
(2007) 07 AHC CK 0195
In the Allahabad High Court

Abdul Sattar

APPELLANT

Vs

Mohammad Saleem and Others

RESPONDENT

Date of Decision : 19-07-2007

Acts Referred:

Citation : AIR 2007 All 198 : (2007) 4 AWC 4075

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—Heard Sri Vishnu Kumar Singh, the learned Counsel for the plaintiff appellant and Sir Anant Vijay, the learned Counsel for the defendant No. 1. No one appears for the remaining respondents.

2. The plaintiff-appellant filed a suit for partition alleging that the plaintiff and the defendant Nos. 1 to 4 are the real brothers and that they were living in the house which was owned by their father Nadey Ali and was being occupied jointly by all the brothers. Subsequently, a new house was constructed by their father in which the plaintiff and three brothers including defendant No. 1 started living in that house and one of the brothers remained in the old house. Upon their father's death, the plaintiff contended, that each brother claimed to occupy a portion of the house as per their convenience, and that there was no formal partition of their shares in the property in dispute by metes and bounds. Consequently, the suit for portion was filed.

3. The defendant No. 1 resisted the suit and contended that there was a previous partition on the basis of which each of the brothers occupied their share of the property in question in which they were living along with their families and consequently, there was no need for any further partition.

4. The defendant Nos. 2, 3 and 4 filed their separate written statements and contended that there was no formal partition by metes and bounds though they were living in separate portions of the house as per their convenience.

5. During the pendency of the suit, the defendant Nos. 5, 6 and 7 were impleaded, who contended that they were the original owners and that the plaintiff and defendant Nos. 1 to 4 were the original owners and that the plaintiff and defendant Nos. 1 to 4 were their licencees.

6. The trial Court, after framing the issues and after considering the material evidence available on the record, decreed the suit holding that the father of the plaintiff and defendant Nos. 1 to 4 was the owner of the house in question and, upon his death, the property devolved in equal shares upon the plaintiff and the defendant Nos. 1, 2, 3 and 4 and that the defendant Nos. 5, 6 and 7 were not the owners of the house nor had they given the house to the father of the plaintiff and defendants as a licensee.

7. The trial Court, further held that there was no previous partition by metes and bounds and that the plaintiff and defendant Nos. 1 to 4 were occupying a portion of the house as per their convenience and that such convenience was not in pursuance of any mutual or private arrangement nor was the property partitioned by metes and bounds. Consequently, the suit was decreed holding that the plaintiff was entitled to 1/5th share in the property in question.

8. Aggrieved, the defendant No. 1 filed an appeal which was allowed, the decree of the trial Court was set aside and the suit was dismissed. The lower appellate Court held that there was a private arrangement between the plaintiff and the defendant on the basis of which each of the brothers were occupying their portion of the house in question and came to the conclusion that there was a previous partition and consequently, held that the suit for partition was not maintainable and dismissed the suit.

9. The plaintiff, being aggrieved by the decision of the lower appellate Court has filed the present second appeal which was admitted on the following substantial question of law.

Whether the lower appellate Court was justified in accepting the case of private partition without there being any definite evidence regarding the shares of the individual members?

10. Upon hearing the learned Counsel for the parties and perusing the record as well as the judgments of the courts below, this Court finds that the judgment of the lower appellate Court cannot be sustained. The conclusion drawn by the lower appellate Court that there was a previous partition between the parties is incorrect and is solely based on the report submitted by the Advocate Commissioner, who reported that the parties were living and occupying separate portions of the property in question.

11. In my opinion, this report by itself could not lead to a conclusion that there existed a family partition at some anterior point of time based on which the parties came in possession of their shares of the property in question. No evidence of any sort has come in before the Court to show that precise shares

were allocated to each of the brothers. In fact, the evidence of plaintiff No. 1 indicates that there existed three Angans, one of which was being utilised by two of the brothers.

12. If the parties are in occupation on the basis of their convenience and are in possession of a certain portion of the property, this by itself, would not make such possession to mean that there was previous partition, To put it more clearly, a partition by way of convenience of possession of certain portion of a property by itself would not come in the way of a decree of partition, especially, where the property has not been divided by metes and bounds. Consequently, assuming that there was a family or a private arrangement on the basis of which the parties were occupying their shares or portions of the house in question by way of mutual convenience will not amount to a partition by metes and bounds between the parties. Consequently, the judgment of the lower appellate Court cannot be sustained. The question of law framed by the Court is answered accordingly, holding that a private arrangement, if any, would still not come in the way for a decree of partition, especially, where the property had not been divided by metes and bounds. In view of the aforesaid, the second appeal is allowed. The judgment of the lower appellate Court is quashed. In the circumstances of the case, parties shall bear their own costs.