

(2022) 03 CAL CK 0051
In the Calcutta High Court

Case No : SA No. 59 Of 2020, I.A. No. CAN 1 Of 2020(old No. CAN 295 Of 2020)

Binod Bihari Manna

APPELLANT

Vs

Bibhuti Bhusan Manna & Ors.

RESPONDENT

Date of Decision : 17-03-2022

Acts Referred:

Registration Act, 1908 — Section 17(1)(b), 17(2)

Citation : (2022) 03 CAL CK 0051

Hon'ble Judges : Soumen Sen, J;Ajoy Kumar Mukherjee, J

Bench : Division Bench

Advocate : Anirban Mitra, Amit Halder, Md. Wasim Akram, Akash Ghosh

Final Decision : Dismissed

Judgement

Ajoy Kumar Mukherjee, J

1. Being aggrieved by and dissatisfied with the Decree and judgment dated 30.07.2019 passed by Additional District and Sessions Judge 1st Track Court , Basirhat in Title Appeal No. 32 of 2015, arising out of the judgment and decree dated 24.06.2015 passed by the learned Civil Judge (Senior Division), Basirhat in Title Suit No. 60 of 2001, the defendant/appellant has preferred the present second appeal before us.

2. Plaintiffs case in brief is that by way of several deeds plaintiff No. 1 to 3 and defendant No. 1 by separate deeds got 39 satak of land in the suit property and enjoying by way of amicable arrangement, their respective portion after raising constructions, and planting trees. Plaintiffs asked defendant for making partition of the suit property by metes and bounds, in terms of settlement deed dated 1st Falgun 1407 B.S., but the defendants did not agree and defendant No. 1 thereafter threatened the plaintiffs that he would dispossess them from the suit property and would cut down the trees planted therein and for that reason, plaintiff filed the suit for partition.

3. Defendant No. 1 contested the suit by filing written statement and contended

that about 18 to 19 years ago he acquired 15 satak of land adjacent to the main road and has raised construction after incurring huge expenditure. Further case of defendant No. 1 is that subsequently he acquired 14 satak of land from plaintiff No. 3 by way of oral ewaz and he is enjoying that land. Accordingly defendant No. 1 has got separate allotment in respect of the said 29 satak of land including said 14 satak of land which he acquired by way of oral ewaz with plaintiff No. 3.

4. Learned Trial Court after considering pleadings submitted by both the parties, framed 10 issues. In order to prove plaintiff's case plaintiff Bibhuti Bhusan manna and one Prabir Chakraborty faced the dock as PW1 and PW2 respectively and to prove defence case, defendant No. 1 and one Panna Lal Giri were examined as DW1 and DW2 respectively. Plaintiff has proved 14 deeds, and concerned rent receipts, which are marked as exhibit and on the other hand defendant filed and proved deed No. 2471 dated 02.05.1990 and rent receipts in connection with the LR Khatian No. 1263/1 which are also marked as exhibit.

5. After considering materials in the record, including evidence and documents, learned trial court held that plaintiff is entitled to obtain 39 decimal of land out of 78 decimal mentioned in the schedule to the plaint and accordingly he gave two months time to partition the suit property by metes and bounds, failing which either party will be at liberty to make prayer for appointment of partition commissioner for executing preliminary decree. Defendant preferred appeal against the judgment and decree which was disposed of by learned Additional District Judge, Basirhat, on 31.03.2011. Learned Appellate Court was pleased to allow the appeal on contest and was further pleased to set aside, the judgment and decree passed in T.S. 60 of 2001 dated 30.05.2008 and 24.06.2008 respectively. Learned Appellate Court was further pleased to send back the case record on remand for deciding afresh after allowing plaintiff to prove their documents already filed and defendant to adduce fresh evidence on their behalf. After remand, the trial Court again decreed the suit in preliminary form declaring plaintiffs' $\frac{1}{2}$ share i.e. 39 $\frac{1}{2}$ decimal of land in the suit property and directed the parties to make amicable partition by metes and bounds, in terms of preliminary decree.

6. Learned Trial Court did not believe that there was any ewaz in between defendant No. 1 and plaintiff No. 3, as the property in question is valued more than Rs. 100/-and as such act of exchange without registration cannot sustain in the eye of law. Learned Trial Court also held there was no witness in whose presence alleged oral ewaz was made and on the contrary the document shows that the suit property measuring 39 decimal of land has been purchased by the predecessor of the plaintiffs and defendant. He further held that defendant No. 1 has no right to claim 14 decimal of land which he claimed to have acquired through alleged oral ewaz. There is no whisper in the evidence of defendant as to how much land has been exchanged in between plaintiff No. 3 and defendant No. 1 and surprisingly plaintiff No. 3 has not come before the court to give evidence

in support of oral ewaz. The rest defendants also did not come to support defendant No. 1's acquisition of said 14 satak of land by way of oral ewaz. Accordingly learned Trial Court turned down defendant No. 1's claim of acquisition of title in respect of 14 decimal of land, by way of oral ewaz with plaintiff No. 3.

7. Being aggrieved by the aforesaid judgment and decree dated 24.08.2015, defendant No. 1 preferred First Appeal and said first appeal came up for hearing before the Learned Additional District Judge , First Court Basirhat, being title appeal No. 32 of 2015. Learned First Appellate Court also framed 11 issues, out of which he has dealt with the issue No.10 specifically concerning the claim of defendant No. 1 that he has acquired right title possession in respect of 29 satak of land, out which 14 satak alleged to have acquired by him by way of oral ewaz with plaintiff No. 3. Learned First Appellate Court also did not believe that defendant No. 1 acquired 14 satak of land by oral ewaz and according to him, this claim of appellant is nothing but vogus and ridiculous as no interest of any property valued more than Rs. 100/- can be passed by way of oral ewaz and it must be made through registered instrument and by no other means. Accordingly learned First Appellate Court did not find any wrong in the findings of learned trial court and dismissed the First Appeal on contest with exemplary cost of Rs. 5,000/-.

8. Being dissatisfied with the judgment and decree passed by the Learned Additional District Judge 1st Track Court, Basirhat on 30.07.2019, defendant No.1 sought to admit present second appeal, on the ground that substantial questions are involved.

9. Defendant /Appellant mainly attacked the judgment passed by the First Appellate Court, on the ground that learned court below completely overlooked the fact that oral ewaz between defendant No. 1 and plaintiff No. 3 was a family arrangement and such family arrangement is enough to effectuate partition and on the basis of such partition defendant No.1/appellant is in possession of land of a specific portion by way amicable partition. Learned Counsel for the appellant strenuously argued that arrangement by way of oral ewaz was made between family members i.e. plaintiff No. 3 and defendant No. 1 and as such said oral ewaz requires no registration and the observation made by the courts below that every transfer valued more than Rs. 100/- must be made through registered instrument, suffers from perversity. He further contended that said oral ewaz ,in the form of partition by metes and bounds does not require formal registration and in this context he relied upon two case laws reported in Kale and Others v. Deputy Director of consolidation and others, reported at AIR 1976 SC 807 and reported in Roshan Singh and others v. Zile Singh and others, reported at AIR 1988 SC 881.

10. In the present case the learned Courts below specifically held that there is no documentary or oral corroborative evidence in support of defendant No.1's claim of oral ewaz. Defendant No. 1 is claiming that the said oral ewaz was made with

plaintiff No.3, but said plaintiff 3 has not come to support defendant No. 1's case of oral ewaz, nor defendant No. 1 produced any document in support of oral ewaz. In this context paragraph 16 of the Judgment reported in AIR 1988 SC 881 as referred by learned Counsel for the appellant/defendant No. 1 can be profitably relied:

"16....in the present case, admittedly there was a partition by metes and bounds of the agricultural lands effected in the year 1955 and the shares allotted to the two branches were separately mutated in the revenue records. There was thus a disruption of joint status. All that remained was the partition of the ancestral residential house called rihashi, the smaller house called baithak and gher/ghetwars. The document Exh. P-12 does not effect a partition but merely records the nature of the arrangement arrived at as regards the division of the remaining property. A mere agreement to divide does not require registration. But if the writing itself effects a division, it must be reregistered. See: *Rajangam Ayyar v. Rajangaam Ayyar*, (1923) 69 Ind Cas 123: (AIR 1922 PC 266) and *Nani Bai v. Gita Bai*, AIR 1958 SC 706. It is well-settled that the document though unregistered can however be looked into for the limited purpose of establishing a severance in status, though that severance would ultimately affect the nature of the possession held by the members of the separated family as co-tenants. The document Exh. P-12 can be used for the limited and collateral purpose of showing that the subsequent division of the properties allotted was in pursuance of the original intention to divide. In any view, the document Exh. P-12 was a mere list of properties allotted to the shares of the parties." (emphasis added)

11. Furthermore the Kales's judgment as reported in AIR 1976 SCC 807 reiterates the same proportion of law and also laid down the essentials for putting the binding effect of a family settlement in a concretize form in paragraph 10 of the judgment which may be reproduced below :-

" (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangements may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immoveable properties and therefore does not fall within the mischief of Section

17 (2) (sic) (Sec. 17 (1) (b)?) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.”(emphasis added)

12. In view of above, fact remains that plaintiff No. 3 with whom alleged oral ewaz took place did not face the trial nor supported the alleged oral ewaz with defendant No. 1 and that even if it is assumed that the defendant No.1 is in possession of said property , even then it does not create title in favour of defendant No. 1, specially when from the available document and evidence there is nothing to show that the suit property was ever partitioned amongst co-sharers at any point of time. Accordingly we do not find any perversity in the findings made by courts below nor we find any reason to interfere with the ultimate findings of the court below and as such SA 59 of 2020 along with connected application if any, are liable to be dismissed.

13. SA 59 of 2020 along with CAN 1/2022 stands dismissed.

There will be no order as to costs .

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree