

(1979) 02 CAL CK 0033
In the Calcutta High Court
Case No : A.F.A.D. No. 811 of 1975

Sm. Kalimoyee Ghosh and Others

APPELLANT

Vs

Narendra Nath Ghosh and Others

RESPONDENT

Date of Decision : 15-02-1979

Acts Referred:

Registration Act, 1908 — Section 17, 49

Citation : AIR 1979 Cal 222

Hon'ble Judges : Sudhindra Mohan Guha, J;N.C. Mukherji, J

Bench : Division Bench

Advocate : Ranjit Kumar Banerjee, Sudhis Dasgupta, Debaprasad Mukerjee II and Smritikana Mukerjee, for the Appellant; Ranen Mitra, (for Nos. 1, 5-7), Sainen Dutta, (for No. 2), Ranjit Mitra, (for Nos. 4(a) to 4(d)) and Uday Sankar Chatterjee, (for No. 8), for the Respondent

Final Decision : Allowed

Judgement

Sudhindra Mohan Guba, J.—This is an appeal against the judgment and decree passed by Shri N. Bhattacharyya, learned Additional District Judge, Second Court, Howrah reversing the decision of Sri S.N. Burman, learned Munsif, Third Court, Howrah in Partition Suit No. 208 of 1972.

2. Plaintiffs alleged that their request for an amicable partition was turned down by the defendants and as such they were obliged to commence the suit on the following aver-meats:

3. The suit property appertaining to a Jama of Rs. 15-12-9 originally belonged to two brothers Nafar Chandra Ghosh and Berharam Ghosh in equal shares. Becharam died leaving his widow Atarmoni as the sole heir. Nafar died leaving his sons Fakir Chandra, Chandi Charan and Nakur Chandra. After the death of Atarmoni. the half share of Becharam devolved on his three nephews as stated before. Thus they began to possess the entire property jointly. Chandi Charan died without any issues. His share, therefore, devolved on his two brothers Fakir Chandra and Nakur Chandra in equal shares and they began to possess jointly.

Then Fakir Chandra died leaving his three sons, viz., Khargeswar, Nilmoni and Hiralal, defendant No. 2 Khargeswar died leaving his widow, defendant No. 3. Plaintiffs are the heirs of Nilmoni who died four years back, Kali and Kunja Behari, defendant No. 1 were the sons of Nakur. The share of Kali in the suit property also vested in Kunja Behari who became co-sharer in respect of the undivided half share in the suit property. In the last district settlement the names of the plaintiffs, their predecessor and co-sharers were rightly recorded, but in the revisional settlement due to the absence of the plaintiffs defendant No. 4 Jotgannath Marik in collusion with other co-sharers got it wrongly recorded. Defendants Nos. 5 and 6 had been claiming interest in the suit property in collusion with other co-sharers. In the month of May preceding the institution of the suit plaintiff No. 3 came to know that the defendant No. 7 was also claiming a share in the undivided bastu of the plaintiffs' predecessor by purchasing the same from defendant Nos. 2 and 3. Defendants Nos. 4 to 8 were stranger purchasers in the suit property.

4. Defendants Nos. 2 and 3 contested the suit. R.S. Khatian was claimed to have been rightly recorded. The purchasers were said to be not in collusion. Joint possession was denied. According to them the suit lands had been previously amicably partitioned on 15th of Magh. 1352 B.S. The terms and conditions of partition were reduced to writing and thereafter various transfers had been made by parties and transferees were in possession of their respective portions. Defendants Nos. 4 to 7 by filing a written statement supported the answers to the plaint given by defendants Nos. 2 and 3. Defendant No. 8 also contested the suit on the allegation that her husband was a transferee from defendant No. 1. Defendant No. 1 by separate written statement supported the plaintiffs. Defendants Nos. 5 and 6 did not contest the suit though they filed a joint written statement. Thus the sum and substance of the defence plea was that the suit was bad for partial partition and the suit lands had already been amicably partitioned.

5. The trial Court overruled the defence plea and decreed the suit. In appeal the learned Additional District Judge upheld the finding of the learned Munsif that the suit was not bad for partial partition; but reversed the finding as to the other point and held that the suit lands had been previously partitioned. So, there has been a further appeal to this Court.

6. It is to be seen whether there had been a previous partition. In support of their assertion of previous partition the defendants produced the deed of partition (Ext. A) with terms of reference (Ext. F). The sale deeds (Exts. 1 and 2) and B series were referred to as they had reference of such partition. The Dakhila (Ext. C) was granted in the name of Kamala Bala Chowdhury in evidence of separation of Jama.

7. As to Ext. A, the learned trial Court opined that it had not been acted upon by distribution of rent and division of tenancy and it was liable to be expunged having not been stamped and registered.

8. In appeal the learned Judge upheld the finding of the trial Court that the suit was not bad for partial partition. As to the point of previous partition the learned Judge agreed that the document (Ext. A) needed to be registered. But according to him, when the document had been admitted into evidence, the Court had no power either to impound or expunge the same from evidence. In support of his finding the learned Judge relied on the decisions in case of *Javer Chand and Others Vs. Pukhraj Surana, , and Ahibhusan Jana v. State of West Bengal* reported in (1975) 1 Cal LJ 262. The properties, in the opinion of the, learned Judge were all along treated as separate and the parties had conveyed lauds showing separate possession as per sale deeds. The learned Judge appears to have enunciated the law on misconstruing the decisions referred to above. It is held in the case of *Javer Chand (supra)* that when a document had been admitted in evidence in spite of the fact that it has not been stamped or properly stamped and has been used by the parties for examination and cross-examination of the witnesses, it is not open either to the trial Court itself or to a Court of appeal or revision to go behind the order Section 36 of the Stamp Act would come into operation. Similarly it is also held in the case of *Ahibhusan Jana (supra)* that once a document though unstamped had been admitted in evidence, the provisions of Section 36 of the Stamp Act apply and the Court had no power to expunge the document from evidence. The learned Judge appears to have overlooked that Ext. A is not only unstamped, but unregistered too.

9. Mr. Mitra, learned Advocate for the respondents contends supporting the view of the learned Judge that once a document is admitted in evidence there is no escape from the position that no Court whether trial or of appeal has any jurisdiction to expunge the same. We are not convinced by his argument and we reject the same for the reasons stated below. It is faintly contended by him that Ext. A may be regarded either as an award or as a memo of amicable partition. But an award is also compulsorily registrable u/s 17 of the Registration Act as pointed out by Mr. Banerjee on behalf of the appellants. The Supreme Court lays down the law in the case of *Ratan Lal Sharma Vs. Purshottam Harit, .* Again it would at once appear from a very look into the document, (Ext. A) that by no stretch of imagination it could be construed as a memo of partition. On the other hand it is apparent that the Arbitrators partitioned the properties as per document dated Magh 15. 1354 B.S. (vide Ext. A). The Arbitrators were also conscious that such document needed registration. Mr. Banerjee for the appellants refers to the decision in the case of *Nanni Bai and Others Vs. Gita Bai*, wherein it is held that a partition may be effected orally, but if the parties reduce the transaction into a formal document to be the evidence of partition, it has the effect of dividing the exclusive title of the co-sharer to whom a particular property is allotted by partition and is thus within the mischief of Section 17(1) (b) of the Registration Act. In short, he contends that a deed of partition is compulsorily registrable, u/s 17 of the Registration Act, otherwise the deed is invalid and cannot be admitted in evidence in proof of partition. At best it can be shown therefrom that the parties since the date of execution of such deed had

been in possession of the properties separately according to convenience. In absence of a regular partition a co-sharer would be entitled to enforce a regular partition by metes and bounds.

10. In the circumstances it does not appear that the learned trial Court committed an error in expunging the document (Ext. A) from evidence. It transpires that it was admitted in evidence with an objection. Subsequently, on the application of the plaintiffs the learned Munsif in judgment gave reasons for not relying on the same. There would be no reasons to hold that a Court is so helpless that it could not expunge a document admitted in evidence erroneously and in violation of law. ON the other hand, it is the learned Judge who fell into an error in relying on such document in utter misconception of law.

11. For the foregoing reasons the judgment and decree of the learned appellate Court cannot be sustained in law.

12. In the result, the appeal is allowed on contest against the respondents Nos. 1, 2, 4 (a) to 4 (d), 5, 6, 7 and 8 and ex parte against the rest. The judgment and decree passed by the lower appellate Court be set aside and that of the learned trial Court be restored, with this modification that the learned trial Court will also consider the prayer for pre-emption in respect of the alleged transfers in favour of defendants Nos. 4 and 5 and 6 and 8 in respect of portions of the bastu and the tanks adjacent to the bastu.

13. Parties will bear their respective costs all through.

N.C. Mukherji, J.

14. I agree.