
(2011) 12 GAU CK 0013

In the Gauhati High Court

Case No : Regular Second Appeal No. 26 of 2010

Sri Parimal Ch. Saha and Others

APPELLANT

Vs

Smt Snehalata Saha and Others

RESPONDENT

Date of Decision : 22-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2012) 1 GLD 510

Hon'ble Judges : Swapan Chandra Das, J

Bench : Single Bench

Advocate : K.N. Bhattacharjee, Mr. D.R. Choudhury, for the Appellant; A.K. Bhowmik, for the Respondent

Judgement

S.C. Das, J.—This second appeal, u/s 100 of the Code of Civil Procedure, directed against the judgment & decree, dated 24.02.2010, passed by learned District Judge, West Tripura (first appellate Court) in Title Appeal No. 6/2009. The first appellate Court reversed the judgment & decree, dated 12.05.2009, passed by learned Civil Judge (Senior Division), Court No. 1, West Tripura, Agartala in Title Suit (Partition) 57/2004. The fact, gathered from the pleadings of the parties, in short, is that the appellants and respondent No. 6, as plaintiffs and 1st party defendant, Rakhal Chandra Sana, since deceased, the predecessor of respondent Nos. 1 to 5, in Title Suit (Partition). 57/2004, were full blood brothers and they were co-owners of the suit land described in the schedule of the plaint. It is the admitted and undisputed case of the parties that the 5 brothers jointly purchased the land from their mother, Parasmani Sana, on 26.12.1988 and were jointly owning and possessing the same.

2. The appellants and respondent No. 6(hereunder mentioned as plaintiffs) instituted TS (partition). 57/2004 alleging that their brother Rakhal Chandra Sana, since deceased, the predecessor of the respondent Nos. 1 to 5, (hereunder mentioned as first party defdt.) was the eldest among the brothers and he was looking after the suit land and with the joint fund of the brothers a hut was

constructed and three rooms of the hut were put on lease to different tenants @ Rs. 400/- (Rupees four hundred) per month and the first party defdt. being the elder brother used to collect the rent from the tenants and distribute it to the plaintiffs. From January, 2003, Rakhal Chandra Saha stopped sharing of the rent, collected from the tenants and even after request made by the plaintiffs he did not part with the share of the plaintiffs and was denying the share and therefore, the plaintiff issued advocate notice, on 16.08.2003 and, thereafter, instituted the suit aforesaid, seeking partition of the suit land in equal shares.

3. The first party defdt., Rakhal Chandra Saha, contested the suit by filing written statement inter alia stating that the suit land was jointly purchased by the five brothers and within a week of such purchase the suit land was amicably partitioned and he (first party defdt.) constructed a hut in the part of the land in his share and put three rooms to different tenants and were enjoying the rent from 1997. He applied for electric connection, entered into lease agreement with different tenants, obtained fire insurance policy and got electricity connection to the suit land in exercise of his right, title and interest to his share measuring 0.044 acres within specific boundary which was 1/5th share of the suit land. Since there was a family arrangement and an amicable partition of the suit land between the brothers, there was no question of further partition between them.

4. The trial Court considering the pleadings of the parties framed the following issues :

(1) Is the suit maintainable?

(2) Whether the suit land is liable to be partitioned, if so, what should be the share of each co-sharer?

(3) Whether the plaintiff is entitled to get relief as prayed for?

(4) To what the relief or reliefs the parties are entitled to?

5. Plaintiff No. 2, examined himself as PW 1 and also examined two more witnesses namely, PW 2 Motilal Saha and PW 3. Sukumar Banik and also proved his documents namely, original Title Deed, dated 26.12.1998 and original Khatian in the name of Parashmani Saha and advocate notice, dated 16.8.2003 and those were marked as Exts. 1, 2 and 3 respectively.

The first party defendant examined himself as DW.1 and also examined six more witnesses namely, Barun Bhomik, Bidyut Laskar, Nimai Debnath, Chandan Debnath, Thakur Chan Das and Nakul Das as DWs. 2, 3, 4, 5, 6 & 7 respectively and also proved the documents namely, offer of service connection of electricity, Consumer Pass Book of electricity reply to advocate notice, fire insurance policy with the premium receipt and monthly rent receipts of the tenants, marked as Ext. A, B, C, D and E(series) respectively.

6. Considering the oral and documentary evidence, the learned trial Judge decided all the issues in favour of the plaintiffs and accordingly, decreed the suit. The observation of the learned trial Judge, while deciding issue No. 2, may be

quoted thus:

The evidence, both oral and documentary as discussed, therefore, goes to establish that the suit land is the joint property of four plaintiffs and 1st party defendants. It is, therefore, held that the suit land is liable to be partitioned. About the share of the parties, it is clear that the four plaintiffs and their brother deceased Rakhal Chandra Saha (Predecessor in Interest of 1st party Defendants) was the other co-sharer of the same suit land so as to entitle the said five brothers to have equal share over the suit property. So, the four plaintiffs and first party defendants as the legal heirs of deceased Rakhal Chandra Saha are the persons to have their entitlement over the suit property. The four plaintiffs are entitled to 1/5th share each and 1st party defendants are entitled to 1/5th share jointly over the suit land.

7. The first party defdt. filed Title Appeal No. 6 of 2009 in the Court of District Judge, West Tripura, Agartala (first appellate Court), and the learned District Judge by the impugned judgment & decree, dated 24.2.2010 reversed the judgment & decree, dated 12.5.2009, passed by the trial Court observing that the plaintiffs could not prove that the hut on the suit land was constructed from the joint fund of the plaintiffs and first party defdt. and that the lease agreement between the first party defdt. and the tenants and also other documents of electric connection etc. established that there was a family partition made orally and the plaintiffs could not rebut the fact of family partition pleaded by the first party defdt. and accordingly, reversed the decree passed by the trial Judge.

8. This Court while admitting the appeal by order, dated 11.01.2011, formulated the following substantial question of law.

1. Whether the burden of proof that there was an amicable partition, lies with the plaintiffs or defendants?

2. Whether oral partition, without registered deed of partition, is admissible in law "in the facts and circumstances of the case?

3. Whether the learned appellate Court, without proper appreciation of the evidence on record, reversed the judgment and decree of the learned trial Court, granting partition as per the prayer of the plaintiffs?

9. I have heard the learned senior counsel, Mr. K.N. Bhattacharjee and learned counsel Mr. D.R. Chohoudhury for the appellants and learned senior counsel Mr. A.K. Bhowmik for the respondent Nos. 1 to 5.

10. Admittedly, the plaintiffs and the first party defedt. acquired the suit land jointly and first party defdt. being elder brother used to look after the suit property.

The claim of the plaintiffs is that the suit property was not partitioned. A semi pakka hut was constructed and three rooms of that hut were put to lease to different tenants and first party defdt. used to collect the rent and distribute it

among the brothers but he stopped doing so to which the plaintiffs raised protest but the first party defdt. denied to share the rent and hence, the plaintiffs instituted the suit for partition.

The case of the first party defdt. is that within a week they got the suit land, it was partitioned amicably and first party defdt. constructed the hut in his share of the land and put it to different tenants executing agreement time to time and he got electric connection, obtained fire insurance policy in his name which proves that there was an amicable partition between the brothers.

11. Learned counsel, Mr. Bhattacharjee, for the appellants, submitted that an amicable family arrangement may be accepted but it must be in writing and accepted by all co-owners.

Learned counsel, Mr. Bhowmik, for the respondents, on the other hand, submitted that the first appellate Court properly appreciated the evidence on record and taking into consideration the documents exhibited by the first party defdt., rightly drawn a presumption based on the evidence on record that there was a family partition and it is not necessary that such family partition must be in writing.

12. According to law, in a joint property, the right of all co-owners extends to the whole property until and unless it is partitioned by meets and bounds. While the joint ownership is an admitted fact and the plaintiffs claimed that it was not partitioned, the first party defdt. who has been claiming family partition of the suit land, burden lies on him to prove that it was amicably partitioned between the brothers. This burden absolutely lies on the first party defdt. alone and the plaintiffs are not required to disprove it. The first appellate Court has drawn presumption stating that plaintiffs did not adduce evidence to show that they have also shared money for construction of hut on the suit land. Legally there cannot be such burden on the plaintiffs to prove the fact.

For argument sake, if it is taken that the first party defdt. constructed the hut, it should be presumed that it belonged to all the co-sharers, if the first party defdt. cannot prove that there was a partition between the co-sharers. The first party defdt. though claimed that there was a partition effected amicably, no date and time is mentioned, even there is nothing as to how the partition was effected and who has measured the suit land and in presence of whom. If there was any such oral partition between the brothers, on which part the share of other co-owners were located? In the absence of any written document of such amicable family arrangement, the first party defdt. was liable to adduce very cogent evidence to prove such partition.

Family arrangement generally governed by a special equity principle where the terms are fair and bona fide, taking into account the well being of a family. If such an arrangement is brought on record, it is the duty of the Court to give effect of such an arrangement and the terms thereof.

In the case in hand, out of the five joint owner brothers, four says that the suit land was never partitioned but 1st party defdt. No. 1 who was admittedly looking after the suit property claimed that there was a family arrangement and he got his share in the suit land. No document of any such partition was executed. In the absence of any document in support thereof, burden heavily lies on him to prove his claim. Though he claimed that he got his share partitioned, no ROR was prepared in his name. Nothing is in the evidence as to which part of the suit land other brothers got in their share after any such partition. First party defdt. therefore, failed to prove that there was any partition of the suit land by way of family arrangement.

13. The first appellate Court in Para 23, 24 and 25 of the judgment observed thus:

23. Oral family arrangement is permissible. If the terms and conditions of family arrangement is reduced to writing it is nothing but a memorandum of what had been agreed upon between the parties and it cannot be used as a future title of the parties. If the agreement is intended to be used as proof of what they had arranged and the agreement is brought about by a document it requires registration and it will be a document of future title.

24. Here in this case according to the defendant-appellants family arrangement was oral arrangement.

25. Family arrangement are made generally to avoid future disputes and to maintain honour of the family and also to maintain peace and harmony between the parties.

While observing the above, the first appellate Court was absolutely wrong in revising the preliminary decree, made by the trial Court, drawing presumption on some documents in the name of first party defdt., who was the co-owner of the entire suit property. Mere creation of some documents such as agreement of tenancy, electric connection etc. cannot be taken to draw a presumption of partition between the co-sharers. The judgment and decree, passed by, the first appellate Court in Title Appeal No, 6 of 2009 is, therefore, liable to be interfered and consequently, set aside.

14. Accordingly, the judgment and decree in T.A. 6 of 2009 is set aside and the judgment and decree, dated 1252009, passed by the learned Civil Judge (Senior Division), Court No. 1, West Tripura, Agartala, is upheld.

15. Send back the LC records along with a copy of this judgment. Prepare appellate decree accordingly.