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In the Calcutta High Court

Case No : C.S. No. 45 of 1986

Sunil Baran Chowdhury — APPELLANT

Vs

Anath Bandhu Chowdhury and Others — RESPONDENT

Date of Decision : 24-02-2006

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 14 Rule 2(1)

Citation : (2007) 1 CALLT 356 : (2006) 2 CHN 294 : (2006) 3 CivCC 372 : (2006) 4 RCR(Civil) 168

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : Sabyasachi Chaudhury and Debdutta Basu, for the Appellant;Sunrit Deb, for the Respondent

Judgement

Aniruddha Bose, J.—In this suit, a preliminary point has been taken on behalf of the defendant Nos. 1,3 and 4 as regards maintainability of the suit. Originally Mr. Deb, the learned Counsel for the said defendants had raised this preliminary point under the principle of Demurrer. But subsequently argument was advanced beyond this point, but on the issue of maintainability only. The primary arguments advanced by Mr. Deb in contesting the maintainability of the suit on the ground that this suit was in effect for partial partition, and hence not permissible under the law.

2. The plaintiff instituted the present suit on 21st January, 1986 claiming inter alia, partition of a premises being numbered 9, Boys Own Library Row, as well as certain movable properties. The reliefs claimed in the suit included accounts for recovery of sums alleged to be due to the plaintiff in respect of the said premises, and in respect of two firms being run under the name and style of M/s. Chowdhury Printer and M/s. Dipti Industries, both located in the same premises. The written statement has been filed by the said defendants in which counter-claims were made for recovery of certain sums of money. Thereafter affidavit evidence was filed on behalf of the plaintiff by the plaintiff himself. So far as the

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defendants are concerned, an interlocutory motion being G.A. No. 1296 of 2005 was taken out for amendment of the written statement as also the counter-claim. Affidavit-in-opposition was filed to this interlocutory motion and affidavit-in-reply thereto were also filed. This interlocutory motion was subsequently dismissed as not pressed as the learned Counsel for the said defendants submitted that the defendants were not interested in prosecuting this interlocutory motion. In the main suit, however, issues have been framed and the first issue relates to the maintainability of the suit.

3. It is in this backdrop the preliminary point as regards maintainability of the suit was heard. The facts of the case, as pleaded by the plaintiff, is that the plaintiff and the defendant Nos. 1 and 2 are brothers of the same blood. The defendant No. 1 is the eldest brother and the third defendant is his son and the fourth defendant is his wife. The case of the plaintiff is that on or about 24th May, 1963 the plaintiff and the defendant No. 1 and 2 had taken lease of certain vacant land in Calcutta for a period of ninety-nine years with a renewable option of equal duration and the premium for the same in equal shares was paid by the three brothers. The three brothers had constructed a four-storied masonry building on the said plot of land. The plaintiff claims that the defendant No. 1 as the Karta of the Hindu Joint Family used to induct tenants on behalf of plaintiff and the second defendant in the said premises.

4. It is the case of the plaintiff that from the same premises a partnership business under the name and style of M/s. M. N. Chowdhury & Sons used to be carried on in which the three brothers had equal shares though the business used to be looked after and managed by the eldest brother (i.e. the first defendant), an arrangement which was accepted by the plaintiff and the second defendant. The plaintiffs allegation is that the first defendant was treated as custodian of his purse and valuables. Major portion of the shares of the income out of the said business and the property of the plaintiff and the second defendant were held by the first defendant. In the year 1970 the said firm had become a losing concern. Ultimately the plaintiff and the defendent No. 2 left Calcutta to live in the village in the district of Bankura, and the business of M/s. M.N. Chowdhury & Co. could not be restored.

5. The substance of the allegations of the plaintiff, which led to the institution of the suit, is that the first defendant started controlling the said premises and had started two different businesses by making investment thereon from the income earned from the business of M/s. M.N. Chowdhury & Sons, and also was amassing wealth by letting out the subject-premises.

6. In the written statement the existence of the Hindu Joint Family constituting of the plaintiff and the first two defendants has been denied by the said defendants. The extent of contribution of the plaintiff in developing the property in question has also been denied by the defendants. It appears from the written statement that the plaintiff and the defendants has certain ancestral property in the district of Bankura. It is the appearing defendants'' case, not seriously contested by the

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plaintiff that vis-a-vis the property in Bankura they have share along with their eldest sister Lilabati and also with other relations. It further appears from the written statement that in the year 1962, there was a mutual partition of certain ancestral property of the parties to the suit, between the plaintiff and the first and second defendants, on one hand and an uncle (father''s brother).

7. The learned Counsel for the defendants in support of the preliminary point of non-maintainability of the suit has taken the plea that in the present suit, by not including the Bankura property the plaintiff is claiming only partial partition and the suit is also not maintainable for non-joinder of a necessary party, Lilabati Mandal. On this point, Mr. Deb, has relied on the following authorities:

(i) Upendra Nath Banerjee v. Umesh Chandra Banerjee XV CWN 375.

(ii) Monsharam Chakravarty v. Gonesh Chandra Chakravarty XVII CWN 521.

(iii) Beni Madhab Sarkar v. Gobind Chandra Sarkar XXII CWN 669.

(iv) Bhajahari and Others Vs. Abdul Karim Shaikh and Others, .

(v) Rajendra Kumar Bose Vs. Brojendra Kumar Bose, .

(vi) Bhagwan Dayal v. Reoti Devi 1962(1) SCC 348.

8. It has been submitted that as each of the parties to the present suit is a coparcener of the Bankura property, which is held as corpus possessions by them, along with others, the instant suit becomes a suit for partial partition. The foundation of this argument is that if the Bankura property was to be brought into the hotchpot of the present suit, then by necessary implication the other coparceners apart from Lilabati Mandal who have share in the Bankura property would be necessary parties to in the suit.

9. Mr. S. Chowdhury, learned Advocate appearing for the plaintiff has resisted this plea for dismissal of the suit. His main submission is that as there is admittedly no other co-owner or coparcener for the subject property in Calcutta, and hence this property can constitute independent corpus for a suit for partition. His further submission is that the principle barring partial partition is not applicable to property held as tenants in common. He has also taken a plea that having regard to the nature of the dispute adjudication of the preliminary issue as raised by Mr. Deb would necessarily involve examination of certain factual aspects, and hence under the provisions of the Rule 2 of Order 14 of the Code of Civil Procedure, determination of this preliminary issue would not be permissible. This Court, under the mandate of the CPC contained in Rule 2(1) of Order 14 of the Code, is required to pronounce judgment on all issues.

10. He has relied on the following authorities in support of this proposition:

(i) Korumbakkat Parkum Vengaalasheri Moidin Kutti Vs. Thuniyilandiyil Mariamumma and Others,

(ii) Pakkiri Kanni Vs. Haji Mohammad Manjoor Saheb by Agent Habibulla Saheb, .

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(iii) Katragadda Virayya Vs. Katragadda Venkata Subbayya, .

(iv) Abdul Rahman and Another Vs. Hamid Ali Shah and Others, .

(v) Umapati Manna v. Becharam Manna 1990 (1) CLJ 461.

11. Mr. Chowdhury also contended that there is no statutory provision imposing absolute bar on partial partition, and each individual case would have to be examined by analyzing the character of the property in question i.e. whether it is coparcenery property or joint property.

12. It is in this factual and legal context I am to decide as to whether at this stage, whether the question of maintainability can be examined, and if I decide this question in the affirmative, if the suit is maintainable or not. The general proposition of law that emerges from the body of authorities relied on by the learned Counsels for the respective parties is that in a suit for partition, all the properties of the contesting parties would have to be included, and the law leans against partial partition. I am not impressed with the argument of Mr. Chowdhury that there is no bar on partial partition. This is a rule which is being uniformly followed by the Courts of this country for over a century, as would be evident from the decisions of this Court in the cases of Upendra Nath Banerjee v. Umesh Chandra Banerjee (supra), Monsharam Chakravarty v. Gonesh Chandra Chakravarty (supra), Beni Madhab Sarkar v. Gobind Chandra Sarkar (supra) and Bhajahari v. Abdul Karim Shaikh (supra). In my opinion, departure from this rule ought not to be made, save under certain exceptional circumstances as laid down by the leading authorities on this subject.

13. The next question that arises for resolution is as to whether the interest of the parties in the subject-property was as co-owners or tenants in common or is it a joint family property. The decisions in the cases of K.P. Vengalaasheri Moidin Kutti (supra), Pakkiri Kanni (supra), Virayya (supra), Abdul Rahman (supra) and Umapati Manna (supra) has been relied on by Mr. Chowdhury in support of the proposition that the rule against partial partition cannot apply to properties held by the parties as tenants-in-common. However, as I have observed in the earlier part of this order, the nature of ownership of the subject-property is not clear. The plaintiff himself has pleaded that the defendant No. 1 as the Karta of the Hindu Joint Family used to induct, tenants in the said property.

14. This has been denied by the defendants in their written statement. Adjudication as regards the issue of maintainability of the suit at this stage on the basis that the subject property was joint family property thus cannot be made without having regard to factual aspects. In the present suit, this question is not only an issue of law, but a mixed question of law and fact. Thus, a decision solely on this issue would be impermissible under Rule 2(1) of Order 14 of the Code.

15. Two other authorities have also been referred to, being a decision of the Hon''ble Supreme Court in the case of Kashinathsa Yamosa Kabadi, etc. Vs.

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Narsingsa Bhaskarsa Kabadi, etc., , and the other being a judgment of and Hon''ble Single Judge of this Court in the case of Dwijapada Mondal and Another Vs. Bholanath Mondal and Others, . The former decision has been relied upon for the proposition that it is always open to the members of a Joint Hindu Family to divide some properties of the family and to keep the remaining undivided. But this proposition in my opinion cannot support the plaintiffs case, as the decision to divide some properties of the Hindu Joint Family and keep the rest undivided has to be by consent. In a case like the present one, where partition of the subject-property is being resisted on the ground that such partition would constitute partial partition, I am of the opinion that the ratio of this decision applicable in the present proceeding.

16. In the case of Dwijapada (supra), it was held:

Two objections were urged on behalf of the appellants in this appeal. The first objection was comparatively of a minor nature. It was contended that the Courts below should have upheld the contention of the appellants that the suit for partition was bad on account of partial partition. This point appears to have been argued at some length before the Lower Appellate Court where the appellants contended that the plaintiffs of the partition suit have not brought into the hotchpot some other properties in which the parties to the partition suit were jointly interested.

The Lower Appellate Court, however, found as a fact that the so-called properties which have been left out belonged not only to the present parties but also to some other co-sharers of theirs who, however, have admittedly got no interest in the properties under partition. That being the case, it is not at all necessary that the properties which are alleged to have been excluded from the scope of the partition suit should have been brought into the hotchpot. In my judgment, the Lower Appellate Court is perfectly justified in holding that the suit was not bad on account of a prayer for partial partition.

17. This judgment also, in my view does not help the plaintiffs case at this stage, since in that case there was a finding of fact that the co-sharers of the properties which was being left out had no interest in having the subject property partitioned in isolation. At this stage of the present suit, in which no such admission from other co-sharers is there, the ratio of this authority cannot apply.

18. There is another aspect to the subject-controversy, which in my opinion, needs to be addressed to. Admittedly, the property, which has been left out of the hotchpot which forms the subject-matter of the present suit is situated outside the Ordinary Original Civil Jurisdiction of this Court. In an authoritative text on this subject, Mitra''s Co-ownership & Partition, (8th edition), it has been observed (at page 355):

Suits praying for partition have been recognized under the following circumstances, namely, (1) when different portions of family property are situated in different districts, separate suits for partition for lands of each district

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may be brought; (2) it may be allowed when portion of joint property at the time of the suit for partition is incapable of partition; (3) when the property left out from its very nature impartible; (4) when the property is held jointly with strangers who cannot be joined as parties to a general suit for partition the same may be left out; or (5) when the co-owners by mutual agreement decide to make partition of the joint family property leaving some portion in common.

19. There is also an authority for the proposition of law that a suit for partial partition would be permissible if the property that is left out is outside the territorial jurisdiction of the Court, being a decision of the Hon''ble High Court of Madras, Abdul Karim Sahib v. Badruddin Sahib (XXVII) ILR (Madras Series) 216.

20. Mr. Deb has brought to my notice a later decision of the Hon''ble Madras High Court in the case of R.P. O''Connor Vs. P.G. Sampath Kumar, , in which this authority was dissented from. But the point on which the Abdul Karim''s case (supra) was dissented from in the case of ft .P. C. Connor related to the jurisdiction of the High Court to return plaint. The jurisdiction of Court in a suit for partition to proceed where properties outside the jurisdiction was not brought into the hotchpot, was not an issue in the case of R.P.C. Connor (supra).

21. Accordingly, I am of the opinion that the defendants have not made out a case for dismissal of the suit at this stage.

22. The preliminary objection accordingly is rejected.

23. Let the suit be listed for hearing before the appropriate Bench.

Later:

24. Liberty is given to the plaintiff to mention before the Approprite Bench for early hearing.

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