
(2019) 05 CAL CK 0060

In the Calcutta High Court

Case No : Civil Second Appeal (SA) No. 43 Of 2017

Tarunnesha Bibi & Anr

APPELLANT

Vs

Amin Sk. & Anr

RESPONDENT

Date of Decision : 24-05-2019

Acts Referred:

Citation : (2019) 05 CAL CK 0060

Hon'ble Judges : Bibek Chaudhuri, J

Bench : Single Bench

Advocate : Partha Pratim Roy, Anirban Das, shish Kr. Sannyal, Pratip Kumar Chatterjee

Final Decision : Dismissed

Judgement

Bibek Chaudhuri, J

1. Plaintiffs of partition suit No.131 of 2011 which was decreed in preliminary form by the learned Civil Judge (Senior Division) Kandi, Murshidabad and subsequently reversed in appeal by the learned Additional District Judge, Kandi, Murshidabad in Title Appeal No.2 of 2014 are the appellants in the instant second appeal.

2. The plaintiffs/appellants filed Partition Suit No.131 of 2011 praying for preliminary decree for partition in respect of 4 ½ decimal of land out of 7 decimal of land recorded in RS khatian No.131, plot No.218 corresponding to LR khatian No.437 and 566. It was pleaded by the plaintiffs/appellants that one Abdul Rob and Abdul Bari were joint owners of the aforesaid plot No.218 in respect of 8 anna 12 gonda and 7 anna 8 gonda shares respectively. Their names were recorded in RS Record of Rights according to their respective shares. Subsequently in revisional settlement the name of Abdul Rob was recorded, however, wrongly in respect of only 8 anna share in respect of the said plot No.218 (hereafter described as the suit property). The said Abdul Rob died leaving behind his wife, one son and 3 daughters. By a registered deed of sale

executed on 7th January, 2011 and registered on 10th January, 2011, the said heirs of Abdul Rob, since deceased transferred 3 ½ decimal of land in favour of the plaintiffs. The defendant/respondent No.1 purchased 1 decimal of land in the suit property from another co-sharer namely, Abdul Bari. Subsequently, the defendant transferred the said 1 decimal land in the suit property in favour of one Romjan Seikh, elder brother of appellant No.1. Romjan Seikh against transferred the said one decimal of land in the year 1998 by a registered deed of sale in favour of appellant No.1. Thus the appellant No.1 becomes the owner of 4 ½ decimal of land by purchase through two separate deeds of sale. Sometimes in 2011 the defendant/respondent No.1 declared that he purchased the suit property by a registered deed of sale dated 29th June, 2011 from the heirs of another Abdu Rob, since deceased, son of one Golap Bibi since deceased. The appellants requested the respondent No.1 to effect partition of the suit property amicably, but the respondent refused such proposal. So, the plaintiffs filed the said suit for preliminary decree for partition and other consequential relief.

3. The defendant/respondent No.1 contested the said suit by filing written statement wherein he denied the case made out by the plaintiffs/appellants. Specific case of the respondent was that the original owners of the suit property were one Abdul Bari, son of Saisar Rahaman and Abdul Rob, son of Mehendi Seikh and Golapi Bibi. They were residents of village Parbatipur within PS Khargram, Kandi. Abdul Bari expired leaving behind two sons and four daughters. They inherited the share of Abdul Rob in the suit property after his death. Subsequently, on 8th June, 2011 they jointly transferred their share in the suit property in favour of the defendant/respondent. Thus, the defendant became the owner of the property which was originally owned by Abdul Rob, since deceased, son of Mehendi Seikh and Golap Bibi. It was further pleaded by the defendant that vendors of the plaintiffs are the legal heirs and successors of another Abdul Rob, since deceased, son of Sohorab Seikh and Jinu Bibi. Further case of the defendant/respondent is that he also purchased the entire share of Abdul Bari and became owner of the entire suit property. The plaintiff/appellant has no right, title and interest over the suit property accordingly he prayed for dismissal of the said suit.

4. On the basis of the pleadings, the learned Civil Judge (Senior Division), Kandi framed as many as five issues which are stated below:-

1. Is the suit maintainable in its present form?
2. Have the plaintiffs any cause of action to file the instant suit?
3. Do the plaintiffs have any right, title and interest over the suit property?
4. Are the plaintiffs entitled to get decree for partition as prayed for?
5. To what other relief/reliefs are the plaintiffs entitled to get as per law and equity?
5. During trial of the suit, the husband of the plaintiff/appellant No.1, namely,

Asraf Seikh deposed as PW1, one Pearul Haque was examined on behalf of the plaintiffs as PW2. On the other hand, the defendant/respondent No.1 deposed in the suit as DW1. DW2 was one Rofik Seikh. Both the parties produced their respective title deeds and the record of rights in respect of the suit property which were marked exhibits during trial of the suit.

6. The learned trial judge decreed the suit on contest in preliminary form against the defendant/respondent and declares share of the plaintiffs in respect of 4 ½ decimal of land in the suit property. It is also declared that the defendant has share in respect of the rest of the suit property.

7. The defendant challenged the said judgment and decree for partition in preliminary suit passed in a partition suit No.131 of 2011 on 11th December, 2013 before the learned Additional Judge in 1st Appellate Court allowed the appeal in part on contest by setting aside the judgment and decree passed by the learned Civil Judge (Junior Division), Kandi so far as the 3 ½ decimal of land purchased from Abdul Rob, son of Md. Soharab @ Soharab Seikh and decreed the suit in preliminary form in favour of the plaintiff in respect of 1 decimal of land in the suit property which she purchased in the year 1998 from Romjan Seikh.

8. the said judgment and decree passed by the 1st Appellate Court is assailed in this appeal.

9. It is found from the record that the Division Bench of this court by an order dated 14th October, 2015 admitted the instant appeal for hearing on the following substantial question of law:-

"Whether the learned 1st Appellate Court was justified in modifying the judgment and decree of the learned trial judge by holding that the deed being No.102 for the year 2011 is invalid without framing any issue relating to liquidity and/or validity of the said deed or not."

10. I have heard Mr. Partha Pratim Roy, learned Advocate for the appellants and Mr. Ashish Kumar Sanyal, learned Counsel for the respondent No.1.

11. It is submitted by Mr. Roy that the fate of the instant appeal depends upon adjudication of the question as to whether Abdul Rob, son of Mehendi Seikh and Golap Bibi or another person under same name, son of Soharab Seikh and Jinu Bibi was the original owner in respect of 3½ decimal of land which is the subject matter of the suit for partition. It is pointed out by Mr. Roy that the learned trial court did not frame any issue with regard to the identity of the vendors of both the plaintiffs and the defendant during trial of the suit. Without such issue being framed, the decision made by the learned Judge in 1st Appellate Court to the effect that Abdul Rob, son of Soharab Seikh and Jinu Bibi was not the owner in respect of the said 3 ½ decimal of land is perverse and liable to be set aside.

12. Mr. Ashish Kr. Sannyal, learned Advocate on behalf of the respondent, on the other hand, submits that the suit property was recorded in the name of Golap

Bibi, wife of Mehendi Seikh in respect of 8 anna and 12 gonda share out of total 7 decimal of land in plot No.218. A copy of the said RS Record of Rights was exhibited on behalf of the appellants and marked as exhibit-7. In LR Record of Rights the said property was recorded in the name of Abdul Rob, son of Mehendi Seikh. Thus from the Record of Rights it is found that originally Golap Bibi, wife of Mehendi Seikh was the owner in respect of the suit property and after her death the same was recorded in the name of Abdul Rob, son of Mehendi Seikh and Golap Bibi. The defendant purchased the suit property from the legal heirs and representatives of the said Abdul Rob, son of Mehendi Seikh by a registered deed of sale dated 8th June, 2011. The appellants are claiming title over the suit property by virtue of a deed of purchase being deed No.102 executed by one Mahimunnecha Bibi and four others being the heirs and legal representatives of one Abdul Rob, son of Soharab Seikh. The said Abdul Rob, son of Soharab Seikh village Kanduri within PS Khargram, Kandi had no right, title and interest over the suit property. Therefore, the learned Judge in 1st Appellate Court held that the appellants did not acquire right, title and interest over the suit property by virtue of the so called purchase from the heirs of Abdul Rob, son of Soharab Seikh, since deceased. There is no reason to interfere with the finding made by the learned Judge in 1st Appellate Court with regard to the title of the vendor of the defendant and subsequently the defendant by purchase in the suit property. The appellant failed to prove that Abdul Rob, son of Soharab Seikh was the original owner in respect of the suit property. Therefore, the learned Judge in 1st Appellate Court rightly decided that the appellants have no right, title and interest over the suit property and they are not entitled to a decree for partition in preliminary form in respect of 3 ½ decimal of land which they alleged to have been purchased from Abdul Rob, son of Soharab Seikh.

13. Mr. Sannyal also refers to Exhibit-E series on perusal of which it is ascertained that Abdul Rob, son of Soharab Seikh was a recorded owner in respect of .74 decimal of land in plot No.4003 of Mouza Kirtipur within P.S Khargram. The appellants could not produce any document to show that the names of the predecessor-in-interest of the vendors of appellant No.1 was ever recorded in respect of any Record of Rights. The learned Judge in 1st Appellate Court upon due consideration of entire evidence on record, both oral and documentary, declared the share of the parties in suit plot No.218 and there is no reason to spill ink over the findings of the learned Judge in 1st Appellate Court.

14. At the time of admission of the instant appeal for hearing, the Division Bench of this Court, it is already stated, framed a substantial question of law as to whether the deed being No.102 for the year 2011 by virtue of which the appellants claimed title over the property can be declared invalid without framing any issue relating to legality and/or validity of the said deed.

15. I have already recorded the issues framed by the learned trial judge on the basis of the pleadings of the parties. Issue No.3 deals with the question as to

whether the plaintiffs have any right, title and interest over the suit property. At the risk of repetition, it is recorded that the plaintiffs/appellants claimed title over the suit property on the basis of the said deed bearing No.102 of 2011 which was executed on 7th January, 2011 by the legal heirs of Abdul Rob, son of Soharab Seikh. Therefore, it was incumbent upon the learned trial court as well as the learned 1st Appellate Court to consider and adjudicate as to whether the plaintiffs/appellants really acquired title over the suit property by virtue of the said purchase deed bearing No.102 of 2011. It is pertinent to mention that the appellants and the respondent No.1 become the joint owners of the said property according to their respective shares by virtue of purchase. Therefore, it was well within the scope of the learned courts below to consider as to whether the deed of purchase by virtue of which the plaintiffs/appellants were claiming title over the suit property was a valid deed or not. In order to arrive at a decision with regard to the appellants' right, title and interest over the suit property, the learned courts below had the duty to consider the authenticity of the deed of conveyance by virtue of which the appellants claimed title over the property. The learned Judge in 1st Appellate Court consider the evidence on record and came to a finding that the appellants did not acquire any right, title and interest over the suit property by virtue of the deed of conveyance bearing No.102 of 2011.

16. Under such circumstances, I am not in a position to hold that the impugned judgment suffers from perversity or error in law for omission to frame issue as to whether the title deed by virtue of which the appellants claimed title over the property was valid or not. Well settled is the law that where the parties will understood the two cases opposed to each other and led all the evidence in support of their contentions, the absence of an issue cannot be said to be fatal to the case or that there was a mistrial. The decision of the Hon'ble Supreme Court in Sayeda Aktar vs. Abdul Ahad reported in AIR 2003 SC 2985 may be relied on in support of my observation. Although no specific issue is raised, it is sufficient if all the controversies arising under the pleadings have been understood by the parties and they have produced the evidence on such controversies and the court while disposing of such lis considers the point for determination which arose out of such controversy. The mere omission to frame an issue on a matter in controversy between the parties cannot be recorded as fatal unless, upon examination of the record, it is found that the failure to frame the issue had resulted in the parties having gone to the trial without knowing that the said question was in issue between them and having therefore, failed to adduce evidence on that point.

17. Coming to the instant case it is found that the defendant in his written statement clearly pleaded that the vendors of the appellants being legal heirs and representatives of Abdul Rob, son of Soharab Seikh had no right, title and interest over the suit property. The parties laid their evidence on the basis of the pleadings. The appellants were not taken to surprise when their title over the suit property was questioned.

18. For the reasons, stated above I do not find any scope to interfere with the finding arrived at by the learned Judge, 1st Appellate Court while deciding Title Appeal No.2 of 2014. Accordingly, I do not find any merit in the instant second appeal and the same is liable to be dismissed. Hence, the instant appeal be and the same is dismissed on contest without any order as to cost.

19. The judgment and decree passed by the learned Additional District Judge, Kandi in Title Appeal No.2 of 2014 on 30th April 2015 is affirmed. Lower Court records be sent down to the courts below immediately.

Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.