

W.B.F.No.-3701

HEADING OF JUDGEMENT IN ORIGINAL SUIT/CASE

DISTRICT : SOUTH 24-PARGANAS.
 IN THE COURT OF : SMALL CAUSES COURT, SEALDAH, 24-PGS.(S).
 PRESENT : SRI ANNADA SANKAR MUKHOPADHYAY, JUDGE,
 SMALL CAUSES COURT, SEALDAH, 24-PGS.(S).

Monday, the 27th day of June, 2016.**TITLE SUIT NO 48 OF 2010**Sk. Kallu Plaintiff(s)Petitioner(s)

VERSUS

Abul Sattar &
Others Defendant(s)/Opposite Party(s)

Give date 04.05.16, 11.05.16, 20.05.16, 03.06.16 & 13.06.16. The suit/case coming of date
 on for final hearing on in the presence of

Sri Sandip Kr. Bhattacharjee-
 & another Advocate(s) for Plaintiff(s)
 Pleader(s) Petitioner(s)

Sri Sambhunath Ghosh &
 others Advocate(s) for Defendant(s)
 Pleader(s) Opposite Party(s)

and having stood for consideration to this day, the court delivered the following judgement.

This is a suit for declaration, injunction, partition and in alternative recovery of
 possession valued at Rs. 80100/-.

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The brief background facts relying on which plaintiff filed this instant suit so understood from the contents of the plaint is that one Golapi Bibi was absolute owner of the suit property situated at B/42C/H/4 Tiljala Road, Kolkata 700 046 under P.S Beniapukur constructed over Thika land measuring more or less 4 cottah 8 chitak. Said Golapi Bibi died executing a Wasiyatnama (Deed of Gift) on 06.05.1981 bequeathing her entire suit property in the names of her three sons namely Abdul Sattar, Abdul Gaffar and Sk Kalloo being defendant no.1, 2 and Plaintiff herein respectively, together with a map of the property. By virtue of the said Wasiyatnama said Abdul Sattar, Abdul Gaffar and Sk Kalloo became joint owners of the suit property. Defendant no.2 Abdul Sattar settled at Miyaji Ostagar Lane, Kolkata 700 017. Subsequently the defendant no.2 in collusion with defendant no.1, Abdul Gaffar made attempt to sell a portion of the suit property without intimating plaintiff and he came to know the same from his local well-wishers on 10.10.1996. Plaintiff feels it impossible to possess the suit property jointly with the defendants due to several dispute and difference amongst them and it also became inconvenient and impossible for the plaintiff to enjoy the suit property together with the defendants for which, plaintiff approached the defendants on several occasions to make the suit property partitioned on the basis of Wasiyatnama dt.06.05.1981 but the defendants refused on such call for partition by the plaintiff. Defendants at the same time have been giving inspection of the suit property to the outsiders with the intention to transfer their share in the suit property and they are required to be restrained from such act. Plaintiff claiming himself a joint co-sharer with the defendants in respect to the suit property, seek partition on the basis of Wasiyatnama executed by their mother. The plaintiff further contended that during the pendency of the suit, the defendants in deliberate violation of the injunction order of this court have executed and registered two deeds of lease in favour of defendant-3&4 illegally. By virtue of the said deeds of lease, no right, title and interest are transferred in favour of defendant-3&4 and they should be restrained from entering into the suit property forcefully and illegally. According to the plaintiff, cause of action arose on 10.10.1995 and continued till 20.11.1995 and subsequently at the suit property. By the instant suit, plaintiff has prayed for partition, declaration that the deeds of lease are illegal and invalid, a declaration that plaintiff is the absolute owner of the suit property, an order of injunction, recovery of possession of the A-schedule property against the defendants, permanent injunction and consequential relief.

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Defendant-3(a) to 3(d) and defendant-4 submit a joint written statement praying for dismissal of the suit. The brief contention of these defendants is that this suit is barred by the provision of Order 2 Rule 2 of CPC, Order 7 Rule 14 CPC and Section 34, 38 & 41(b) of the Specific Relief Act. They further contended that this suit is bad for non-joinder of necessary party and also barred by Law of Limitation and principle of res-judicata. The specific averment of these defendants is that Gulapi Bibi died intestate leaving behind her 4 sons and they have inherited the estate of Gulapi Bibi as per law of inheritance. They denied execution of any Wasiyatnama on 06.05.1981 by said Gulapi Bibi and therefore, the entire property of Gulapi Bibi devolved upon her 4 sons only. They further contended that the plaintiff filed another suit being TS-197/1995 seeking declaration, injunction, and partition and alternatively for recovery of possession against the defendant-4 and the predecessor in interest of defendant-3(a) to 3(d) and the said suit was dismissed by Ld. Asst. District Judge at Sealdah. This defendants contended that defendant-1 executed a deed of lease in favour of husband of defendant-4 on 22.12.1995 and by virtue of the said deed, original defendant-1 leased out his portion in the suit property for 99 years. Defendant-2 by another registered deed of lease dt.22.12.1995 leased out his portion in the suit property in favour of defendant-4 for 99 years. One Sk. Bechu and Kanchan Bibi also executed a deed of lease dt.22.01.1998 in respect of their share in the suit property in favour of the husband of the defendant-4 for 99 years and therefore, these defendants are actual owner/lessee in respect to entire suit property. They stated that plaintiff has got no right, title and interest over the suit property. These defendants also averred in their written statement that they have every right to make construction or to induct tenant or to grant sub-lease to anybody of the suit property and plaintiff to make illegal gain out of it, filed the instant suit. They further contended that plaintiff cannot seek partition of the suit property. They further contended that all the deeds of lease were executed in between 1995-98 in continuance of Calcutta Thika Tenancy Regulation & Abolition Ac, 1981 and not during continuance of injunction.

ISSUES

On the basis of the pleadings of the parties, following issues were framed for adjudication of the suit in meaningful manner:-

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1. Is the suit maintainable in law?
2. Has the plaintiff any cause of action in the present suit?
3. Is the plaintiff owner of the structure and thika tenant of A-schedule property?
4. Whether the purported lease deed No.2304 dated 22.12.1997 and 2305 dt.22.12.1997 executed by defendant No.182 in favour of defendant No.384 are invalid, illegal and void ab initio and is binding on plaintiff or not?
5. Whether the defendant No.182 are still co-sharer of suit property after the execution of two lease deeds in favour of defendant No.384 or not?
6. Is the plaintiff entitled to get decree as prayed for?
7. To what other relief/reliefs is the plaintiff entitled to get in law and equity?

Witnesses and Documents in support to the facts

To prove the case, plaintiff adduced his son Sk. Anwar as PW-1. PW-1 by filing his evidence U/o 18 Rule 4 CPC supported the contention of the plaintiff so described in the plaint need not to be repeated here. He produced letter of authority of his father (Ext.1), certificate copy of sale deed of 1952 (Ext.2), corporation tax bill of 12.02.2013 (Ext.3), property tax receipt dt.28.01.2011 (Ext.3/A), certified copy of deed of lease dt.22.12.1995 (Ext.4 with objection) and another deed of lease of the same date (Ext.4/A). Considered the written argument so filed.

Defendants adduced one Sk. Nazir Ahmed, defendant-3 as DW-1 who filed his examination in chief on affidavit and produced KMC Tax Bill (Ext.A), lease deed dt.16.04.1992 (Ext.B with objection).

Decision With Reasons.

Issue No.182 : Both these issues are taken up together for discussion for the sake of brevity and convenience as they are interlinked to each other and to avoid unnecessary repetition.

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The contesting defendants in their written statement contended that the suit is not maintainable and barred by Order 2 Rule 2 CPC, Order 7 Rule 14 CPC, Sections 34,38 & 41(b) of Specific Relief Act, Law of Limitation and insufficient court fee.

PW-1 during the cross-examination admitted that there was a suit being TS-197/95 pending before Ld. Asst. District Judge, Sealdah. Defendants during their evidence, did not produce any decree or order in TS-197/1995 to establish that there was a dismissal of previous suit. Defendants also did not produce any document to show that there was a previous suit on the selfsame property between the same parties with same prayer. Defendants also did not place any such evidence in support of bar of this suit U/o 7 Rule 14 CPC. Plaintiff during the course of trial, did not produce any Wasayatnama but this is not coming within the purview of Order 7 Rule 14 CPC and cannot be said to be that the suit is not maintainable on the said ground. Defendants also did not able to produce any evidence to prove that this suit is barred by provision of Section 34,38 & 41(b) of Specific Relief Act.

In consideration of the evidence of all the sides, this court does not come to the conclusion that the plaintiff has no cause of action to file the instant suit. Cause of action is not a single incident but consists of bundles of facts. Considering the plaint and the subsequent evidence it can be said that these two issues are decided in favour of the plaintiff.

Issue No.3: The contention of the plaintiff is that the entire property is a thika tenanted property and according to the Thika Tenancy Act, the property cannot be transferred. However, during the course of evidence, PW-1 did not file any document to prove that the property is a thika tenanted property. In evidence, PW-1 admitted that his father never filed any return before the office of Thika Controller. He also admitted that he is not aware whether his father filed any application before Thika Controller seeking cancellation of those lease deeds in favour of Sk. Saukat and Laadli Begum. From the evidence so produced by the plaintiff, this court has not come across any documentary evidence to hold that the suit property is a thika property and the plaintiff is a thika tenant. Making Thika Controller as a party to the suit does not make any sense in accepting that the suit property is a thika property. Plaintiff also did not file any rent receipt of the previous zaminders to establish his claim in this regard.

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Therefore, this issue is decided in favour of the plaintiff in negative.

Issue Nos 4 & 5: Both these issues are taken up together for the opurpose of discussion being co-related.

From the plaint as well as evidence of the plaintiff, it is admitted position that Gulapi Bibi was originally the owner of the suit property. From the evidence of PW-1 that the said Gulapi Bibi had three sons namely, Abdul Sattar, original defendant-1; Abdul Gaffar, original defendant-2 and Sk. Kallo the plaintiff. Plaintiff denied that one Sk. Bechu was the son of said Gulapi Bibi. It appears from the evidence of PW-1 that by virtue of deed of sale (Ext.2), defendant-1&2 transferred their share in the suit property to original defendant-3 and defendant-4. At the same time, plaintiff that defendant-3&4 are owners of the suit property. The Ext.2 is found to be a certified copy of the deed of sale by which, Gulapi Bibi purchased the property situated at 8/A, Azgar Mistry Lane.

From the four corners of the evidence so adduced by the plaintiff, it does not appear that the defendant-1&2 have any right, title and interest over the suit property at this moment. Therefore, this issue is decided accordingly, holding that defendant-1&2 are not co-sharer of the suit property.

(Ext.2), defendant-1&2 transferred their share in the suit property to original defendant-3 and defendant-4. At the same time, plaintiff that defendant-3&4 are owners of the suit property. The Ext.2 is found to be a certified copy of the deed of sale by which, Gulapi Bibi purchased the property situated at 8/A, Azgar Mistry Lane.

From the four corners of the evidence so adduced by the plaintiff, it does not appear that the defendant-1&2 have any right, title and interest over the suit property at this moment. Therefore, this issue is decided accordingly, holding that defendant-1&2 are not co-sharer of the suit property. Accordingly the deeds of lease No.2304 dated 22.12.1997 and 2305 dt.22.12.1997 executed by defendant No.1&2 in favour of defendant No.3&4 are correctly done and are not invalid from the eye of law and the issue to this respect is decided accordingly in favour of plaintiff in negative.

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Issue No.6 & 7: Both these issues are taken up together for discussion for the sake of convenience and brevity as they are interlinked to each other and to avoid further repetition.

Plaintiff in the plaint as well as in his evidence prayed for partition on the basis of the Wasiyatnama alleged to have been executed by Gulapi Bibi in his favour on 06.05.1981. However, plaintiff did not produce the said Wasiyatnama in this court. PW-1 in his evidence stated that he has filed the said Wasiyatnama before this court but no Wasiyatnama is found in this record. He also stated during evidence that by virtue of Wasiyatnama, Gulapi Bibi distributed the suit property in favour of her three sons i.e. Abdul Gaffar, Abdul Sattar and the plaintiff but he prayed for the entire suit property in his favour. PW-1 on another date stated before this court during evidence that Gulapi Bibi died leaving behind four sons and a daughter. He also replied that he never saw the original Wasiyatnama executed by Gulapi Bibi. If this evidence is to be believed, then this suit is bad for non-joinder of necessary party. At the same time, on the basis of this evidence, this suit property cannot be partitioned on the basis of Wasiyatnama which according to this case record is not in existence. Therefore, no decree can be passed on the basis of oral evidence and in absence of any documentary evidence, on the basis of which, the entire case of the plaintiff is dependent.

In the written notes of argument, the defendant contended that in the two lease deeds mentioned in schedule-B, the Wasiyatnama was referred and it is the defendant-3, transferee, he must be in possession of the Wasiyatnama. The contention of this defendant is depending upon the surmise and conjecture. He is not sure about the possession of the original Wasiyatnama. Under the Mahomedan Law, a will may be in writing or oral but it is the intention of the testator which must be clear and explicit as regard to bequest and the said bequest must be 1/3rd of the testator's estate after meeting the funeral expenses and debts. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and in deciding how it is to be proved, the court should inevitably refer to the statutory provisions of Sections 67 & 68 of the Evidence Act and Sections 59 & 63 of the Indian Succession Act. In the instant case, the defendant failed to prove the said will/Wasiyatnama according to the law described herein above.

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Therefore, these two issues are not decided in favour of the plaintiff.

A fact is necessary to be stated in this judgement regarding the non-compliance of the Hon'ble High Court's direction by the defendant. In C.O. No.4494/15, the Hon'ble High Court at Calcutta vide order dt.21.12.2015 imposed a cost assessed upon the petitioner Ashique Ahmed assessed at Rs.25,000/- to be deposited with State Legal Services Authority within a week of the said date. So far this record is concerned, this court is not aware whether the said order of the Hon'ble Court is complied by the said defendant till date or not. This court is of the view that this fact is necessary to be drawn to the attention of the Hon'ble High Court.

C/F paid is correct.

Hence, it is,

ORDERED

That the suit be and the same is dismissed on contest without any order as to cost.

D/c by me.

Judge, S.C.C., Sealdah

Judge, S.C.C., Sealdah,
South 24-Parganas.