

WBF 3701

HEADING OF JUDGMENT IN ORIGINAL SUIT/CASE

DISTRICT : SOUTH 24 PARGANAS

IN THE COURT OF : SMALL CAUSES COURT AT SEALDAH,

**PRESENT : ANNADA SANKAR MUKHOPADHYAY
JUDGE, SMALL CAUSES COURT,
SEALDAH**

THURSDAY, THE 19TH MAY, 2016

TITLE SUIT NO. 37 OF 2013

[CIS Registration No. 31/15]

MD ILYAS,PLAINTIFF

VERSUS

MD YUSUF AND OTHERS,DEFENDANTS

Give date, 02.05.2016, 06.05.2016, The suit / case coming for final hearing in the presence of:

Sri. Ranjit Kumar De and Smt. Parbati Das Advocates for Plaintiff

and

Kaji Tajammel Hossain, Advocate for the Defendants

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

This is a suit for declaration, partition, and permanent injunction valued at Rs. 500001/-

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The factual matrix of the plaintiff's case in short spectrum is that one Md Sayeed was the absolute owner of the land, hereditament and structure measuring about 2 cottah 8 chittaks 42 square feet lying and situated at premises no. 1/2/H/1, J K Ghosh Road, P.S Ultadanga, Kolkata 700 037, hereinafter referred as the suit property and being the subject matter of this suit. Said Md Sayeed during his lifetime executed his last will and testament dated 4th December, 1986 and bequeathed 1/3rd share of the undivided suit property to the plaintiff which is the maximum extent a Sunni Muslim can bequeath by way of will as per Mohammedan Law. Said Md Sayeed died on 28th May, 1987 leaving behind defendants as sons and daughters to inherit remaining 2/3rd share in the undivided suit property. Plaintiff came to know about the will from the letter of Advocate Sailendra Nath Chatterjee dated 6th September, 2005 with which a copy of the will was enclosed. By virtue of the said will, plaintiff became owner of 1/3rd share of the undivided suit property within the knowledge of the defendants. Plaintiff is the son of the defendant no.1 and is in possession of a portion of the ground floor of the suit property within the knowledge of the defendants as licensee without license fees.

Plaintiff contended that the defendants, without any disputes and differences, started causing all sorts of obstructions in his peaceful enjoyment of the suit property and put pressure upon him to deliver the possession of 'B Schedule' property in their favour on the basis of partition deed, which

was not given into effect, wherein plaintiff's 1/3rd share was not taken care of. In this circumstances, plaintiff is compelled to file instant suit on the basis of cause of action arose on 29.04.2010 at the suit property. He prayed for partition of the suit property declaring his 1/3rd share, declaration that the deed of partition dated 29.04.1993 has not been effected and consequential relief.

Appearing on the basis of summons, Defendant no.1 filed his Written Statement denying the allegations of the plaintiff. The contesting defendant stated that Md Sayeed was never the absolute owner of the suit property and was owner of the structure of the Thika Tenancy Right over the premises and the land is owned by Government of West Bengal after abolition of Zamindari systems. He further contended that Md Sayeed never executed any will and testament on 4th December, 2010 or at any time during his lifetime bequeathing 1/2rd share of the suit property in favour of the plaintiff and the purported will/wasiyatnama is forged one. He admitted that Md Sayeed died leaving behind defendant no.1 and his legal heirs but in respect to entire suit property and not 2/3rd of it as contended by plaintiff. He alleged that the plaintiff hatched a conspiracy with Advocate Sailendra Nath Chatterjee by way of a manufactured will for his wrongful gain which is very hard to digest and denied of having any knowledge of such will before the execution of partition deed on 26.04.1993. He further contended that B Schedule Property falls under him by virtue of the Deed of Partition and denied that the plaintiff is in

constructive possession of the same. He contended that the plaintiff has no right, title and interest over the suit property wherein plaintiff is residing as licensee under him being his son. He prayed for dismissal of the suit.

On the basis of the pleadings of both sides, following issues were framed and subsequently re-casted at the time of writing of this judgement for just decision of this suit:

1. Is the suit maintainable in law?
2. Has the plaintiff any cause of action to file present suit?
3. Is the suit barred by Law of Limitation, estoppel, waiver and acquiescence?
4. Is the plaintiff co-sharer in respect to the suit property?
5. Is the Partition deed of 1993 never been effected?
6. Is the plaintiff entitled to get decree as prayed for?
7. Is the plaintiff entitled to get any other relief as prayed for?

Plaintiff being obliged to prove his case adduced himself as PW1, Advocate Sailendra Nath Chatterjee as PW2, Gopal Chandra Ghosh as PW3. On the contrary, Defendant no.1 Md Yusuf was examined as DW1, Humera Bibi was examined as DW2 and Md Idris was examined as DW3. Following documents were formally proved before this court:-

For plaintiff:

- Death Certificate of Md Sayeed Exhibit 1
- Corporation Tax Bill Exhibit 2
- Rations cards of plaintiff Exhibit 3
series
- Letter of Advocate Exhibit 4
- Wasiyatnama of Md Sayeed Exhibit 4/A

For Defendants:

- Photograph of Md Sayeed Exhibit A
- Signature of Md Sayeed in Urdu Exhibit A/ 1
- EPIC of DW1 Exhibit B
- Death Certificate of Md Sayeed Exhibit C
- KMC tax Receipt of 2015-16 Exhibit D
- Registered Partition Deed Exhibit E

After closure of evidence, Ld Advocates of both sides presented their written arguments.

DECISION WITH REASONS

Issue nos. 1 to 3:

All these issues are taken up together for consideration for the sake of brevity and convenience.

Save and except evasive denials, defendant no.1 did not allege or contradict both these issues. After attentive consideration of the evidence this court is of the view that there

is nothing in the record which suggest anything contrary to the contentions of the plaintiffs against these issues. Therefore these issues are decided in favour of the plaintiff.

Issue no.4:

Plaintiff contended that on the basis of the washiyatnama of Md Sayeed he became owner of 1/3rd share of the suit property. From the Examination-in-chief on Affidavit of the PW1 it is revealed that from the letter of Advocate Sailendra Nath Chatterjee dated 06.09.2005 addressed to Md Sayeed with enclosed Will and Testament he came to know about the existence of the will. Ld Advocate who prepared the will appeared as PW2 and from his evidence it appears that Md Sayeed met him at his chamber about 10/12 times before execution of the will of 04.12.1986 an asked him to keep the same with him after putting his signature there in at the presence of Sunil Kumar Guha and Nirmal Chandra Sen, the witnesses of the will and never came to receive the same. It appears that while he was cleaning his chambers and disposing of old papers, he found the will and by letter dated 06.09.2015 sent the same to the executor with a copy to the beneficiaries to the said will. Evidence of the PW1 corroborates the said facts. He identified Exhibit 4 and 4/A. After receive of his letter Md Iliyas came to meet him at his chamber and he came to know from him that Executor is no more. During cross examination, he was strict to his stand. One of the witness execution of the said will also corroborated about the execution of the will but he

put his signature before the signature of the executor. From the evidence of the PW1 and PW2 there is no scope and point to disbelieve the execution of the will and is most probable and believable to accept the same. Defendant no.1 contended that the said will is forged one but did not adduce any satisfactory evidence that effect. He asserts the document to be forged but he did not satisfy this court by satisfactory evidence. DW1 filed the Passport of his father Md Sayeed but the same bear signature in Urdu. The deed in question is also bears signature of the executor in Urdu but there is no counter claim from the side of the defendant that the deed is forged. The DW1 and other defendant also did not produce any document of recent time of the date of execution of the will to show and satisfy the court that the signature on the will is not believable and forged one. There is no document to compare the signature in the alleged will of the executor in the possession of the defendant. Save and except oral evidence defendant no1 is not found to be able to prove by believable evidence more effective than that of the plaintiff that the will is forged one. It cannot be said to be forged document only due to reason that he is not aware about the execution. Such defence is nothing but lame excuse and could not stand of its own. Evidence of DW2 and DW3 have not added any value to the defence of the defendant no.1.

Defendant no.1 averred that the partition Deed was executed on 26.04.1993 among heirs of Md Sayeed which bears signature of the plaintiff and therefore he cannot have any right

over B Schedule Property. There is no counter-claim from the side of the defendant to that effect and this contention is only an evidence in this suit from the side of the defendant.

According to Mohammedan Law, a bequest to heirs is not valid unless the other heirs consent to the bequest after death of testator. In the instant case, plaintiff's claim is restricted to 1/3rd of the property of the testator and the plaintiff claimed the said share.

In Mohammedan Law, there is no necessity of Probate of a will to be given into effect. This court is not going to deal with the legality and validity of the will but to decide the suit for partition on the basis of most believable evidence taking into consideration the will and the partition deed. To my conscience it appears that the will was properly executed by the Md Sayeed and kept it with the Ld Advocate for handing over which never been possible. From the evidence so put forth this court does not find that the said will is not sufficient to be given into effect taking into consideration of the Mohammedan Law.

According to the evidence so put forth it appears that the plaintiff is co-sharer and co-owner in respect to the suit property in the circumstances when the will of the Md Sayeed is found to be properly executed and beyond doubt of any forgery or fraud. Defendant no.1 did not able to satisfy this court by cogent evidence that the suit land is a thika property owned by Government. The Partition Deed was executed in the year 1993 and the will is found to have been executed in the year 2005.

Therefore it could not be possible to be within the knowledge of the parties that the partition be made taking into consideration of the said will. Defendant no.1 was one of the parties to the Partition Deed and after taking into consideration of the will, plaintiff became co-owners of the suit property. Therefore this issue is decided in favour of the plaintiff.

Issue no.5:

From the Deed of Partition and the evidence of both sides it appears that the plaintiff and defendants are in possession of the suit property not according to the said deed of partition. Defendant and plaintiff admitted that the plaintiff is in possession of the 'B Schedule property' though according to the defendant no.1, it should not be as the defendant no.1 claimed that plaintiff could not have any right over the B Schedule Property. Therefore the contention of the defendant no.1 could not sustain in law and in the fact to the effect that the deed of partition was given appropriate effect.

From the evidence of the plaintiff and the defendant it appears that the plaintiff is in possession of the suit property not according to the partition deed. Defendant alleged that the Partition Deed was executed amongst them but there is no evidence in support. Therefore it can be said and hold that this issue is decided in favour of the plaintiff in affirmative.

Issue nos. 6 and 7:

Defendant is not able to prove by sufficient evidence that the suit property is already partitioned. From the evidence it appears that the will executed by Md Sayeed is a believable document and after the discovery of the Will it can be said that the partition deed has no effect and therefore the property, being joint and un-partitioned, is required to be partitioned by metes and bounds amongst its owners. Plaintiff became owner by virtue of the will and therefore he will be entitled to get the 1/3rd share of the suit property. Thus these issues too are decided in favour of the plaintiff.

Court Fees paid are correct.

Hence it is,

ORDERED

that the Suit be and the same is decreed in its usual preliminary form on contest against the defendants without costs.

It is hereby declared that the Plaintiff has got undivided 1/3rd (one third) share in respect of the suit schedule property as mentioned above on the body of the judgment.

Parties are directed to make partition of the suit property amicably within six months from the date of the order in terms of the share declared in the preliminary decree, failing which either of the parties will be at liberty to make partition through Court as per law.

Typed by me

Judge. Small Causes Court
Sealdah

Judge. SCC, Sealdah