



2025:CHC-AS:254-DB

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

And

The Hon'ble Justice Uday Kumar

FA 177 of 2024

With

CAN 3 of 2022

Amal Kumar Ghosh

Vs.

Rathindra Mohan Ghosh and Ors.

For the appellant : Mr. Shibendranath Chattopadhyay,
Mr. Prabir Kumar Misra,
Mr. PriyamMisra,
Ms. AnkitaMisra,
Mr. Sanket Chanda

For the respondent Nos. 1
& 2 : Mr. Kumaresh Dalal.

For the respondent No. 3(b) : Mr. Mohit Chatterjee.

Hearingconcluded on : 30.01.2025.

Judgment on : 30.01.2025

Sabyasachi Bhattacharyya, J.:-

1. The present appeal arises at the behest of the plaintiff in a partition suit. By the impugned judgment and decree, the said partition suit was decreed on the sole ground that one of the joint properties of the



parties pertaining to plot No. 450/1258 was left out of the hotchpot of the partition suit.

2. The plinth of the plaint case was that the original owner of the property, one Radha Mohan Ghosh (since deceased), left a registered deed of settlement distributing the property among his prospective heirs.
3. In the said deed, the settlor expressed the intention that the beneficiaries of the said deed would have the property partitioned by metes and bounds between themselves according to their respective allocations as earmarked in the deed. Subsequently, such partition having not taken place, the suit was filed, in a way to implement the deed of settlement by seeking partition in respect of the properties covered by the said deed.
4. In the first round of the litigation, the suit was dismissed for non-joinder of Smt. Anima Sinha (since deceased), one of the sisters of the parties, against which an appeal was preferred before this court. The appellate court remanded the matter to the trial court and directed the said sister to be impleaded as a party to the suit. Subsequently, such impleadment took place and upon the demise of the said sister, her heirs and legal representatives have been substituted in the suit.
5. Thereafter, the learned Trial Judge upheld the validity of the deed of settlement, turning down the challenge by defendants/respondent Nos. 3(a) and 3(b), and proceeded to declare the shares of the parties on the strength of such deed of family settlement. However, thereafter,



on the objection taken by the defendants/respondent Nos. 1 and 2 during the course of argument, that one of the joint properties pertaining to plot No. 450/1258 was omitted from the hotchpot of the partition suit, the learned Trial Judge dismissed the suit on such ground.

6. Learned Counsel appearing for the respondent Nos. 1 and 2 submits that the said respondents do not have any objection in the event the deed of family settlement is given effect to, along with the shares being declared in respect of the other joint property comprised of plot No. 450/1258.
7. Learned Counsel appearing for the respondent No. 3(b), however, objects to such a course of affairs. It is argued by learned Counsel that the extent of property shown in the schedule of the plaint is much larger than that contained in the original deed of family settlement, as such, leaving out large portions of the joint property which originally belonged to the first owner, Radha Mohan Ghosh.
8. That apart, it is contended that the plaintiff has been depriving the respondent Nos. 3(a) and 3 (b) by misappropriating the usufructs of the property and collecting rents from the tenants. It is further submitted that unless the counter claim of the said defendants is decided, the learned Trial Judge could not declare the shares of the parties.
9. The respondent no. 3 (a), it may be recorded here, has died during pendency of the appeal.



10. Upon hearing learned Counsel for the parties, we find that the learned Trial Judge elaborately considered the validity of the deed of settlement and arrived at the conclusion that the same is a valid document. Thereafter, the learned Trial Judge painstakingly ascertained the shares of each of the parties in terms of the deed of family settlement, pertaining to the properties covered by the said deed. As such, since none of the parties have preferred any challenge against such allocation of shares, it is beyond the purview of the present appeal to disturb such delineation of shares in terms of the family settlement. Insofar as the objection of the respondent No. 3(a) and 3(b) regarding the extent of the schedule property is concerned, such problem can be resolved merely by indicating that the learned Trial Judge should declare the shares of the parties strictly in terms of the schedule of the deed of family settlement and the shares allocated thereby.
11. Insofar as the omission of plot No. 450/1258 is concerned, we are of the opinion that the learned Trial Judge erred in law in dismissing the suit outright despite having otherwise decided the same on merits, on such technical ground, without first granting the plaintiff an opportunity to amend the plaint and incorporate the said left-out joint property within the hotchpot of the partition suit.
12. The contention of the plaintiff/appellant that the said property need not be included, as it was not the subject-matter of the deed of settlement and the present suit is primarily for implementation of the deed, however, cannot be accepted. The suit, as framed, is a partition



suit simpliciter, seeking declaration of shares of the parties to their joint properties and partition. Hence, it is not restricted to the confines of the deed of settlement. It is well-settled that a partition suit must include within its fold all the joint properties of the parties; otherwise, it would be rendered bad for partial partition. Thus, the omitted plot, apparently being also a joint property of the parties, has to be included in the subject-matter of the partition suit between the parties.

13. Hence, we are of the opinion that the matter ought to be remanded to the learned Trial Judge by retaining the findings regarding the respective shares of the parties in terms of the deed of family settlement and the validity of the same, while at the same time, directing the plaintiff to incorporate plot No. 450/1258 within the hotchpot of the suit, upon which the trial court shall adjudicate on hearing the parties and declare the shares of the parties independently of the deed of family settlement.
14. Insofar as the objection of the respondent no. 3 (b) is concerned, we notice that the counter claim of the said respondent is still pending and should be independently adjudicated by the learned Trial Judge. Infact, since the defence taken by the respondent no.3 (b) in his written statement is intertwined and inextricably connected with the reliefs sought in the counter claim, in any event, the said issues will fall within the domain of consideration of the learned Trial Judge at the time of re-adjudicating the suit after remand.



15. Accordingly, FAT 328 of 2020 is partially allowed on contest, thereby directing the learned Trial Judge to grant the plaintiff an opportunity of amending his plaint by incorporating plot No. 450/1258, which has been held by the learned Trial Judge also to be a joint property of the parties, to bring the same within the hotchpot of the partition suit.
16. Upon such amendment being effected, the learned Trial Judge shall re-adjudicate the suit upon hearing the parties afresh, and thereafter proceed to pass a preliminary decree of partition. Such preliminary decree of partition shall be on two fold aspects: insofar as plot no. 450/1258 is concerned, subject to the parties establishing the joint title of the parties thereto, shares of the parties therein shall be declared independently of the deed of family settlement. Insofar as the properties covered by the deed of family settlement is concerned, the learned Trial Judge shall pass a preliminary decree in respect of such properties, declaring the respective shares of the parties in respect of such properties strictly in consonance with the terms of the deed of settlement and the schedule thereto.
17. Needless to say, while re-adjudicating such issues, the learned Trial Judge shall also hear the respondent no.3(b) on his objections as taken in the written statement and decide all issues in accordance with law.
18. It is expected that in view of the long pendency of the matter, the learned Trial Judge shall endeavour to complete the entire exercise, till passing of the preliminary decree, at the earliest, preferably within



eight months from the date of communication of this judgment and order to the court below.

19. We however make it clear that we do not interfere with the finding of the learned Trial Judge to the effect that the deed of family settlement executed by Radha Mohan Ghosh (since deceased), on which the plaintiff bases his case, is valid in the eye of law.
20. Insofar as the pending counter claim of the respondent no.3(b) is concerned, since the issues raised in the same are also covered by the written statement of the said respondent, while deciding the shares of the parties, the contention of the respondent no. 3(b) in the written statement cum counter claim shall also be considered by the learned Trial Judge and the counter claim shall also be decided accordingly.
21. As to the other grievances of the respondent no.3(b) relating to usufructs of the suit property allegedly being misappropriated by the plaintiff, since those have been raised for the first time before this court in appeal, we do not express any opinion on the same. However, if law so permits, it will be open to the respondent no.3(b) to agitate such issues and seek appropriate relief in that regard in the court below after remand.
22. No order as to costs.

(Sabyasachi Bhattacharyya, J.)



I agree

(Uday Kumar, J.)