

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION**

PRESENT:

**THE HON'BLE JUSTICE HARISH TANDON
And
THE HON'BLE JUSTICE PRASENJIT BISWAS**

FA 50 of 2016

**Kasim & Ors.
Vs.
Usman Ali & Ors**

Judgment on : 18.10.2023

Prasenjit Biswas, J:-

1. It is admitted position to the fact that RS recorded tenants were the original owners in respect of the suit properties and the genealogy of their heirs are also admitted.
2. It is stated by the defendants/appellants that the property originally belonged to Baona Singha and Vatak Singha in equal share and out of 6.44 acres of land they got eight anas share each. Baona Singha died leaving behind Dhuleswari Singha and Fuleswari Singha and those two daughters of Baona Singha got 0.55 acres of land. Thereafter, Vatak purchased 0.55 acres of land each from the said two daughters. Accordingly Vatak Singha became owner of 4.32 acres of land in respect of plot no 864 and 869.
3. Thereafter, Vatak sold 3.11 acres of land in total to different purchasers by registered deed of sale. After these sales 1.21 acres of land remained with

Vatak which his heirs got by way of inheritance. Those heirs of Vatak Singha sold from their shares to different persons by dint of registered deeds of sale to Amir Hossain, Afjal and Munsad Ali. Defendant no.5 Amir Hossain also purchased from the son Mejo Kumar Singha and wife Bela Devi and daughter Saoni Devi by registered deeds of sale being no. 27512003 and 4492004 measuring 1.16 acre of land. So, Vatak Sangha had remained with 0.05 acres of land.

4. Sons Mejo Kumar Singha, Basanta Kumar Singha Lalit Singha and daughter Saoni Devi sold 0.51 acres of land to the plaintiff Usman Ali by deed of sale being No. 837/2007 although they had saleable right to the extent of 0.05 acre of land. The submission of the learned Advocate of the appellant is that the plaintiff is entitled to get 0.05 acre of land.
5. It is profitable to quote the observation rendered by the Hon'ble Apex Court in Paragraphs 21, 22 and 24 in case of **R. Mahalakshmi vs A.V. Anantharaman and Others** reported in **(2009) 9 SCC 52**

“21. The abovesaid legal position has not been disputed seriously by the learned counsel for the respondents. But the question is whether all the properties left behind by late A.V. Venkataraman were included in the plaint for partition or not. Critical examination of the registered deed of partition would show that all the immovable properties inherited by late A.V. Venkataraman were not included in the suit filed by Respondent 1. The courts below committed grave error in coming to the conclusion that the appellant has not disclosed, with documentary proof with regard to the other properties inherited by her late father.

22. In the light of the partition deed available on record, no further proof thereof was required, more so, when the plaintiff himself relied on the same. According to us, this aspect of the matter has not been considered by the courts below. Thus, after having considered the submissions of the learned counsel for the parties and after perusal of the records, we are of the considered opinion that the matter deserves to be remanded to the trial court on the following grounds:

i. That all the properties that were inherited by the father of the parties by virtue of registered deed of partition dated 27-4-1954 have not been included in the partition suit.

ii. The appellant herein had taken a consistent stand right from the very beginning that unless all the properties are included in the plaint, the suit would be bad and partial partition cannot be effected.

24. In the light of the foregoing observations, the judgment and decree passed by the courts below are hereby set aside and quashed. The matter is remitted to the trial court for giving opportunity to the parties to amend their respective pleadings, to file additional documents and to lead further evidence in support of the amended pleadings. The trial court thereafter would pass a judgment after appreciating the additional pleadings and the evidence adduced thereon.”

- 6.** The above referred case of **R. Mahalakshmi** (supra) Hon'ble Apex Court observed that as all the properties inherited by the father of the parties were not included in the partition suit then it would be bad and partial partition cannot be effected. As a result the matter deserves to be remanded to the trial court.

- 7.** In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff's share in the suit properties, but also division of his share by metes and bounds. In a suit is for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as 'decree' under Order 20 Rule 18(1) and termed as 'preliminary decree' under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division. Partition' is a re-distribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them, into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. 'Separation of share' is a species of 'partition'.
- 8.** It is a matter of common knowledge that in a suit for partition, the important aspects to be undertaken by the Court are ascertainment of the shares, identification of the property available for partition, division of the available property by metes and bounds and allotment of the divided parts to the parties, commensurate with their shares. The impugned judgement and decree has not indicated the shares of the parties. The trial court only stated that the

plaintiff has a share in the 'kha' schedule property. In a suit for partition it is necessary for the court to delineate the shares of the plaintiffs and the defendants which has not been done by the trial court in the instant case. It is the general rule that partition suit should embrace all joint property ensures a just partition, otherwise parties might be greatly prejudiced as regards equitable distribution or sale. It is brought to our notice at the time of hearing that all the properties of the above mentioned two R.S. Recorded tenants were not brought into the hotchpot for partition

- 9.** In the light of above discussion the judgement and decree passed by the learned Trial Court is hereby set aside and quashed. The matter is remitted to the trial court on the following grounds-

“That all the properties of the original R.S. Recorded tenants have not been included in the partition suit.”

“The impugned judgement and decree has not indicated the shares of the defendants. The trial court only stated that the plaintiff has a share in the kha schedule property as described in the plaint.”

- 10.** The trial court should give opportunity to the parties to amend their respective pleadings, to file additional documents and to lead further evidence in support of the amended pleadings if they wish. The Trial Court thereafter would pass a judgement after appreciating the additional pleadings and evidences adduced thereon keeping the evidences already adduced in the record.
- 11.** The appeal thus stands allowed to the extent mentioned hereinabove, looking to the facts of the case, the parties to bear their respective costs.
- 12.** Let the lower court be sent down immediately through special messenger at the cost of the appellant.

13. Both the sides shall accordingly appear before the Learned Trial Court for further necessary order.
14. Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)