

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

**APPELLATE SIDE**

**PRESENT:**

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

**FA 172 OF 2022**

**Smt. Sikha Malakar & Anr.  
Vs.  
Sri Prasinjit Saha & Ors.**

**For the appellants** : **Mr. Shibaji Kumar Das, Adv.**  
: **Ms. Rupsa Sreemani, Adv.**  
: **Ms. Suranja Bhattacharyya, Adv.**

**For the respondents** : **Mr. Tapas Kr. Bhattacharya, Adv.**  
: **Mr. Prabir Majumdar, Adv.**  
: **Mr. Bishnu Prosad Singha Roy, Adv.**

**Hearing concluded on** : **29.08.2023**

**Judgment on** : **17.10.2023**

**Prasenjit Biswas, J:-**

1. The instant appeal has been preferred on behest of the plaintiffs/ appellants challenging the impugned judgment and decree dated 15.02.2022 passed by the learned Civil Judge (Senior Division), 2<sup>nd</sup> Court at Krishnagar, Nadia in connection with T.S. No. 191 of 2014.

**2.** By passing of the impugned judgment and decree the learned Trial Court dismissed the suit filed by the plaintiffs praying for partition in respect of the suit properties as mentioned in the schedule of the plaint.

**3.** Being aggrieved by and dissatisfied with the impugned judgment and decree passed by the learned Trial Court the instant appeal has been preferred by the plaintiffs/appellants.

**4.** It is the case of the plaintiffs that the suit property originally belonged to Sukchand Bawri, Phulchand Bawri, Kumari Bawri, Laba Bawri in equal shares and their names have been duly recorded in R.S. Khatian No. 271. Thereafter, these said R.S. recorded tenants transferred their shares to Prabodh Kumar Sarkar and Prabhat Kumar Sarkar and thus, they became owners in respect of the suit plots to the extent of 8.25 decimals of land. Prabodh Kumar Sarkar and Prabhat Kumar Sarkar transferred their 8.25 decimal of land to Gautam Ghosh, Purna Chandra Ghosh and Priyabrata Ghosh by dint of registered deed of sale being No. 9968 dated 09.08.1988. Gautam Chandra Ghosh and Purna Chandra Ghosh jointly sold the land from their shares of 2 decimals to Priyabrata Ghosh on 29.10.2010 by dint of registered deed of sale being No. 3770. After that the said Priyabrata sold 1.77 decimals of land from his purchased portion to Gouranga Ghosh who in turn transferred his 1.77 decimals of land to the plaintiff No. 2 by a registered deed No. 12297 dated 10.10.2012. After that the said Priyabrata again sold 2.66 decimals in the scheduled plot to the plaintiff No. 1 on 10.10.2012 by a registered sale deed being No. 12999 and this plaintiff No. 1 is the mother of plaintiff No. 2. It is stated by the appellants/plaintiffs that their names have been duly recorded in the present record of rights and they are paying revenue to the government.

5. It is stated by the appellants/plaintiffs that the defendants are the co-sharers and the co-owners of the scheduled plot of land with them and those defendants became co-sharers after gradual transfers from the original owners Sukchand and others.

6. These appellants are in enjoyment and possession with the defendants/respondents as the scheduled properties have not yet been partitioned by metes and bounds and in accordance with law. As the defendants/respondents are creating disturbance in the peaceful joint possession of the parties these plaintiffs under compelling circumstances knocked the door of the Court with a prayer for partition of the suit properties as per provision of law.

7. Defendants entered appearance in the suit before the Trial Court and filed written statement by stating that Gautam Ghosh, Purna Chandra and Priyabrata Ghosh were the owners in respect of 8.25 decimals of land in the suit property which they got by dint of registered deed of sale being No. 9968 dated 09.08.1988 from Prabhat Kumar Sarkar and Probodh Kumar Sarkar with proper specification. It is averred by the defendants that Gautam Ghosh, Purna Ghosh and Priyabrata Ghosh sold away 8 decimals of land of the suit plot with proper specification to the defendant No. 1 on 29.10.2010 by deed of sale being No. 13769 and since the date of purchase the defendant No. 1 is possessing the said quantum of land which he has purchased in a demarcated way. It has been stated by the defendants that the said Gautam Ghosh, Pruna Chandra Ghosh gifted away 4.25 decimals of land in the suit plot to their brother Priyabrata Ghosh on 29.10.2010. As per contention of the defendants that said Priyabrata Ghosh had no saleable right to transfer the passage which was earlier given by them to the defendant No. 1 and so the plaintiffs have no right, title and possession as per area purchased by them.

**8.** Learned Counsel appearing on behalf of the appellants submitted before us that it is not the case of either of the parties that after a series of transfers by the previous owners in favour of them the said Gautam and Purna Ghosh had a miniscule share of about 0.17 decimals of land in the suit plot. The learned Trial Court failed to appreciate that both the parties have not mentioned in the pleadings that the said Gautam and Purna had 0.17 decimals of land and they would be brought on record as necessary parties to the suit.

**9.** It is not disputed that both the parties derived their right title and interest from Gautam Ghosh, Purna Ghosh and Priyabrata Ghosh who admittedly owned 8.25 decimals of land in the suit property. The said Gautam and Purna sold as per plaint case to Priyabrata who in turn sold it to Gouranga Ghosh and thereafter, the said Gauranga Ghosh sold 1.77 decimals of land to the plaintiff No. 2 by registered sale of deed on 10.10.2012. Priyabrata Ghosh also sold 2.66 decimals of land to the mother of the plaintiff No. 2 i.e. plaintiff No. 1 on 10.10.2012.

**10.** It is the averment of the defendants that Gautam Ghosh, Purna Ghosh and Priyabrata Ghosh sold 4 decimals of land to the defendant No. 1 on 29.10.2010 by registered deed of sale being No. 13769. It is further averred by the defendants that Gautam Ghosh and Priyabrata Ghosh gifted 4.25 decimals of land in favour of their brother Priyabrata on 29.10.2010 by dint of deed of gift being No. 13770 after registration of the sale deed in favour of the defendant No. 1.

**11.** Learned Trial Court framed the following issues for disposal of the suit:-

- i. Is the suit maintainable in law and form?
- ii. Whether the plaintiffs have any cause of action to file the instant suit?

- iii. Whether the suit property is liable to be partitioned and whether parties are co-sharers thereto?
- iv. Whether the plaintiffs have any right, title, interest and possession in respect of the suit property?
- v. Whether the plaintiffs are entitled to get a decree of partition as prayed for declaring their title in respect of 4.43 decimals of land in the suit property?
- vi. To what other relief/reliefs, if any, plaintiffs are entitled to under the law and equity.

**12.** In this case, three witnesses including plaintiff No. 2 were examined in favour of the plaintiffs. Whereas defendant cited three witnesses including defendant No. 1 in this case. Documents were exhibited in favour of both the parties. It appears that the defendants/appellants did not take plea that the suit preferred by the plaintiffs/appellants is bad for non-joinder of necessary parties and no issue was framed by the Court as to whether the suit was bad for non-joinder of the necessary parties. It appears from the evidence of DW 1 that he admitted that the parties to the suit are possessing the scheduled properties jointly according to their respective shares and he also admitted that he along with his father (deceased defendant No. 2) purchased 7 decimals of land prior to the purchase of his 4 decimals of land from Gautam, Purna and Priyabrata Ghosh. The learned Trial Court observed that the both the parties are the co-sharers in the suit plot and they are possessing the same jointly without any partition by metes and bounds. It is not the case of either of the parties that a miniscule share remained with Gautam and Purna Ghosh after transferring their shares in suit plot to the vendor of the plaintiffs as well as defendants.

**13.** Let us see whether a Court can weave out a new case not borne out from the evidences on record. The defendants have not taken the plea that after series of transfers Gautam and Purna had a miniscule share of about 0.17 decimals of land in the suit plot and they had to be made parties in the suit and the said factum of non-joinder of Gautam and Purna is fatal for the suit.

**14.** It is profitable to the quote the observation of the Hon'ble Apex Court in **Manma, Saraswathi Sampoorna Kalavathi and Others vs. Manager, Andhra Pradesh State Road Transport Corporation, Tadepalligudem, Andhra Pradesh and Another** reported in **(2010) 5 SSC 785**, wherein Hon'ble Court observed that the High Court was totally unjustified in weaving out a new case which is not borne out from the evidences on record.

**15.** In the above-referred case of **Manam Saraswathi Sampoorna Kalavathi (supra)** it is held by the Hon'ble Apex Court in paragraphs 15, 16 and 17 inter alia that-

*“15. The High Court further observed in the impugned judgment that the possibility of the deceased, while driving the scooter at a high speed, falling down, and sustaining head injury cannot be ruled out. This finding is totally contrary to the record of this case. PW 2 has categorically stated in his evidence that the deceased was driving slowly and cautiously on the left side of the road and the driver of the bus was driving the bus in a rash and negligent manner without blowing horn.*

*16. The High Court further observed that significantly the driving licence of the deceased was not produced. So the possibility of the deceased not possessing a driving licence, and his falling down due to*

*lack of experience and sustaining the head injury cannot be ruled out. There is no basis, logic and rationality in arriving at this conclusion.*

*17. The High Court was totally unjustified in weaving out a new case which is not borne out from the evidence on record. Similarly, the High Court erroneously observed that the possibility of Respondents. 1 to 5 (appellants herein) influencing the police and getting an FIR registered with time and date of their choice cannot be ruled out and the possibility of PW 2 not being with the deceased at the time of accident and his implicating a bus belonging to the appellant (Respondent 1 herein) as having caused the accident also cannot be ruled out, because if really PW 2 was thrown away into the bushes due to the impact, as stated by him, he would have sustained at least some scratches and would have been referred to government hospital. The entire analysis of evidence by the High Court is erroneous and faulty. There was no basis for the High Court to come to the conclusion that the possibility of the respondents (appellants herein), influencing the police and getting the FIR registered with time and date of their choice cannot be ruled out.”*

**16.** We find that the learned Trial Court held to have ignored the principles relating to the object and necessity of pleadings. It is not the case of the defendants that the suit is bad for non-joinder of necessary parties and no plea has been taken by the defendants in their written statement to that extent.

**17.** A case not specifically pleaded can be considered by the Court only where the pleading in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally

cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the Court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and the parties being conscious of the issue had led evidence on such issue. But where the Court is not satisfied that such case was at issue, he cannot weave out a new case for the parties to the suit.

**18.** We are of the opinion, that without pleading, issues and evidences, the Court cannot make out a new case which is not pleaded and more so, the Court cannot consider such a case which is not specifically pleaded and cannot consider when it is raised by one of the parties at the stage of argument. Where neither the party put forth such a contention the Court cannot obviously make out such a case in the parties not pleaded suomotu.

**19.** If the written statements filed by the defendants/respondents are scrutinized, it appears that the defendants never pleaded that Gautam and Purna had a miniscule share of 0.17 decimals of land in the suit plot and they should be made parties in the suit.

**20.** The Hon'ble apex Court in case of **Bachhaj Nahar vs. Nilima Mondal and Others** reported in **(2008) 17 SSC 491**, has discussed in detailed on whether Court can consider a case specifically not pleaded by the parties. In that case the Apex Court held that the object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence

appropriate to the issues before the Court for its consideration. This Court has repeatedly held that pleadings are meant to give to each side intimation of the case of the other, so that, it may be made to enable the Courts to determine what is really an issue between the parties, and to prevent any deviation from the Courts which litigation on particular causes must take.

**21.** In case of Ram **Sarup Gupta (dead) by LRs Vs Bishun Narain Inter College and Others** reported in **(1997) 2 SCC 555** it has been categorically stated by the Apex Court that it is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered and it is also equally settled that no party should be permitted to travel beyond its pleadings and that all necessary and material facts should be pleaded by the party in support of the case set up by it. It has further been held in that case by the Apex Court that object and purpose of the pleading is to enable the adversary party to note the case it has to meet and in order to have a fair trial of its merit that party should say the essential material facts so that other party may not be taken by surprise.

**22.** In the above referred case of **Bachhaj Nahar (supra)**, Hon'ble Apex Court came to the conclusion that it is, thus, clear that a case not specifically pleaded can be considered by the Court only when the pleading in substance, though not any specific terms, contains the necessary averments to make out a particular case and the issues framed also generally covered the question involved and the parties proceed on the basis that such case was at issue and led evidence thereon.

**23.** The above discussions clearly earmarked the situation where a case is not pleaded can still be considered provided that the parties had general idea about such issues being involved and evidence was led by both sides covering those ends.

**24.** In the instant case, plaintiffs/appellants filed the instant suit with a prayer for partition in respect of the scheduled properties before the Trial Court tracing their titles from Sukchand Bawri and others, R.S. recorded tenants the said Sukchand Bawri and others transferred their entire share to the Prabodh and Pravat who in turn sold to Gautam, Purna and Priyabrata. The said Gautam and Purna transferred  $2\frac{2}{3}$  decimals of land to Priyabrata who in turn sold it to plaintiff No. 1. Priyabrata also sold from his share in respect of the suit plot to Gouranga Ghosh who in turn sold that share to the plaintiff No. 2. Whereas, defendant No. 1 claimed that he became owner in respect of the suit plot after purchasing shares from Gautam, Purna and Priyabrata. So, it is clear that somehow both the parties became owner either direct purchase from Gautam, Purna and Priyabrata or either from subsequent purchasers of Priyabrata. It is also admitted fact that both the parties are possessing the suit property jointly and the suit property is yet to be partitioned.

**25.** No issue has been framed by the Trial Court that whether the suit is bad for defect of non-joinder of parties and this plea is not taken by the defendant by filing their written statement but the Court without giving opportunity to either of the parties went on calculation and found that the Gautam and Purna had a miniscule share in respect of the suit plot and they have not been made parties to the suit and as such the suit is defect for non-joinder of those two persons or their heirs which we find is totally unjustified and Trial Court cannot weave out a new case not borne out from evidences on record.

**26.** Law is well-settled that a suit for partition cannot be dismissed on the ground of non-joinder of necessary parties unless the plaintiff had failed to implead such parties despite a specific direction is passed by the court to such

effect. In the present case there was no direction issued by the court asking the plaintiff to implead Goutam Ghosh and Purno Ghosh. We are of considered opinion that disposing the appeal by deciding the issue of non-joinder in affirmative without giving an opportunity to the parties or impeding them or their legal representatives will certainly cause prejudice to both the parties.

**27.** Without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. The court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suomoto.

**28.** Thus, in view of the above discussions we are of the considered opinion that the impugned judgment and decree passed by the learned Trial Court on 15.02.2022 in T.S. No 191 of 2014 cannot be sustained and, accordingly, the same is liable to be set aside.

**29.** In the heels of surrounding facts and circumstances, we are of the mindful opinion that the matter consequently warrants remand to the learned Trial Court for further hearing. When we revisited the evidence on record we hold that the most essential issue is as follows:-

“Whether the suit is bad for defect of parties?”

**30.** We, therefore, frame that issue. Without answering this, there cannot be a proper decision in the instant case and in view of the matter rehearing is necessary. Since, new issue has been casted, opportunity need to be provided to the rival parties to lead evidence on that issue again.

**31.** Opportunity must be given to either of the parties to adduce further evidence if they wish keeping the evidences already brought on record.

**32.** Thus, the instant appeal is allowed to that extent and the judgment and decree passed by the learned Trial Court dated 15.02.2022 is hereby set aside.

**33.** However, there is no order as to costs.

**34.** Consequently, other applications pending in connection with this appeal are hereby disposed of.

I agree.

**(Harish Tandon, J.)**

**(Prasenjit Biswas, J.)**