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

SA 133 OF 2022
With
CAN 1 of 2022
&
CAN 2 of 2022

Sk. Saifuddin and Another

- versus -

Sk Nurul Huda

For the appellants : Mr. Abir Lal Chakravorti, Adv.
Sk. Hedayatullah, Adv.

Judgment on : 17.10.2023

Prasenjit Biswas, J:-

1. Both the Courts below have decided the case against the appellants/defendants.

2. Plaintiffs filed the suit against the appellants/defendants praying for partition in respect of the suit properties. It is stated by the

plaintiffs that they are the owners of 9/20th shares and rest shares belonged to the defendants and they are possessing the same jointly. The entire suit property belonged to one Mohiruddin Sheik and after his death his one son, namely, Abdul Hai and three daughters, namely, Zamila, Rahima and Ramicha got the shares of the properties as per Mohammadean Law of Succession. One of the three daughters of Mahiruddin Sheik, namely, Rahima died intestate and her share was devolved upon her only daughter Mashkura Bibi and the remaining share went to her brother Abdul Hai. Accordingly, Abdul Hai became the owner of 1/28th share and his two sisters became owners of 1/48thshare each. Thereafter, Abdul Hai transferred his entire share to Panchkori Das by dint of registered deed of sale dated 19.11.1958 and in turn Panchkori sold out his purchased share in the suit property to Sahila Bibi on 26.06.1980 who again in turn sold her entire property to the plaintiff on 18.12.1991. It is also the case of the plaintiff that Zamila Bibi and Maskura Bibi who had 9/14th and 1/10th shares respectively in the suit property sold the same to Hasnahara Begum who in turn, sold her entire share to the defendant No. 2 and in the same way Ramicha Bibi sold her 9/48th share to the defendant No. 1.

3. As per case of the plaintiff, he becomes owner to the extent of 9/28th share and defendants have 11/28th share in the suit property and they are possessing the same jointly. As per contention of the plaintiff that R.S and L.R R.O.R. is erroneous and as the plaintiff is facing difficulty in possessing his share in the suit property jointly and the defendants was not agreeable to make the schedule property

partitioned, so under compelling circumstances, he knocked the door of the Court by filing a suit with a prayer for making the suit property partitioned by metes and bounds in respect of their shares as stated above. Defendants/Appellants contested the suit by taking plea that the suit is not maintainable as the property in question had already been partitioned between Abdul Hai and his three sisters orally and by dint of such oral partition, Zamila Bibi and Ramicha Bibi got 8 ana shares each in the suit property and as such, there is no existence of co-sharership in between them. It is stated by the defendants/appellants that Zamila Bibi sold out $15\frac{5}{8}$decimals of land to Hashnahara Begum by dint of registered deed of sale on 15.06.1972. It is the specific case of the defendant that the said Rahima Bibi, her daughter Mashkura and Abdul Hai did not have any share in the suit property and as such no title was passed by the sale deed executed by Abdul Hai to Panchkori Das and consequently, no title was passed by deed executed in favour of Sahila Bibi and similarly from said Sahila Bibi to the plaintiff. The defendants/appellants took stand point on the fact that the property purchased by Panchkori, Hashnahara Begum, Sahila Bibi and plaintiff are all void, illegal, fraudulent, and collusive and not acted upon and no title irrespective of those properties have been transferred to the purchasers.

4. At the time of hearing learned Counsel appearing for the appellants submitted before us that the plaintiff/respondent has no *locus-standi* to file the case in respect of the suit property with a prayer for partition as the same has already been partitioned between the heirs/

legal representatives of the original owner Mahiruddin Sheik orally. So, there is no existence of co-sharership in between the plaintiff and the defendants.

5. An individual can certainly acquire title to an item of property, if it has fallen to his share in a partition. If the partition is through a decree of a Court or a written document, filing of the decree of the document, as the case may be, would go a very long way in establishing the title. If, on the other hand, the partition is oral, the evidence to prove it can be adduced. Such evidence may comprise of the deposition of the persons, who were allotted shares or those acquainted with the partition or the revenue records that reflect the partition.

6. In the instant case, except stating that the suit property has already been partitioned between Abdul Hai and his three sisters orally and by such partition Zamila Bibi and Rahima Bibi got 8 anas share each in the suit property and the other co-sharers got nothing in suit property in the said partition,these appellants did not elaborate the manner in which the partition has been taken place. The written submission filed by the defendants/appellants is blissfully silent in this aspect.

7. Appellants No. 2, Sheik Kibria as DW1 stated in his evidence that he could not say whether the suit property is joint property or not. He further contradicted by stating that amicable partition took place between Abdul Hai and her three sisters, namely, Zamila, Rahima and Ramicha. He further stated that Rahima predeceased her father namely Mohiruddin Sheik. It further appears that defendants purchased

the suit property from the daughter of Rahima Bibi and took plea that the mother of Maskura predeceased her father, the original owner. The entire defence stands upon the plea of oral partition in between the heirs and legal representatives of Mahiruddin Sheik. But they have utterly failed to examine any person and there is also no documentary proof in respect of the partition as stated by them, and, accordingly, it cannot be held that there was oral partition as alleged by the appellants/defendants. Under Section 101 of the Evidence Act, the burden of proof to prove the partition was upon the defendant and under Section 106 of the Evidence Act, the burden was also on the defendants to show that separate possession of their shares of the suit properties were given to each of them in accordance with their shares. However, in order to establish the said fact apart from their words the defendants/appellants did not adduce any documentary evidence to show that there is an oral partition in between the heirs and the legal representatives of Mohiruddin Sheik.

8. Admittedly, there is neither any deed of partition on record nor any writing set out any partition and under these circumstances, in order to prove the contention of the defendants that there was oral partition in between the predecessor-in-interest of both the parties, the defendants/appellants failed to discharge the burden of proof that oral partition ever took place in between the heirs of the original owner namely Mohiruddin Sheik.

9. We do not find any discrepancy in the finding of Trial Court and the first Appellate Court. The appellants have failed to establish

their right through partition as allegedly made in between the heirs of Mohiruddin Sheik. It is admitted position that parties to the suit had derived their shares from the heirs of Mohiruddin Sheik. It is true to state that oral partition is valid in law but the oral partition should be proved in the manner known to law and that is acted upon by the conduct of the parties. There is no cogent evidence adduced by the appellants/defendants to prove that there was oral partition and it was acted upon by the parties. In the absence of any substantiating evidence the questions of law are answered against the appellants.

10. From the discussions made above, we do not find any merit in the instant appeal or any involvement of the substantial question of law. The appeal is, thus, dismissed.

11. Consequently, connected applications, if any, are also hereby dismissed as disposed of.

12. There shall, however, be no order as to costs.

13. 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.)