

District: Sepahijala Tripura

**In The Court of Civil Judge (Sr. Division),
Sepahijala, Sonamura**

Present:- Sri U.H. Das
Civil Judge (Sr. Division)
Sepahijala Tripura, Sonamura

Friday, the 15th day of February, 2019.

Title Suit (Partition) 04 of 2015

Date of institution :- 06-01-2015

Smt. Ila Das
W/O Sri Pradip Kumar Das
D/o Late Kshetra Mohan Das,
Resident of Sreenagar, Raod No.1
P.O- A.D Nagar, P.S – West Agartala,
Dist – West Tripura, Pin-799003.....Plaintiff.

Versus

1. Sri Swapan Kumar Das
S/O Late Kshetra Mohan Das
A resident of Basera, the east side of police station
P.O Radha Kishorepur, Udaipur
Dist – Gomati Tripura Pin-799120
2. Sri Sankar Prasad Das
S/O Late Kshetra Mohan Das
A resident of Dhaliyai, Sonamura
P.O- Sonamura, District- Sepahijala, Pin-799131
..... Defendants.

This suit coming on for final hearing on the 5th day of January, 2019 & 25th day of January, 2019 in the presence of :-

Mr. D. Dutta, Ld Advocate..... for the plaintiff.
Mr. I. Pal, Learned Advocate for the defendants.

*and having stood for consideration on this the 15th day of
February, 2019, this Court delivered the following judgment :-*

J U D G M E N T

[1] This is a suit for partition of joint property instituted by plaintiff against the defendants seeking the relief of preliminary decree of partition of the schedule suit property. Suit is valued at Rs. 6,00,000/- being the value of suit property.

[2] The factual background of the plaintiff's case, in a nutshell is that plaintiff and defendants are the brothers and sister and their predeceesor late Kshetra Mohan Das was the original owner of the suit property measuring total 2.48 acre covered under Khatian No. 540/1, 540/2 and 540/3 of Mouja Khedabari under Sonamura Sub-Division. Said Kshetra Mohan Das died 07-01-13 leaving behind plaintiff and defendants as his legal heirs while his wife pre-deceased him on 28-07-2011. According to plaintiff after death of her predecesor-in-interest, she and her two brothers became the joint owners of suit property by inheritance and they each are entitled to get 1/3rd equall share out of the suit property comprising of both homestead and paddy land. It is also pleaded that defendant No.2 has been in possession of suit property and enjoying usufruct of same. It is also alleged by plaintiff that on several ocassions and lastly on 09-11-2014 she requested the defendants to make amicable partition of suit land but defendants made no response. Then plaintiff served one demand notice dated 14-11-14 upon defendants through her Advocate claiming partition of the suit land through registered post and in reply to same on 26-11-14 defendants refused the demand for pertition of the suit land by projecting a fabricated story that during the lifetime of their father he had purchased several cash certificates, fixed deposit certificates amounting Rs. 12,00,000/- making the plaintiff as his nominee and they were lying with plaintiff.

[3] Plaintiff also narrated that in their reply capricious statement was made by defendants to the effect that following an altercation on 19-10-14 and 09-11-14 amongst the legal heirs of original owner, defendants learnt that plaintiff had already encashed the cash certificate and fixed deposit certificate left by their predecesor-in-interest while defendants were entitled to get one third share of Rs.12,00,000/- . Plaintiff also pleaded that she being the Class-I legal heir is entitled to get her 1/3rd euqal share in the suit property and the cause of action for the suit arose on 09-11-14 when the defendants refused to make partition of suit property and lastly on 26-11-14 when defendants made the reply to the Advocate notice of plaintiff. With the above background plaintiff prayed to pass preliminary decree.

[4] In response to the summons issued upon defendants, both the defendants appeared through their pleaders and contested the suit by filing joint written statement wherein they denied the assertion of plaintiff in the plaint except that their predecessor in interest left the suit property and also denied the claim of plaintiff to get 1/3rd share of the suit property. Defendants took the plea that during life time of Late Kshetra Mohan Das, he purchased several cash certificates, fixed deposit certificates etc. amounting to Rs. 12,00,000/- wherein plaintiff being his eldest issue was made nominee and all these cash certificates and fixed deposit certificates were lying in the custody plaintiff. It is further submitted that on 19-10-2014 and on 09-11-2014 altercation took place amongst the plaintiff and defendants while the defendants came to learn that plaintiff had encashed all the cash certificates and fixed deposit certificates left by since deceased Kshetra Mohan Das in which defendants were entitled to get 1/3rd share each of the amount of those certificates.

[5] According to defendants, the plaintiff being the nominee could encash all the aforesaid cash certificates and fixed deposit certificates but she ought to have divided the amount amongst the defendants equally. Since the plaintiff did not make any payment of share to the defendants out of said debt left by since deceased Kshetra Mohan Das, plaintiff committed a serious breach of obligation as well as cheating with the defendants. The husband of the plaintiff was serving in a bank and with his connivance plaintiff committed mischief and wrong. It is also pleaded that, defendant No.1, Swapan Kumar Das has been serving as Medical Officer at Udaipur while the Defendant No.2 is a small businessman at Sonamura and he has been looking after properties at Sonamura with his own cost.

[6] The next plea of defendants is that during life time of Late Kshetra Mohan Das, the plaintiff took an amount of Rs. 15,00,000/- in cash from Late Kshetra Mohan Das to purchase the landed property/house at Milan Chakra, Agartala and with such money the plaintiff constructed dwelling house at Milan chakkra, Agartala and this

property being a benami property defendants are also entitled to get share over it. It is further submitted that in 2009 Late Kshetra Mohan Das became bed ridden when the defendants incurred his entire treatment expenses but plaintiff did not support them financially and it was then settled that plaintiff would not claim any property of Late Kshetra Mohan Das and in presence of witnesses she clearly expressed and relinquished her all claims in respect of the suit property and so she has no right to claim any share or partition of the suit property. Further plea of defendants is that owing to family settlement and oral partition amongst the parties, plaintiff is not entitled to get any further share in the suit property. It is also contended that plaintiff ought to have included the movable property viz. cash certificates and fixed deposit certificates left by deceased Kshetra Mohan Das and the house purchased by plaintiff at Milan Chakra at his cost in the present suit and in absence of this the partition suit is not tenable. With this contentions defendants submitted to dismiss the suit.

[7] Thereafter, perusing the pleadings of both the parties and the documents relied on by them, and hearing the submission Ld. transferee Court settled the following issues on 09-09-2015:-

ISSUE

(i) *Whether the suit is maintainable in its present form and nature ?*

(ii) *Whether the suit property is a joint property and liable to be partitioned in equal share ?*

(III) *Whether the plaintiff relinquished her claims over the suit land in favour of the defendants ?*

(IV) *Whether the plaintiff is entitled to get preliminary decree as prayed for ?*

(V) *Whether parties are entitled to any other relief/reliefs as prayed for ?*

[8] In course of trial plaintiff examined herself as PW1 and exhibited 5 Nos. documents in support of her case. The defendants, on the other hand, examined three witnesses but exhibited no document which are specifically mentioned in the appendix.

[9] Thereafter, Ld. Counsels of both sides furnished written argument and their argument was also heard at length.

FINDINGS

[10] Having heard learned counsels for the both sides and considering the materials on record, my decision on each issue with reasons is as follows :-

Issue No.(II) & (III):-

[11] For the sake of convenience in discussion and appreciating evidence both the issues are taken up together as they are inter-connected. Here it is to be considered whether the suit property is the joint property of plaintiff and defendants and whether the plaintiff relinquished her claims over the suit land in favour of the defendants. With reference to this issue I have meticulously gone through the evidence on record in the light of rival submission of both parties.

[12] Ld counsel of Mr. D. Dutta appearing on behalf of plaintiffs contended that the suit property being inherited from her predecessor in interest, is the joint property of plaintiff and defendants and so she is entitled to get 1/3rd equal share as per Hindu Succession Act. According to Ld. Counsel plaintiff never relinquished her share of property by way of any family settlement earlier and so the story of defendants cannot be believed.

[13] Ld counsel Mr. I.Pal appearing for the defendants, on the other hand, strongly argued that plaintiff is not entitled to get any share as she did not come in clean hand and suppressing the fact of cash certificate and fixed deposit certificates of her predecessor in interest where she was named as nominee filed the instant suit to deprive the defendants. According to him defendants are entitled to get share of the cash certificates and fixed deposit certificates left by their deceased father.

[14] Upon careful scrutiny of the pleadings of both the parties and testimonials particularly Khatian No. 540/1, 540/2, 540/3 vide Exbt.1,

Exbt.2 and Exbt.3 respectively of Mauja Khedabari Teheshil-Sonamura it is undisputedly transpired that Kshetra Mohan Das who died on 07-01-2013 leaving behind plaintiff and defendants as his legal representative, was the original owner of the suit land measuring total 2.48 acre covered by these Khatians. It is also undisputed that mother of plaintiff and defendants namely Sobha Rani Das predeceased late Kshetra Mohan Das on 28-07-2011. These facts are admitted position and can be deemed to be proved in view of sec.58 of the Evidence Act. Thus I find that both plaintiff and defendants are the class-I legal heirs of deceased Kshetra Mohan Das and they became the joint owners and possessors of the suit land by way of succession.

[15] Now it is to be examined whether there was any family settlement or partition made amongst the parties and whether they are entitled to get 1/3rd equal share out of the suit property. In this respect plaintiff Smt. Ila Das examined herself as PW1 and in her affidavit evidence it is consistently narrated that plaintiff being one of the legal heirs of deceased Kshetra Mohan Das is entitled to get 1/3rd share out of suit property. In the cross examination PW1 replied that she did not mention the fact of fixed deposit account created by her father making her nominee in the plaint which was reflected in paragraph No.10 of her examination-in-chief. PW1 also did not mention in the plaint that her father left amount of money in fixed deposit and the same is to be partitioned. PW1 also answered that her brothers informed her through notice and in written statement that her father had left Rs. 12,00,000/- in fixed deposit naming her as nominee.

[16] PW1 also replied that she did not submit any document to prove that only Rs. 12,19,560/- was deposited as maturity of fixed deposit created by her father wherein she was the nominee. In this regard PW1 also clarified in her re-examination that she mentioned in her examination in chief on affidavit that her father made herself as nominee in one fixed deposit certificate having matured value of Rs.2,19,560/- and she also clarified that inadvertently it was written in her deposition that her father had left Rs. 12,19,560/- in the fixed deposit instead of Rs.

2,19,560/-. PW1 also stated that her father did not make any fixed deposit certificate for sum of Rs. 12,19,560/-. PW1 further stated that she did not submit any document to prove the value of the entire suit land to be Rs.6 crore. PW1 volunteered that she had not taken Rs. 15,00,000/- from her father to built the house at Agartala. In the cross PW1 also stated that she did not offer the share of fixed deposit account.

[17] On the contrary, in the affidavit evidence of DW1 Sankar Prasad Das , DW2 Tapan Dutta and DW3 Sunil Ch. Das they categorically narrated that during life time of deceased Khetramohan, he purchased several cash certificates and fixed deposit certificates amounting to Rs. 12,00,000/- in which plaintiff was made as his nominee and she being the eldest all these certificates were lying in her custody. DW1 further deposed that following an altercation on 19-10-14 and 09-11-14, defendants came to know that plaintiff had already encashed those cash certificates and fixed deposit certificates left by her father in which he was entitled to get 1/3rd share of those amount. According to DW1, plaintiff being the nominee, she did not give any share of amount to the defendants.

[18] DW1,DW2 & DW3 further deposed that he being a small businessman at Sonamura and defendant No.1 being posted as Medical Officer at Udaipur he has been maintaining the suit property at his own cost while plaintiff took the sum of Rs. 15,00,000/- in cash from her father during his life time to purchase the landed property at Milan Chakra, Agartala and after purchase she constructed house there at the cost of their deceased father. But this property having purchased with the money of their father ought to have been incorporated in the present suit and due to this the suit is not maintainable.

[19] DW1,DW2 & DW3 further deposed that in the year 2009 when their father became bed ridden it was settled that plaintiff would not claim any property or any share over the property of their deceased father and that settlement was made in presence of their relatives and so plaintiff expressly relinquished and abandoned her claim of share over

the suit property. It is also narrated by DW1 that plaintiff admitted the fact of her nomination as nominee in respect of one fixed deposit account which got matured.

[20] In his cross-examination DW1 admitted that he did not submit any document in support of the fact that plaintiff was made nominee for the cash certificates and fixed deposit certificates of their deceased father amounting Rs. 12,00,000/-. DW1 also did not submit any document in support of his claim that his father gave Rs. 15,00,000/- to his daughter Ila Das to construct her dwelling hut at Milanchakra. DW1 also volunteered that his father did not create any document regarding payment of money to plaintiff by their father and he came to know from his father that he had given the amount of Rs. 15,00,000/- to plaintiff for construction of her house. DW1 also did not know the owner of the land on which the building of his sister stood. DW1 denied the suggestion of plaintiff that she wanted to give share of the fixed deposit of Rs. 2,19,560/- after death of their father.

[21] From the above evidence of defendant it is clear that defendants did not produce the alleged fixed deposit certificates and cash certificates of their deceased father showing plaintiff as nominee for total sum of Rs. 12,00,000/-. This assertion of defendants was firstly pleaded in their reply dated 26-11-14 vide Exbt.5 to the demand notice of Advocate of plaintiff dated 14-11-14 vide Exbt.4. Since defendants have asserted the fact of existence of cash certificates and fixed deposit certificate of total 12,00,000/- allegedly lying in the custody of plaintiff being left by their father, the burden lies upon defendants to prove this fact. Here defendants except pleadings and oral evidence of DW1 no other document i.e the original cash certificate and fixed deposit certificate in the name of their father were exhibited.

[22] As per section 61 of the Evidence Act, the contents of document may be proved either by primary or by secondary evidence. In case of primary evidence the document itself must be proved while as per sec.65 of that Act secondary evidence can be adduced in absence of

original document in issue under certain conditions. Though it is asserted that these documents were in the custody of plaintiff but no secondary evidence of those cash certificates and fixed deposit certificates was adduced by defendants. So in my considered view the contents of these cash certificates and fixed deposit certificates are not proved in the evidence in accordance with section 61 of 65 of the Evidence Act. Mere exhibit of reply of defendant no.1 cannot prove the factum of cash certificates and fixed deposit certificates since the reply of defendants only contain a reference but without production or exhibit of those certificates there is no scope to draw a conclusion that father of plaintiff left such certificates for value of total Rs. 12,00,000/- making plaintiff as nominee during his life time.

[23] Though plaintiff in her evidence admitted that her father gave one fixed deposit certificate of Rs. 2,19,560/- and made her nominee and she was ready to give share of this amount to defendants in my view this is beyond her pleadings and so this part of her evidence though contained admission about the fact of fixed deposit certificate of Rs. 2,19,560/-only cannot be looked into and as such according to plaintiff this fixed deposit account is not the subject matter of the present suit. Besides, there is no counter claim made by defendants to have division of the fixed deposit amount of Rs. 2,19,560/- left by their predecessor in interest. I also find no force on the contention of Ld. Counsel of defendants that during life time of Kshetra Mohan Das any oral family settlement or partition of the suit land was made. Unless a family settlement is reduced into writing and the property is divided by metes and bounds, such oral assertion of family settlement has no basis and cannot be given effect. So the plea and oral testimony of DW1, DW2 & DW3 that the suit property was earlier partitioned and plaintiff relinquished her right of share on the suit property cannot be believed.

[24] Thus from what has been discussed above and analysis of evidence made I am of the considered view that it is clearly proved in the evidence that the suit property is the joint property of plaintiff and defendants and the suit property is liable to partition and they each are

entitled to get 1/3 equal share out of the suit property. It is not proved in the evidence by preponderance of probability that plaintiff had relinquished her claim of share over the suit land in favour of defendants.

Hence Issue no.(II) is decided in favour of plaintiff while Issue No. (III) is decided in the negative against the defendants.

Issues No. (I), (IV) and (v):

For the sake of convenience in discussion and appreciating evidence these issues are taken up together as they are interconnected. Here I have to examine whether the suit is maintainable and plaintiff is entitled to get the relief(s) as sought for.

[25] As regards the maintainability of the suit Ld. Counsel of defendants submitted that since plaintiff did not include movable property i.e., fixed deposit certificate and her house property in the suit, the suit is not maintainable. In this regard my view is that defendants though pleaded and DW1 mentioned in the evidence that plaintiff purchased her house property at Milan Chakra with the money of Rs. 15,00,000/- taken from her father but PW1 straightway denied this fact in her cross-examination. There is no document or any corroborative evidence shown by defendants to support his contention that plaintiff received the money of Rs. 15,00,000/- from her father and with that money she constructed the house. In the absence of such testimonial the plea of defendants cannot be believed and not tenable in the eye of law.

[26] As regards the issue of movable property my view is that the fixed deposit certificate and cash certificate having value of Rs. 12,00,000/- was though pleaded by defendants but existence of such fixed deposit certificate and cash certificate was not admitted by plaintiff and not also proved in the evidence. So it cannot be said that this alleged fixed certificate and cash certificate of Rs. 12,00,000/- are also the subject matter of the suit. Though plaintiff admitted the fact of existence of one fixed deposit certificate of Rs. 2,19,560/- in her

evidence but in my view, non-inclusion of this fixed certificate in the subject matter of the present suit for partition of the joint immovable property, is not fatal.

[27] In case plaintiff does not divide the maturity value of this admitted fixed deposit certificate, there is recourse in the hands of defendants to initiate criminal proceedings for breach of trust or move proceedings under the Indian Succession Act, 1925 for getting succession certificate to receive the matured value of the fixed deposit certificate. Therefore, I cannot agree with the contention of Ld. Counsel of defendants that the suit is not maintainable due to non-inclusion of movable property. In other words, I hold that the suit of plaintiff seeking preliminary decree for partition of the suit property is well maintainable and she is entitled to get the preliminary decree of partition. At the stage plaintiff is not entitled to any other relief as final decree will be passed after physical division of the share of the parties in terms of preliminary decree.

Accordingly, issues No.(I) & (IV) are decided in the affirmative while issue No. (V) is decided in the negative.

ORDER

[28] In the result, it is hereby held that the plaintiff has succeeded to establish the cause of action for the suit and the suit is allowed and decreed preliminary on contest with cost with declaration that Plaintiff, defendant No.1 & defendant No. 2 are each entitled to get 1/3rd share portion out of the suit property measuring total 2.48 acre under Khatian No.540/1, 540/2 and 540/3 vide Exbt.1, Exbt.2 and Exbt.3 respectively.

[29] Prepare preliminary decree accordingly and place it before me for signing within 14 days.

[30] Both the parties are at liberty to make amicable partition of the suit land in respect of their respective shares as afore noted within

30 days from this date failing which both parties are directed to take necessary step for appointment of survey commissioner to partition the suit land in the light of preliminary decree.

[31] List the case after 30 days for step by the parties.

Pronounced in the open Court.

*Typed to my dictation
and corrected by me*

(Sri U.H.Das)
Civil Judge (Senior Division)
Sepahijala, Sonamura

(Sri U.H.Das)
Civil Judge (Senior Division)
Sepahijala, Sonamura

APPENDIX

Case no. TS (Part)04 of 2015

(A) Plaintiff's Exhibits :-

Ext.1 - Certified copy of Khatian 540/1

Ext.2 - Certified copy of Khatian 540/2

Ext.3 - Certified copy of Khatian 540/3

Ext.4 - Advocate notice issued by Advocate Debapryo Datta

Ext.5 - Reply to the Advocate notice given by Advocate Sri PK Dhar

(B) Defendant's Exhibits :- Nil

(C) Plaintiff's Witness :- Nil

PW-1 Smt. Ila Das

(D) Defendant's Witness :-

DW-1 Sri Sankar Prasad Das;

DW-2 Sri Tapan Datta;

DW-3 Sri Sunil Ch. Das.

*Typed to my dictation
and corrected by me*

(Sri U.H.Das)
Civil Judge (Senior Division)
Sepahijala, Sonamura

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Civil Judge (Senior Division)
Sepahijala, Sonamura