

West Bengal Form No. 3701

HIGH COURT FORM NO.(J)2

HEADING OF JUDGEMENT OF ORIGINAL SUIT

DISTRICT : COOCH BEHAR
IN THE COURT OF CIVIL JUDGE, (SR. DIVN.),DINHATA

PRESENT : Saibal Dutta
Civil Judge, (Senior Division)
Dinhata.

Thursday , 3rd day of May, 2018

TITLE SUIT No. 2 OF 2016

Md. Majid and others.....Plaintiff.

-VERSUS-

Salimuddin Miah and others.....Defendant.

Give date this/suit coming on for final hearing on

23.03.2018 in presence of

Ld. Ajit Kr. Das..... Advocate(s) for plaintiff (s)
Pleader(s)
Ld. Pradip Kr. Guha..... Advocate(s) for Defendant (s)
Pleader(s)

and having stood for consideration to this day, the Court
delivered the following judgment.

J U D G E M E N T

This is a suit for partition and separate possession.

According to the plaint case, the suit property originally belonged to predecessors of the plaintiffs and defendants namely Safiruddin Mia since deceased, Moyjuddin Mia since deceased and Nijamuddin Mia since deceased. All of them were sons of Momtajuddin Mia having equal share of total land of 2.34 acres, at RS khatian No. 897 of Mouza Baronachina.

According to the plaintiffs Safiruddin Mia and his wife died leaving behind their only son Salimuddin Mia (principal defendant No. 1). Nijamuddin Mia and his wife died few years ago leaving behind their three sons namely Mahammad Mojid, Giyasuddin and Jaharul Hoque (plaintiff Nos. 1, 2 and 3) and four daughters namely Rahima Bibi, Julekha Bibi, Rezia Begam and Morjina Begam (plaintiff Nos. 4, 5, 6 and 7). Erphan Ali, the son of late Nijamuddin Mia and his wife died leaving behind their only son

Sekendar Ali who also died leaving his wife Rubina Khatun and minor son Rahim Ali, (proforma defendant Nos. 1 and 2 respectively).

It is further case of the plaintiffs that Moyjuddin Mia and his wife also died without any issue and as such his entire share devolved upon the plaintiffs and defendants equally.

It is the allegation of the plaintiffs that defendants are not willing to partition the suit land according to their respective shares.

The further allegation of the plaintiffs is that they on several occasions requested the defendants for amicable partition of the suit property but they made no response.

Hence, this suit.

The plaintiffs have prayed for a preliminary decree to the extent of 0.975 acres of share in the schedule property and decree for final partition, injunction etc.

Defence Case:

Defendant No. 1 entered appearance in this suit by filing W.S wherein he has denied all material allegations made by the plaintiffs.

The chief contention of the defendant No. 1 is that he is the actual owner of the suit property and the RS khatian No. 897 has not been prepared properly and correctly.

It is further pleaded that Nijamuddin Mia and Moyjuddin Mia have wrongfully claimed themselves as sons of Montajuddin Mia. As such, according to the defendant No. 1 the said Moyjuddin Mia and Nijamuddin Mia never acquired any right, title and interest in the suit property.

Finally, the defendant No.1 has prayed for dismissal of the suit.

ISSUES

Upon consideration of materials on record and submissions of the respective parties, the following issues are framed :-

1. Is the suit maintainable in its present form or in law?
2. Is the suit bad for partial partition?
3. Is the suit bad for defect of parties ?
4. Is the plaintiff entitled to a decree for declaration and partition as prayed for?
5. What other relief and reliefs , the plaintiff is entitled to get in both law and equity?

Evidence on record

To substantiate their case, the plaintiffs have adduced evidence by examining plaintiff No. 4 as P.W-1 and placed one material as documentary evidence such as :-

1. Certified copy of RS khatian No. 897 (Exbt-1)

On behalf of the defence side, the defendant No. 1 Salimuddin Mia was examined as DW -1. No material as documentary evidence has been adduced on his behalf.

Since no step was taken on behalf of the proforma defendant Nos. 1 and 2, case was proceeded ex parte against them.

Issue Nos.- 1 to 3

All the issues are taken up together for discussion for the sake of convenience and to avoid prolixity.

None of the parties, during the stage of evidence and argument , has pressed these issues. On careful consideration of the plaint, I do not find any irregularities or illegalities in the framing of the suit.

Similarly, on careful perusal of the pleadings of the parties and evidence adduced by them, there appears a dispute regarding partition of the suit property by metes and bounds.

As such, the instant suit being a suit for partition I think there is sufficient cause of action to institute the suit.

In the entire proceeding of the suit, no point was raised on behalf of the defendant that the suit is bad for partial partition. No evidence was adduced on behalf of defendant No. 1 in this respect.

Therefore, no contrary material was found against such plea of partial partition or non-joinder of parties.

Ld. Advocate for the defendant No. 1 has pointed out that there has been an irregularity in appointing the proforma defendant No. 1 as natural guardian of proforma defendant No. 2 since according to the Mohammedan Law mother of minor cannot act or be appointed as guardian.

On perusal of the materials on record, it is transpired that this Court has become *functus officio* since passing of order dated 15.01.2016, on the date of institution of this suit when mother of proforma defendant Rahim Ali has been appointed as his natural guardian.

The defendant No. 1 did not challenge the said order to any higher forum or review such order. He has not raised such issue in his pleading.

As such, all the above issues are decided in favour of the plaintiffs.

Issue nos- 4 and 5.

Such issues are interlinked with each other and such issues are taken up together for discussion for the sake of brevity and convenience.

According to the plaintiffs, the suit property is described in the schedule of the plaint.

As regards, the claim of the predecessors of the plaintiffs as co-sharer in schedule property , the plaintiffs have adduced evidence by producing the RSROR record in the names of Safiruddin Sekh, Moyjuddin Sekh and Nijamuddin Sekh, all sons of Montajuddin Mia having 1/3rd share each in the suit khatian (Exbt 1) from which it appears that such property is recorded in the names of the predecessors of the plaintiffs and defendants.

It is argued on behalf of defendant No. 1 that he is the absolute owner of the suit property and Nijamuddin and Moyjuddin Mia did not have any right, title and interest in the suit property since they have left Dinhata permanently.

It is further argued that the two predecessors namely Nijamuddin and Moyjuddin Mia have wrongfully and illegally claimed themselves as sons of Montajuddin Mia.

It is settled principle of law that a person cannot be allowed to approbate and reprobate. In this suit , the defendant No. 1, has admitted that both Nijamuddin Mia and Moyjuddin Mia had left Dinhata jurisdiction permanently and hence they have no right, title and interest in the suit property. However, the defendant No.1 did not take any plea of ouster of such co-sharers from the suit property in his pleading.

On the other hand, it is pleaded him that both Nijamuddin and Moyjuddin Mia have wrongfully claimed themselves as sons of Montajuddin Mia, the original owner of the suit property.

Such contradictory contentions on behalf of the defendant No. 1 are not accepted. There is no documentary evidence on behalf of the defendant No. 1 to prove the contention that Nijamuddin and Moyjuddin Mia are not the sons of Mantajuddin Mia or in other words, to prove that Safiruddin Mia is the only son of Montajuddin Mia.

Although there is no direct proof of heirship of deceased Montajuddin Sekh on behalf of the plaintiffs, we may rely upon the RS ROR (exhibit 1) disclosing the names of Safiruddin, Nijamuddin and Moyjuddin

Mia being sons of deceased Montajuddin Sekh.

The relationship of paternity is a matter of belief and the issue has to be answered in terms of preponderance of probability in the absence of direct evidence or substantive proof.

Hence, the plaintiffs, in my opinion, have successfully proved the heirship of deceased Montajuddin Sekh by way of producing the RSROR and also by dint of preponderance of probabilities.

It is argued on behalf of defendant No. 1 that the PW-1 in her cross-examination has admitted the fact of non-impleadment of children of Moyjuddin Mia in this suit. But such a stray comment in deposition does not have any bearing on the suit since there is a clear pleading on behalf of the plaintiffs at para No. 3 of the plaint to the effect the Moyjuddin Mia and his wife, both died issueless. So, the plaintiffs' claim cannot be thrown out or disbelieved on a mere technicality revealed in a comment in deposition of PW-1.

Moreover, the WS filed on behalf of the defendant No. 1 appears to contain only evasive denials. He simply denied the contention of the plaintiffs that Moyjuddin Mia and his wife both died issueless. He did not answer the point in substance by way of clear pleading that Moyjuddin and his wife have any issue or legal heir to inherit their share.

Hence, the defence case based on evasive denial is not accepted in this suit.

Result:

From the evidence adduced by the plaintiffs and on perusal of the materials on record it becomes clear that the suit property to the extent of 2.34 acres at RS Khatian No. 897 of Mouja Baronachina of P.S. Dinhata belonged to the predecessors of plaintiffs and defendants.

Again it appears that both Safiruddin Mia (defendant No. 1) and Nijamuddin Mia (predecessor of the plaintiffs and proforma defendant Nos. 1 and 2) should get 1.17 acre each out of total 2.34 acres, since 1/3rd share of issueless Moyjuddin Mia and his wife devolved upon them in equal shares.

Hence, it can be concluded that the plaintiffs are entitled to get separate allotment of their share to the extent of 0.975 acres of land in schedule property as prayed for.

In view of above discussion, it is invariably determined that the suit property is a joint property of the plaintiffs and defendants having respective rights therein and plaintiffs are entitled to get preliminary decree

for partition as prayed for.

The issues are decided in favour of the plaintiffs.

Accordingly all the issues are disposed of.

In the result, the suit succeeds.

C.F paid is correct

Hence, it is.

ORDERED

that the suit be and the same is decreed on contest in preliminary form against the defendant No. 1 and ex parte against proforma defendants.

It is hereby declared that the plaintiff Nos. 1, 2 and 3 being sons of Nijamuddin Mia have right in the schedule suit property to the extent of 0.195 acre each and the plaintiff Nos. 4, 5, 6 and 7 being daughters of Nijamuddin Mia have right in the schedule property to the extent of 0.0975 acre each out of the entire 1.17 acre of land (share of brothers and sisters as per Mohamadan Law of inheritance being 1:1/2) and defendant No.1 has right in the said schedule property to the extent of remaining 1.17 acre and proforma defendant Nos. 1 and 2 jointly have right to the extent of 0.195 acre.

Parties are directed to effect partition of the schedule property by metes and bounds amicably, within three months from the date of this order failing which any of the parties shall be at liberty to effect partition by metes and bounds by appoint of a Survey Commissioner.

The survey commissioner, if and when appointed shall effect partition having regard to the existing possession of the parties as far as practicable.

The final decree shall be passed after considering the commissioner's report.

The parties shall bear respective costs towards the final decree.

Dic. & Cor. by me.

Civil Judge (Senior Division),
Dinhata.

Civil Judge (Senior Division),
Dinhata.