

Munshi Abdul Mannaf and anr. Vs. Abdul Latif Mullick Founder of Wakf Estate Mutwalli and ors.

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Court : Kolkata

Decided On : Apr-30-2008

Reported in : 2008(4)CHN686

Judge : Sadhan Kumar Gupta, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 27

Appeal No. : F.M.A. No. 944 of 2006

Appellant : Munshi Abdul Mannaf and anr.

Respondent : Abdul Latif Mullick Founder of Wakf Estate Mutwalli and ors.

Advocate for Def. : S.P. Roy Chowdhury and ;Anit Kumar Rakshit, Adv.

Advocate for Pet/Ap. : Kashinath De and ;Sandip Kumar De, Adv.

Disposition : Appeal allowed

Judgement :

Sadhan Kumar Gupta, J.

1. This appeal has been preferred against the judgment passed by the Id. Additional District Judge, 2nd Court, Hooghly in Title Appeal No. 204 of 1991.

2. It is the case of the plaintiff/appellant that the original plaintiff, since deceased, filed the Title Suit No. 19 of 1984 before the Id. Assistant District Judge praying for a decree of partition in respect of the properties, as mentioned in the schedule of the plaint. Said suit was contested by the respondent/defendant No. 5. After hearing the parties and upon consideration of the materials on record, the Id. Assistant District Judge by his judgment dated 28.6.1991 was pleased to decree the suit in preliminary form in favour of the plaintiff/appellant and thereby allowed the prayer for partition. Against that judgment the defendant No. 5 preferred an appeal before the Id. First Appellate Court who after hearing the parties was pleased to remand the suit back to the Trial Court by way of allowing the prayer, as made by the defendant No. 5, for holding local investigation in respect of the properties, as mentioned in the partition deed of the year 1923, which allegedly took place in between the co-sharers, with that of the properties, as mentioned in the schedule of the plaint, in order to come to a conclusion as to whether the properties mentioned in the schedule of the plaint and the properties mentioned in the deed of the year 1923 were same or not. As the plaintiffs, who are the heirs of the original plaintiff, were aggrieved by this order of remand, so they have preferred this appeal before this Court praying for setting aside the said remand order.

3. It is claimed by the appellant that the Id. Judge was not at all justified in setting aside the judgment, as passed by the Id. Trial Judge and in the process to send back the suit again to the Trial Court on remand for the purpose of holding local investigation. According to the appellants it was not permissible for the Id. First Appellate Court to remand the suit back to the Trial Court in order to fish out the evidence at such a belated stage. They have further claimed that the Id. First Appellate Court also committed illegality in not taking into consideration the entry in the record-of-rights in respect of the properties in dispute. It is further contended by the appellants that the Id. First Appellate Court committed mistake in allowing the defendant No. 5 to file the L.R. record of rights during the pendency of that appeal and thereby admitting those documents into evidence by virtue of provisions of Order 41 Rule 27 of the Code of Civil Procedure, although the said defendant No. 5 could not produce those documents before the Trial Court although those were available to him at that time. It is further claimed by the

appellants that the Id. First Appellate Court was not at all justified in sending back the suit to the Trial Court on open remand though there was no dispute for partition with regard to the other part of the properties under schedule of the plaint.

4. The respondent/defendant No. 5 contended that the order of remand, as passed by the Id. First Appellate Court was justified as the identity of the properties, as mentioned in the partition deed of the year 1923 could not be established with the properties, as mentioned in the schedule of the plaint. It is further contended by the respondent/defendant No. 5 that in the judgment of the Trial Court it was specifically mentioned that there was anomaly in respect of the identity of the properties and that anomaly could have been removed by way of relayment through a local investigation commission. In fact, in order to remove such anomaly, as pointed out by the Id. Trial Court, the respondent/defendant No. 5 took step by way of filing a petition under Order 41 Rule 27 of the Code of Civil Procedure seeking liberty of the Court to pray for local investigation of the properties in dispute. Under such circumstances, the respondent/defendant No. 5 has claimed that since there is no illegality in the order of remand, as passed by the Id. First Appellate Court, so this appeal being devoid of merit, should be dismissed.

5. The point to be considered so far as this appeal is concerned, is, whether the Id. First Appellate Court was justified in remanding the suit in order to get the suit properties investigated through relayment.

6. It is the admitted position that the properties described in the schedule of the plaint formerly belonged to one Dabiruddin Mallick and from him his heirs including the erstwhile plaintiff and other co-sharers became the co-sharers in respect of those properties. It has been pleaded in the plaint that at the time of filing of the suit, those properties were still joint and as the erstwhile plaintiff felt inconvenience in possessing the suit properties jointly with the defendants, so he requested for partition by metes and bounds. Since the defendants did not agree to such proposal, so the erstwhile plaintiff had to file the partition suit in respect of his 1/4th share in the suit properties.

7. It is the specific case of the defendant No. 5, who alone contested the suit, that the suit properties, excepting plot No. 1502, were previously partitioned amongst the co-sharers prior to C. S. operation by virtue of a registered partition deed of the year 1923. As such, the said defendant claimed that since the properties were already partitioned amongst the co-sharers, so question of further partition does not arise at all.

8. From the above contentions of the parties, it appears that the main question that is to be decided in the suit, is, as to whether already there was a partition in respect of the suit properties excepting plot No. 1502 or not. It is nobody's case that by virtue of the partition deed of the year 1923 plot No. 1502 was already partitioned. As such, if the plaintiff can establish that he is/was also a co-sharer in respect of the said plot which still remain undivided, then there cannot be any bar for him/them to get a decree for partition in respect of the said plot. So far as the other properties are concerned it has already been pointed out that it is the case of me plaintiff that he is also a co-sharer in respect of those properties along with other defendants and it is his case that there was no partition by metes and bounds in between the co-sharers and as such he prayed for such partition.

9. On the other hand, it is the case of the defendant No. 5 that the suit properties were already partitioned by registered deed of partition which was executed amongst the co-sharers in the year 1923. Nowhere it appears from the judgment of the Id. First Appellate Court that the defendant No. 5 disputed the co-sharership of the plaintiff in respect of the suit properties. It is the main contention of the defendant No. 5 that the decree for partition should not be granted in favour of the plaintiff in respect of the suit properties as those were already partitioned by the registered deed of partition of the year 1923. So the dispute in between the parties lies to the effect as to whether there was any such partition of the suit properties by virtue of the registered deed of the year 1923. This deed of the year 1923 has been marked as Exhibit - A before the Court below. It appears that in the Exhibit - A no plot number was mentioned as because it took place prior to C.S. record of rights. It is observed by the Id. First Appellate Court in his judgment that the case of the defendant No. 5 regarding the previous partition amongst the co-sharers could not be established as there was no such evidence to establish that the

properties mentioned in the deed of the year 1923 are also the same properties which are mentioned in the schedule of the plaint. The Id. Trial Court in his judgment casually mentioned that this anomaly could have been removed by the defendant No. 5 by way of appointing a local investigation commissioner. However, Id. Trial Court was of the opinion that as the identity of the properties could not be established beyond doubt, so there was no bar for the plaintiff in getting a decree for partition. This finding was under challenge before the Id. First Appellate Court. It appears that the Id. First Appellate Court was of the opinion that there was anomaly in respect of the identity of the suit properties with that of the properties mentioned in the registered partition deed of the year 1923 and as such, he was pleased to allow the prayer of the defendant No. 5/respondent herein for appointment of a local investigation commissioner for the purpose of relayment of those properties, as mentioned in the plaint as well as in the deed in question.

10. Id. Advocate for the plaintiff/appellant submitted that there is practically no anomaly in respect of the identity of the properties, as mentioned in the schedule of the plaint and in the partition deed of the year 1923. According to him there is no dispute that the parties inherited those properties being the heirs of Dabiruddin, since deceased. Nowhere in the written statement this claim of the plaintiff was disputed by the defendant No. 5. On the contrary it was admitted that the properties belonged to Dabiruddin. In the partition deed of the year 1923 also it was mentioned that the heirs of Dabiruddin decided to partition the properties amongst themselves. If we look into the plaint, then also it will appear that the plaintiff prayed for partition being one of the co-sharers of the suit properties as was inherited by him being one of the heirs of said Dabiruddin. As such, question of anomaly in respect of identity of the properties, as mentioned in the plaint schedule as well as in the deed of the year 1923 does not arise at all. In fact, Mr. Dey, Id. Advocate for the plaintiff appellant at the time of argument emphatically submitted that the properties, as mentioned in the plaint excepting one plot are the same properties, as mentioned in the deed of the year 1923. It is the case of the defendant/respondent that as both the properties are same and as there was previous partition amongst the co-sharers in respect of those properties, so plaintiffs prayer for further partition of those properties does not arise at all. Since I have already mentioned that there is practically no anomaly in respect of those

properties, as mentioned in the plaint schedule and in the deed of the year 1923 and since this fact has been clearly admitted by the Id. Advocate for the plaintiff/appellant at the time of argument, I am of opinion that the Id. First Appellate Court was not at all justified in allowing the prayer for local investigation, as prayed by the defendant No. 5/respondent herein.

11. Mr. Roy Chowdhury, Id. Senior Advocate appearing for the respondent argued that there is clear evidence on record that the partition deed of the year 1923 was acted upon by the parties. In this respect he has drawn my attention to the Exhibit-B, B-I and E-I. According to Mr. Roy Chowdhury since from all those documents it is very much clear that the partition deed of the year 1923 was given effect to by the co-sharers and it was very much acted upon, so question of further partition, as prayed by the plaintiff/appellant does not arise at all.

12. As against this Mr. Dey, Id. Advocate for the appellant argued that even if there was registered partition deed executed amongst the co-sharers, that cannot be bar for the co-sharers to pray for partition my metes and bounds in a Court of law provided the plaintiff can establish that the partition deed, as executed in the year 1923 was not at all acted upon. In this respect he has heavily relied upon the decision reported in : AIR1959 Pat331 , (Santan Narain Tewari v. Saran Narain Tewari and Ors.) and : AIR1983 Pat129 , Most. Marjadi Devi and Ors. v. Jagannath Singh and Ors.).

13. In the decision reported in : AIR1959 Pat331 (supra) it was clearly held that prayer for fresh partition is always permissible provided it is established that the earlier partition deed amongst the co-sharers was never acted upon.

14. Mr. Dey further argued by drawing attention of this Court to the C. S. and R.S. record-of-rights in order to justify his claim that the properties remained joint notwithstanding the registered deed of the year 1923. In this respect Mr. Dey relied upon the decision reported in 2008 (1) CHN 146 Gurunath Manohar Pavaskar and Ors. v. Nagesh Siddappa Naval Gund and Ors.). By citing the said decision Mr. Dey argued that the entry in the record-of-rights carry a presumption of correctness so long it is not rebutted. There cannot be any dispute in respect of this legal position. But that presumption is always rebuttable and it is for the Courts

below to consider the evidentiary value of those entries in the record-of-rights.

15. Mr. Roy Chowdhury, Id. Advocate for the defendant No. 5 submitted that the entry in the record-of-rights is not a proof of title. In this respect he has relied upon the decision reported in : 2006(2)CHN687 (Jitendra Nath Chalki and Ors. v. Bimal Krishna Kundu Chowdhury and Anr.). According Mr. Roy Chowdhury in a partition suit, title of the co-sharers must be proved and not possession. According to him, the entries in the record-of-rights, as relied upon by the plaintiff can in no circumstances, be considered to be a proof of title of the co-sharers. As such, he argued that the submission, as made by the Id. Advocate for the plaintiff/appellant in respect of the entries in the record-of-rights cannot be accepted.

16. I have taken into consideration the submissions made by the Id. Advocates of both the sides. So far as this appeal is concerned, we are not considering all those questions at this stage. It is for the Courts below to consider the same. The real dispute in between the parties in this appeal, is, whether the Id. First Appellate Court was justified in remanding the suit to the Trial Court thereby allowing opportunity to the defendant No. 5 to get the properties, as mentioned in the deed of the year 1923 with that of the properties, as mentioned in the plaint schedule, to be relayed by a local investigation commissioner. I have already pointed out that from the materials on record it appears that there is practically no anomaly in respect of the identity of the properties, as mentioned in the plaint schedule and also in the deed of the year 1923. As such, in my considered opinion no purpose will be served in appointing a local investigation commissioner for relayment of those properties, as prayed by the defendant No. 5. In fact, such appointment will be redundant for the proper adjudication of the dispute in question, as raised by the parties in the suit and if such prayer is allowed it will unnecessarily delay in disposal of the suit for a considerable period of time. It is the settled position that delay in filing such application should not be condoned. It is always desirable that a prayer for holding local investigation should be filed as early as possible. There is no dispute that the suit was filed on 9.3.1984. It was decreed by the Id. Trial Court on 28.6.1991 and the appeal against that decree was preferred on 5.9.1991. When the first appeal was pending, at that time only in the month of March, 2001 this petition under Order 41 Rule 27 praying for holding local investigation was

filed. There cannot be any doubt that this petition was filed at a hopelessly belated stage and I cannot rule out the possibility of filing such petition by the defendant No. 5 only to cause delay in deciding the dispute in between the parties.

17. In the decision reported in : AIR 2001 SC2802 , N. Kamalan (dead) and Anr. v. Ayyasany and Anr.) it was held by the Apex Court that permission to produce additional evidence by the Appellate Court as per provisions of Order 41 Rule 27 should not to be granted to help the parties to patch up the weak points and make up for omissions earlier made. It was further observed by the Apex Court to the effect that Courts must always be cautious about allowing application seeking to adduce additional evidence, after a long interval between the decree and the application. So far as the present matter is concerned, I have already pointed out that the prayer for local investigation was made after a lapse of about 17 years. Since I have already pointed out that such prayer for holding local investigation was not at all necessary for the proper adjudication of the dispute in between the parties, so I have got no hesitation to hold that it was not proper on the part of the Id. First Appellate Court to remand the matter to the Trial Court for holding local investigation on the prayer of the defendant No, 5 after the lapse of about 17 years. To my mind, by allowing such prayer, the Id. First Appellate Court has committed gross illegality and this direction of the said Court cannot be said to have been passed in the interest of justice. However, it may be pointed out that the Id. First Appellate Court admitted some record-of-rights into evidence on the basis of the petition filed by the defendant No. 5 respondent herein. As those documents are public documents, I think that no prejudice was caused to the plaintiff/appellant for such action on the part of the Id. First Appellate Court. Those documents can always be taken into evidence for proper adjudication of the dispute in between the parties. As such, I think that such direction, as passed by the Id. First Appellate Court should not be interfered with.

18. Therefore, from my above discussion, I am of opinion that the Id. First Appellate Court was not at all justified in remanding the matter to the Trial Court for the purpose of holding local investigation of the properties in question and I have got no hesitation to hold that this direction of the Id. First Appellate Court was not at all proper and as such it should be immediately set aside.

19. Since the matter was pending before the Id. First Appellate Court when such remand order was passed and which is proposed to be set aside by this Court, I think that it will be fair and proper to send back the matter to the Id. First Appellate Court to hear out the appeal which was preferred against the judgment, as passed by Id. Trial Court and to dispose of the same on merit.

20. In the result, the appeal succeeds and the same is allowed on contest but without cost. The judgement, as passed by the Id. Additional District Judge, 2nd Court, Hooghly in Title Appeal No. 204 of 1991 is set aside. The order of remand for holding local investigation is also set aside and the entire matter is sent back to the Id. First Appellate Court with the direction to consider the appeal afresh on merit after giving opportunities to the parties to make their submissions. Since the matter has already been delayed considerably, the Id. First Appellate Court is directed to take all possible steps to dispose of the said appeal as expeditiously as possible without allowing any unnecessary adjournment to either of the side.

21. Send a copy of this judgment to the First Appellate Court at once for information and taking necessary action as indicated above.

22. Xerox certified copy, if applied for, be handed over to the parties on urgent basis.