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Calcutta High Court

Case No: Appeal from Original Decree No. 362 of 1979

Sm. Umme Kulsum Bibi		APPELLANT
	Vs	
Abdul Hai and Another		RESPONDENT

Date of Decision: July 16, 1987

Acts Referred:

- West Bengal Land Reforms Act, 1955 - Section 4(2A)

Hon'ble Judges: S.P. Das Ghosh, J; L.M. Ghosh, J

Bench: Division Bench

Advocate: Tarun Chatterjee in F.A. No. 362 of 1979 and Mr. Sankar Mukherjee in S.A. No. 792 of 1980, for the Appellant;S.P. Roy Chowdhury, Anit Kr. Rakshit, for the Respondent

Final Decision: Allowed

Judgement

L.M. Ghose, J.
Two appeals have been taken up for hearing together they are First Appeal No. 362 of 1979 and Second Appeal No. 792 of 1980. Both the matter have been heard together, because the decision of the Second Appeal would depend upon the decision of the First Appeal.

2. To come to the facts of the First Appeal first. The plaintiff filed the suit for partition and accounts. A genealogy was furnished by the plaintiff. It is not disputed that the suit property belonged to one Yakub Ali Mondal. According to the plaintiff, Yakub Ali left wife, Wahidunessa, one son, Abdu1 Hai (the defendant No. 1) and one daughter, Marium. Following the genealogy, the plaintiff stated that Marium left one daughter, the plaintiff, and husband, Abdul Latif. The Defendant No. 2 is described as a son of Abdul Latif but it is not averred in the paint that the defendant No. 2 is the son of Marium also. By successive devolutions, the plaintiff claimed 1/4th share in the suit properties. She also prayed for a decree for accounts on the grounds that the Defendant No. 1 had mis-appropriated the income from two plots, C.S. Plot No. 3177 and C.S. No. 3164.

3. The defendant No. 1 filed a written statement and contested the case. It is admitted that Yakub was the common ancestor. But the first divergence between the plaint case and the defence case is that according to the defendant, Yakub had another wife and out of that wedlock, another son, Fable Karim, was born. It is further stated that Fazle Karim left a widow Naima Khatoon. As against the plaintiff''s claim for partition and accounts, the defendant pleaded that the plaintiff and her mother were completely ousted from the suit properties. It was averred that the plaintiff''s mother was never in possession and she was aware of that. So also, according to the defence case, the plaintiff wad never in possession. Thus, according to the defendant, the plaintiff was never entitled to any relief whatsoever.

4. The learned court below decreed the suit in part. The plaintiff''s title to the extent of 1/9th share was declared. There was a direction for making within certain period. The sprayer for accounts was dismissed on the ground that there was no sufficient evidence about the defendants quarrying sand on any plot.

5. First Appeal No. 362 of 1979 is directed against that judgment and decree of the learned court below. So far as the Second Appeal No. 792 of 1980, is concerned, the plaintiff in the partition suit also filed suit for share of the produce. She claimed 1/4th share. The learned Munsif awarded certain amount, Rs. 1840, in favour of the plaintiff on the footing that she had 1/4th share. There was an appeal and the learned Additional District Judge, 2nd court, Hooghly, allowed the appeal in part and modified the decree. A decree for Rs. 818 was passed in favour of the plaintiff on account of damages in respect of her 1/9th share, because in the partition suit, the plaintiff''s 1/9th share was declared.

6. It is necessary to dispose of the matter in the First Appeal first, because the decision of the Second Appeal will follow the decision of the First Appeal, With regard to the partition suit, which is the matter of the First appeal here, as observed before, that the properties belonged to Yakub, is not disputed. That Wahidunessa was a wife of Yakub, is also not disputed. That the defendant No. I and the plaintiff''s mother, were the son and the daughter of Yakub, are also not disputed. But, according to the defence, Yakub had another wife and had another son, Fazle Karim, by that wife. If that be the position, the whole line of devolution would be different from the accounts given by the plaintiff. As to the Second wife of Yakub, the matter has been accepted by the P.W. 1 during evidence. P.W. 1 has clearly answered that Yakub left another son, Fazle Karim, besides Abdul Hai, the defendant No. 1. So, we have to proceed on that footing, namely, that Yakub had another son by another wife. Calculating on that basis, we get that on the death of Yakub, Wahidunessa would get 1/8th share, Fazle Karim would get 7/20th share, Abdul Hai (defendant No. 1) would get 7/20th share and Marium, the plaintiff''s mother, would get 7/40th share. Then Fazle Karim died. On his death, the shares of the respective persons would be as follows:

Wahidunessa ... ... 1/8th share,

Marium ... 7/40+7/80=21/80 share,

Abdul Hai (defendant No. 1) 7/20+7/40=21/40 share,

Naima Khatoon, wife of Fazle Karim ... 7/80 share.

7. It is now not disputed that Naima sold her 7/80th share to Wahidunessa. So Wahidunessa got 1/8th+7/80th=17/80th share. On the death of Wahidunessa, her share devolved an her son, the defendant No. 1, and her daughter, the plaintiff''s mother, So, on the death of Wahidunessa, the defendant No. 1 got 21/40+34/240=2/3rd share. Marium got 21/80+17/240=1/3rd share.

8. Thereafter, Marium died. There has been a rather serious controversy as to upon whom the shares of Marium devolved.

8a. Mr. Tarun Chatterjee, appearing for the appellant, has contended that on the death of Marium, her share would devolve upon her daughter, the plaintiff and her husband, Abdul Lalif. According to Mr. Chatterjee, no part of her share would devolve upon the defendant No. 2, because the defendant No. 2 is a son of Abdul Latif, but not of Marium. So to say his contention has been that the defendant No. 2 is a son of Abdul Latif by another wife. If that be the position, the defendant No. 2 would not get any share of Marium.

10. Mr. S. P. Roy Chowdhury, appearing for the Respondent, however, has contended that the defendant No. 2 is also to get a share of Marium, because there is no pleading and no evidence that Abdul Lalif had another wife. This controversy has to be resolved before the shares are to be settled finally. It is to be noticed that the plaintiff all along has asserted that Marium left the plaintiff as her only child. That is pleaded in paragraph 3 of the plaint. True, it is not set out in so many words that Abdul Latif had another wife. But when it is clearly asserted that Marium left her only child, the plaintiff, that is compatible with the case that Abdul Latif had another wife; similarly, it is not compatible with any other hypothesis from which it can follow that Marium was the mother of the defendant No. 2. When there is clear unambigous assertion that Marium left her only child, the plaintiff, it cannot be accepted that the plaintiff in her plaint might have adopted any other hypothesis. Now, coming to the evidence, P.W. 1 has categorically stated that Marium left only one issue, namely, the plaintiff. That excludes any other issue of Marium. This evidence of P.W. 1 is not challenged during cross-examination. Neither any controverting evidence has been led on the side of the defendant. Therefore, it is clinched by direct evidence that the plaintiff is the only child of Marium. And the direct question is whether the plaintiff is the only child of Marium. If the direct question is established by clear evidence on the basis of clean pleadings, the court need not be beset by other hypothetical considerations. It is established that the plaintiff is the only child of Marium. On the death of Marium, her 1/3rd share would then devolve upon the plaintiff, her husband, Abdul Latif, and the defendant No. 1, her brother Abdul Latif would get 1/4th of 1/3rd, that is, 1/12th. The plaintiff would

get 1/2 of 1/3rd, that is, 1/6th. The balance would go to the defendant No. 1 who would get 1/4th of 1/3rd, that is, 1/12th share, by way of succession to Marium. On the death of Abdul-Latif, his share would devolve on the defendant No. 2 (son) and the plaintiff (daughter). The defendant No. 2 would get 2/3rd of 1/12th of the share of Abdul Latif, that, is, 1/18th share. The plaint'' would get 1/3rd of 1/12th, that is, 1/36th, from Abdul Latif, The final result would be that the plaintiff would get 1/6th of l/36th, that is 7/36th share. The. defendant No. 2 would get 1/18th share and the defendant No. 1 would get 2/3rd+l/12th that is 8/4th share. That would be the final shares of the parties. The Judgment and the decree of the learned court below are to be modified accordingly.

11. So far as the question of accounts is concerned, the learned court below has disallowed the prayer solely on the ground that there is no sufficient evidence about the defendant''s quarrying any sand on any plot, which no raiyat can do in view of the bar of Section 4(2A) of the West Bengal Land Reforms Act, This approach of the learned court below is not correct and is evasive, What Section 4(2A) of the Land Reforms Act is concerned about is the obtaining of permit from the State Government for quarrying sand, etc. That would be a matter between the State Government and the raiyat. But if one raiyat has actually used his land in a certain way and has earned income, he cannot deprive the other co-sharer of his share of the income. It is quite settled even by pleadings that the defendant No. 1 made use of plots 3177 and 3164 for raising sand, for obtaining licence fee from truck, etc. In paragraph 8 of the written statement, the defendant Na 1 has accepted that plots 3177 and 3164 have been converted into Sand pits. It is asserted that the same has not been done secretly. In paragraph 8 of the written statement, it is also admitted that he has realised Rs. 1200 annually as Licence fee for carrying sand in Bag No. 3164. In fact, after asserting all that, the defendant No. 1 wanted to set up a case of ouster. The learned court below has not accepted the case of ouster and has held that the plaintiff''s share subsists.

12. A cross-objection has been filed against the finding of the learned court below as to ouster, but at the time of hearing, no argument was developed on that. The case of ouster is also not sustained by the evidence on record. P.W. 1 has asserted that the plaintiff has her own possession over a portion of the suit property. The only witness against that is D.W. 1. He has made a bare statement that so long as Marium was alive she did not possess the suit property. And he has added that she was disinherited as she married out of her free will. Also, it is stated that Kulsum never possessed any portion of the suit property. Even if the statement of D.W. 1 is accepted, the ingredients of ouster are not made out. Mere non-possession does not amount to ouster against a co-sharer. So, the learned court below has rightly rejected the case of ouster. But having accepted that the plaintiff has a certain share in the suit properties, it is not seen how the learned court below could disallow the prayer for accounts, when the defendant No. 1 himself openly asserted that he earned incomes from the two plots. Therefore, there would also be a decree for

account in a preliminary farm for the two plots.

13. Coming now to the Second Appeal, it is already observed that the result of the same depends upon the final declaration of the shares of the respective parties in the suit for partition. In that proceeding, the learned Munsif had passed a decree for Rs. 1840, on the basis of 1/4th share of the plaintiff. On appeal, the learned Additional District Judge, modified the decree and ordered that the plaint respondent do get a decree for Rs. 818 only for damages, in respect of her 1/0th share. Now it has been found the plaintiff has got 7/36th share in the suit properties. There being no dispute at this stage as against the total amount, that is, Rs. 7860, the plaintiff in the Money Suit would be entitled to get Rs. 1432 in her 7/36 share. The Second appeal is also to be allowed in part accordingly.

14. The result is that First Appeal No. 862 of 1979 is allowed in part. The judgment and decree of the learned court below for partition is hereby modified. The plaintiff''s title to the extent of 7/36th share in the suit properties is hereby declared. The parties do amicably partition the suit properties and the plaintiff be given an exclusive possession of the share declared in her favour, within two months from the date of the receipt of the records in the court below. Failing that, the plaintiff will be at liberty to have the suit properties partitioned by metes and bounds by appointment of an Advocate Commissioner and for making the decree final. The judgment and decree of the learned trial court, disallowing the prayer for accounts, are set aside. The plaintiff do get a decree for accounts in a preliminary form in respect of plots 8177 and 3164, the actual amount of which will be determined in a subsequent proceeding. The Cross-objection filed by the Respondents is dismissed without any order as to costs.

15. Second Appeal No. 792 of 1980 is also allowed in part. The judgment and decree passed by the learned Additional District Judge, 2nd Court, Hooghly, is hereby modified. The plaintiff do get a decree for Rs. 1432 on account of damages.

16. In both the appeals, the parties to bear their own costs. The lower court records be cent down to the court below as early as possible.

S.P. Das Ghosh, J.

17. I agree.