

Title Suit Case No. 27/2017

17.11.2017.

Plaintiff is unrepresented today.

Defendant is present.

Today is fixed for cross of PWs.

Plaintiff failed to bring the PWs to face cross-examination and instead have become conspicuous by their absence.

Hence, in view of the provisions of Order 17 rule 2 CPC, I, proceed to decide the suit forthwith.

Plaintiff filed the instant suit for declaration, partition and for permanent injunction.

It is the plaintiff's case that land measuring 35K-1B-9L described in the schedule to the plaint was owned and possessed by one Azimuddin Sheikh who expired about 45-46 years ago, living behind the two sons, three daughters and a wife to inherit his intestate properties. It is averred that the wife of Azimuddin Sheikh @ Gedang Sheikh expired 16 years ago and his son Joyen Uddin Sheikh died on 12.04.2006 living behind defendant nos. 2 to 5 and that plaintiff nos. 1 and 2 are other daughters of Azimuddin Sheikh while Plaintiff no. 3 to 7 are the children of one of the daughter of Azimuddin Sheikh who expired 3 years ago. That Azimuddin Sheikh during his lifetime did not partition his properties and after his death, plaintiffs inherited the suit-land jointly and they have been possessing the same by dividing the same according to convenience.

It is alleged that in the year 1998, the plaintiff when sought for their share in their father's property, the sons of the original owner gave 4B-2K of land to the plaintiff in a family settlement and thereafter the said

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donee again gifted the said land to the predecessor of the defendant nos. 2 to 5 vide gift deed no. 2324 dated 14.12.1999 and that said Joyen Uddin gifted 1K-5L of land to the mother of Plaintiff nos. 3 to 7 vide gift deed no. 2325 dated 14.12.1999 and since then plaintiffs have been possessing the land received in gift being the K-Schedule land.

It is the plaintiff's case that the plaintiffs being the daughter of the original owner are entitled to get share in their father's property subtracting the land already received in gift.

It is further alleged that the plaintiff were surprised to receive a notice of mutation in respect of suit-land in the name of defendant no.1 and his brother Joyen Uddin Sheikh and were further surprised to receive legal notice for taking steps for peaceful possession of defendant no.1 and by correcting the land records in respect of suit-land in the name of defendant no. 1.

It is averred that the plaintiff approached the defendants for amicable partition of the suit-land, but the defendants refused to yield and accordingly plaintiff were compelled to institute the suit for declaration that plaintiff no. 1 and 2 are entitled to get 3B-2K-17.48L of land each while plaintiff no. 3 to 6 are entitled to 3B-4K-2.48L jointly, decree for the partition of suit-land, permanent injunction alongwith the costs of the suit.

Defendant no. 1 Md. Abdul Khaleque entered appearance pursuant to summons and filed his written statement. In his written-statement, he raised the plea of absence of cause of action, non-maintainability etc.

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Defendant no. 1 besides the aforesaid pleas, avers that on the death of Azimuddin Sheikh, the suit -land was inherited by his wife Nurjahan Bibi and that after the death of said Noorjahan Bibi, land was recorded in the name of Joyen Uddin Ahmed at the will of Noor Jahan Bibi and the said land was jointly enjoyed by Joyen Uddin Sheikh and defendant no. 1 by constructing residential structures thereon and accordingly land records were mutated in their names.

The defendant denying the plaintiff's case of mutual settlement and the gift of 4B-2K of land in favour of Joyen Uddin Sheikh avers that alleged gift deed no. 2324 dtd 14.12.1999 is fraudulent. The defendant accordingly prayed for dismissal of the plaintiff's suit.

The defendants no. 2 to 5 also filed joint written statement supporting the plaintiff's case. The defendants avers that the defendant no.1 had mutated the suit-land in collusion with Revenue staff for his wrongful gain and the defendant no. 1 failed to make partition of the suit property by family settlement depriving all. The defendant prayed for decreeing the suit in favour of the plaintiff accordingly.


Upon perusal of the pleadings, the Ld. Munsiff, North Salmara, Abhayapuri framed 8 nos. of issues vide order dated 2.6.2015.

The issues so framed are enumerated as under:-

ISSUES

1. Whether the suit is properly valued? (preliminary issue)
2. Whether there is any cause of action for the suit?

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3. Whether the suit is maintainable in its present form?
4. Whether the suit is barred by limitation?
5. Whether the plaintiff no. 1 and 2 are entitled to get 3 Bighas 2 Kathas 17.48 lessas of land each as their share over the suit land?
6. Whether plaintiff no. 3 to 6 are jointly entitled to get 3 bighas 4 kathas 2.48 lessas of land as their share over the suit land?
7. Whether the plaintiffs are entitled for the decree as prayed for?
8. To what over relief(s) the plaintiffs are entitled?

It deserves mention herein that the suit was filed in the court of Learned Munsiff, North Salmara, Abhayapuri and trial was proceeded with therein. However the counter-claim filed by the defendants was adjudged to be beyond the pecuniary jurisdiction of the court of Ld. Munsiff, which led to the returning of the counter-claim to be filed in the instant court, a order which was also affirmed by the Hon'ble Gauhati high Court in CRP (I/O) No. 4/16 dated 29.01.2016. Thereafter the counter-claim proceeded as a separate suit being T.S. 20/2016, in the instant court. Again on prayer the present suit was called from the court of Ld. Munsiff, North Salmara, Abhayapuri to be tried along with T.S. 20/2016 and accordingly the suit proceeded in this court after being renumbered as T.S. 27/2017.

The plaintiffs in order to prove their case filed the evidence-in-affidavit of 2 nos. of witnesses but said witness failed to turn up for cross-examination despite availing opportunities on various dates.

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Accordingly, the veracity of the PWs could not be tested on the touch stone of cross-examination.

The evidence of PWs are accordingly taken off record.

The defendant side had not adduced evidence till date.

Heard the Ld. Counsel for the defendant side only when the suit is decided to proceeded with under the provisions of Order 17 rule 2 CPC.

Perused C/R.

My decision on the issues framed alongwith reasons is given herein under:-

Discussion, Decision and Reasons therefor

Issue No.1

Issue No. 1 relates to the question of valuation of the suit.

This issue was taken up as a preliminary issue and the Learned Munsiff, North Salmara, Abhayapuri vide order dated 18.8.2015 decided the preliminary issue in the negative in favour of the plaintiff holding that section 7(V) b of the Court fees, 1870, would find attraction and that proper court fees had been paid by the plaintiff. This order in respect of the preliminary issue not being challenged in any higher forum, the finding therefore stands on record and I desist from discussing the preliminary issue any further.

The issue stands answered in favour of the plaintiff.

Issue No.2

Issue No. 2 relates to the question of presence of cause of

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action for the suit. Plaintiff has instituted the suit for declaration of share and partition alongwith the relief of injunction.

Defendant no. 1 denied the plaintiff's right to share in the suit-land. It is the defendant's pleas that suit-land belonging to Noor Jahan Bibi on death of her husband was partitioned among her two sons and that plaintiff is not entitled to any share therein. Plaintiff also claimed a part of suit-land having received the same in gift, vide registered deed No. 2325 dated 14.12.1999. The defendant disputed the genuinity of the said gift deed.

Rival claims and contentions of both parties discloses grounds for maintaining a suit. A cause of action for the suit is disclosed.

The issue is decided in the affirmative in favour of the plaintiff.

Issue No.3

Issue No. 3 relates the question of maintainability of the suit in its present form.

Plaintiff has filed the instant suit for declaration, partition and injunction. The defendant though had raised the plea of non-maintainability of the plaintiff's suit yet failed to show as to how the suit is rendered non-maintainable. The Civil court is the appropriate forum for seeking the reliefs for which the suit has been filed. Accordingly, I am constrained to hold that the suit is maintainable in its present form.

The issue is decided in the affirmative in favour of plaintiff.

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Issue No.4

Issue No. 4 relates to the question of bar of limitation.

Plaintiffs have filed the instant case for declaration, partition and injunction claiming the same as their ancestral property. Plaintiff's also claimed the K-schedule land by dint of gift vide gift deed no. 2325 dated 14.12.1999.

The defendant No. 1 claimed the suit-land to be the exclusive property of Joyen Uddin Sheikh and himself. The case of gift is also denied. In a suit for partition, unless ouster is proved by the defendant, plea of limitation will not hold water. Accordingly, the issue is decided in the affirmative in favour of plaintiff.

Issue No. 5 and 6

Issue No. 5 relates to the question of entitlement of plaintiff No. 1 and 2 to land measuring 3 bighas 2 kathas 17.48 lessas each as their share over the suit land **while**

Issue No. 6 relates to the question of plaintiff no. 3 to 6 being jointly entitled to get 3 bighas 4 kathas 2.48 lessas of land as their share over the suit land.

The two issues being inter-related are addressed together for the sake of convenience and to avoid repetition in discussion.

It is the plaintiff's case that suit-land was the original property of Azimuddin Sheikh and that after the death of said Azimuddin

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Sheikh the said suit-land devolved upon his wife, sons and the plaintiff No. 1 and 2 and the mother of plaintiff No. 3 to 6, they being the daughters of original owner.

But as discussed in foregoing paragraphs, plaintiff failed to exhibit or prove any documents in support of her case, that the suit-land originally was owned and possessed by Azimuddin Sheikh. Plaintiff also failed to prove that K-Schedule land was received in gift from Joyen Uddin Sheikh. Hence, in the absence of any evidence, I am but to hold that the plaintiff suit would not succeed and plaintiff would not be entitled to any reliefs in the suit.

The issue are decided in the negative against the plaintiff.

Issue no. 7 and 8

Issue No. 7 and 8 relates to question of the entitlement of the plaintiff to reliefs in the suit. The issues being co-related are addressed together for the sake of brevity.

In view of the discussions and decision arrived at in Issue nos. 5 and 6, I am constrained to hold that the plaintiff is not entitled to decree in the suit.

The issues are decided in the negative against the plaintiff.


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ORDER

In the light of foregoing discussions, plaintiff's suit is dismissed on contest with costs.

Prepare a decree accordingly.

Given under my hand and seal of this court on this 17th day of November, 2017

As dictated



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