FORM NO.(J2)

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

Present:
Hon'ble Justice Girish Chandra Gupta
And
Hon'ble Justice Shib Sadhan Sadhu

FAT No. 243 of 2013
+
CAN 204 of 2014
+
FAT 115 of 2013

Mr. Saptangshu Basu, Sr. Advocate.
Mr. Ayan Banerjee, Advocate
Ms. Debashree Dhamali, Advocate
Advocate for the Appellant: in FAT No115/2013

Mr. Atarup Banerjee, Advocate
Mr. Sandipan Pal, Advocate
Advocate for the Appellant: in FAT 243/2013

Mr. Milon Chandra Bhattacharya
Sr. Advocate for the Respondent

Hearing concluded on : 10.09.2014, 11.09.2014
Judgment delivered on : 19.09.2014.

GIRISH CHANDRA GUPTA J. FAT No. 115 of 2013 is directed against a preliminary decree passed in the partition suit being Title suit/Case No.126 of 2007 by which share of the sole plaintiff and the sole defendant was declared at 50% each in the suit property and they were directed to effect partition amicably within three months, failing

which the parties were granted liberty to apply before the learned Trial Court for effecting the partition with the assistance of Court.

FAT No. 243 of 2013 is an appeal against the selfsame preliminary decree at the instance of the sister of the parties to the suit property. She claims that she has right, title and interest in the land jointly purchased by the plaintiff and the defendant on the basis that both of them have admitted during their deposition in the suit that they utilized money left by their mother in purchasing the land. It is on this basis that she applied for leave to prefer an appeal. Both the appeals were taken up together for hearing.

The following issues were framed during the trial:-

"1) Whether the suit is maintainable in its present form and in law?

2) Whether the plaintiff has any cause of action to file the suit?

3) Is the suit bad for non-joinder of necessary parties?

4) Is the suit barred by the principle of waiver estoppel and acquiescence?

5) Whether the suit property is ejmal property?

6) Whether the plaintiff is joint owners of the suit property and he is entitled to 50% share in the suit property?

7) Whether the plaintiff is entitled to get a decree of permanent injunction restraining the defendant from executing any deed in respect of his 50% undivided share of the suit schedule property?

8) Whether the plaintiff is entitled to get the decree as prayed for?

9) To what other relief or reliefs the plaintiff is entitled to get as per law and enquiry?"

The learned Trial Court has decided the issue No.6 in favour of the plaintiff and it is on this basis that the preliminary decree was passed.

It is not in dispute that the land was purchased jointly by the plaintiff and the defendant. The dispute between the plaintiff and the defendant is restricted to the cost of construction. According to the plaintiff they jointly applied to the Uttarpara, Kotrang Municipality for sanction of a building plan and a one storied building was made by spending money equally. The plaintiff ordinarily is a resident of Raniganj. He used to come to the suit premises twice a week during the period of construction. The title deed of the land in question was deposited with the bank for the purpose of obtaining a house-building loan. The LIC policy of the plaintiff was also mortgaged in favour of the banker in order to secure the loan. The plaintiff resided at the suit premises whenever he came down to Uttarpara where the suit premise is

situated. The objection, for the first time, was raised by the defendant during his last visit on 7th June, 2007.

The plaintiff at that juncture asked for amicable partition to which the defendant did not agree. Thereafter a notice dated 12th June, 2007 through a learned Advocate of the plaintiff was served upon the defendant.

The case of the defendant, however, is that the plaintiff gave consent to the defendant to raise the construction on the condition that he shall not bear any part or portion of the cost of construction. His further case is that the plaintiff, as a matter of fact, wanted to gift the property to the defendant and for that purpose consent of the bank was also obtained by him.

Not one paisa was spent by the plaintiff in raising the construction nor did he even meet the defendant since 2002. It is on this basis that the defendant prayed for dismissal of the suit for partition.

The learned Trial Court in answering the issue no. 6 in favour of the plaintiff has advanced the following reasons:-

(a) The land is jointly owned by the plaintiff and the defendant having 50% share each.

(b) The defendant has admitted that both the plaintiff and defendant jointly applied for house building loan before the bank, though the EMI was deducted from the salary of the defendant.

(c) From the evidence of the plaintiff it has transpired that the suit schedule building has been constructed from the joint fund and both the plaintiff and the defendant have 50% share each in respect of the suit/schedule property.

Mr. Basu, learned Senior Advocate relying upon the following deposition of the plaintiff contended that the land in question was purchased from out of the sale proceeds of the flat which stood in the joint name of the defendant and his mother.

> *“ At the time of purchase of the suit property with my brother, the suit property was lying vacant. Before purchasing the suit property there was a flat at Dankuni in the name of my brother and mother. After selling out such flat the suit property was purchased. Presently over the suit property an one storied building was constructed.”*

Mr. Basu relying on the following admission of the plaintiff during the cross-examination contended that the plaintiff did not bear the cost

of construction. *“the expenses were borne from the loan taken by my brother from his office and for which the property was mortgaged in the Bank of India.”*

Relying on the following admission of the plaintiff during cross-examination Mr. Basu contended that *“tax was paid by the defendant.”*

Mr. Basu added that there is nothing to show that the plaintiff ever paid any tax. He added that the deposition of the plaintiff, that he had to spend more than what was paid by the defendant, in his Examination-in-Chief by way of affidavit is untrue and unbelievable, because there is no such allegation in the plaint. The fact that the plaintiff did not bear any part of the cost of construction, according to him would also be evident from the following admission during his cross-examination:-

“I cannot say that the defendant had made construction forcibly, rather it can be said that he had made the construction at his own accord without my permission.”

He also drew our attention to a letter dated 16th December, 1990 admittedly addressed by the plaintiff to the lending banker seeking their permission to gift his share to the defendant. Mr. Basu contended that if the plaintiff were to bear the cost of construction there could be no reason on his part to seek for any permission to gift his interest in the land to the defendant.

It is on the aforesaid basis that Mr. Basu contended that the learned Trial Court erred in holding that the cost of construction was incurred by both the plaintiff and the defendant. He, therefore, prayed for reversal of the preliminary decree. It is not however disputed by him that the land was jointly purchased by the plaintiff and the defendant.

Mr. Banerjee, learned advocate appearing for the sister in FAT No.243 of 2013 relying on the selfsame admission of the plaintiff indicated above and the following case of the defendant appearing from paragraph 9 of the written statement contended that his client is entitled to a share in the land. The case made out by the defendant in paragraph No.9 of the written statement relied upon by Mr. Banerjee, reads as follows:-

> *(E) "But the fact remains that a plot measuring 2 cottahs 1 chittack as mentioned in the schedule 'A' was purchased by way of a registered Deed of Sale not from the joint fund but the fund was provided by the mother (since deceased) and the same was purchased in the joint name of the plaintiff and the defendant as per the desire of the mother (since deceased)."*

She therefore, according to him, was a necessary party to the suit for partition. Since the suit was decreed without hearing the sister the decree should be set aside.

Mr. Bhattacharjee, learned advocate disputed the submissions made on behalf of the appellants. He contended that the plaintiff and the defendant are admittedly joint owners of the land. The cost of construction was shared by the plaintiff. He drew our attention to the admission made by the defendant during his cross-examination to the effect that the plaintiff and the defendant were having good relation between themselves.

He submitted that the evidence adduced by the plaintiff that the cost of construction was made over by the plaintiff to the defendant in cash is not unbelievable considering that the parties were having good relationship between themselves. There was no occasion for the plaintiff to insist upon any receipt for the payments made by him from time to time.

He added that it is true that the EMI was deducted from the salary of the defendant but the plaintiff paid his share in cash to the defendant. He contended that the plaintiff is financially more solvent than the

defendant. The plaintiff is a Physician having good amount of practice at Raniganj and Bankura. The plaintiff already had a building at Raniganj for his personal residence. He submitted that if the plaintiff were not to bear the cost of construction, there was no occasion for him to apply to the bank for the loan nor was there any need on his part to mortgage his Life Insurance Policy to secure the loan. The building plan was sanctioned jointly in the names of the plaintiff and the defendant. The mutation was made in the joint names of the plaintiff and the defendant. After construction, the building was assessed by the concerned Municipality in the joint names of the defendant and the plaintiff and the taxes have been paid in the joint names of the parties. He submitted that the case of the defendant that he alone had borne the cost of construction is altogether false and is intended to deprive the plaintiff of his lawful right in the building.

Disputing the claim put forwarded by the sister. He submitted that the sister was given in marriage by the deceased father in the year 1978. The land in question was purchased in the year 1994. He submitted that there is nothing to show that the land was purchased with the funds made available by the mother. It is, however, true that there was a flat in the joint names of the mother and the defendant.

The aforesaid flat was sold before the land in question was purchased. But it is untrue to allege that with the sale proceeds of the flat the land was purchased.

He contended that the sister cannot have any claim with regard to the land in question. She can at best claim her share in the sale proceeds of the flat as an heir of the mother which she never did. The claim made by her at this juncture is, according to him, at the instance of the defendant who with an oblique motive and to frustrate the decree obtained by the plaintiff has set up the sister for the purpose of raising an untenable dispute.

Both the plaintiff and the defendant deposed in this case. No other witness was examined on either side. From the evidence adduced by the parties the following facts appear to have been admitted:-

A) That the land was purchased jointly by the plaintiff and the defendant by a registered deed of sale dated 19th January, 1994.

B) Mutation was carried out in the records of the Municipality in the joint names of the plaintiff and the defendant.

C) The building constructed on the land in question was assessed in the records of the Municipality in the joint names of the plaintiff and the defendant.

D) The application for sanction of the building plan was filed by the plaintiff and the defendant jointly.

E) Both the plaintiff and the defendant jointly applied for house building loan.

F) The title deeds of the land and the personal Life Insurance Policy of the plaintiff were offered by way of security for the loan obtained from the bank.

G) The defendant has been residing at the building even since the same was constructed.

H) He naturally has been paying the rates, taxes and electricity charges etc.

I) The defendant during his cross-examination has admitted that the plaintiff has no residential building at Kolkata or adjacent to Kolkata apart from the building in question which is admittedly adjacent to Kolkata.

J) All the relatives of the plaintiff and the defendant are residing in the neighbourhood of the building in question.

K) The plaintiff is a Physician in Homeopathy. He already constructed a residential building at Raniganj before the building in question was constructed.

L) The defendant has admitted during cross-examination that there was good relationship between the plaintiff and the defendant when the application for loan was made to the bank.

M) The defendant has also admitted during his cross-examination that during construction of the building the plaintiff used to come to the suit property twice a week.

N) The defendant has admitted during his cross-examination that he received a notice from the learned advocate of the plaintiff seeking partition of the property to which the defendant did not reply.

O) The defendant admitted during his cross- examination that he had requested the plaintiff on several occasions to send money for the purpose of construction of the building.

P) The defendant has also admitted during his cross- examination that the responsibility of construction of the building was given to him because he was residing in the same locality.

From the conduct of the parties coupled with the admitted facts tabulated above, it is difficult if not impossible to hold that the plaintiff was not interested in the suit premises or in the construction thereof. The defendant has not disclosed the amount of monthly salary and the amount of EMI. In the absence of the aforesaid disclosure, it is not possible to find out whether the defendant had the capacity to survive

after paying the equated monthly installments. The case of the plaintiff is that the defendant did not have such capacity and he paid amounts month by month to the defendant in cash, which is probabilized by the fact that there was good relationship between the parties.

The property was developed in the joint names of the parties. There was, as such, no reason for the plaintiff to be apprehensive nor was there any occasion for him to insist upon a receipt for the payments, which he claims to have made.

The defendant who was admittedly in charge of the construction of the building has not disclosed the amount actually spent in raising the construction. The loan obtained from the bank was for a sum of Rs.2,00,000/-. In the absence of any disclosure as regards the actual cost of construction, it is not possible to hold that the building was constructed only with the amount of loan obtained from the bank.

The case made out by the plaintiff from the witness box as regards the payments made monthly and additional sum of more than three lakhs is in elucidation of the allegation contained in the plaint that the cost of construction was borne by the parties equally.

The submission raised by Mr. Basu, that there is no foundation for such a case made from the witness box is not acceptable. Necessary averments are there in the plaint. The plaintiff had no reason to apprehend that the defendant is likely to take a plea that the cost of construction was not shared by the plaintiff. When such a plea was taken the plaintiff has from the witness box elucidated his case appearing from the plaint that he had borne the cost of construction in equal proportion.

We are, as such unable to attach any importance to the aforesaid submission of Mr. Basu. The plaintiff has during his cross- examination denied that he ever agreed to gift the property to the defendant. He has offered an explanation that at the insistence of the bank the aforesaid letter was written. From the letter dated 19th December, 1999, it appears that the loan was disbursed on 21st May, 1998 whereas the letter seeking permission to gift the property was written on 16th December, 1999.

It is possible that after the building was constructed or during construction thereof, the plaintiff may have sought for such permission. But mere seeking of permission does not mean that he had made up his mind to gift the property nor can the said letter be an evidence of the fact that, the plaintiff did not share the cost of construction as alleged by the defendant.

The submission that the plaintiff during his cross-examination deposed that the construction was made without his permission is a pointer to show that he did not share the cost of construction has not impressed us. The construction could not have been started without his permission because the piece of land belonged to the parties jointly. The defendant alone could not have legally constructed the building. The fact that construction was not made without the permission of the plaintiff is also evident from the fact that the plaintiff and the defendants have jointly applied for sanction of the building plan.

We are inclined to think that the plaintiff may not have been interested at that stage to raise the construction, whereas the defendant was insisting upon raising the construction. The plaintiff ultimately agreed to start the construction. The defendant has not disputed during his cross- examination the solvency of the plaintiff or his capacity to spend money, whereas the capacity of the defendant to spend money has been disputed by the plaintiff. These facts are also inconsistent with the contention raised by the defendant.

Last but not the least is the following admission of the defendant during his cross- examination:- *"I never denied that my elder brother has 8 anna share in respect of the suit schedule property."*

Mr. Basu contended that on the basis of a stray admission the suit cannot be decided. Even assuming that Mr. Basu is correct, it is not possible to ignore the admitted facts and circumstances of this case, which we have tabulated above. In the backdrop of the aforesaid, admitted facts and circumstances of the case, the admission made by the defendant during his cross- examination demolishes the case of the defendant altogether that the plaintiff did not bear the cost of construction.

Even assuming that the plaintiff did not bear any cost of construction, can the defendant claim in law to have become absolute owner of the property on the aforesaid basis?

In our considered opinion, the defendant cannot claim to have become absolute owner. It would in that case be a case of unilateral improvement of the property by a co-owner. He can, in such a case, at best have a claim for contribution against the other co-owner, but he cannot claim to have become absolute owner of the property.

In the case of Sreemutty Atarjan Bibee & Ors. –V- Sheikh Ashak & Anr. reported in 4 CWN 788 the plaintiff and the defendant were the co-sharers in a *Putni* taluk. They had equal interest. The plaintiff in that case alleged that the defendant had dug a tank in the joint property, in

spite of protest and he wanted a decree for restoration of the land to its original position. This Court held that by digging the tank no injury was caused to the property. Therefore, the plaintiff could not have the tank filled up or the land restored to its former position. But he was entitled to a declaration of title in the tank to the extent of his share.

On the basis of the aforesaid Division Bench Judgement of this Court it can be held that if the cost of construction was not shared by the plaintiff coupled with the fact that the construction was raised without his consent he would still be entitled in law to have his right declared in the suit property.

The aforesaid judgment was followed in the case of Srimati Brahmomoyi Chowdhurani –V- Gopi Mohan Roy Chowdhuri reported in 15 CWN 188. We are, for the aforesaid reasons, of the view that the impugned judgment and decree passed by the learned Trial Court is unexceptionable and is therefore, affirmed.

In so far as FAT No.243 of 2013 at the instance of the sister is concerned, Mr. Banerjee, learned Advocate drew our attention to the evidence of the plaintiff during his cross- examination wherein he deposed that *“there was a flat at Dankuni in the name of my brother and mother after selling out such flat the suit property was purchased.”*

On the basis of the aforesaid admission of the plaintiff, Mr. Banerjee contended that the sister should be held to have a share in the land. We are unable to accept this submission for the following reasons:-

The defendant during his cross- examination admitted that the sale proceeds of the flat were received by cheque but the amount of sale proceeds was not disclosed by him. The defendant also deposed during his cross- examination that he paid the balance amount for the purpose of purchasing the suit property.

We are not required to decide as to whether the balance price was paid by the defendant or by the plaintiff because joint ownership of the plaintiff and the defendant in the land was not disputed by Mr. Basu. It is established from the evidence of the defendant that the land was purchased at a price which was more than the price at which the flat was sold.

It is, therefore, not possible to say that the land was purchased with the money of the mother. The sister could have legitimately claimed a share of the sale proceeds which she did not do. The sale of the flat was prior to 1994 but the exact date of sale is not before us.

The right to claim a share of the sale proceeds was not exercised by the sister within a reasonable time and is, therefore, deemed to have been waived. In any case, the right to a share of the sale proceeds of the flat can have no connection with the title of the property in dispute.

We are, as such of the opinion that the sister can have no claim with regard to the suit property and, therefore her appeal cannot be entertained and the prayer for leave to prefer an appeal is refused.

In the circumstances both the appeals are dismissed and the decree of the Trial Court is affirmed.

Parties shall bear their own costs.

(GIRISH CHANDRA GUPTA J.)

(SHIB SADHAN SADHU J.)