

Assam schedule VII, Form No.132.
High court form No.(J)2.

HEADING OF JUDGMENT IN ORIGINAL SUIT.Dhubri

IN THE COURT OF MUNSIFF NO 2, DHUBRI

Title Suit No.503/2006

Present: B. Medhi,
Munsiff no 2, Dhubri

Plaintiff.....

1. Sri Nirmal Kr. Ghose
S/O- Late Nagendra Kr. Ghose
Ward No-9, D. K. Road
Dhubri town, P.O. & P.S.- Dhubri, Assam

-----VS-----

Defendant.....

1. Sri Apurba Kr. Ghose
S/O- Late Mukunda Lal Ghose
C/O- Dimapur Timber Basundhara, Napara
P.O- Napara
Dist- North 24 Paragana, West Bengal
2. Sri Sanjiv Kr. Ghose
S/O- Late Santose Kr. Ghose
Ward No-9, Church Road
Dhubri town, P.O. & P.S.- Dhubri, Assam

Pro Forma Defendants.....

1. Smti. Dipa Ghose
W/O- Late Nagendra Ghose
Ward No-9, D. K. Road
Dhubri town, P.O. & P.S.- Dhubri, Assam
2. Smti. Manti Ghose
W/O- Sri Badal Ghose
Fulbari, Dist- West Garo Hills, meghalaya

Given under my hand and seal on this 02nd June 2014 in the presence of,

1. Sri Harmahan Das & Sri Anupam Ghose Learned Advocate for the Plaintiff.

2. Md. Kazi Motahar Hussain & Md. A. B. Akand Learned Advocate for the Defendant.

JUDGEMENT

This is a suit for declaration and mandatory injunction.

BRIEF FACT OF THE CASE:

There plaintiff has filed this case stating inter Alia that the father of the plaintiff Late Nagendra Nath Ghose being brothers had jointly purchased a plot of land measuring 1 Katha under Dag number- 287 of Khatian No-158, situated at present ward number-9 of Dhubri municipality vide registered sale deed number 449/1964. Immediately after the purchase, both of them started living jointly by constructing an Assam type building. The names of both brothers were recorded in the records of rights of the land. Subsequently for the convenience of the members of with the family they constructed a R.C.C. building after obtaining permission for the same.

After some years the father of the plaintiff Nagendra Nath Ghose died on 23/01/95 leaving behind the plaintiff and pro forma defendant number 1&2. His death led to the situation that there is no love lost between the two families. Accordingly both families part away by a mutual family settlement and got the said purchased land partition along with the existing structure.

There plaintiff claims that proforma defendants number 1 & 2 have surrendered their rights in favour of the plaintiff. As per the family arrangement out of total land measuring 1 Katha the plaintiff got a land measuring 1727.50 square feet as shown in schedule a land and the remaining land measuring 1162.50 square feet along with the RCC building had fallen in the share of defendant number-1. Thereafter the defendant number one left for Calcutta in the month of February 2002 and at the time of leaving he had reportedly left the RCC building under the care of defendant number-2..

There plaintiff now a allege that in the year 2004 they found defendant doing construction work over the said RCC building and on

being abstracted the defendant no-2 told the plaintiff that he had purchased 50% of the building from the share of defendant number-1. On being enquired the plaintiff found of a registered sale deed number-113/2001 having been executed in favour of the defendant number -1.

Plaintiff claims that as per the terms and conditions of the family arrangement defendant number-1 has got no right to transfer schedule B land to any person other than the present plaintiff. Therefore the sale without the knowledge and notice of the plaintiff is void ab initio and liable to be set aside. Plaintiff further claims that the alleged sale covered land beyond the share of defendant number-1.

Plaintiffs further claims that having obtained the information he contacted of a telephone to defendant number-1 asking him to give effect to the family arrangement and take back the consideration amount which is paid by the defendant number two to him. But both defendant number 1 &2 showed downright indifference to the same. Instead the defendant number-2 has been continuing with the construction.

The plaintiff having left with no option issued an advocate notice on 02/06/2005 upon the defendants and through that he requested them to vacate the possession of schedule B and to execute a sale deed in favour of the plaintiff with respect to the Suitland. The said notice also received no attention from the defendant.

Therefore the plaintiff has come up with the suit for declaration that neither parties have any right to deviate from the family arrangement, that the sale deed number 1133/2001 is fraudulent, collusive and void ab initio, the defendants are legally bound to execute a sale deed with respect to schedule B land and mandatory injunction.

After registration of the suit summons were issued to the defendants which were properly served and the defendants filed their written statements.

In their written statements the defendants have taken some routine Pleas that the suit is not maintainable, there is no cause of

action, of the suit is barred by law of estoppels and waiver, that the suit is barred by the provision specific relief act, the suit is undervalued etc.

Defendants in their written statements have admitted the fact of joint purchase of the suitland and amicable partition between the two family. But he has denied to have violated the condition of family arrangement. He has claimed that before the execution of sale deed in favour of defendant number two, the defendant number one had made verbal offer to purchase his portion of land but the plaintiff refused for the same on the price fixed by the defendant number one. Therefore he by giving knowledge to the plaintiff and other persons of the locality sold out his portion of land to defendant number two vide registered sale deed number 1133/2001.

The defendants father denied the fact that the plaintiff came to know about the sale only when the defendant number two started making construction. Rather after the sale possession was handed over the defendant number two, he applied for permission to the reconstruct the house before the chairman of Gauripur development authority and a accordingly no objection certificate to construct commercial cum residential building was obtained.

Accordingly, the defendants claim that they have never violated the conditions for family arrangement is proper notice of sale was already given to the plaintiff and only after his refusal the same was sold to the defendant number two.

Hence they have prayed for dismissing the suit of the plaintiff.

ISSUES

My learned predecessor was pleased to frame the following issues after going through the pleadings of the parties.

1. Whether there is any cause of action for the suit?
2. Whether the suit is undervalued?
3. Whether the suit is barred by specific relief act?

4. Whether the family arrangement dated 14/02/2002 became the plaintiff and defendant number one has binding effect upon both the parties?
5. Whether the sale deeds number 1133/2001 dated 22/08/2001 is void ab initio?
6. Whether the plaintiff is entitled to be schedule land by way of transfer in his favour from defendant number one as per condition of the family arrangement?
7. Whether the plaintiff is entitled for permanent injunction?
8. To what other relief/reliefs the party is entitled to?

DECISION DISCUSSIONS AND REASONS THEREOF:

Issue number one: whether there is a cause of action for the suit?

Cause of action is the bundle of facts which the party alleging to exist has to prove to get the relief. In other words it is the bundle of facts which is asserted by one party and denied by the other. In the present case the plaintiff has alleged that the defendant number-1 has illegally sold the suit property in violation of the terms of the family arrangement. On the other hand the defendant number one has claimed that there was no violation of any terms of the family arrangement as before the alleged sale proper notice was given to the plaintiff and the offer was made to him to purchase the suit property. It is only after his refusal to purchase the same and the proposed price the defendant number one had to sell it to the defendant number-2. Thus there is a clear dispute between the parties. The plaintiff has a definite case to prove in other to get the relief as prayed for. Hence there is a cause of action.

Accordingly this issue is decided in the positive in favour of the plaintiff.

Issue number two: whether the suit is undervalued?

There plaintiff has filed this suit for declaration but the family arrangement arrived at between the plaintiff and the defendant-1 has binding effect upon the parties, cancellation of sale deed number-1133/2001 and permanent injunction. Accordingly the suit falls under the category claiming declaration along with consequential

relief which Prima facie comes within clause IV, sub-clause(c) of section seven of court fees Act. The said provision makes the following

S7(iv)(c)- for a declaratory decree and consequential relief;-to obtain a declaratory decree or order, where consequential relief is prayed, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. In all such suits the plaintiff shall state the amount at which he values the relief sought.

This provision gives the plaintiff an unfettered option to value the suit for the purpose of court fees and it is not open court should it be to such variation except in cases where the same may be found to be arbitrary in nature.

In the present case the plaintiff has valued the schedule B land to be 50,000/-which is the value of the consideration fixed by the defendants. Given the liberty to the plaintiff for valuation of a suit of the considered opinion that the suit is properly valued.

Accordingly this issue is decided in the positive in favour of the plaintiff.

Issue number three: whether the suit is barred by specific relief act?

This is a suit for declaration, cancellation and permanent injunction.

The learned counsel from the defendant side has argued that since the time of partition both parties have been enjoying the respective shares of the suitland according to the terms of the contract. As regards the sale to the plaintiff is concerned, the learned counsel has argued that there was no consideration paid by the plaintiff for claiming specific performance of contract. The plaintiff's claim is beyond the provision of law and as such the suit is barred by specific relief act.

However there was an agreement does not have any stand in the eye of law. The parties had a family arrangement in which both parties were entitled by respective shares of properties. Moreover existence of a contract is itself brings their rights of parties within the

ambit of Indian contract act and the relief there have can be claimed and the specific relief act automatically no matter whether there was a consideration or not. It is entirely up to the other party to prove a the time of trial that there was no consideration for the contract and hence the same is void disentitling the other party the relief as prayed.

As regards the to the cancellation of sale deed is concerned, any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury may sue to have it adjudged void or voidable and prayed for cancellation of the same. In the present case since the plaintiff claims that defendant number one and he is bound by the family arrangement, he has prayed for cancellation of the sale deed. This right is certainly within the ambit of specific relief act.

Therefore I am of the considered opinion that the suit is not barred by provision of specific relief act.

Issue number four: Whether the family arrangement dated 14/02/2002 became the plaintiff and defendant number one has binding effect upon both the parties?

For the purpose of convenience I have taken up this issue before the issue number three.

PW1 in his evidence in chief has stated that there was a family arrangement dated 14/02/2000 and the same has been admitted by the defendants. The plaintiff has exhibited the said family arrangement vide exhibit-1 identified the signatures of all the signatories are of the same.

The learned counsel from there defendant side has raised two folded objection against the binding effect of the family arrangement dated 14/02/2002. He has argued that same is violative of both section 22 of Indian succession act and provisions of Indian contract Act. The learned counsel further argued that the clause 15 of the said arrangement is violative of section 22 of Indian succession act.

Now let me first date of the first objection that the said family arrangement is violative of section 22 of Indian succession act.

To substantiate his argument the learned counsel has submitted a judgment given by honourable by the high court in Appellants: **Krishnapada Roy alias Saha and Anr.Vs. Parimal Chandra Saha and Anr.**, AIR2000Gau117 in this case the hon. Guwahati high court has held that referential right as envisaged in section 22 of the Indian succession act can be claimed only with respect to that ancestral properties which is not partitioned. The hon. Guwahati high court had relied upon

Bhagirathi Chhatoi v. Adikanda Chhatoi, reported in [MANU/OR/0077/1988](#) : AIR 1988 Ori 285, the Orissa High Court has also held (at page 288) :-- in which the hon. Orissa high court had held as follows,

"The right under Section [22\(1\)](#) is not available to be exercised after partition between the co-heirs since partition clothes the respective parties with authority to hold their shares independently and absolutely as their separate properties and it could not be the intention of the legislature to put a clog on the power of alienation of independent owners of properties. Where, however, the partition is not a complete one, the right under Section [22\(1\)](#) is not stamped out. Preferential right is not confined only to two brothers but is also available to other Class I heirs."

The learned counsel from the plaintiff side has also relied upon a decision of hon. Kerala high court given in, C.M gocindan Nair & others VS M Ramachandran Nair & others, 2013(2) CCC 341(ker). In this case also the hon. High court has held that the right of pre-emption cannot be claimed where property had already been partitioned. Ones partition has taken place section 22 is not applicable . Once share has been transferred to a stranger, other co-sharers cannot exercise their preferential right under section 22.

After listening to the argument of the learned counsel and going through the above stated decisions of honourable High courts I find that the learned counsel has looked down the entire matter keeping the preferential right envisaged in section 22 of Indian succession act and preferential right accrued under the accounts of the family arrangement (Exhibit-1) on the same footing. In my considered opinion this is not what the law has contemplated. Right accrued under section 22 is statutory right which can be exercised by one co-

sharer with respect to any ancestral property only after execution of the sale by other co-sharer to a third person. This is a statutory right which exist as long as there is no partition and the other co-sharer can step into the shoes of the third person/vendee by compelling the vendee to handover the transfer property with the same consideration as he has been to the vendor/co- sharer.

In the present case in hand the plaintiff has been claiming his preferential right over the suit property by virtue of the terms of the family arrangement. This is a right accrued by the terms of a contract and section 22 Indian succession act cannot go along with the present situation. Therefore the argument put forwarded by the defence counsel that it is violative of section 22 of Indian succession act is not tenable in this case.

Now let me discuss the second objection raised by the defendant side.

The learned counsel from there defendant side has argued that clause 15 of the deed of partition is against the provision of Indian contract. By referring to section 25 of the Indian contract act he said that the said provision is void as it was incorporated without any consideration.

It is a settled principle as incorporated in section 25 of Indian contract act that contract with a consideration is void. However the argument of the learned defence counsel cannot hold much water because in any family arrangements acceptance of one share operates as consideration for giving the remaining share to other parties vice versa. Therefore to argue that the said family arrangement was contracted without consideration is not plausible.

Therefore in my considered opinion the family arrangement dated 14/02/2002 is binding upon both parties.

Hence this issue is decided in the positive in favour of the plaintiff.

Issue number five: Whether the sale deeds number 1133/2001 dated 22/08/2001 is void ab initio?

Issue number six: Whether the plaintiff is entitled to be schedule land by way of transfer in his favour from defendant number one as per condition of the family arrangement?

For my convenience to reach at a definite conclusion I have taken up these two issues together. Let me at the outset make it perfectly clear that if the sale deed no-1133/2001 was proved to be executed in violation of the terms of the family arrangement, as in the previous issue the family arrangement has been held to be binding upon the parties, the fate of their rights and liabilities of the parties will be governed by the provisions of Indian contract Act and transfer of property act.

Therefore let me first discuss whether the alleged sale deed was executed in violation of the family arrangement and then I will analyse which provision of transfer of property act will govern the fate of the parties.

In order to decide the legal position of the sale deed number 1133/2001 I have to pore over whether the defendant number one had complied with the terms of the agreement as incorporated in clause-15, of the said agreement by giving notice in writing to the plaintiff before selling the suitland to defendant number-2.

The learned counsel from there defendant side has argued that the defendant number-1 before selling the suitland to the defendant number-2 duly offered the plaintiff to purchase his land but the plaintiff refused to purchase the same. He has, in his written argument stated that in compliance with the terms of the argument a written letter showing the intention of the defendant number one to sale the suitland was the given to the plaintiff through PW2, Manish Chakrabarty. However the plaintiff refused to purchase the same and therefore having left with no other alternatives the defendant number one had sold the suitland to defendant number two.

On the other hand the learned counsel from there plaintiff side has argued that the defendant side has failed to prove that they had given notice for sale to the plaintiff. They have neither produced any copy of the letter nor shown any other documents in proof of the fact that any such letter was in fact given to the plaintiff. Moreover the learned counsel argued, that the defendant number one in his cross examination has stated that he had at first intimated the plaintiff verbally through Maniklal Ghose and Shyampada Ghose but none of them were examined.

In the line of above arguments let me go through the evidence put forwarded by both sides.

PW1, in his deposition has stated that after the admitted family partition the defendant number-1 left for Calcutta in the year 2002 making defendant number-1 is the caretaker of his building. In the year 2004 the defendant number two started construction in the said building. And on being opposed by the plaintiff, Defendant no-2 said that he had purchased their share of defendant number one vide registered sale deed number-1133/2001. The plaintiff has claimed that as per clause-15 of the terms of the said family arrangement the defendant number one has to first make an offer to the plaintiff which he did not comply. In his cross examination he has stated that the defendant number one had never approached him with regard to any proposed sale. Having come to know about the alleged sale to the defendant number two he had served an advocate notice but the defendant number one did not respond to the said notice. The plaintiff has exhibited exhibit-2 of the said legal notice

DW2 in his evidence in chief has stated that defendant number one had sent a letter to him for the purpose of giving it to the plaintiff and accordingly he delivered it to him. He further asserted that he had also asked the plaintiff to purchase the share of defendant number one on paying market value of the suitland but the plaintiff refused for the same. In his cross examination he has stated that he can't remember the exact date of sending the letter but said that it is given just before the sale.

DW3, the defendant number-1 of in his deposition has stated that he had sent a written notice to the plaintiff making proposal for the sale to which the plaintiff refused. In his cross examination he first stated that he had verbally intimidated him about the intention to sell. At the same time he has also stated that he is not in talking terms with his nephew, the plaintiff. He then stated that he intimated him by writing on and around February, 2001 through Manish Chakrabarty.

If these evidence is weighed in the light of written statement it appears that such evidence is beyond the ambit of pleading. In the written statement the defendants never stated that written offer was

made to the plaintiff. In paragraph-14 of their written state the defendants have stated that before of selling the portion of land defendant number one made by the for the plaintiff to purchase his portion of land. It is only when he had refused to purchase the same at price fixed by the defendant number one, he sold the suitland by defendant number-2. In paragraph 17 also the defendants similarly stated only about verbal notice to the plaintiff. Nowhere in the written statement had the defendants made a single utterance about the written offer made to the plaintiff.

The subsequent claim by the defendants against the stage of evidence that a written notice of intended sale was given by the plaintiff is not only beyond the purview of pleading but certainly an impeccably crafted afterthought.

In fact what is unfurled from the entire development, that after defendant number one left for Calcutta, as the and the suit property was being taken care of by defendant number two, when the need to sale the same arose, he sold out the same to defendant number two in a cavalier manner by being unmindful of clause 15 of the deed of family arrangement. The bad blood between the parties has also contributed for his attitude. It is only when the suit was filed; where requirement of the said clause was invoked the defendants initially came up with the story of oral notice and at the stage of evidence the story of written notice. Thus I am of the view that defendants have failed to prove that they had given written notice to the plaintiff before the alleged sale to defendant number two.

The terms of the family arrangement requires a written notice to be given by one party to the other before any portion their respective share is sold out. In my considered opinion the defendant number one has failed in this regard.

Now let me consider the legal validity of sale deed number 1133/2001. Question that is required to be answered for the purpose he is whether non compliance of terms of family agreement makes the sale deed void ab initio? Or whether non performance of terms of family arrangement can be a ground, within the purview of Indian contract act for declaring a sale deed void ab initio?

The plaintiff side has prayed for declaration of the said sale deed as void ab initio and issue has been framed accordingly. However it may be mentioned that an agreement can be void ab initio only when the object and consideration is illegal, or which is impossible to be performed or due to change in circumstance it becomes impossible to perform what becomes unlawful etc., as enshrined in the Indian contract act.

However in the present case in hand the objection against the alleged sale deed has been raised not on any of the grounds mentioned above rather on the ground that terms of family agreement has not been complied with. The legal status of a sale deed executed subsequent to and in violation of a already existing agreement is determined in section 40 of transfer of property act.

For that purpose let me traverse through section 40 of transfer of property act which reads,

“Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment¹[in a particular manner of the latter property], or

Or of obligation annexed to ownership but not amounting to interest or easement. -Where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands .

Illustration

A contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A .”

Thus the second paragraph of this section creates an obligation under the contract which creates no interest in land but certainly concerns the land and the interest is enforceable against an assignee of the land who takes from the transferor either gratuitously or takes for value but with notice. The interest created under paragraph two and the illustration given therein makes it amply clear that the contract for sale does not create an interest in the land, but it is annexed to the ownership of the land the right can be enforced against a subsequent transferee from the vendor or a transferee for value with notice.

In the present case the defendant number two is the transferee for value. But in order to have this section and enforceable it is necessary to prove that he had notice of existence of pre-existing contract earlier.

On perusal of exhibit-1 it appears that defendant number two was the witness to the deed of family arrangement. The plaintiff has exhibited his signature as exhibit -1(7). In his evidence in chief he has stated that he knows the whole story as to how the property was acquired, partitioned and later sold to him. He has in his cross examination unequivocally stated that he knew about clause 15 of the said agreement requiring the defendant number one to give a notice to the plaintiff of his intention to sell.

Therefore without resorting to much of discussion it can be concluded he was transferee with notice as required by section 40 of transfer of property act. As a result he is a subsequent transferee for value with notice. Consequently going by the principle of this section and the illustration given therein I am of the opinion that the plaintiff can enforce his right accrued by the family arrangement against him.

The principle enshrined in this section and so many other sections in transfer of property act clearly shows that the sale deed number-1133/2001 is not void and is not required to be declared void for that matter. But since the right has been transferred by that sale deed to the defendant number-2 and since the plaintiff has right to enforce his right accrued through their family arrangement, I hold that the plaintiff is entitled to the schedule the and by way of transfer in his favour from defendant number two.

Accordingly this issues are decided accordingly in the positive in favour of the plaintiff.

Issue number seven: whether the plaintiff is entitled to permanent injunction?

In view of our discussions and decisions arrived in the above issues, having come to the conclusion that the plaintiff he is entitled to enforce his right accrued under family arrangement against the defendant number two, I am of the opinion that the plaintiff is entitled to permanent injunction.

Accordingly this issue is decided in the positive in favour of the plaintiff.

Issue number eight: to what other relief/reliefs the plaintiff is entitled to?

Considering the nature of dispute and considering the decisions in the above issues I held that the plaintiff is not entitled to any other relief/reliefs.

ORDER

The suit is decreed on contest in favour of the plaintiff.

The plaintiff shall be entitled to purchase the suitland from the defendant no-2 by paying an amount equal to the consideration agreed between defendant number one, Apurba Kr. Ghose and defendant number two, Sanjev Kr. Saha while executing the registered sale deed number-1133/2001. On payment of the said amount the defendant number two shall hand over the suit property to the plaintiff by executing a sale deed. Failure of Defendant no-2 to comply with the order of the court would entitle the Plaintiff to the sale deed executed from the court.

Prepare a decree accordingly.

Given under my hand and seal on this 18th May of 2014.

APPENDIX

Witnesses of the Plaintiff:

1. PW1, Nirmal Kr. Ghose

Witnesses of the Defendant:

1. DW1, Sri sanjeev kr. Saha
2. DW2, Sri manish Chakravarty
3. DW3, Sri apurba Kr. Ghose

Exhibits of the plaintiff:

1. Exhibit 1- Deed of the family arrangement
3. Exhibit 2- Photocopy of the Advocate notice
4. Exhibit 3- Certified Copy of sale deed No-1133/2001

Exhibit of Defendant:

1. Exhibit A- Regtd. Sale Deed
2. Exhibit **B- jamabandi(PIO)**
3. Exhibit C- land Holding certificate
4. Exhibit D- Municipal tax receipt
5. Exhibit E- permission for construction

Bidyut Medhi
(Munsiff No 2)