

Sk. Abdul Halim & Ors.
Vs.
Sk. Hasem Ali @ Hossain Ali & Ors.

Mr. Udayan Datta,
Mr. Subrata Bhattachajya.
... for the appellants.

The present Second Appeal arises from the preliminary decree passed by the first Court and modified by the Court of Appeal below.

The suit for partition and separation of shares was filed by the plaintiffs/respondents claiming the property from the common ancestor by way of inheritance and also exclusive share by dint of purchase as well as the Heba created by the said common ancestor in their favour. The defendants/appellants took a defence that they have not only acquired the right, title and interest in respect of 5 cents of land in 'Ka' schedule property but have also got right, title and interest in respect of 5 cents of land comprised therein on the basis of the Hebanama executed by the common ancestor, i.e. Sk. Soleman.

The Trial Court without adverting to the aspect in this regard proceeded to declare the shares of the plaintiffs in respect of the property comprised in the suit and failed to determine the share of the defendants/appellants. The said preliminary decree was carried to the appellate Court by the defendants/appellants alleging not only non-declaration of their shares but also disbeliefment over the Hebanama executed by the said Sk. Soleman in respect of the other 5 cents of land.

It is a specific case of the defendants/appellants that by virtue of such Hebanama the possession was

delivered in respect of the other 5 cents of land than the 5 cents of land purchased by them by a Deed and the Record of Right was also altered on the basis thereof.

Mr. Udayan Datta, learned Counsel appearing on behalf of the defendants/appellants, vehemently submits that the mutation in the Record of Rights implies the possession in respect of the property and in fact the possession was also delivered by the executant of the Hebanama and, therefore, it fulfills the conditions required for proving the valid Hebanama.

At the first blush we were inclined to interfere with the preliminary decree modified by the first appellate Court, but after meticulously examining the reasons recorded therein we do not feel that such points involve substantial questions of law under Section 100 of the Code of Civil Procedure.

The defendants/appellants deposed in the Trial Court and were unable to disclose the date of such oral Hebanama already executed by the said Sk. Soleman. It is a categorical stand of the defendants/appellants that by virtue of oral Hebanama the property of 5 cents of land was given and they are possessing the same to the exclusion of others.

In order to prove the oral Hebanama three essential conditions are, firstly the declaration of the gift having made by the donor; secondly acceptance of the gift either expressly or for necessary implication by or on behalf of the donee; and thirdly the delivery of possession by the donor in favour of the donee. The aforesaid three ingredients are required to be proved to constitute an oral Hebanama as valid piece of document divesting the

right, title and interest of the donor in favour of the donee. It is no doubt true that mutation in the name in the Record of Rights has a presumptive value on possession, but such presumption is rebuttable one. Mere long possession in the property in absence of any cogent evidence that the said possession was delivered immediately upon execution or declaration of oral Hebanama does not fulfill the conditions. The possession of the co-sharer in respect of the joint property is the possession on the basis of the shares held therein as well as on behalf of the other co-sharers. It is not uncommon that a co-sharer may occupy a particular portion not in commensurate with the shares held in the joint property and it is the duty of the Court at the time of passing the final decree to separate the shares strictly in terms of the shares held in the joint property in the preliminary decree and the excess possession to be delivered to other co-sharers.

The aforesaid three ingredients must exist and proved by valid piece of evidence, otherwise the plea of oral Hebanama cannot be accepted by the Court. Precisely both the Courts have found that the plaintiffs have miserably failed to prove the execution of oral Hebanama by the said Sk. Soleman and there is no iota of evidence produced in this regard. Though the other defendants have stepped up to stand by the side of the present appellants with categorical assertion that the oral Hebanama was executed by the said Sk. Soleman in their presence, yet they were unable to disclose the date of such execution and categorically deposed that there was no declaration followed by such oral Hebanama, though it was registered.

It is no longer res-integra that a person asserting

a particular fact has to prove the same and the moment such initial onus is discharged it shifts on the other side to dispel the same. In the present case the defendants/appellants have miserably failed to prove the very existence of oral Hebanama and, therefore, we do not find that there is any ambiguity, illegality and/or irregularity in the judgement of the first appellate Court. The share of the defendants/appellants has been declared by the first appellate Court to the extent of 5 cents of land in 'Ka' schedule property, which admittedly was acquired by virtue of the purchase from the said Sk. Soleman.

The appeal does not involve any substantial question of law.

The same is hereby dismissed under Order XLI Rule 11 of the Code of Civil Procedure.

There will be no order as to costs.

(Harish Tandon, J.)

(Kausik Chanda, J.)