

**In The High Court at Calcutta
Ordinary Original Civil Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

APD No. 414 of 2014

**International Society for Krishna Consciousness
Vs.
Inshwari Prasad Singh Roy**

For the appellant : Mr. Ahin Chowdhury,
Mr. Debabrata Banerjee,
Mr. Koushik Bhattacharyya

For the respondent : Mr. Arijit Chaudhuri,
Mr. Kaushik Mandal,
Mr. Sayantan Basu

Hearing concluded on : 16.08.2021

Judgment on : 15.11.2021

The Court:

1. The present reference arises under Clause 36 of the Letters Patent in view of the difference of opinion in the Judgment and Decree dated September 20, 2019 passed in APD No. 414 of 2014 on Issue Nos. 1 to 5 as formulated by the learned Single Judge in CS No. 927 of 1982.
2. The matter arises from a suit, inter alia for eviction, filed by Sunil Kumar Singh Roy, the Plaintiff/Respondent against the Defendant/Appellant No. 1-Society and its officials on the ground of trespass and unlawful occupation. Subsequently the original plaintiff died and the present plaintiff/respondent no. 1 was substituted as plaintiff in place and stead of the deceased in the capacity of the latter's heir and legal representative. Apart from defendant no. 1,

which is a registered society, the rest of the defendants are allegedly functionaries/agents of the defendant no. 1.

3. The suit was contested by the Defendant nos. 1 and 5 by filing independent written statements. The defendant no. 5 denied having any connection with defendant no. 1 and claimed to be an independent entity. The rest of its written statement was mostly comprised of bald denials of the plaint allegations.
4. The defendant no. 1 set up a case of tenancy in respect of the suit property and denied the allegation of trespass.
5. The contesting parties adduced evidence, both oral and documentary, which are part of the records.
6. The relevant five issues, on which there was dissent between the two learned Judges of the Division Bench, are set out below:
7. *Did the first defendant encroach upon or trespass into any portion of any premises beyond what was originally let out to the defendant no. 1?*
8. *Was the 1st Defendant inducted as a lessee under the Indenture of Lease dated 18th June 1971 in respect of the portion of the premises now occupied by the defendant no. 1?*
9. *Was the defendant no. 1 inducted as a tenant even before the said lease? If so when?*
10. *Prior to the demise in favour of the defendant no. 1 was the premises clearly demarcated on both floors and only such demarcated upper portion was let out to the defendant no. 1?*

11. *Is the defendant in unlawful occupation of any part of the premises now in possession of the defendant no. 1?*
12. All the five issues are so inter-dependent that they cannot be decided in isolation, since the decision on each would affect that on the others.
13. Before going into the merits, certain relevant dates are required to be set forth:
 - i. April 7, 1926 - Priyambada Debi, the then owner of the original premises no. 3, Albert Road, Calcutta, executed her last Will and Testament, thereby bequeathing her properties, including the aforementioned premises; 8 annas, comprising the western side of the said premises (Schedule "Ka") was bequeathed to one Lillamohan Singh Roy, through whom the present defendant/appellant claims its rights, and the other 8 annas, comprised of the eastern portion (Schedule "Kha") to Saileswar Singh Roy, through whom the present plaintiff/respondent claims title.
 - ii. March 25, 1939 - The testatrix Priyambada expired.
 - iii. July 21, 1939 - Priyambada's Will dated April 7, 1926 was duly probated.

- iv. May 26, 1971 - A notarized Deed of Declaration was entered into between Lillamohan Singh Roy and Sunil Kumar Singh Roy (the latter being the nephew of Saileswar Singh Roy, on whom Saileswar's portion devolved by virtue of a Will executed by Saileswar during his lifetime), being the then owners.
 - v. June 18, 1971 - A registered Deed of Lease was executed by Lillamohan and his son Kamala Prasad in respect of Lillamohan's portion in favour of the defendant/appellant no.1, namely, the International Society for Krishna Consciousness ("ISKCON", for the sake of brevity).
- 14.** The evolution of the original property, comprised of premises no. 3, Albert Road, insofar as its municipal identity is concerned, proceeded as narrated below in brief:
- 15.** In the year 1952, the parent premises at 3, Albert Road was trifurcated into 3A, Albert Road (residential house), 1/1A, Upper Wood Street and 5/1A, Hungerford Street.
- 16.** From the Fourth Quarter of the financial year 1972-73, the then 3A, Albert Road was further bifurcated into a new (truncated) 3A, Albert Road (eastern portion of the original premises no. 3A) and 3C, Albert Road (western portion of the original premises no. 3A).

17. Issue No. 4 is central to the adjudication of the *lis*. To consider the merits of the same, the trail of devolution of title needs to be gone into.
18. Undisputedly, Priyambada was the sole and exclusive owner of the then 3, Albert Road when she executed her last Will and Testament on April 7, 1926 as well as on the date of her death on March 25, 1939. The Will was duly probated in the year 1939 and has been marked as Exhibit 'B' in the suit.
19. Priyambada bequeathed, among other properties, the western portion of the said premises no. 3, Albert Road and the eastern part thereof equally to Lilamohan and Saileswar respectively.
20. The next important document is a notarized Deed of Declaration executed jointly on May 26, 1971 by Lilamohan and Sunil Kumar Singh Roy. The latter was the legatee of Saileswar (since deceased), who filed C.S. No. 927 of 1982, from which the instant *lis* arises. On the subsequent demise of Sunil, his heir and legal representative Ishwari Prasad Singh Roy (the present plaintiff/respondent no.1) was substituted as plaintiff.
21. The plaintiff alleges that the Deed of Declaration dated May 26, 1971 clearly reflects the separate demarcation and possession between the declarants, of the western and eastern portions of the then premises no. 3A, Albert Road, in terms of Priyambada's Will.
22. Soon thereafter, in 1972-73, the said municipal premises no. 3A was further bifurcated into two re-numbered premises – a truncated, new 3A (eastern portion of previous 3A) and 3C (western portion of previous 3A), Albert Road.

- 23.** The plaintiff alleges that subsequently the defendant no. 1 ISKCON, the tenant in respect of the newly-carved out premises no. 3A, trespassed and wrongfully encroached upon the suit property, which is a part of the western verandah, that is part and parcel of premises no. 3C, which is exclusively owned and was possessed till such alleged trespass by the Plaintiff. However, the defendant no. 1/appellant denies such proposition by arguing that, in the absence of any lawful partition by metes and bounds, the mere execution of a notarized Deed of Declaration could not be deemed to effect actual physical partition by metes and bounds between the eastern and western portions of the previous premises no. 3A. By virtue of the Lease Deed dated June 18, 1971, Lilamohan and his son Kamala Prasad granted lease in respect of their western portion of the then 3A, Albert Road in favour of the defendant/appellant ISKCON. The appellant further contends that the 250 square feet of suit property, which is a part of the entire balcony, fell within such western portion of the previous premises no. 3A, Albert Road, and thus formed a part and parcel of the lease granted to the appellant by Lilamohan and his son.
- 24.** Moreover, the appellant argues, the factum of trespass by the appellant, which is a positive assertion of the plaintiff, was never proved by the plaintiff by cogent evidence.
- 25.** To determine whether a specifically demarcated upper portion of the suit building was let out to the defendant no. 1/appellant, we have to look into the intrinsic evidence, as found from the relevant

documents, as well as the surrounding circumstances and conduct of the predecessors-in-interest of the contesting parties.

- 26.** Priyambada, the admitted original owner, by her last Will dated April 7, 1926, had clearly bequeathed “absolute rights” in the properties mentioned in Schedules ‘Ka’ and ‘Kha’ to Lilamohan (through whom the appellant claims) and Saileswar (the original predecessor-in-interest of the plaintiff/respondent no. 1) respectively (at page 31 of the Supplementary Paper Book, Volume 1).
- 27.** At pages 47-48 and 51 of the same volume of Supplementary Paper Book, we find that the three-storied house called Rai Castle, situated at the then 3, Albert Road, being the parent premises, was clearly demarcated into moiety shares, described to be situated at the western and eastern sides respectively (including the main building), as Item No. 10 of Schedule ‘Ka’ (to Lilamohan) and Item No. 2 of Schedule ‘Kha’ (to Saileswar).
- 28.** The Will (Exhibit ‘B’), upon being probated in the year 1939, acquired finality in law with effect from the date of death of the testatrix.
- 29.** Such bequest of ‘absolute’ rights in the western and eastern portions of the property has to be now seen in conjunction with the subsequent conduct of the legatees.
- 30.** On such score, the Deed of Declaration (Exhibit ‘D’), executed jointly on May 26, 1971 by the predecessors-in-interest of the contesting parties, acquires relevance. The same finds place at pages 85 to 98 of Volume 1 of the Supplementary Paper Book.
- 31.** Shorn of unnecessary narrative, paragraph no. 6 thereof, in no uncertain terms, declares that, after probate, the Executrix and

Executors fully completed the administration of the estate and, without executing any deed or document, put Lilamohan in exclusive possession of the western portion. Paragraph no. 7, again, declares the same in respect of the exclusive possession of the eastern portion being given to Saileswar.

- 32.** In paragraph no. 14 of the said Deed of Declaration, the declarants proclaim that they had agreed that, to avoid any misunderstanding between their respective heirs and legal representatives in future in view of non-execution of any specific document, they should clearly demarcate the said eastern and western portions. The expression “we have agreed”, used in paragraph 14, indicates that such demarcation had already taken place in the past.
- 33.** However, any shade of doubt which could still have remained regarding the Deed merely recording, and not effecting the demarcation, stands thoroughly clarified by the very next paragraph, that is, paragraph no. 15 of the said Deed. Both declarants clearly state therein : “We declare that we have demarcated the Western and Eastern portion of the premises No. 3, Albert Road as mentioned in Schedule ‘Ka’ and ‘Kha’ to the will of the said later Priyambada Devi by creating and constructing boundary wall eight feet in height between the said Western and Eastern portions and running from North to South as shown by dotted yellow lines on the map or plan hereto annexed and marked as boundary pillars thereof”.
- 34.** Paragraph 16 of the Deed further reiterates such position.
- 35.** Hence, the predecessors-in-interest of the plaintiff as well as the defendant no. 1 recorded in writing the factum of such previous

demarcation, which had already taken place, at least from the day when the Executrix and Executors of Priyambada's probated Will administered the estate of Priyambada, including the present suit property, putting the said predecessors-in-interest of the contesting parties in "exclusive" possession of the portions of the suit building belonging to them "absolutely" in terms of the said Will.

- 36.** A Deed effecting a present/future transfer of immovable property, equivalent in worth to the suit building, is compulsorily registrable in terms of Section 17 of the Indian Registration Act. The said provision, read in conjunction with Section 49 of the said Act, prohibits transfer of title by virtue of such document in the absence of registration.
- 37.** However, it is well-settled that if a document merely records the factum of past settlement/arrangement between the parties thereto and does not, of itself, purport or operate to create any right, title and interest in the property, such document is not compulsorily registrable at all, thus saving such a document from the mischief of Section 49 of the Registration Act.
- 38.** In the instant case, the Deed of Declaration dated May 26, 1971 only reiterated in writing that the parties thereto had already been put in exclusive possession of their respective (western and eastern) portions at the time of administration of the probated Will by the Executrix and Executors. Such separate exclusive possession was further reinforced by constructing an eight feet-high boundary wall demarcating the western and eastern portions respectively, as evidenced by paragraph no. 15 of the said Deed.

- 39.** Thus, the said Deed (Exhibit 'D' in the suit) was sufficient corroborative evidence, apart from the language of Priyambada's Will, which was duly probated, to show that the predecessors-in-interest of the plaintiff and defendant no. 1 clearly knew and conducted themselves in accordance with the fact that the said predecessors were already separately possessing demarcated exclusive properties in terms of the Will of Priyambada Debi all along, at least since the date of administration of the said Will by its Executrix and Executors.
- 40.** In view of the Will and the conduct of parties, there was no need of any further formal partition by metes and bounds, since the separate demarcations and possession as per Priyambada's Will had already been continuing on mutual agreement as between the legatees of the Will and all claiming through such legatees subsequently.
- 41.** Since the lessor of the defendant no. 1, namely Lilamohan, could not transfer better title to the lessee/defendant no. 1-society than the lessor himself had, the Deed of Lease executed on June 18, 1971 by Lilamohan could not have conferred any right, title and/or interest in respect of the suit property, which is a part and parcel of the eastern portion of the previous premises no. 3A, Albert Road, which was again renumbered as the truncated 3A, and is owned exclusively by the Plaintiff, who claims through Sunil Kumar Singh Roy, whose title relates back to Saileswar Singh Roy.
- 42.** The registered Lease Deed (a certified copy of which was marked as Exhibit 'E' in the suit) was executed on June 18, 1971 only, that is, already after the demarcation and separate possession had been

continuing for a long time, at least since administration of late Priyambada's estate to the legatees, and even after the Deed of Declaration dated May 26, 1971, which unequivocally recorded in writing the admission of the lessor of the defendant no. 1/appellant as to such demarcation and reinforcement of the same by construction of an eight-feet tall boundary wall.

43. The execution of the Lease Deed subsequently on June 18, 1971 could not be given retrospective effect from May 1, 1971 to by-pass the lessor's unambiguous and written admission of such prior demarcation in the Deed of Declaration of May 26, 1971, since on June 18, 1971 the lessor himself had no right, title and/or interest over the suit property comprised of the 250 square feet western portion of verandah on the first floor, which fell squarely within the current premises no. 3A, Albert Road, owned by the Plaintiff.
44. In such context, the physical occupation of the suit property by the Defendant no.1-society is *ex facie* unlawful. With utmost respect to Kapur, J., the burden and onus is upon the defendant to prove the legality and status of its possession. Such possession could be only be held to be legal either in the capacity of owner, or lessee or licensee or any subtler shade of such jural relationships. In view of the failure of defendant no. 1 to prove the lawfulness of its possession, as opposed to the several pieces of documentary evidence to corroborate the plaint case of the plaintiff's title in the suit property, the actual proof of the exact date and act of trespass pales into insignificance, since the possession of the suit property by the defendant no. 1 is proved to be unlawful.

- 45.** With due respect, documentary evidence prevails over oral evidence. There was sufficient cogent and corroborative evidence on record to establish the plaintiff's exclusive ownership and prior separate possession of the suit property on the basis of Priyambada's Will. Hence, the current possession of the defendants over the suit property is unlawful and the defendants' status is on the same footing as rank trespassers, which entitles the plaintiff to the reliefs as claimed in the plaint.
- 46.** The plaintiff and defendant no.1 and/or their predecessors-in-interest had been continuously in separate possession of their respective demarcated portions at least from May 26, 1971. Hence, preponderance of probability befitting any prudent person unerringly indicates that the entry of defendant no. 1 and its men/agents was at some subsequent point of time and is patently unlawful.
- 47.** Even assuming the worst-case scenario against the plaintiff, the defendant no. 1 can claim possession, at the most, pursuant to the lease deed dated June 18, 1971 from that date and/or from May 1, 1971. However, the suit for eviction was filed in the eleventh year thereafter, that is, in 1982. Since the limitation period for filing an eviction suit is twelve years from dispossession, the suit is not time-barred under the Limitation Act.
- 48.** Even as per the defence case, there is no pleading as to continuous possession of the defendant no. 1 over the suit property for more than twelve years, let alone open, uninterrupted and adverse to the plaintiff, which would be sufficient to amount to adverse possession.

- 49.** Without any proof whatsoever of conscious and lawful relinquishment of title by the plaintiff and his predecessors-in-interest, there cannot arise any question of estoppel, waiver or acquiescence attributable to the plaintiff, which might have stood in the way of the grant of the reliefs sought in the plant.
- 50.** The Supreme Court judgment cited by the appellant, reported at *(2015) 14 SCC 450*, does not help the defendants in any manner, since the plaintiff was sufficiently able to prove the plaint case by cogent evidence, which could not be rebutted by the defendants.
- 51.** Thus, with utmost respect to the legal erudition of both the learned Judges of the Division Bench, I cannot but agree on principle with the opinion of Sen, J. as far as the decision on issue nos. 1 to 5 is concerned. Thus, the Letters Patent appeal, bearing APD No. 414 of 2014, is partially allowed, without any order as to costs.
- 52.** C.S. No. 927 of 1992 is, thus, decreed in part, thereby granting the plaintiff decree in terms of reliefs (a), (b), (e) and (f) of the plaint thereof.
- 53.** Liberty is given to the plaintiff to levy execution of the decree after 90 (ninety) days from date in respect of reliefs (a), (b) and (f). With regard to relief (e), the plaintiff shall be at liberty to approach the Special Referee as appointed by Sen, J. for adjudication of the mesne profits as per the modalities as fixed by Sen, J. and will be at further liberty to move the executing court and/or the Division Bench of Sen and Kapur, JJ., as and when constituted by the Hon'ble the Chief Justice if so necessary, for further appropriate orders/final decree with regard to the mesne profits, in accordance with law.

- 54. The present reference is answered accordingly.
- 55. The department shall draw up and finalize the decree at the earliest.
- 56. Certified copies of the judgment and decree, if applied for, be supplied to the parties upon compliance of requisite formalities.

(Sabyasachi Bhattacharyya, J.)

Later

Learned counsel appearing for the appellant seeks stay of operation of this order after the above judgment is passed. However, since 90 days have been granted for the plaintiff to be able to execute the decree, such further prayer for stay is redundant and, accordingly, refused.

No order as to costs.

(Sabyasachi Bhattacharyya, J.)