

IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

S.A. 47 of 2020
CAN 1 of 2018
CAN 2 of 2023
CAN 3 of 2023

Nemai Charan Bhowmik
VS.
Malina Ghorai & Ors.

For the Appellants	: Mr. Soumak Bera, Adv.
For the Respondents.	: Mr. Rwitendra Banerjee, Adv. Mr. Devdutta Pathak, Adv.
Hearing concluded on	: 13 th December, 2023
Judgement on	: 13 th December, 2023

Siddhartha Roy Chowdhury, J (Oral):

1. The second appeal is directed against the judgment and decree passed by learned Additional District Judge, First Court, Paschim Medinipur in Title Appeal No. 44 of 2016, affirming thereby the judgment and decree passed by learned Civil Judge(Junior Division), Ghatal, Paschim Medinipur in Title Suit No. 35 of 2010.
2. For the sake of convenience the parties will be referred to as they have been arrayed in the suit.
3. Briefly stated that the plaintiff and the defendants are the son and daughter of Sadhan Bhowmik since deceased, who according to the plaintiff died in the month of January, 1955. Therefore, the plaintiff acquired the properties left by their father exclusively.

4. Since then the plaintiff has been possessing the property by mutating his name in the revenue records and in exercise of his right of ownership on 5th July, 1988, he has transferred some portion of property he inherited to Rahit Kumar Jana and Swapan Kumar Jana. The defendant no. 1, Malina Ghorai since after her marriage has been living in her matrimonial home which is four or five kilometres away from the house of the plaintiff.
5. It is contended further that the plaintiff has been possessing the properties jointly with other co-sharers from different branches. Suddenly he was served with a notice from the office of B.L. & L.R.O., the proforma defendant no. 3, and came to know about an application filed by his sister to get her name mutated in the revenue record of right after claiming to have acquired.
6. Hence, by filing the suit the plaintiff prays before the court to declare his absolute title in respect of the suit property and also prays for permanent injunction restraining the defendant no. 1 from interfering with the possession of the plaintiff in respect of the suit property and/or from changing the nature and character of the suit property and from getting her name mutated in the proceeding being Mutation Case No. 120 of 2009.
7. The defendant no. 1 contested the suit by filing the written statement denying all material averments. It is the specific CASE of the defendant that her father Sadhan Bhowmik died on or about 9.8.1376 BS corresponding to the year 1970, leaving behind the plaintiff and the defendant no. 1 as his legal heirs and successors. But the plaintiff

managed to get his name mutated in the revenue record of right depicting himself as the absolute owner of the properties left by their father.

8. Learned trial court after considering the pleadings of the parties framed issues and after taking into consideration the evidence adduced by the parties both oral and documentary was pleased to dismiss the suit.
9. The plaintiff made an unsuccessful attempt to get the judgment of learned trial court reversed by preferring the Title Appeal No. 44 of 2016. Hence, this second appeal which was admitted on 10.2.2020 on the following substantial question of law:-

“Whether the learned Judges of both the Courts below substantially erred in law in dismissing the suit without appreciating that even if the plaintiff fails to prove that his father died prior to the enactment of Hindu Succession Act he has inherited at least 50% share in the suit property”.

10. Heard Mr. Soumak Bera, learned counsel representing the plaintiff (appellant herein) and Mr. Rwitendra Banerjee, learned counsel representing the defendant no.1. Others are not represented. The fate of this lis depends on the date or year of death of Sadhan Bhowmik.
11. In this case death certificate of Sadhan Bhowmik therefore, plays the crucial role. If it is found that he died before the Hindu Succession Act, 1956, came into force, the plaintiff shall crown success otherwise defendant no. 1 shall have her share in the property. It goes without saying that the plaintiff since asserts that his father died in the year 1955 and he has acquired the property to the exclusion of his sister, under Section 101 of the Evidence Act onus lies upon him to prove the same. It appears that the plaintiff, Nema Charan Bhowmik while

adducing evidence before the trial court during cross-examination stated:-

“At the time of hearing before the B.L.and L.R.O. I submitted the death certificate, but at the time of submitting the application for mutation I did not submit the death certificate of my father”.

12. This testimony of PW-1 is sufficient to hold that despite having the best evidence in his possession he has not filed the same before the learned trial court which would inspire the court to draw adverse presumption under Section 114 illustration (g) of the Indian Evidence Act.
13. Mr. Bera, learned counsel submits that with the promulgation of West Bengal Land Reforms Act, 1955 the work of R.S. settlement was kept in abeyance. Therefore, the revenue records of right (Exhbt. 1 and 2) series should be considered to be reliable documents to infer that Shri Sadhan Bhowmik, father of Nemai Charan Bhowmik was dead in the year 1955, otherwise revenue record would be in his name only.
14. It is further submitted by Mr. Bera that learned trial court relied upon a document which is a certificate issued by the Municipal Authority on 22nd May, 2010 while the suit was filed on 26.4.2010. The document was not even proved according to law. According to Mr. Bera in the year 1955 there was no scope to register the death of a person.
15. Learned Trial Court as well as learned First Appellate Court ought not to have relied upon the document to arrive at a decision which is under challenge, as palpably it is clear that the document was manufactured for the purpose of this suit.

16. Per contra, Mr. Banerjee submits that the partition suit was filed by one, Sattya Kinkar Mandal impleading the parties to this suit as defendant nos. 4 and 5 and the share of the plaintiff as well as defendants were decided in the partition suit .
17. The said preliminary decree passed on 30th May, 2008, (Exhbt. (g)/1 suggests that the parties to this suit are co-sharers, particularly when the plaintiff of this suit has accepted the decree.
18. True it is that the document Exhibit C, suggests that it was obtained in the month of May 2010 after filing of the suit. Therefore, learned courts below could not have relied upon the same to decide the suit.
19. However, when admittedly PW-1 is found to have withheld the death certificate of his father which he produced in getting his name mutated in Revenue Record, the court is left with no other option but to draw the inference that had the death certificate been produced it would have demonstrated that Sadhan Bhowmik died after 1956.
20. The record of right does not indicate the date of death of Sadhan Bhowmik. From the document Exhibit 1 and 2 series it can be said that at best Sadhan Bhowmik was not alive in the year 1968 when the LRROR was finally published. This belies claim of the defendant as to the death of her father in the year 1970 but it is not lending support to the case of the plaintiff.
21. Thus it appears that the plaintiff and defendant no. 1 being the son and daughter of Sadhan Bhowmik, the original owner of the property have acquired equal share in the properties, left by Sadhan Bhowmik. Therefore, learned trial court could not have any reason to dismiss the suit.

22. Learned Trial Court as well as learned First Appellate Court ought to have allowed the prayer of plaintiff and decreed the suit in part.
23. The substantial question of law as framed is thus answered in favour of the appellant.
24. Consequently, the appeal succeeds but in part.
25. The judgment and decree passed by learned courts below are set aside.
26. It is declared that both plaintiff and defendant no. 1 have $\frac{1}{2}$ share each in the property left by their father Sadhan Bhowmik.
27. Though Mr. Bera has filed an application inviting the court to frame additional substantial question of law but with all humility, I do not find those questions to be relevant to decide this appeal.
26. Let a copy of this judgment along with lower court records be sent down forthwith.
27. Urgent Photostat certified copy of this order, if applied for, be given to the parties upon compliance of all formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)