

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FA 63 of 2023
FAT 4 of 2017

Pritilekha Nayek & Ors.
versus
Gobinda Biswas & Ors.

For the Appellants : *Mr. Partha Pratim Roy,*
Mr. Dyutiman Banerjee.

For the Respondent No.1 : *Mr. Asis Chandra Bagchi, Ld. Sr. Adv.,*
Mr. Soumyadeep Biswas.

Hearing is concluded on : *20th April, 2023.*

Judgment On : **3rd May, 2023.**

Partha Sarathi Chatterjee, J.

1. Judgment and decree dated 21st September, 2016 passed by the learned Civil Judge, Senior Division, 1st Court at Krishnagar, Nadia in Title Suit No. 112 of 2012, whereby the suit was decreed in preliminary form declaring the shares of the parties to the suit in respect of the properties

delineated in Schedule –‘B’ appended to the plaint, are under challenge in the present appeal.

2. One Gobinda Biswas (in short, Gobinda) filed one suit for declaration with an alternative prayer for partition which was registered as Title Suit No. 112 of 2012. Facts spelt out in the plaint, which are germane, are as follows:

- i) Property described in schedule-‘B’ was originally belonged to one Debendranath Banerjee, who by dint of one registered deed of sale transferred a demarcated portion from ‘B’ schedule property, which has been described in schedule ‘A’ appended to the plaint, to his son, Ashok @ Arjun Banerjee (in short, Ashok) annexing one map with the deed and that portion of property was duly mutated in name of Arjun in LR R-O-R and also in the assessment register of Krishnagar Municipality and Arjun paid rents to the competent authority;
- ii) Ashok sold out that specific portion i.e. ‘A’ schedule property to the plaintiff by virtue of one registered deed of sale dated 18.06.2008 with a map annexed therewith and delivered possession thereof to the plaintiff, who also in the same manner got his name mutated in LR R-O-R and assessment register of Krishnagar Municipality and paid rents and since, an error had crept in the deed, one deed of rectification was also executed by Ashok in favour of Gobinda on 03.09.2010;

- iii) Gobinda claimed that after the possession was delivered to him, he entrenched that portion of property with one boundary wall and even fixed one grill gate at the entrance and he planted mango and other fruit bearing trees thereon;
- iv) The defendants are the co-sharers of 'B' schedule property and defendant nos. 1, 2 & 3 openly threatened to take forceful possession of 'A' schedule property from Gobinda and even Gobinda gave proposal to defendant nos. 1 to 3 to make partition of the entire 'B' schedule property if they were not ready to accept boundary of 'A' schedule property but the defendants rebuffed such claim of Gobinda and hence, the suit.

3. Following properties were described as 'A' and 'B' schedule properties:

'A' schedule – District- Nadia, P.S. Kotwali, Mouza- Krishnagar, J.L.No.92, Ward no. 19 (New) of Krishnagar Municipality, Holding no.32/2(new), Khatian no. 959(L.R.), Plot no. 2481 (RS) corresponding to 5120 (LR), Area- 3.90 out of 04 out of 68 decimals.

Measurement – North & South – 39 feet, Eastern Side- 34 feet, Western Side- 53 feet.

Boundary –

On the north – common passage (West to East);

On the south- House of Jiten Roy or RS plot no. 3356;

On the East – House of Subrit Sen or R.S.plot no. 25864;

On the West – House of Jayanta Roy or R.S.plot no. 3356.

‘B’ schedule - District- Nadia, P.S. Kotwali, Mouza- Krishnagar, J.L.No.92, Ward no. 19 of Krishnagar Municipality, Holding no.32/2(new), Khatian no. R.S. 2481, Plot no. 3356 (RS) corresponding to 5120(LR), Area- 68 decimals.

4. Only the defendant nos. 1, 2 & 3 (hereinafter referred to as the appellants) contested the suit by filing written statement. Specific defence taken by the appellants is as follows:

- i) Ashok acquired ownership of a specific demarcated portion of 04 decimals of land from his father, Debendranath by virtue of one deed of sale *vide.* no. 184 dated 18.12.198 and Ashok possessed that portion of land separately from other portion of R.S. plot no. 3356;
- ii) Arjun @ Ashok by virtue of two deeds of sale *vide.* nos. 3295 and 4605 dated 25.5.1999 and 30.6.1999 respectively sold out that specific portion of land, which is described as the ‘A’ schedule property, to Shibdas, husband defendant no.1, since deceased and to her with specific demarcation and delivered possession thereof to defendant no.1 and her husband and defendant no.1 and her husband erected boundary wall encircling the ‘A’

schedule property and fixed grill gate at the entrance and planted mango trees and other fruit bearing trees thereon;

- iii) Appellants claimed that the story which Gobinda depicted in the plaint to the extent that he was delivered possession of 'A' schedule property was nothing but a myth and no title in respect of 'A' schedule property has been passed on in favour of Gobinda by virtue of deed of sale dated 18.6.2008 and deed of rectification dated 3.9.2010 and story of mutation of 'A' schedule property in name of Gobinda and payment of rent by him are all false and the appellants are not the co-sharers of 'B' schedule property;
- iv) Gobinda having failed to take forceful possession of 'A' schedule property, filed one complaint against Arjun @ Ashok before the Court of learned Chief Judicial Magistrate, Krishnagar basing upon which a specific case vide. Kotwali P.S. case no. 84 of 2012 U/s. 467/468/472/420/406 IPC was started against Ashok wherein it was alleged that Ashok sold out 'A' schedule property to defendant no.1 and her husband in 1999 and again sold out the same to Gobinda and hence, Ashok committed offences punishable under the aforesaid provisions of the Indian Penal Code. It was claimed

therein that Gobinda suppressed the material facts and did not come to the Court with clean hands.

5. Records reveal that upon the pleadings of the respective parties, learned Court below framed as many as 7 (seven) issues and plaintiff adduced oral testimonies of two witnesses whereas the defendant nos.1 to 3, appellants herein, refuted the claim of the plaintiff by adducing oral evidence of three witnesses and both the parties tendered certain documents in support of their respective claims which were admitted in evidence as Ext. nos.1 to 7 and Ext. nos. A to F.

6. Suit was decreed in preliminary form declaring that plaintiff and appellants are entitled to shares of 0.039 acres and 04 acres of land respectively whereas other defendants are entitled to share of 0.609 acres of land from 'B' schedule property.

7. Aggrieved thereby, appellants impugned the judgment contending *inter alia* that learned Court below ought to have held that Gobinda is not a co-sharer in respect of the suit property and that Ashok had no transferable right in respect of 'A' schedule property after selling the same to defendant no. 1 and her husband and learned Court below committed error in holding that the boundary depicted in the sketch map of deed of 1989 is different from the boundary incorporated in the deed of defendant no.1 and her husband.

8. Mr. Roy, learned advocate for the appellants submits that Ashok got a definite and/or demarcated portion from his father and Ashok sold out

that demarcated portion to defendant no.1 and her husband and hence, defendant no.1 and her husband cannot be stated to be co-sharers with other co-sharers of 'B' schedule property and he argues that Gobinda himself in his complaint filed against Ashok admitted that Ashok sold out same portion to defendant no.1 and her husband and then to Gobinda. Taking us to sketch maps of both the deeds of Ashok and deeds of defendant no.1 and her husband wants to convince that same demarcated portion was sold out to defendant no.1 and her husband and he contends that actually, common passage was constructed on the northern side of the 'A' schedule property. He argues that 'A' schedule property cannot be held to be partible. According to Mr. Roy, the learned Court below has made out a third case and erroneously decreed the suit in preliminary form. To bolster his submission, he placed reliance upon the judgments delivered in cases of *Rabi Kumar Dass & Ors. -vs- Chittaranjan Das & Ors.* reported in 2006(4) CHN 302, *Labanya Bala Debi -vs- Parul Bala Debi & Ors.* reported in AIR 1973 Cal 367.

9. In response, Mr. Bagchi, learned advocate for the respondent argues that schedules and boundaries of deed by which Ashok purchased from his father and of the deed by which Ashok transferred to defendant no.1 and her husband are different and Gobinda and appellants are in possession of the portions of the suit property. So, in the given situation, partition is the only remedy and according to Mr. Bagchi that if it is found that same portion has been sold out to appellants and Gobinda, then benefit under Section 43 of Transfer of Property Act should be granted to both of

them by feeding their grants. He contends that insertion of word 'proposed' in the boundary appended in the deed itself speaks that property was joint. He asserts that learned Court below rightly directed partition of the suit property leaving no scope to interfere with the same.

10. A close scrutiny of the judgment impugned will speak that the learned Court held a specific demarcated portion was sold to Ashok by his father but the boundary and the sketch map appended to that deed does not resemble with the boundaries and sketch maps appended to deeds of defendant no.1 and her husband since in the former deed, four feet wide common passage was said to have been situated on the eastern side whereas in the later deeds, four feet common passage was said to have been situated on the northern side. Learned Court below held that at the time of execution of deeds in favour of defendant no.1 and her husband, Ashok inherited interest in 'B' schedule property along with other co-sharers thereof. Learned Court below held that in given situation neither Section 48 nor Section 43 of Transfer of Property Act shall be applicable and although Gobinda failed to prove that he acquired ownership of specific 'A' schedule property but preponderance of probability suggests that Gobinda and appellants were co-sharers along with others in respect of 'B' schedule property.

11. Indisputably, by dint of one registered deed of sale *vide*. no. 184 dated 18.12.1989 (Ext.-1), Debendranath Banerjee sold out 0.04 decimals of land to Ashok from R.S. plot no. 3356 incorporating measurement and boundary in the deed in the following words:

On the north – 36'-6", R.S. Plot no. 3356 of Debendranath; On the south – 53' land of 'C' block;

On the east – 39', R.S. Plot no. 3356 of Debendranath;

On the west – 39', proposed 4' ft. common passage.

Measurement and boundary of deed *vide.* no. 3295 dated 25.5.1999 whereby Arjun @ Ashok sold out 0.02 decimals of land to husband of defendant no.1, namely, Shibdas Nayak speaks as follows :

On the north- 18' – common passage;

On the south- 24'- House of Dipak Banerjee;

On the east – 39'- House of Sanjay Sen;

On the west – 39'- land of vendor.

Measurement and boundary of deed *vide.* no. 4605 dated 30.6.1999 whereby Arjun @ Ashok transferred 0.02 decimals of land to defendant no. 1 speaks as follows:

On the north – 18'-6" – common passage;

On the south- 29'- house of Dipak Banerjee;

On the east- 35'- land of Shibdas Nayak;

On the west- 39'- land of Animesh Banerjee.

12. In the recital of deed *vide.* no. 184 a specific and demarcated portion from 'B' schedule property was alienated to Ashok @ Arjun. It is

trite law that if one owner sells any specific portion with defined area and boundary, then that portion cannot be part of other portion of the property and hence, there cannot be unity of title and possession of 'A' schedule and 'B' schedule property. [See the case of *Labanya Bala Debi (supra)*].

13. Now, question is whether same portion was sold out to defendant no.1 and her husband by Arjun @ Ashok.

14. In the recitals of deeds *vide.* nos. 3295 and 4605, Arjun @ Ashok admittedly recited that he sold out the portion which he got from his father by virtue of the deed *vide.* no. 184. Measurements mentioned in the deed *vide.* no. 184 and measurement of deed *vide.* nos. 3295 and 4605 conjointly resemble and/or tally with each other and only difference is that in the deed *vide.* no. 184, proposed common passage was shown in the western side whereas in other two deeds, which were executed almost after 10 years, common passage was shown to have been situated on the northern side. Neither of parties has asked for appointment of commissioner to ascertain that proposed common passage was actually constructed on the western side or on the northern side. However, in absence of any definite evidence, no prudent man can hold that the proposal came into reality and common passage was actually constructed on the western part of portion sold out to Ashok @ Arjun by Debendranath and then to defendant no.1 and her husband by Arjun @ Ashok. In the deed of Shibdas, on the western side, it was mentioned that Ashok had his own land whereas in the deed of defendant no.1, on the western side, land of Animesh Banerjee has been

mentioned which speaks that in the meantime, land lying on the western side was acquired by Animesh Banerjee.

15. It is well-established principle that when there is inconsistency in the body of the document containing evidence clause and the schedule, the former prevails over the later. As such when the intention of the parties is clear, the schedule or map or boundary to the document should not have been allowed to override the recital clause and in this regard, reference can be made to the judgment delivered in case of *Narayana -vs- Kumaran*, reported in (2004) 4 SCC 26.

16. Intention of the author of the document shall be gathered from the recital of the deed and from the recital of the deeds of Shibdas and defendant no. 1, it is crystal clear that Ashok @ Arjun intended to alienate the portion which Ashok got from his father and hence, such recital shall prevail over the map or boundary.

17. Conjoint reading of the recitals of the deed *vide*. no. 184, recital of deeds of Shibdas and defendant no. 1, complaint (Ext.-F) and pleadings and evidence of respective parties suggests that the 'A' schedule property which Arjun @ Ashok got from his father had been sold out to Shibdas and defendant no.1 in 1999 and preponderance of probability suggests that claim of appellants to the extent that although the common passage was proposed to be constructed on the western side but in reality, it has been constructed on the northern side appears to be probable and the learned Court below committed mistake in not considering this aspect and from

the deed of Gobinda and from Ext.-F, it is evident that 'A' schedule property has also been sold out to Gobinda in 2008 by Arjun @ Ashok.

18. Section 48 of Transfer of Property Act, 1882 (in short, T.P. Act) provides that where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created. Section 48 of T.P. Act is based on a maxim- *qui prior est tempore potior est jure* which means 'he who is prior in time is better in law'. When the same property is transferred by the same person to different persons by different documents, earlier transferee has priority over the subsequent transaction of transfer. Hence, the transfer made in favour of Shibdas and defendant no. 1 shall prevail over the transfer made in favour of Gobinda.

19. In such sequence of facts, we have no qualm to hold that a specific and demarcated portion from 'B' schedule property being the property delineated in schedule-'A' was alienated to Shibdas and defendant no. 1 and such 'A' schedule property cannot be part and parcel of 'B' schedule property and 'A' schedule property is not partible amongst the co-sharers of 'B' schedule property and appellants cannot be held to the co-sharers with other co-sharers of 'B' schedule property.

20. Undoubtedly, Ashok @ Arjun has inherited share in 'B' schedule property on demise of his father, Debendranath. Section 43 of T.P. Act lays down that where a person fraudulently or erroneously represents that he is

authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists but nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

21. Section 43 of T.P. Act is based on the principle of estoppel. Where vendor sells without title in the property but subsequently acquires title, then a right accrues to the purchaser to claim interest in the said property and it can go in favour of the transferee if the transferee opts to acquire interest therein.

22. Hence, if Ashok @ Arjun has any interest in 'B' schedule property, Gobinda shall acquire interest to the extent of 0.0390 acres of land from the share of Ashok @ Arjun lying in 'B' schedule property. 'B' schedule property shall be deemed to be land comprising of an area of 64 decimals excluding the portion of land transferred to the appellants. Liberty is granted to Gobinda to claim such benefits, in accordance with law.

23. In the result, the appeal succeeds. Judgment and decree are set aside. It is held that 'A' schedule property cannot come within the hotchpot of the suit for partition and the suit in present form is dismissed. Parties shall bear their own costs.

24. Let a decree be drawn up, accordingly.

25. Let a copy of this judgment along with LCR be sent down to the learned Court below forthwith.

26. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)