

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

BEFORE:-

THE HON'BLE JUSTICE RAJASEKHAR MANTHA
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA

F.A. No. 222 of 2008

SMT. BELA RANI SAHA

-VERSUS-

DEITY SHRI SHRI BROJAJUGAL AND SHRI SHRI RADHA KRISHNA BIGRAHA
REPRESENTED BY THE TRUSTEES SRI MANINDRA KUMAR ROY AND OTHERS

With

F.A. No. 47 of 2013

MONINDRA KUMAR ROY & ORS.

-VERSUS-

SUDHIR KUMAR SAHA & ORS.

Mr. Sibasish Ghosh

...for the appellant (in F.A. 222 of 2008)

Mr. Partha Pratim Ray,

Mr. Dyutiman Banerjee

for the respondent nos. 1, 2, 3 and 5

Ms. Shohini Chakraborty,

Mr. Arijit Sarkar

....for the appellant (in F.A. 47 of 2013)

Mr. Asit Baran Rout,

Ms. Shila Sarkar

..for the respondents (in F.A. 47 of 2013)

Hearing Concluded On : 30.08.2023

Judgment On : 11.09.2023

Rajasekhar Mantha, J.

1. The instant appeal (FA No. 222 of 2008, Smt. Bela Rani Saha v. Deity Shri Shri Brajojugal and Shri Shi Radha Krishna Biggraha represented by the Trustees Sri Manindra Kumar Roy and Others) is directed against the judgment dated 24th December 2007 passed by the Learned Civil Judge, Senior Division, Malda in OC Suit No. 14 of 1985. In the plaint the appellant sought the following reliefs:-

“17) Plaintiff prays for:-

Ka) Declaration that the (ka) schedule properties are the properties at the Brojojugal Idols by the deed of gift executed by Jugol Moni Dasya and that the two Idols have no to the and cannot have any title in (kha) (Ga) and (Gha) schedult properties.

Kha) Declaration that the plaintiff has zx right and title in the landed properties, ornaments and uteusile described in (kha), (Ga) and (Gha) schedule properties because the plaintiff is the daughter of Jugol Moni Dasya's husband's brother and hence under the Hindu Succession Act the plaintiff is the heir of Jugol Moni Dasya.

Ga) Permanant Injunction restraining the defendants nos. 1 to 8 from causing obstruction in plaintiff's enjoyment and possession of (kha), (Ga) and (Gha) schedule properties in suit and /or transferring the said properties in any manner and /or removing the (G) schedule ornaments kept in the Locker at defdt. No. 9 Bank acquired by plaintiff as heir at Jugol Moni and permanent injunction restratning the defeat. no. 9 Bank from allowing the defendants. nos. 1-8 to remove the zombat contents of the locker.

Gha) Decree for cost of the suit.”

2. This appeal was heard along with FA No. 47 of 2013 (Monindra Kumar Roy and others v. Sudhir Kumar Saha and others).

3. The said FA 47 of 2013 has been filed against the judgment and order dated 31st March 2012 passed by the Learned District Judge at Malda in an application being Misc. Case No. 1 of 2003 under Section 92 of the Code of Civil Procedure, 1908. The applicant was Sudhir Kumar Saha, son of Mohit Kumar Saha, another named trustee in the original Arpannama of Jugol Moni Dasya, of the year 1970. The said Sudhir Kumar Saha, a member of the Maheswari Vaishya Saha community, filed an application for the removal of trustees alleging various acts of omissions, commissions and mismanagement against them.
4. Since the subject matter of OC 14 of 1984, is similar to the subject matter of Misc. Case No. 1 of 2003, out of which FA 222 of 2008 arises, a common judgment is proposed to be passed. The evidence in the two appeals are vitally interlinked to each other. The decision in FA 222 of 2008 will have a vital bearing on FA 47 of 2013.

FACTS OF THE CASE

5. The plaint is amended subsequently, to include the names of the legal heirs of the original 4, 7, and 9 defendants. The original defendant nos. 1 to 8 were the trustees.
6. The Appellant/plaintiffs', Bela Rani Saha and Shankar Saha, case in the plaint was as follows:-
 - a. One Amrita Lall Saha, a Soundra Kshatriya by caste, died in the month of Shravan 1324 BS (Bengali Calendar year) leaving behind his 2nd wife and daughter Lalit Moni Saha and Jugol Moni Saha respectively. The wife, Lalit Moni Saha, died later.

- b. Jugol Moni Saha was married to Brojendra Nath Saha. He died in the year 1977. Jugol Moni Saha died on 10th January 1985, leaving no surviving issue of her own. She had three children (two daughters and one son), born out of her wedlock with Brojendra Nath Saha, but they died as minors during her lifetime. It later transpired in the suit that Brojendar nath Saha was from a poor family and brought up by Amrita Lall Saha in his house. Jugol Moni was given in marriage to Brojendra Nath and lived in Amrita Lall's house as a domesticated son-in-law.
- c. Jugol Moni Saha, later known as Jugol Moni Dasya, inherited the money-lending business from her father. She was a pious and religious lady. Having no heirs of her own, she settled and established a religious trust (Debuttar) by a registered Arpannama dated 21st October 1970 (Exhibit 6), called "Shri Shri Brajajugal, and deity Shri Shri Radha Krishna", located at her own house, at Fulbari Ghat Road, Malda Town, P.S. English Bazar, District Malda.
- d. The property mentioned in 'Ka' schedule of the plaint was admittedly dedicated to the trust. In terms of the trust deed/Arpannama dated 21st October 1970, Jugool Moni Dasya named herself as the first trustee. It was further stipulated in the trust deed that after her death, her husband, namely, Brojendra Nath Saha would be the sole trustee. If, however, her husband died during her lifetime the original defendants, 8 in number, shall act as trustees. They were Manindra Kumar Roy, Jitendra Nath Saha, Dwijendra nath Saha, Mohit Kumar

Saha, Pramatha Nath Saha, Tarun Kumar Saha, Tapan Kumar Saha, and Phani Bhushan Saha

- e. Brojendra Nath Saha died before Jugol Moni Dasya. There were thus 8 named surviving trustees. On the death of Jugol Moni Dasya, the original defendant nos. 1 to 8 were in possession of the 'Ka' schedule property that was dedicated in the name of the Deity. The said properties included immovable land i.e. buildings, structures, certain mango orchards, and certain other lands. The movable property included certain gold and silver ornaments of the deities, old valuable coins and utensils used for the seba puja of the Deities themselves.
- f. During her lifetime Jugol Moni Dasya had acquired other landed properties including gold and silver ornaments and utensils. Jugol Moni Dasya also acquired several personal properties, more fully described in schedules 'Kha', 'Ga', and 'Gha', in her own name, out of the profits from the money-lending business inherited from her father and cultivation of land standing in her name.
- g. The trust deed dated 21st October 1970 (Exhibit 6) further provided that all the trustees are to be members of the Maheshwari Vaisya Saha Community. In the event of any disputes and differences with regard to the maintenance of worship of the temple and the deities, or if any of the trustees act detrimental to the trust properties, or if otherwise, any disputes between the trustees arise, the local Maheshwari Vaisya Saha Community was to call for a meeting by advertisement and appoint new trustees. The dedicated properties were to belong to the Deities.

Admittedly the Deities were perpetual minors as per the Dayabhaga School of Hindu Law.

- h. The trustees were authorized to engage a Brahmin priest to conduct the Seba Puja of Idol, and also remove him, if necessary. The trustees were authorized to purchase properties in the name of the Deity, construct buildings and properties, and maintain the same. The trustees were entitled to let out the properties of the trust and receive rent by giving receipts. The President, Cashier, and Secretary of the Trust were all to be Brahmins, who would work without remuneration. Their expenses were, however, to be borne out of the income of the Trust.
- i. The trustees were entitled to engage advocates and pleaders in connection with the Debuttar property. In case the properties of the Deities were acquired by the Government, the trustees were to receive the compensation money or rent or any other money due from the Debuttar properties.
- j. The trustees were to maintain books of accounts and receipts of expenditure and file yearly accounts with the Maheshwari Vaisya Saha Community in an annual meeting. The trustees were also liable for prosecution, both civil and criminal, for breach of trust.
- k. If any person offers money or other valuable gifts to the Deities, the same would become part of the trust property.
- l. Poor Brahmins were to be fed out of the daily offerings to the Deities. Rs. 2500/- of the annual income was to be reserved for the Seba Puja of the Deities. The balance sums of money were to be spent for

religious ceremonies. The schedule of properties dedicated to the Trust was clearly mentioned in the trust deed.

7. The plaintiff/appellant, Bela Rani Saha is the niece of Jugol Moni Dasya. She is the daughter of Khagendranath Saha, who was the brother of the late husband of Jugol Moni Dasya i.e. Brojendra Nath Saha. The plaintiff/appellant claimed that she looked after the late Jugol Moni Dasya in her last days and until her death. After the death of Jugol Moni Dasya on 10th January 1985, the plaintiff/appellant removed and secured some of her jewellery and utensils under lock and key.
8. Before her death, Jugol Moni Dasya had handed over the original deeds of her personal properties to the plaintiff/appellant. After the death of the settlor the trustees forcibly took possession, broke open the padlock of an almirah, took away some documents, all the gold and silver ornaments, and deposited them with the respondent no. 9, United Industrial Bank at Malda, subsequently merged with Allahabad Bank, now merged into Indian Bank.
9. It was alleged that after the death of the settlor the defendant nos. 1 to 8 tried to sell her personal property, particularly the mango orchard inherited by the plaintiff. They also prevented the Bargadars (Tillers and Share Croppers) in possession of the said land from delivering the produce of the property to the land. Defendant no. 1, Manindra Nath Roy is stated to have coerced and induced the late Jugol Moni Dasya during her lifetime to sell the mango orchard for a sum of Rs. 65,000/- and is also stated to have appropriated the entire sum of money.

10. It was further alleged that the late Jugol Moni Dasya, during her lifetime, relied upon the advice of defendant nos. 1 and 4. The gold and silver ornaments were taken out of the locker of the bank by the trustees to conduct the funeral ceremony of Jugol Moni Dasya. Around 3713 ancient Indian coins with a market value of Rs. 148520 in 1985, were also appropriated by the trustees. The mango orchards at Begumnagar and Sadiquepur sold by Jugol Moni Dasya during her lifetime on the advice of Manindra Kumar Roy through a power of attorney in the year 1982 (Exhibit E). The trustees deposited a sum of Rs. 50,500/- only to the Union Trust of India, and misappropriated the balance sum of Rs. 14,500/-.

PROCEEDINGS IN THE COURT BELOW

11. Written statements were filed by the defendant nos. 1, 3, 5 to 8. The defendant nos. 10, 11, 12, and 13 filed a separate written statement on 20th December 1985 opposing the plaintiff's claims. They espoused the rights of the legal heirs of Jugol Moni's uncle, Srinath Saha (brother of Amrita Lall Saha) in respect of the personal properties of Jugol Moni Dasya. They alleged that another trustee, Phani Bhushan Saha misappropriated 3713 silver coins kept in the wall of Jugol Moni Dasya's house. Defendant no. 2 Jitendra Nath Saha, on 23rd September 1985 and defendant no. 4 Mohit Kumar Saha on 24th September 1985 filed independent written statements and made allegations against the other trustees. Defendant no. 2, Jitendra Nath Saha stated he was never involved in the management of the Trust property. He did not accept or

act upon his appointment as a trustee. His signature on some blank papers and a blank vakalatnama was obtained by the other trustees. He was working with Customs Department, and posted far away from Malda for 2 decades, at Siliguri. He did not approve or sign any objection to the application for injunction and for 'Receiver', filed by the plaintiff.

12. Additional written statements were filed by defendant nos. 1, 3, 5 to 8 after the plaintiff amended the plaint on 23rd February 1988. An amended written statement was also filed by defendant nos. 1, 3, 5 to 8 on 1st October 2007 for the first time introducing the purported two Trust deeds of 28th March 1977 (Exhibit G) allegedly executed by the Jugol Moni Dasya.

13. The Court below framed 11 issues as follows:-

"1. Is the suit maintainable in its present form?"

2. Are the properties mentioned in the schedule 'ka' of the plaint, the dedicated properties of Jugalmoni Dassy a in favour of the deities "Brojugal" and "radhakrishna" ?

3. Are the immovable properties described in the schedule 'kha' of the plaint and movable properties described in the schedule 'Ga' and 'gha' of the plaint, the personal properties of Jugalmoni Dassy?

4. Had Jugalmoni Dassy any knowledge of any deed of dedication alleged to have been executed by her in respect of the properties schedule 'kha' in the year 1977?

5. were such alleged deeds of dedication of 1977 acted upon ?

6. Was such deeds of dedication of 1977 genuine deed?

7. Are the properties mentioned in the schedule kha' 'Ga' & Gha' of the plaint, the self- acquired property of Jugalmoni ?

8. Is the plaintiff the only legal heir of Jugalmoni and entitled to inherit the properties both immovable and movable described in the schedule 'kha', 'Ga' & 'Gha' of the Plaint?

9. Is there any existence of the ornaments - Gold and silver as described in schedule 'Ge of the plaint and if so who is in custody of such properties?

10. Is the plaintiff entitled to get decree in this suit as prayed for?

11. To what other relief plaintiff may be entitled?"

14. As many as 24 documents were exhibited by the plaintiff. The defendants exhibited 6 documents. The plaintiff examined two witnesses PW1 (plaintiff no. 1) and PW2 (Plaintiff no. 2). The defendants examined Phani Bhushan Saha, defendant no. 8 (DW!), Dwijendra Nath Saha, defendant no. 3 (DW2), and one Manbabul Haque, an employee of the local Sub-Registrar as DW3. Arguments were heard and judgment was delivered on 24th December 2007.
15. F.A. no. 47 of 2013 has been filed to challenge a decision of the District Judge, Malda, in an application being Misc. Case No. 1 of 2003, under Section 92 of the CPC, 1908, which found that the 7 trustees of the Trust/Debutter property, were guilty of mismanagement and were removed.
16. The judgment and decree dated 24th December 2007 in OC No. 14 of 1985 was accepted and considered in the said Misc case No. 1 by the District Judge. It is essentially based on the said judgment dated 24th December 2007 that was passed by the Ld. Civil Judge (Sr. Div.) in O.C. Suit No. 14 of 1985 that the District Judge of Malda decided Misc. Case no. 1 of 2003.
17. In the said Misc. case, Sudhir Kumar Saha deposed in evidence. The trustees Monindra Nath Saha, Jitendra Kumar Saha, Tarun Kumar Saha, Tapan Kumar Saha, Phani Bhushan Roy, and Tushar Kanti Saha only filed written objection but did not depose oral evidence. Arguments were heard thereafter and judgment was delivered on 31st March 2012.

18. It appears to this Court, after considering the evidence in both the appeals, that three persons, namely, Manindra Nath Saha, Dwijendra Nath Saha, and Mohit Kumar Saha had been assisting, advising, and managing the late Jugol Moni Dasya since about 1970. Eventually, disputes and differences cropped up between Mohit Kumar Saha on the one side and the other two trustees Manindra Nath Saha and Dwijendra Nath Saha, supported by some other trustees, most likely in connection with the sale of the property at Begumnagar and Sadiqpur, pursuant to a power of attorney dated 13th September 1982 (Exhibit E). Subsequently, Mohit Kumar Saha joined the side of Bela Rani Saha.
19. In the amended written statements filed in 2007, the said defendant nos. 1, 3, 5 to 8 mentioned for the first time, the existence of two additional Arpannamas/ trust deeds/ amendment classification deeds dated 28th March 1977 (Exhibit G). By the said 2 deeds of March 1977, Jugol Moni Dasya is alleged to have dedicated the properties mentioned in schedules 'Kha', 'Ga', and 'Gha' in the plaint to the deities Trust properties. The said defendants did not mention the existence of the 1977 Arpannamas any time before. Mohit Kumar Saha, defendant No. 4, appears to have been aggressively attacked by the other trustees and defendants. As on date, there is only one surviving trustee, the rest have all died.
20. At the interlocutory stage in the suit, one Baidya Nath Saha, who was the husband of the plaintiff/appellant, Bela Rani Saha, was appointed as 'Receiver' in the suit. The appointment was made immediately after the death of Jugol Moni Dasya. Mohit Kumar Saha took the side of Bela Rani Saha and her husband and fell apart with the other 8 trustees. Having

failed to succeed in the instant suit, Sudhir Kumar Saha, son of Mohit Kumar Saha, who died thereafter, took up cudgels against the other trustees and instituted an application under Section 92 of the CPC being Misc Case No. 1 of 2003.

21. On behalf of Bela Rani Saha, her son Sankar Saha is now pursuing the suit. His father Baidya Nath Saha (since deceased) was appointed as 'Receiver' by the District Court, for overseeing the affairs of the entire properties, religious and secular, of late Jugol Moni Dasya along with Mohit Kumar Saha and his son Sudhir Kumar Saha.

THE DECISION OF THE COURT BELOW

22. The Civil Judge Senior Division Malda in O.C. Suit No. of 1985, came to the conclusion that the properties in schedule 'kha', 'ga', and 'gha' were self-acquired by Jugol Moni Dasya. The said finding is based on the evidence that has come on record that the title deed of the properties was in the name of Jugol Moni Dasya where she described herself to be engaged in the business of money-lending and cultivation. The Civil Judge also found that bela rani Saha was the legal heir of late Jugol Moni Dasya. The Court, however, found favour with the 2 Arpannamas dated 28th march 1977 (Exhibit G) and held that all the suit properties under the 4 schedules 'ka', 'kha', 'ga', 'gha' were dedicated to the deities hence the plaintiff could not claim any right on the same despite being the only legal heir of Jugol Moni Dasya.

THIS COURT'S ANALYSIS AND FINDINGS

23. This Court is in agreement with the findings of the Court below, in respect of issue nos. 1 to 3, and 7 to 11. The other issues, in respect of the two deeds of dedication dated 28th March 1977, nos. 5146 of 1977 and 5145 of 1977 (Exhibit G), however, need an appropriate reconsideration.
24. The said two deeds dated 28th March 1977 were not mentioned in the original written statements filed by the respondent trustees. They came to be referred for the first time in an amended written statement, filed by the 6 trustees in 2007, i.e. 12 years after the filing of the suit. The original deeds dated 28th March 1977 (Exhibit G) were not even produced by the said 6 contesting trustees/defendants. What was produced in the Court below was the volume extracts from the records of the Office of the Registrar of Assurances at Malda.
25. Md. Mahbabul Haque, DW 3, who was an employee of the Office of the Registrar of Assurances at Malda, clearly stated that he had not produced the LTI of Jugol moni Dasya on the said deeds dated 28th March 1977 in Court. He was not aware where the original LTI was. None of the respondent trustees, except saying that the original deeds were lost, made any effort to indicate how the said deeds dated 28th March 1977 were executed, who prepared the deeds, who was the scribe, or who witnessed the same and under what circumstances were they executed.
26. The circumstances under which alleged deeds of dedication, of 1977, were prepared, have not been brought on record. The said two deeds of 1977 also do not find mention in the power of attorney executed by the settler

dated 13th September 1982 (Exhibit E). It has come on record that in the year 1982 the settler was allegedly desirous of selling a mango orchard in Begumnagar and Sadiqpur. She is stated to have executed a power of attorney on 13th September 1982 (Exhibit E) in favour of 3 named trustees for the said purpose. In the recitals of the power of attorney she mentioned only the trust deed dated 21st October 1970 (exhibit 6). There is no mention of execution of the purported trust Deeds of 1977 (Exhibit G). This is so as such deeds of 1977 were neither executed by Jugol Moni Dasya nor were in existence at the relevant point of time. The manner of production and proof of a certified copy of a document is laid down under Section 64 and 65 of the Evidence Act, 1872.

27. In the case of **Rakesh Mohindra v. Anita Beri** reported in **(2016) 16 SCC 483**, the Supreme Court in paragraphs 16, 17, 20 and 22 has stated as follows:-

“16. The High Court in the impugned order [Anita Beri v. Rakesh Mohindra, 2014 SCC OnLine HP 4258 : AIR 2014 HP 63] noted the following: (Anita Beri case [Anita Beri v. Rakesh Mohindra, 2014 SCC OnLine HP 4258 : AIR 2014 HP 63] , SCC OnLine HP para 9)

“9. There is no averment about Ext. DW 2/B in the written statement. The written statement was filed on 19-2-2007. Ext. DW 2/B in fact is only a photocopy. The plaintiffs are claiming the property on the basis of a registered gift deed executed in her favour in the year 1984. It was necessary for the defendant to prove that in what manner the document dated 24-8-1982 was executed. The defendant while appearing as AW 1 has admitted in his cross-examination that except in his affidavit, Ext. AW 1/A, he has not mentioned in any document that the letter of disclaimer was executed by Justice late Shri Tek Chand in his presence. The statement of DW 2 does not prove that Ext. DW 2/A, ever existed. DW 2 Shri Gurcharan Singh, has categorically admitted in his cross-examination that he has not brought the original of Ext. DW 2/B. He has also admitted that on Ext. DW 2/B, the signatures of P.C. Danda were not legible. Volunteered that, those were not visible. The learned trial court has completely misread the oral as well as the documentary evidence, while allowing the application under Section 65 of the Evidence Act, 1872, more particularly, the statements of DW 2 Gurcharan Singh and DW 3 Deepak Narang. The applicant has miserably failed to comply

with the provisions of Section 65 of the Evidence Act, 1872. The learned trial court has erred by coming to the conclusion that the applicant has taken sufficient steps to produce document, Ext. DW 2/B.”

17. The High Court, following the ratio decided by this Court in *J. Yashoda v. K. Shobha Rani* [*J. Yashoda v. K. Shobha Rani*, (2007) 5 SCC 730 : (2007) 3 SCC (Cri) 9 : AIR 2007 SC 1721] and *H. Siddiqui v. A. Ramalingam* [*H. Siddiqui v. A. Ramalingam*, (2011) 4 SCC 240 : (2011) 2 SCC (Civ) 209 : AIR 2011 SC 1492], came to the conclusion that the defendant failed to prove the existence and execution of the original documents and also failed to prove that he has ever handed over the original of the disclaimer letter dated 24-8-1982 to the authorities. Hence, the High Court is of the view that no case is made out for adducing the secondary evidence.

20. It is well settled that if a party wishes to lead secondary evidence, the court is obliged to examine the probative value of the document produced in the court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law.

22. After considering the entire facts of the case and the evidence adduced by the appellant for the purpose of admission of the secondary evidence, we are of the view that all efforts have been taken for the purpose of leading secondary evidence. The trial court has noticed that the photocopy of Ext. DW 2/B came from the custody of DEO, Ambala and the witness, who brought the record, has been examined as witness. In that view of the matter, there is compliance with the provisions of Section 65 of the Evidence Act. Merely because the signatures in some of the documents were not legible and visible that cannot be a ground to reject the secondary evidence. In our view, the trial court correctly appreciated the efforts taken by the appellant for the purpose of leading secondary evidence.”

28. In the case of **H. Siddiqui v. A. Ramalingam** reported in (2011) 4 SCC

240, the Supreme Court at paragraphs 11 to 17 had held as follows:

“11. In view of the pleadings, as the respondent has specifically denied the execution of a power of attorney in favour of R. Viswanathan, Defendant 2 in the suit (not impleaded herein), the main issue could be as to whether the power of attorney had been executed by the respondent in favour of R. Viswanathan enabling him to alienate the suit property and even if there was such power of attorney whether the same had been proved in accordance with law.

12. The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation

been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide *Roman Catholic Mission v. State of Madras* [AIR 1966 SC 1457], *State of Rajasthan v. Khemraj* [(2000) 9 SCC 241 : AIR 2000 SC 1759], *LIC v. Ram Pal Singh Bisen* [(2010) 4 SCC 491 : (2010) 1 SCC (L&S) 1072 : (2010) 2 SCC (Civ) 191] and *M. Chandra v. M. Thangamuthu* [(2010) 9 SCC 712 : (2010) 3 SCC (Civ) 907] .)

13. The trial court decreed the suit observing that as the parties had deposed that the original power of attorney was not in their possession, question of laying any further factual foundation could not arise. Further, the trial court took note of the fact that the respondent herein has specifically denied execution of power of attorney authorising his brother, R. Viswanathan to alienate the suit property, but brushed aside the same observing that it was not necessary for the appellant-plaintiff to call upon the defendant to produce the original power of attorney on the ground that the photocopy of the power of attorney was shown to the respondent herein in his cross-examination and he had admitted his signature. Thus, it could be inferred that it is the copy of the power of attorney executed by the respondent in favour of his brother (R. Viswanathan, the second defendant in the suit) and therefore, there was a specific admission by the respondent having executed such document. So it was evident that the respondent had authorised the second defendant to alienate the suit property.

14. In our humble opinion, the trial court could not proceed in such an unwarranted manner for the reason that the respondent had merely admitted his signature on the photocopy of the power of attorney and did not admit the contents thereof. More so, the court should have borne in mind that admissibility of a document or contents thereof may not necessarily lead to drawing any inference unless the contents thereof have some probative value.

15. In *State of Bihar v. Radha Krishna Singh* [(1983) 3 SCC 118 : AIR 1983 SC 684] this Court considered the issue in respect of admissibility of documents or contents thereof and held as under : (SCC p. 138, para 40)

“40. ... Admissibility of a document is one thing and its probative value quite another—these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil.”

16. In *Madan Mohan Singh v. Rajni Kant* [(2010) 9 SCC 209 : (2010) 3 SCC (Civ) 655 : AIR 2010 SC 2933] this Court examined a case as a court of fifth instance. The statutory authorities and the High Court had determined the issues taking into consideration a large number of

documents including electoral rolls and school leaving certificates and held that such documents were admissible in evidence. This Court examined the documents and contents thereof and reached the conclusion that if the contents of the said documents are examined making mere arithmetical exercise it would lead not only to improbabilities and impossibilities but also to absurdity. This Court examined the probative value of the contents of the said documents and came to the conclusion that Smt Shakuntala, second wife of the father of the contesting parties therein had given birth to the first child two years prior to her own birth. The second child was born when she was 6 years of age; the third child was born at the age of 8 years; the fourth child was born at the age of 10 years; and she gave birth to the fifth child when she was 12 years of age.

17. Therefore, it is the duty of the court to examine whether the documents produced in the court or contents thereof have any probative value.”

29. In the case of **J. Yashoda v. K. Shobha Rani** reported in **(2007) 5 SCC**

730 at paragraphs 7 to 10, it was held as follows:

“7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the section declares that secondary evidence “means and includes” and then follow the five kinds of secondary evidence.

9. The rule which is the most universal, namely, that the best evidence the nature of the case will admit shall be produced, decides this objection. That rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided (sic proved) by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section. In *Ashok Dulichand v. Madahavlal Dube* [(1975) 4 SCC 664] it was inter alia held as follows : (SCC pp. 666-67, para 7)

“7. After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of Section 65 of Evidence Act, secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on 4-7-1973, before Respondent 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case Respondent 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of Respondent 1. There was also no other material on the record to indicate that the original document was in the possession of Respondent 1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent 1 in his affidavit denied being in possession of or having anything to do with such a document. The photostat copy appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court.”

10. *The admitted facts in the present case are that the original was with one P. Srinibas Rao. Only when conditions of section prescribed in Section 65 are satisfied, documents can be admitted as secondary evidence. In the instant case clause (a) of Section 65 has not been satisfied. Therefore, the High Court's order does not suffer from any infirmity to warrant interference.”*

30. This Court in the case of **Naresh Chandra Bose v. State of West Bengal and Ors.** reported in **1954 SCC OnLine Cal 269** a Division Bench of this Court, at paragraphs 21 and 22 has stated as follows:

“21. Moreover, a kobala is a document which requires to be signed or executed by the executant under the law. Under section 67 of the Evidence Act the signature of the executant must be proved before such a document is admitted in evidence. Mere registration of a document is not by itself sufficient proof of its execution (vide *Salimatul Fatima v. Koylashpoti* (2) (I.L.R. 17 Cal. 903), and *Munnar v. Najnum* (3) [11 I.C. 50 (Allahabad)]). That being the position even if the contention of Mr. Mazumdar be accepted that the registers of the Sub-Registrar containing copies of the document in question should be regarded as original documents, we must hold that the kobalas were improperly and illegally admitted in evidence inasmuch there was no attempt made for formal proof of their execution. In these circumstances, the two sale deeds in question must be excluded from evidence.

22. It need only be pointed out that the admissibility of the two documents was raised in the trial Court and in spite of that no proper steps were taken by the State.”

31. The following principles emerge from the above:-

- a) A certified copy, even if produced from the Office of the Registrar of Assurances, can only be accepted when there is a factual foundation laid as regards the original documents and their absence.
- b) The absence of the original must be properly accounted for.
- c) The mere admission of the secondary evidence and evidence would not amount to conclusive proof. The probative value of the same must be assessed.
- d) The conditions under Section 65 of the Evidence Act must be satisfied before accepting the secondary evidence.
- e) The existence and execution of the original documents must be proved in accordance with law.
- f) The signature of the executor must also be proved.

32. This Court clearly finds that the Court below has failed to apply the test required to accept secondary evidence i.e. the certified copies of the alleged deeds of dedication dated 28th March 1977. The circumstances under which the documents were executed , are not on record. The

witnesses to the documents have not deposed. The scribe is unknown. The LTI of the executor has not been produced in Court. At whose instance were the documents prepared, who drafted and wrote the same has not been demonstrated. It has not been proved that the contents were read over to be understood by the Executor. The documents could not have been admitted or exhibited by the court below. Even assuming for the sake of argument that the documents may have been correctly exhibited, their probative value has not been assessed by the Court below. This Court's mind is not free from doubt that the two alleged deeds of dedication dated 28th March 1977 may not have been executed by Jugol Moni Dasya at all. The said purported Trust deeds of 1977 (Exhibit G) were not even mentioned in the Power of attorney dated 13th September 1982 (Exhibit E). The documents are suspicious and may have been procured to defeat the claims of the plaintiff Bela Rani Saha. No reliance could have been placed in the purported deeds dated 28th March 1977 by the Court below.

CONCLUSION

33. This Court is therefore of the clear view that the properties under schedules 'kha', 'ga', and 'gha' were personal properties of late Jugol Moni Dasya and would devolve onto the legal heirs of Brojendra Nath Saha i.e. his brother, Khagendranath Saha and or his legal heirs, in terms of the mandate of Section 15 of the Hindu Succession Act, 1956. One of such heirs are the appellants Bela Rani Saha, and Sankar Saha. The impugned decree dated 24th December 2007 shall stand set aside to that extent.

34. Insofar as the findings of the District Judge, dated 31st March 2012, in Misc. Case no. 1 of 2003, is concerned, and in view of the decision rendered by this Court in FA 222 of 2008, the judgment dated 31st March 2012 shall be restricted only to the extent of 'ka' schedule property i.e. the dedicated and religious trust property. This is in view of the findings of this Court in FA No. 222 of 2008 hereinabove. The said decision is modified to the extent that it seeks to include the subject matter of Schedules 'kha', 'ga', and 'gha' to the plaint in OC No. 14 of 1985 as properties of the Trust/Deities. The Religious Trust/Debuttar property/properties of the deities, shall be confined to the first Arpannama dated 21st October, 1970. All references to trust property and the properties of the deity shall be restricted to 'ka' schedule property as above.

35. The said decree shall stand modified to the extent indicated hereinabove.

36. Insofar as the findings of the District Judge in judgment dated 31st March 2012, against the trustees and appellants in appeal no. 47 of 2013, this Court is of the view that the same calls for absolutely no interference for. The reasons are based on a careful and threadbare examination of the pleadings, proceedings, evidence on record, and the depositions of the witnesses in OC Suit No. 14 of 1985 and Misc. case No. 1 of 2013.

- a) There was a conscious attempt on the part of the trustees, which may or may not include Mohit Kumar Saha, in surreptitiously manufacturing and introducing the two alleged deeds of dedication dated 28th March 1977 (Exhibit G), to defeat the claims of the plaintiff Bela Rani Saha.

- b) The ornaments of Late Jugol Moni Dasya either attached to the deity or to her person, weighing at least 1 kg, remain unaccounted for till date.
- c) The sale proceeds of the two properties sold at Begamnagar and Sadiqpur for Rs. 65,000 have not been accounted for till date.
- d) While there is some grey area as regards the 3500 odd British Era coins, most likely made of silver allegedly found in the wall of the room of Jugol Moni Dasya, remain unaccounted for. There are pleadings to point a needle of suspicion towards a trustee Phani Bhushan Saha for such misappropriation. The allegation has however not been specifically proved in evidence.
- e) The trustees had never submitted any account after the death of Jugol Moni Dasya, and before the receiver was appointed.
- f) The amounts collected from the bargadars of the landed property either attached to the deeds of dedication of the year 1977 or otherwise have not been accounted for.
- g) No meeting of this Maheshwari Vaisya Shah community has been called until April 2023 or after the appeal was taken up for hearing.
- h) None of the trustees came forward to depose evidence in Misc. case 1 of 2003.

37. This Court is of the view that the Maheshwari Vaisya Saha community has woken up late in the day. Trust properties dedicated to the public often meet and fall into the hands of persons with vested interests. Community properties do not become anybody's responsibility unless there is effective

and appropriate monitoring of the same, by an authority constituted under statute.

38. In the above circumstances, this Court is inclined to direct the District Magistrate, Malda to forthwith take custody of the entire properties under 'ka' schedule in OC 14 of 1985.

39. The District Magistrate may appoint 9 trustees of his/her own choice. Three of such trustees may, at the sole discretion of the District Magistrate, include members of the Maheshwari Vaisya Saha community. In the event the District Magistrate is of the opinion that the properties cannot be effectively managed by the trustees, he shall, in his exclusive discretion, be at liberty to dissolve the same. The properties under 'ka' schedule, dedicated by Jugol Moni Dasya, called Shri Shri Brojajugal and Sri Sri Radha Krishna, shall thereafter vest in the State, in their entirety.

40. With the aforesaid observations, FA 47 of 2013 and FA 222 of 2008 shall stand modified and disposed of.

41. In view of the above, all pending interim (CAN) applications, if any, shall stand automatically disposed of.

42. Let the decrees be drawn up expeditiously.

43. There shall be no order as to costs.

44. Let the LCR be returned to the Court below expeditiously.

45. Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

(Rajasekhar Mantha, J.)

I agree.

(Supratim Bhattacharya, J.)