

28.02.2023
SL No.9
Court No.8
(gc)

FA 72 of 2014

Md. Murtuja Hossain & Ors.

Vs.

Ashraf Sk. & Ors.

Mr. Rwitendra Banerjee,
Mr. Shibasis Chatterjee,
Mr. Sandip Kundu,
Mr. Devdutta Pathak,
...for the appellants.

Mr. Sayan Chattopadhyay,
Mr. Soumen Biswas,
Mr. Koustav Sen,
Mr. Ivan Sarkar,
...for the Respondent Nos.2, 4 to 13.

Soumen Sen, J. (oral): The appeal is arising out of an order dated 21st day of December, 2013 passed by the Civil Judge, Senior Division, Malda in a suit for declaration of title and permanent injunction.

The learned Trial Judge dismissed the suit.

Briefly stated, one Bajan Mahajan was the original owner of total 123 decimals of land situated in C.S. plot No. 646 and 49 decimals of land in C.S. plot no.639 under Mouza Purba Hossainbad, District Malda.

On 8th February, 1939 Bajan by an unregistered deed of sale sold and transferred 57 decimals of land in C.S. plot no.646 in favour of Habil Sheik. at a consideration of Rs.49/-. While Habil Sk. was in peaceful possession of 57 decimal of land in plot no.646 he died leaving behind him, his three sons Kutubuddin Sk. Baisu

Sk. and Mamtaj Sk as his legal heirs and successors. The only daughter of Habil namely Lajjo Bewa predeceased her father Habil.

Subsequently, on 24th October, 1944 Bhajan sold and transferred 62 decimals of land in C.S. plot no. 646 and entire 49 decimals of land in C.S. Plot No.639 to his three brothers Bhado Sk., Hazrat Sk. and Hezabuddin Biswas. Thereafter by an oral Hebanama, Bhajan transferred the residue 4 decimals of land in C.S. plot no.646 to the aforesaid three transferees.

Bhado Sk. died as a bachelor leaving behind him two brothers Hajrat and Hezabuddin as his legal heirs and successors who became the owner of 55 ½ decimal of land each in the said two plots. While Hezabuddin and Hajrat were in ejmal possession of the said 111 decimal of land the said two brothers amicably divided the said property whereby Hezabuddin received 55 ½ decimal of land in plot no.646 and Hazrat Sk. got 10 ½ decimal of land in plot no.646 and 40 decimals of land in plot no.639.

While Hezabuddin was in possession he transferred his 55 ½ decimal of land by way of registered sale deed dated 18th April, 1956 in favour of three sons of Habil Sk., namely, Kutubuddin Sk., Baisu Sk., and Momtaj Sk. By reason of the aforesaid transfer the said three sons of Habil became the owner of 112 ½ decimal of land in plot

no.646 and as owner thereof they constructed dwelling house and planted mango trees.

Hajrat Sk. was also in possession of 55 ½ decimal of land in plot no.646 and 639. Subsequently, State of West Bengal for construction of road acquired 64½ decimal of land in plot no.646. By reason of such acquisition the possession of land by Kutubuddin, Baisu and Mamtaz had reduced to 48 decimal of land. Baisu died leaving behind him his wife two sons and one daughter that is plaintiff nos.2 to 5 as his legal heirs and successors. Mamtaj during his life time transferred his share in suit plot no.646 by a registered deed of sale dated 26th April, 1979 and he delivered possession of the said land to the plaintiffs. Kutubuddin also transferred his share by way of Heba-Bil-Ewaj dated 10th August, 2003 in favour of plaintiffs.

The said deed was written by Abdul Kashem in presence of the witnesses namely, Merajul Hoque, Md. Abu Sajan and Kutubuddin Sk. put his L.T.I on the said Deed in presence of the plaintiff no.1.

While Hajrat Sk. was in possession of his share in the suit properties in plot no.646, he transferred the same to Defendants No.14 to 17.

The entire 123 decimal of land of plot no.646 have been divided in separate Bata plots in the R.S. R.O.R.

The plaintiffs alleged that the R.S. R.O.R. was wrongly prepared. The defendants nos. 1 to 13 have no

any right, title, interest and possession over the suit properties. On the allegation of threatened disposition the plaintiff filed a suit for declaration and partition.

The defendants contested the suit. In the written statement it was alleged that there was no amicable partition between Hazrat and Hejabuddin @ Hezabuddin Sk. on January, 1, 1955. There were four brothers being Bhadu Sk., Hazrat Sk. Hejabuddin @ Hezabuddin Sk. and Gaful @ Gafur Sk and after the death of Bhadu Sk., his interest devolved upon the other three brothers as Bhadu Sk. died as a bachelor. Thereafter, there was a deed of partition between Hazrat Sk., Hejabuddin @ Hezabuddin Sk. and Gafur Sk. with regards to the portion of the suit property owned and possessed by them in the year 1958.

Therefore, Hejabuddin @ Hezabuddin Sk. could not have transferred 55.5 decimal of C.S plot No.646 in the year 1956 as at that time he only had 29.33 decimal in C.S plot 646 given that 66 decimal of C.S. Plot 646 was in total transferred to three brothers so each had 22 decimal and when one brother died his share of 22 decimal was divided into three parts amongst the two other brothers and fourth brother which is 7.33 decimal each making the total 29.33 decimal. Even after the deed of partition in 1958 whereby Gaful @ Gafur Sk did not get any share of the portion belonging to Bhadu Sk. Hejabuddin @ Hezabuddin Sk. got only 33 decimal in C.S. Plot no.646 as per the deed of partition.

The case of the respondents no.1, 3 to 13 is that their predecessor in interest Hejabuddin@Hezabuddin Sk. only transferred portion of LR plot no.646 and not LR plot nos. 646/1170 and 64/1203 which were all part of C.S. plot No.646. The respondents no.1 to 13 have been in possession of LR plot nos.646 of 1170, 64 of 1203 measuring 27 decimal and 08 decimal each and are owners thereof.

Mr. Rwitendra Banerjee, learned Counsel appearing on behalf of the appellants submits that the learned Trial Judge has failed to take into consideration the admission made in paragraph 14 of the written statement in which they have clearly admitted that Bajan Mahajan at the relevant point of time was left with .04 decimal of land in Dag No.646 meaning thereby the rest of the land is in possession of the appellants which is evident from Exhibits 2 and 3. The said exhibits clearly describe the boundary of the transferor and the claim of the plaintiffs with regard to the 57 decimals of land in Dag No.646 is duly established.

Mr. Banerjee submits that it has been judicially recognized that the admission is the best piece of evidence and the admission in pleading is an admission under Section 58 of the Evidence Act which the Trial Court has overlooked. Mr. Banerjee also submits that the evidentiary value of an unregistered deed was considered by a Coordinate Bench in ***Rajendra Nath Sarkar Vs.***

Gour Gopal Ghosh & Anr. reported at ***AIR 1971 Cal 163*** where in the context of the Bengal Tenancy Act, 1885 it was clearly stated that an unregistered document would not be a bar in law of evidence to receive it for the purpose other than for establishing a title. Mr. Banerjee further submits that in absence of any evidence being established by the respondents with regard to their claim over and in respect of 57 decimals of land in Dag No.646, the party being able to have a better evidence on title is entitled to the relief. It is submitted that undoubtedly the two documents executed by the predecessor of the respondents read with their admission in paragraph 14 of the written statement, prima facie establishes a better title over and in respect of 57 decimals of land in Dag No.646 and the learned Trial Judge having not taken into consideration the aforesaid aspect has clearly erred in dismissing the suit.

Mr. Sayan Chattopadhyay, learned Counsel appearing on behalf of the respondents has submitted that the plaintiffs were unable to establish that after acquisition of land by the State of West Bengal, they have remained as owner in respect of the disputed portion of the land and in absence of such plea being established at the trial, the plaintiffs are not entitled to the reliefs. The learned Counsel further submits that in respect of the Bata plots, the respondents are in possession.

Mr. Chattopadhyay further submits that paragraph 14 of the written statement cannot be read in isolation and it has to be read with paragraphs 12 and 13 of the written statement.

The determination on the issue depends upon the quality of the evidence led by the parties. The learned Trial Judge did not consider the unregistered agreement for sale and allow the appellants to mark it as an exhibit. This, in our view, is contrary to the judgment of the Hon'ble Division in **Rajendra Nath Sarkar** (supra). In **Rajendra Nath Sarkar** (supra), it was clearly held that there would not be any bar in law of evidence to receive the unregistered document for purposes other than for establishing title. This will be evident from the observations made by the Coordinate Bench in Paragraph 6 of the said judgment. In the instant case, the appellants are aware of the fact that by reason of Section 26-C of the Bengal Tenancy Act, he may not be able to establish his title on the basis of the unauthorized deed of sale but it cannot deny him to rely on the said document for the purpose of establishing his possession.

We also find substance in the arguments of Mr. Banerjee that admissions made by contesting defendants in their written statement are binding upon them and constitute waiver of proof as held in **Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram & Ors.** reported at **(1974) 1 SCC 242 paragraph 27**. Mr.

Banerjee has argued that the unregistered deed of sale read with Exhibits-2 and 3 are sufficient to hold that the plaintiff is able to create a higher degree of probability of his title to the land so as to shift the onus on the defendant and it would be for the defendant to discharge his onus and in absence thereof, the burden of proof lying on the plaintiff shall be held to have been discharged so as to “amount proof of the plaintiff’s title”, per **Justice Bhan** in ***R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and Anr.*** reported at ***(2003) 8 SCC 752 Paragraphs 29 and 30.***

In ***R.V.E. Venkatachala Gounder*** (supra), the Appellate Court noted that the plaintiff was not able to produce any deed of title directly lending support to his claim for title and at the same time the defendant too has no proof of his title much less even an insignia of title. Being a civil case, the plaintiff cannot be expected to prove his title beyond any reasonable doubt; a high degree of probability lending assurance of the availability of title with him would be enough to shift the onus on the defendant and if the defendant does not succeed in shifting back the onus, the plaintiff’s burden of proof can safely be deemed to have been discharged. ***(Per Justice Bhan in R.V.E. Venkatachala Gounder (supra) at page 768, Paragraph 30).***

This is crucial because of the argument made by Mr. Banerjee that in relation to the suit property, the

defendants could not lead an iota of evidence and when it is compared with the quality of the evidence produced before the Trial Court by the plaintiffs in respect of the property. If a thing or a state of thing is shown to exist, an inference of its continuity within a reasonably proximate time both forwards and backward may sometimes be drawn which is discernible from the illustration (d) to Section 114 of the Indian Evidence Act, 1872 and in appropriate cases, an inference of the continuity of a thing or state of things backwards may be drawn under this section, though on this point the section does not give a separate illustration. **(as per Justice Bachawat in Ambika Prasad Thakur & Ors. Vs. Ram Ekbal Rai (Dead) by His Legal Representatives & Ors. reported at AIR 1966 SC 605 paragraph 15).** This is also a matter which needs consideration once the Trial Court allows the parties to lead evidence on the unregistered deed of sale for the limited purpose as observed earlier.

Once we accept the unregistered deed for the limited purpose as indicated above, it needs to be seen how far the admission in paragraph 14 of the written statement would benefit the plaintiffs in the suit. Admissions in pleadings are admissible under Section 58 of the Evidence Act as held in **Nagindas Ramdas** (supra).

These are the matters to be considered afresh by the Trial Court.

It appears from the nature of the dispute that the appointment of a survey passed advocate commissioner is necessary for elucidating and eliciting true facts. Both the parties have agreed that an appointment of an advocate commissioner is necessary. Accordingly, the learned Trial Judge before hearing the suit shall appoint a survey pass advocate commissioner on points to be suggested by the parties.

In view of the aforesaid, the impugned judgment is set aside.

The Trial Court is directed to hear the suit afresh and while considering the pleadings and evidence shall take into consideration, amongst other, the principles laid down in the aforesaid judgments.

The appeal succeeds.

Accordingly, the appeal being FA 72 of 2014 is allowed.

However, there shall be no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

I agree

(Uday Kumar, J.)

(Soumen Sen, J.)