

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**S.A. 365 of 2010
With
CAN 4 of 2022**

**Sri Anil Kumar Pal
Vs.
Chabi Pal & Others.**

For the Appellant : Mr Tanmoy Mukherjee
Mr. Gopal Ch. Ghosh
Ms. Shila Sarkar
Mr. Souvik Das

For the Respondents : Mr. Bhaskar Ghosh, Sr. Adv.
Mr. Arup Banerjee

Heard on : 05.03.2024

Judgment on : 08.04.2024

Ajoy Kumar Mukherjee, J.

1. This Second Appeal has been preferred challenging the judgment and decree dated 21st August, 2010 passed by Additional District Judge 4th court Burdwan in T.A. no. 126 of 1989/ 22 of 1989. By the impugned judgment the court below has reversed the judgment and decree dated 14th August, 1989 passed by learned Assistant District Judge, Burdwan in T.S. No. 21 of 1985/ 24 of 1979.

2. The Predecessor-in-interest of the plaintiffs/respondents herein, filed aforesaid T.S. No. 24 of 1979/T.S No. 21 of 1985 for recovery of “khas” possession against the present appellant/defendant no.1 treating the present appellant to be a licensee under the original deceased plaintiff. In the plaint plaintiff specifically pleaded that suit property originally belonged to one Laxmi Mani Dasi, who during her lifetime bequeathed her property in favour of Partiosh Bala Dasi, who is the mother of the plaintiff, by virtue of a will executed on 8th December, 1924 where the husband of Paritosh Bala namely Ratan Chandra Pal was appointed as executor. Thereafter the said will was probated and accordingly mother of the plaintiff, Paritosh Bala became the owner of the suit property. Said Paritosh Bala died on 18th March, 1937 and according to plaintiff, he being the son of Paritosh Bala has solely inherited property left by her mother. His further case is that the RS recording of the suit property in the name of his father Ratan Chandra Pal is erroneous. Plaintiff's further case is defendant no.1/appellant herein was born due to second marriage of his father Ratan Chandra pal with one Aruna Bala Dasi. Subsequently after the death of the first wife of Ratan namely Paritosh Bala, Ratan Chandra pal as well as present defendant no.1/appellant herein were given a status of licensee, in respect of the suit property under the original plaintiff. Plaintiff has revoked the aforesaid license and as defendant no.1 failed to quit and vacate, inspite of revocation of license, plaintiff filed the aforesaid suit against the defendant no. 1 for his eviction from the suit property.

3. The defendant no.1/ appellant herein contested the suit by filing written statement denying the material allegations contained in the plaint.

Defendant No. 1 specifically denied that he was begotten out of the alleged second marriage of Ratan Chandra pal but he was begotten out of the first marriage of Ratan Chandra pal with Paritosh Bala and as such after the death of Paritosh Bala, Ratan being the husband of Paritosh and the defendant no.1 being the second son of Paritosh Bala cannot be treated as licensee under the original plaintiff and on the contrary the defendant no.1 /appellant herein is a co-sharer in respect of the suit property and accordingly he prayed for dismissal of the suit.

4. Learned Trial judge while deciding the vital issues being issue no. 3, 4 and 5 came to a finding that both the witnesses of plaintiff have categorically admitted about the status of Ratan Chandra Pal being the father of the plaintiff to be a co-sharer and not to be a licensee and also considering the entry in the Record of Rights in the name of Ratan (marked exhibit-6) the trial court negated the case made out by the original plaintiff with regard to creation of license in favour of the father of plaintiff as well as in respect of the present defendant no.1/appellant. Learned Trial Court also on the basis of evidence, negated the plaintiffs contention that the defendant no.1 is not the son of Paritosh Bala.

5. Plaintiff respondent being aggrieved by the aforesaid judgment preferred first appeal before the appellate court being aforesaid Title appeal no. 126 of 1989/22 of 1989 and learned first appellate court after hearing both the parties by a judgment and decree dated August, 21, 2010 was pleased to allow the appeal and thereby set aside judgment and decree passed by the Trial Court. The learned first appellate court was pleased to declare plaintiffs right title interest in the suit property and was further

pleased to direct to vacate the premises within a period of three months from the date of the order.

6. During the course of hearing before the first appellate court, Appellant filed application under order XLI rule 27 of the Code to rely upon a copy of alleged birth certificate of appellant and the court below found the said birth certificate to be a vital piece of evidence, which can be taken into consideration, while disposing of the said appeal on merit and allowed the said application of additional evidence while passing the final judgement observing that the date of birth of the present appellant is 11th August, 1940 and as such the appellant cannot be said to be son begotten out of the first marriage of Ratan Chandra Pal and Paritosh bala and accordingly court below treated the appellant herein as a licensee under the plaintiff and thereby passed the decree for eviction.

7. Being aggrieved by the said judgment and decree passed by the court below Mr. Tanmoy Mukherjee learned counsel appearing on behalf of the appellant submits that though the learned first appellate court has allowed the application for additional evidence but the alleged certificate of birth has not been marked as exhibit following the procedure of Indian Evidence Act and Order XIII of the code of the Civil Procedure nor any opportunity was granted to the Appellant herein to controvert said document by giving opportunity to adduce evidence.

8. He further submits that from the extract of the alleged certificate of birth available in the court record, it will reveal that the same was obtained after filing of the suit on 8th September, 1989. Moreover the three columns of the said alleged certificate of birth i.e. the name of districts, name of

police station and the name of the child are lying blank. He further submits that a recent communication was also made under the Right to Information Act in the office of Burdwan Municipality and the said authority has answered that as per their record, the details of the said birth certificate is not found. He also submits that it is pertinent to point out that the suit was filed in 1979 and after dismissal of the suit, during pendency of the first appeal, the alleged copy of the birth certificate was obtained in the year 1989 in relation to the Birth Register of 1941 but in 2022 the record was not available in the Municipal office.

9. In reply to the substantial question of law as framed by the Division Bench, Mr. Mukherjee argued that from the bare reading of Rule 28 and Rule 29 of Order XLI of the Code, makes it abundantly clear that even if the court considers additional evidence is necessary for the purpose of adjudication of an appeal as per Rule 27, then also the court has to follow the procedure as laid down in Rule 28 and Rule 29 of Order XLI while receiving such additional evidence on record and for which the right of the adversary in respect of rebuttal of such evidence by production of further evidence is corollary and the same cannot be taken away by the said court. In the present case though there are various anomalies in regard to the alleged birth certificate, the court below while passing the final judgment allowed the plaintiff to rely upon such birth certificate to be an additional evidence without following any of the procedure as laid down under Rule 28 and 29 of Order XLI. In this regard he relied upon

(i) *Land Acquisition Officer, City Improvement trust Board Vs. H Narayanaiah and Others* reported in 1976 4 SCC 9.

(ii) ***Shiv Sarup Gupta Vs. Dr Mahesh Chand Gupta*** reported in **1999 6 SCC 222.**

(iii) ***Associated Electronics & Anr. Vs. Anilendu Sekhar Naskar & Ors.*** reported in **2017 3 CLJ (CAL) 569.**

10. Mr. Mukherjee while answering in connection with the second part of substantial question of law, contended that according to the Dayabhaga School of Hindu Law, the right of inheritance of a property left by a female Hindu prior to promulgation of Hindu Succession Act 1956, if considered to be a “*stridhan*” of the deceased female Hindu then such property can be inherited by the son in exclusion of the husband of the said deceased female Hindu. But if such property which is left by a female Hindu is not her “*stridhan*” prior to promulgation of Hindu Succession Act 1956, then the rule of inheritance will be otherwise and in such a situation there will be no exclusion of the husband of the deceased female Hindu in case of line of succession.

11. Mr. Ghosh learned counsel appearing on behalf of the respondents/plaintiffs submits that from the exhibited documents and the oral evidence, it is clear that the defendant no. 1/appellant is the son born out of second wedlock of Ratan Chandra Pal with Aruna Bala after the death of Paritosh Bala. He further submits that exhibit 2(a) is the preliminary decree of auction of suit no. 243 of 1948 (which was instituted on 17.11.1938) clearly shows from the cause title, that Paritosh Bala since deceased was represented by minor Bangshidhar Pal/plaintiff who was represented by natural guardian Ratan Chandra Pal. Accordingly if in the year 1938 the appellant herein Anil Chandra had taken birth his name

would have certainly been mentioned as an heir of Paritosh Bala in the said suit. The school leaving certificate of defendant no. 1 had been produced by PW-6 and it appears from the said certificate that the date of birth of the defendant /appellant is November 2, 1942 as per admissions register. On conjoint reading of exhibit 8 with the statement made in cross examination of DW-1, it is clear that the above school certificate is of the defendant no.1/appellant. The learned first appellate court as per direction of Hon'ble court considered the birth certificate of the defendant/appellant while reaching the conclusion of the issue and admitted the same in evidence as additional evidence. The date of birth of the defendant as per birth certificate is August 11, 1940 and as such the birth certificate of defendant /appellant was recorded as per Birth, Deaths and Marriage Registration Act, 1986. He further submits that the provision of the insertion of the name of the child subsequent to initial registration, for the first time was introduced in section 14 of the Registration of the Birth and Deaths Act 1969 read with Rule 11 of the West Bengal Registration of Births and Death Rules 1972. Since there was no such provision in the previous Act being the Birth Death and Marriage Registration Act and since defendant was born long before introduction of said Act, his name was not inserted as he was not given any name till the date of registration of the birth of the defendant/appellant. Accordingly it is quite clear that the defendant no.1/appellant was born after the death of Paritosh Bala who died on 18th March, 1937. Finally the respondent submits that the defendant in the written statement has categorically stated that Paritosh Bala was only a name-lender and was never owner and actually her husband was the real owner. Beside this

whatever has been argued by the appellant herein regarding succession under the Dayabhaga School of Hindu Law, is beyond the pleading and cannot be taken into consideration at the stage of second appeal in the absence of pleading or evidence. According he has prayed for dismissal of the second appeal.

12. The Divisions Bench of this court while admitting the second Appeal vide order dated October, 6, 2010 was pleased to held that this appeal will be heard on the following substantial question of law.

1. *“whether the learned judge of the court of appeal below committed substantial error of law in relying upon exhibit-B, birth certificate, granted under the provision of the Registration of Births and Deaths Act, 1969 in respect of births and deaths stated to have taken place on August 11, 1940, when the said Act was not given retrospective effect and there is no provision in the said Act to record births or deaths, taking place prior to the Act coming into force.*

2. *Whether the learned judge of the court of appeal committed substantial error of law in not holding that Exhibit-B itself is condemned, when such certification under the provisions of the said Act of 1969 could not register a birth taking place on August 11, 1940 and registration could not be made on August 17, 1940 when the provisions of the Registration of Births and Deaths Act, 1969 and Rules of 1972 did not at all come into force.*

3. *Whether the learned judge of the court of appeal below committed substantial error of law in reversing the findings of the trial court on proper appreciation of the reasons recorded by the learned trial judge relating to relationship between the plaintiff and the defendant no.1 as full blood brothers.”*

13. Two more substation questions of law were also framed by this Court
Vide Order dated 15.06.2022.

(i) *Whether the appeal Court below has committed substantial error of law in treating the Certificate of Birth issued by the Registrar of Birth and Death, Burdwan Municipality as the Certificate of Birth of the defendant/appellant when the said Certificate does not contain the name of the defendant/appellant.*

(ii) *Whether the appeal Court below has committed substantial error of law in 2 receiving the Certificate of Birth issued by the Registrar of Birth and Death, Burdwan Municipality by way of additional evidence in appeal and decreeing the suit on the basis of the said additional evidence without affording an opportunity to the defendant/appellant to produce evidence in rebuttal.*

Decision with Reasons

14. While dealing with substantial questions of law, I find that it is not in dispute in the present context that the property described in the schedule to the plaint, originally belonged to Laxmi Mani Dasi, who has bequeathed the suit property in favour of Paritosh Bala Dasi by a Will dated 23rd Agrahayan 1331 BS, wherein Ratan Chandra Pal, father of the plaintiff was appointed as executor of the said will, who took probate of the said will. It is also not in dispute that the name of Paritosh Bala was recorded in CS Record of Rights, though in the RS Record of Rights, the suit property was recorded in the name of Ratan Chandra Pal. The Will executed in favour of Paritosh Bala was filed and marked as exhibit before the Trial Court. It is not in dispute also that plaintiff is the son of Paritosh Bala and Ratan Chandra Pal. From the exhibited document it also appears that said Paritosh Bala died on 18th March, 1937. Said document regarding Paritosh Bala's death was never challenged rather it remains undisputed. Now the defendant's date of birth as appearing from the School Leaving Certificate marked as Exhibit-8 goes to show that the defendant No.1 was born on 2nd November, 1942. However, during pendency of the first appeal one more document produced in respect of date of birth of the defendant no. 1 issued by Registrar of Birth and Deaths and according to said document the date of birth of defendant no.1 is 11.08.1940, though said document neither bears the name of the child or the details of the address of the child and said document was also not marked as exhibit. However, whatever may be the date of the birth of defendant no.1, be it 11.08.1940 or according to School Registrar 02.11.1942, fact remains that he was born after the death of Paritosh Bala,

who died on 18th March, 1937 and whose death certificate is marked as Exhibit-5. Accordingly I do not find any perversity in the finding of the court below that the documentary evidence do not suggest that defendant no.1 was born during the life time of Paritosh Bala.

15. However, on the basis of finding regarding the birth of defendant no. 1 who is admittedly the son of Ratan Chandra Pal, the courts below differ with each other and had arrived at their own findings. While the Trial court accepted the defendant no.1's plea of adverse possession on the basis of plaintiffs admission in evidence and accordingly held that the possession of Ratan Chandra Pal in the suit property became adverse against the plaintiff and accordingly Ratan separated the house into two parts for both of his sons namely plaintiff and defendant no.1 and as such Trial court was pleased to dismiss the plaintiffs contention that the defendant no. 1 is a licensee in respect of the suit property. However, when the matter came up before the first appellate court, it was held by the said court that plaintiff has able to prove his title in the suit property which he has inherited from his mother Paritosh Bala but defendants failed to prove acquisition of title by way of adverse possession and in the absence of proof of acquisition of title by way of adverse possession, the status of defendant no.1, must be that of a licensee and as such the court below decreed the suit in favour of plaintiff with a direction upon defendant no.1 to quit and vacate the suit premises within a period of three months from the date of the order.

16. In view of above, I am to consider whether on the basis of materials on record, the court below has arrived at a correct finding that the status of

defendant no.1 is no better than that of a licensee in respect of the suit property.

17. While dealing with the same I am not unmindful to the fact that so far as the facts are concerned first appellate court is the final court and unless and until the findings of facts recorded by the courts below are found to be manifestly perverse and/or contrary to the evidence on record, this High Court is not supposed to re-appreciate the entire evidence on record in order to come to its own finding.

18. As I have stated above that the mother of the plaintiff Paritosh Bala got the suit property by dint of a Will executed by admitted original owner Laxmi Mani Dasi. It is also not in dispute that Laxmi Mani Dasi was not a family member of Paritosh Bala but she was a stranger to Paritosh Bala which is also reflected from the recital of the Will, wherein the Will maker has clearly stated said Paritosh Bala and her husband Ratan Chandra Pal were in occupation of shop room in the house of testatrix Laxmi Mani Dasi, where both of them were running a shop and being satisfied with the love and affection of said two stranger namely Paritosh and Ratan and testatrix having been issueless, has bequeathed the property in favour of Paritosh Bala, wherein he has appointed Ratan as executor of the Will.

19. Be it mentioned that the said Will was executed in favour of Paritosh Bala on 23rd Agrahayan 1331 BS. Under the old Hindu Law property given or bequeathed by a stranger to a Hindu female coverture is "*stridhan*" according to Bombay, Benaras School but not according to Mithila and Dayabhaga School. According to Mullah's Hindu Law, even according to Dayabhaga School, such property becomes her *stridhan* after her husband's

death. As appears from the fact that Dayabhaga recognizes ownership of the wife in such property even during coverture, though it says it is not her “*stridhan*”, it is subject to her husband’s control.

20. In the present context it is not in dispute, when Partisoh Bala died in the year of 1937, her husband Ratan was alive. Accordingly though the property was bequeathed in favour of Partitosh Bala during her coverture by stranger/owner, still it does not constitute “*stridhan*” of Paritosh Bala under Dayabhaga school of Hindu Law, because Paritosh Bala had no independent power over it. Under the Dayabhaga school, that property alone is “*stridhan*” which a woman can dispose of independently without her husband’s consent.

21. Since in the present context, property in question bequeathed to Paritosh Bala by stranger testatrix during coverture of Paritosh Bala, the property was subject to her husband’s dominion and could have been her absolute property after the death of her husband but since admittedly Paritosh Bala died before the death of her husband, the property devolved upon her husband after her death in terms of her line of succession and as such it cannot be said that the defendant no.1 whose father is Ratan Chandra pal did not have any scope to inherit the property of Ratan Chandra pal.

22. There is another aspect of the matter, which appears from the recital of the Will also. On careful perusal of the recital of the Will, it appears that the testatrix having been satisfied with the service rendered by both Paritosh Bala and Ratan Chandra pal had executed the will stating Paritosh Bala as legatee and Ratan Chandra pal as executor. Not only that it is further

recited in the will that the property of Paritosh Bala will be enjoyed by “*putra poutradi warison and sthalavisikto gonkrome* (sons, daughters, heirs and their successors-in-interest)”.

23. It is settled law that the intention of the testator should be given primary importance and the court should construe the words in the background of the intended meaning which the testator himself desired to ascribe to the words used. Now after going through the contents of the will as a whole, it is very much clear that the testator was satisfied with the love affection and service rendered by both Paritosh Bala and her husband Ratan and testator’s further intention is that the property will be enjoyed by Paritosh Bala and in her absence her sons, daughters, heirs and successors-in-interest and thereby he has given a right to Ratan also in the absence of the beneficiary. Putting the words “*Warison and Sthalavisiktogon korme*” in the recital of the will is clearly suggestive that the intention of the testatrix was that after the death of Paritosh Bala, it will be devolved upon her original legal heirs and their successors.

24. Accordingly I am constrained to conclude that neither of the two courts applied its mind to the effect of the recital of the will and also did not consider the provision of old Hind Law applicable to such cases to the persons belonging to Dayabhaga School of Hindu Law and thereby though the ultimate finding of the Trial Court is correct but I am not aggregable with the basis of finding of the Trial Court regarding acquisition of title by defendant no.1.

25. In view of above, the judgment and decree passed by the court below dated 21st August, 2010 in T.A. No. 126 of 1989 (Renumbered as T.A 22 of

1989) is hereby set aside and the decree of dismissal dated 14.09.1989 passed by learned Assistant District Judge Burdwan in T.S. no. 21 of 1985 (Renumbered as T.S 24 of 1979) is hereby affirmed.

26. S.A. 365 of 2010 is thus allowed. Connected Application accordingly disposed of. Records of court below be returned immediately.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJOY KUMAR MUKHERJEE, J.)