

(2001) 09 CAL CK 0054
In the Calcutta High Court
Case No : F.A. No. 84 of 2000

Akbar Ali Molla and Others

APPELLANT

Vs

Sonargaon Housing Co-operative Society Ltd.

RESPONDENT

Date of Decision : 27-09-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144(2), 44(2)
West Bengal Estates Acquisition Act, 1953 — Section 44(2)
West Bengal Land Reforms (Amendment) Act, 1981 — Section 4C(2)

Citation : (2002) 2 CALLT 314 : (2002) 1 CHN 406 : 106 CWN 449 : (2002) 1 ILR (Cal) 147

Hon'ble Judges : Tarun Chatterjee, J;Asit Kumar Bisi, J

Bench : Division Bench

Advocate : S.P. Roy Chowdhury, Bimal Chakraborty, Sakya Sen and Nirmalansu Roy, for the Appellant;Sudhis Dasgupta and Joytirmoy Bhattacharyya, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Bisi, J.—This appeal has been preferred by the defendant/appellant against the Judgment and decree passed by Shir Abdul Quader the learned Civil Judge (Senior Division), Baruipure, South 24-Parganas on 9th July, 1999 in Title Suit No. 144 of 1993.

2. As per the plaint case the plaintiff Sonargaon Housing Co-operative Society Ltd. purchased a base area of agricultural land in Mouza Tegharia and Kamarabad, P.S. Sonarpur with a view to develop the same as Township for comfortable living of its members in congenial atmosphere with all civil amenities and facilities of modern Society. The property of the society has been developed under the name and style of "Sonargaon Park", The Township area is duly demarcated by the boundary pillars. The suit properties measuring total area of 2.09 acres comprise R.S. Plot Nos. 340, 341, 342, 343 and 344 of Mouza Tegharla. By the registered sale deed dated 27.1.68 the plaintiff purchased 1.39 acres out of the suit properties from Niyamat Ali Molla and his three sister Juhara

Khatoon, Alekjan Bibi and Neharganu Bibi who proclaimed to be in exclusive Khas possession of the demarcated area by inheritance through their mother. By another registered sale deed dated 27.1.68 the plaintiff purchased the remaining 70 dec. of land of the suit properties from Malekjan Bibi the widow of late Dilbahar Molla. Since after purchase the plaintiff is in khas possession of the suit properties: The plaintiff has been maintaining khas possession of the property in suit by exercising all sorts of proprietary rights upon mutation of name, by enjoyment of usufructs therefrom and by changing the nature and character of the property of its discretion as of right. The plaintiff has been in actual physical possession of the suit property as of right for more than 25 years openly and adversely against all others and has acquired good and indefeasible title and ownership over the property by adverse possession as well. All on a sudden, the defendants being armed with deadly weapons with the help of some musclemen trespassed upon the suit property on 30.3.93 and broke down some of the boundary pillars of the township, removed bricks and also ploughed a portion of the suit property. The total loss caused to the plaintiff on that date was estimated at about Rs. 30,000/ -. The matter was duly reported to the police but the local police did not take any action except making of G.D. Entry No. 1641 dated 30th March, 1993. The plaintiff also filed a petition u/s 144(2) of Cr.PC and obtained favourable order but no action was taken by the police. On 19th April, 1993 the defendants held out serious threat of grievous hurt and murder to the security supervisor of the plaintiff. On 20th April, 1993 a large scale raid was made by the defendants being armed with deadly weapons and substantial damage was caused by them to the suit property. By such illegal acts of the defendants the plaintiffs title to the suit property has been clouded. Hence the suit for declaration of title to the suit properties and permanent injunction has been instituted by the plaintiff against the defendants.

3. The defendants contested the suit by filing the written statement wherein the material allegations contained in the plaint have been denied. The specific case of the contesting defendants is that the suit property originally belonged to Alta Bibi. After death of Alta Bibi the same was inherited by Bibijan Bibi, wife of Dilbahar Molla. While in possession of 1.85 acres of land Bibijan Bibi transferred 1.36 acres of land by oral heba in favour of the husband Dilbahar Molla and possession of the said property in suit was delivered by Bibijan Bibi in favour of Dilbahar Molla. The R.S. record was made accordingly in favour of Dilbahar Molla in respect of the said property. After demise of his first wife Bibijan Bibi, Dilbahar Molla acquired 1/4th share of the remaining 49 decimals of land and thereby he became owner in respect of 12 decimals of land of the said plot. The same has correctly been recorded in the R.S. record of right. After demise of Bibijan Bibi, Dilbahar Molla married Malekjan Bibi and by a registered deed of conveyance he transferred 70 decimals of land in favour of his second wife Malekjan Bibi. Subsequently Dilbahar Molla died leaving behind his one son, two daughters through his first wife and three sons and two daughters through his second wife. The second wife Malekjan Bibi had 1/8th share, each son had 7/48 share and

each daughter had 7/96th share in the remaining 2dec. land of Dilbahar. The co-sharers of the suit properly never partitioned the property and they are in joint possession of the same. The son and daughters by first wife of Dilbahar Molla never sold any suit property to the plaintiff as alleged. Malekjan Bibi never executed any sale deed in respect of an portion of the suit property in favour of any person. The suit property was all along in possession of defendant Nos. 4, 5, 6 and 7 and their co-shares. The plaintiff has no right, title and interest in the suit property.

4. On consideration of the evidence, both oral and documentary, adduced on behalf of the parties the learned Civil Judge (Senior Division) Baruipur, South 24-Parganas has arrived at the finding that the plaintiff has title as well as possession over the suit property and the defendants have failed to prove their possession and title over the same. He has disbelieved the case of oral heba in respect of 1.36 acres of land by Bibijan Bibi in favour of her husband Dilbahar Molla as propounded by the contesting defendants. Consequently the learned trial Judge has decreed the suit in favour of the plaintiff.

5. Being aggrieved by and dissatisfied with the judgment and decree passed by the learned trial Judge in the above noted suit the defendants/ appellants have preferred the instant appeal contending inter alia that the learned Judge of the Court below erred in decreeing the suit by granting declaration and permanent injunction though it is the specific case of the defendants/appellants that the suit property was all along in possession of defendant Nos.4,5,6 and 7 and their co-shares, that the learned Judge of the Court below erred in not taking into consideration the presumption arising out of the R.S. record of right standing in the name of the defendants/appellants and that the learned Judge of the Court below erred in holding that the land in question cannot be gifted by Bibijan Bibi by means of oral heba.

6. The following points arise for decision in the instant appeal:-

(1) Whether or not the case of oral heba in respect of 1.36 acres of land out of the suit properties by Bibijan Bibi in favour of her husband Dilbahar Molla as propounded by the defendants/appellants is proved by evidence on record in convincing manner.

(2) Whether or not the title and possession of the plaintiffs/respondents over the suit property has been proved by cogent evidence on record.

7. Being interlinked both the points are taken up together for consideration for the sake of convenience and brevity.

8. Admittedly the suit property measuring total area of 1.85 acres of land appertaining to suit plots 340, 341, 342 and 34S originally belonged to Alta Bibi who subsequently transferred the same in favour of Bibihan Bibi by the registered deed of gift dated 31th January, 1940 which is marked exhibit-1. It is indisputable as well that Bibijan died leaving her husband Dilbahar Molla, son

Niyamat Ali Molla and daughters Alekjan Bibi, Neharbanu Bibi and Juhara Khatoon. It is an admitted fact that after demise of his first wife Bibijan Bibi. Dilbahar Molla married Malekjan Bibi. Exhibit-1 (a) is the registered sale deed dated 13th February, 1962 executed by Dilgahar Molla in favour of Melekjan Bibi in respect of 70 decimals of land out of the suit plots.

9. The plaintiff/respondent claims title over the suit property on the strength of purchase by the two sale deeds marked exhibit-1 (b) and exhibit-He) respectively. The registered sale deed dated 27th January, 1968 marked exhibit-1(b) indicates that the plaintiff/respondent purchased 1.39 acres of land of the suit properties from Niyamat, Juhara, Alekjan and Neharbanu. Exhibit- 1(c) is the registered sale deed dated 27th January, 1968 executed by Malekjan Bibi in favour of the plaintiff/respondent in respect of .70 decimals of land (.46 dec+.24 dec.) out of the suit Properties. It is evident from the said two sale deeds that the plaintiff purchased 12 annas share of the vendors Niyamat, Juhara, Alekjan and Neharbanu which they acquired by inheritance after demise of their mother Bibijan and that the plaintiff/respondent purchased the remaining 4 annas share of the other vendor Malekjan Bibi which was acquired by her by means of purchase from her husband.

10. It is the case of the defendants/appellants that during her life time Bibijan Bibi the first wife of Dilbahar Molla transferred 1.36 acres of land out of the plots 340,341 and 342 to her husband Dilbahar Molla by oral heba in 1348 B.S. and the B. S. record was accordingly prepared and finally published in the name of Dilbahar Molla. It is not worthy in this context that had there been no such oral heba alleged to be made by Bibijan Bibi in favour of Dilbahar Molla, Dilbahar Molla could acquire 1/4th share of 1.85 acres of land in suit left by her first wife Bibijan Bibi. So the pivotal issue on which the fate of the case primarily hinges is whether or not there is convincing evidence to substantiate the plea of oral heba by Bibijan Bibi in favour of Dilbahar Molla in respect of 1.36 acres of land out of the said suit plots.

11. It is settled law that oral heba is permissible under the Mohammendan law and to constitute valid gift donor should divest himself completely of all ownership and dominion over the subject of the gift. The case of Maimuna Bibi and Another Vs. Rasool Mian and Others can be referred to in this context. It is incumbent on the defendants/appellants to prove their case of oral heba. The learned trial judge has specifically observed in the impugned judgment that in order to prove that oral heba made by Bibijan Bibi in favour of her husband Dilbahar Molla the defendants have not adduced any cogent and reliable evidence. The oral heba, as contended by the appellants, was made by Bibijan Bibi in favour of Dilbahar Molla in respect of 1.36 acres of land appertaining to suit plots 340, 341 and 342 in 1348 B.S.

12. Out of the eight witnesses examined on behalf of the defendants D.W.4 Samsuddin Mondal who is the eldest son-in-law of Dilahar Molla has stated that he himself, Khadabox, Dilbahar and Bibijan were present at the time when

Bibijan had gifted the said land to Dilbahar Molla-the releant portion of his evidence is as folows:- Suit property originally belonged to Bibijan Bibi. Bibijan Bibi had gifted 3 plots of land to Dilbahar in our presence standing on the land concerned. The plots are 340,341 and 342. 1 myself, Khadabox, Dilbahar and Bibijan were there. Bibijan told Dilbahar to make record of the land according to oral gift. Since that time of oral gift, Dilbahar has been possessing the disputed land. In corss-examination D.W.4 has specifically stated that oral gift has been made in 1355 B.S. in his presence and in presence of Khodabox. On being further cross-examined he has stated that his first baby was born after 8 years of his marriage and he is now 28 years of age. D.W.4 was examined on 13.7.95. As per his version his marriage took place 36 years prior to the date of her deposition and if that is so, his marriage took place in 1959 whereas as per the case of the defendants/appellants the oral heba was made by Bibijan Bibi in favour of Dilbahar Molla in the month of Baishakh 1348 B.S. corresponding to 1941. This glaring contradiction makes the story of presence of D.W.4 at the time of oral heba unworthy of credence. D.W. 1 Akbar Ali Molla who is defendant No.4 stated in his evidence that the suit plot Nos. 340, 341, 342 and 343 belonged to Alta Bibi originally and Alta Bibi had gifted those properties to Bibijan Bibi and Bibijan Bibi has gifted the said properties in respect of the said four plots orally to her husband. This part of testimony of D.W.1 contradicts the plea of the defendants that the oral heba was made by Bibijan Bibi in favour of her husband in respect of three plots 340,341 and 342 and not in respect of the four plots as stated by D.W.1 There is nothing tangible in the evidence of any other D.Ws. so far as the case of oral heba as propounded by the defendants/ appellants is concerned.

13. It is contended by the learned advocate for the appellants that Dilbahar Molla is the recorded owner in respect of 1.36 acres of land appertaining to plots Nos. 340, 341 and 342 and his name has been duly recorded under khatian No.80 of Mouza-Tegharia. He has drawn our attention to the certified copy of the relevant R.S. record which is marked exhibit-A. He has further contended that such recording of 1.36 acres of land in the said R.S. record of right necessarily implies that the said land was transferred by oral heba made by Bibijan Bibi in favour of Dilbahar Molla. The learned Advocate for the plaintiff/respondent on the other hand has drawn our attention to the registered sale deed dated 13th February, 1962 executed by Dibahar Molla in favour of his second wife Malakjan Bibi wherein it has been specifically recited that Dilbahar Molla acquired only 46 decimals of land out of the said plots by way of inheritance after demise of his wife Bibijan Bibi. There is nothing in the said deed to indicate that Dibahar ever acquired 1.36 acres of land out of the said three plots by oral heba from his first wife Bibijan Bibi. The learned advocate for the respondent has drawn our pointed attention to the relevant recitals of the said registered sale deed marked exhibit-I(a) and contended that the said recitals amply reveal that Dilbahar Molla acquired 46 decimals of land out of the said there plots under khatian No. 80 of the suit mouza by way of inheritance after demise of his first wife Bibijan Bibi

and such clear admission on the part of Dibahar Molla as evident from the recitals of the said deed rebuts presumption of entry in the R.S. record of right the certified copy which is marked exhibit - A. In this context he has cited the case of Sm. Pankajmi Debi and Others Vs. Sudhir Dutta and Others, to buttress up his contention that admission binds the person making the admission and rebuts the entry in the settlement record of rights.

14. The learned Advocate for the respondent has cited the case of Kumudini Mazumdar Vs. Rasik Lal Mazumdar and Others wherein it has been held that when by private arrangement amongst co-sharers, one of them is in exclusive possession of a certain portion of the ejmali land, a purchaser of the right, title and interest of the latter is entitled to be placed in the same position as his vendor and an arrangement amongst co-sharers like the above continues to be a good and binding arrangement until the co-sharers themselves agree to give it up and come to some other arrangement or until any one of the co-sharers demand a partition of the entire joint lands either in Court or out of Court. Relying on the said case of Kumudini Majumdar (supra) the learned advocate for the respondent has argued that recording of 1.36 acres of land under khata No. 80 of the suit mouza in the name of Dilbahar Molla at best indicates that by private arrangement amongst the co-sharers Dilbahar being one of the co-sharers was in possession of the same and such arrangement amongst co-sharers does not indicate that Dilbahar alone acquired title in respect of the said 1.36 acres of land.

15. The learned advocate for the appellants has laid emphasis on recording of the said 1.36 acres of land under the said khatian No. 80 in the name of Dilbahar Molla and contended that the said recording represents the area of land covered by oral heba. He has cited the case of Calcutta Municipal Corporation Vs. Pawan Kumar Saraf and Another, wherein it has been held at page 741 (para 13) that if a fact is declared by a statute as final and conclusive, its impact is crucial because no party can then give evidence for the purpose of disproving that fact. He has also cited the case of Satish Mohan Bindal Vs. The State of U.P., wherein it has been held that admission in pleadings or Judicial admissions by themselves can be made the foundation of the rights of the parties as held by the Supreme Court in the case of Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram and Others, . He has further cited the case of Sm. Indira Debi and Another Vs. State of West Bengal and Others, wherein it has been held that as there is specific provision for rectification of records u/s 44(2)(a) of the W. B. Estates Acquisition Act recourse to inherent powers for rectification of records was not Justified. After careful consideration of the above noted decisions cited by the learned advocate for the appellant and materials on record we find that those decisions no doubt enunciate the well-settled principles of law but the said decisions have got no manner of application to the instant case we are seized of.

16. The glaring discrepancies in the evidence adduced on behalf of the defendants to substantiate the plea of oral heba by Bibijan Bibi in respect of 1.36

acres of land in favour of her husband Dilbahar Molla have already been mentioned. As pertinently pointed out by the learned advocate for the respondent, the sale deed dated 13-2-62 executed by Dilbahar Molla in favour of his second wife Malekjan Bibi contains recital of acquisition of title of Dilbahar in respect of .46 decimals of land out of 1.36 acres of land recorded in khatian No. 80 of the suit mouza by way of inheritance after demise of his first wife Bibijan Bibi and such clear admission of Dilbahar as recited in the said deed rebuts presumption of entry relating to 1.36 acres of land in the name of Dilbahar Molla in the R.S. khatian No. 80. In fact nowhere in the four corners of the said sale deed exhibit-1 (a) there is anything to indicate acquisition of title of Dilbahar Molla in respect of 1.36 acres of land of the said khatian by means of oral heba from her first wife Bibijan Bibi as alleged. Under the above circumstances we find that no credible evidence on record to substantiate the plea of oral heba in respect of the said 1.36 acres of land out of the suit lands by Bibijan Bibi in favour of Dilbahar Molla as raised by the appellants. It has been rightly held by the learned trial Judge that recital of the said deed exhibit-1 (a) rules out the defendants' story of oral heba.

17. After going through the evidence on record we find that Bibijan Bibi died leaving behind her husband Dilbahar Molla, one son Niyamat All and three daughters Juhara, Alekjan and Neharbanu who inherited the property in suit as legal heirs of the deceased Bibijan Bibi according to Mohammedon law. The materials on record make it abundantly clear that Niyamat, Jahura, Alekjan and Neharbanu sold their shares of the suit property to the plaintiff by virtue of the registered deed of sale dated 27-1-68 marked exhibit-I(b). Another registered deed of sale dated 27-1-68 exhibit-He) was executed by Malekjan Bibi in favour of the plaintiff in respect of her share of the suit property which had been sold to her by her husband Dilbahar Molla by the registered sale deed dated 13-2-62 the certified copy of which is marked exhibit-1 (a). Thus the materials on record congenitly prove that the plaintiff/respondent purchased the suit property from the above named vendors on the strength of the two separate registered sale deeds dated 27-1-68 marked exhibit-I(b) and I(c) respectively. So title of the plaintiff/ respondent over the property in suit is well proved by the evidence on record.

18. So far as the possession is concerned we find convincing evidence, both oral and documentary, to show that since after purchase the plaintiff/ respondent has been possessing in the suit property. The testimony of all the P.Ws. coupled with the relevant documents admitted in evidence and referred to by the learned trial Judge in his Judgment clearly prove lawful possession of the plaintiff/respondent over the suit property. The materials on record clearly indicate that after purchase the plaintiff/respondent mutated their name and developed the property and has been exercising all sorts of proprietary right over the same. The document marked exhibit-4 indicates as well that the plaintiff obtained sanction from the appropriate authority for conversion of the lands in question from Sali began (Agricultural) to bastu (Non-agricultural) u/s 4C(2) of W.B.L.R.

(Amendment) Act, 1981 for construction of dwelling house for members of the plaintiff society. The oral evidence of D.Ws. is far from convincing to prove their case of possession. That apart, the R.S. records of rights the certified copies of which are marked exhibit-"A" series and other documents marked exhibits-"B", "C" and "D" do not indicate in convincing manner that the defendants/appellants are still in occupation of the suit property in respect of which the plaintiff/respondent already acquired valid title and lawful possession. The learned advocate for the appellants has drawn our attention to the Commissioner's report marked exhibit-"D" wherein it is reported by the Commissioner appointed for local inspection that on inspection he found the present nature and character of the suit property to be an agricultural one. But in our view such report of the Commissioner can hardly lend any amount of assurance to the appellants especially when the appellants have failed to prove their lawful title over the property in suit. It has been held in the case of *Promode Kumar Roy and Others Vs. Kali Mohan Saha Pramanick and Others*, that where there is strong evidence of possession on the part of the respondents opposed by evidence apparently strong also on the part of the appellant, in estimating the weight due to the evidence on both sides, the presumption may well be regarded that possession went with the title, and that with the aid of it, there is a stronger probability that the respondents' case is true than that of the appellant. Having regard to above noted well-settled principles of law and the facts and circumstances of the instant case we hold that possession of the property in suit goes with the lawful title acquired by the plaintiff over the suit property and that is evidently more so in view of overwhelming evidence on record with regard to the title and possession of the plaintiff/respondent over the suit property.

19. For the foregoing reasons we are of the view that the learned trial Judge is quite justified in holding that the plaintiff has title and possession over the suit property and rightly decreed the suit in favour of the plaintiff/ respondent. There is no merit in the instant appeal.

20. The appeal is accordingly dismissed. The judgment and decree passed by Sri Abdul Quader, learned Civil Judge (Senior Division) Barulpur, South 24-Parganas on 9th July 1999 in Title Suit No. 144 of 1993 are affirmed No order as to costs.

Xerox certified copy of this Judgment, if applied for, be given to the parties.

T. Chatterjee, J.

21. I agree.