
(2000) 09 CAL CK 0013
In the Calcutta High Court
Case No : Second Appeal No. 1747 of 1965

Mayejuddin Mondal

APPELLANT

Vs

Ali Box Mondal

RESPONDENT

Date of Decision : 28-09-2000

Acts Referred:

Bengal Tenancy Act, 1885 — Section 88

Citation : (2000) 2 ILR (Cal) 342

Hon'ble Judges : Basudeva Panigrahi, J

Bench : Single Bench

Advocate : Abu Sufian, for the Appellant; Arun Kumar Sanyal and Bikash Mondal, for the Respondent

Final Decision : Allowed

Judgement

Basudeva Panigrahi, J.—This appeal is against the judgment and decree dated February 26, 1964, passed by the Additional District Judge, Murshidabad in Title Appeal No. 282 of 1963 reversing the judgment and decree dated July 31, 1963, passed by the Sub-ordinate Judge Murshidabad in partition Suit No. 3 of 1961 whereby the Learned Subordinate Judge allowed the Plaintiff's prayer for partition.

2. If shorn of unnecessary detail, the Plaintiff's case be stated as follows:

That the suit properties described in the plain schedule originally belonged to one Moslem Mondal who died leaving behind his two sons, namely, Gopal and Hares and two daughters Tafi and Kaifa. Hares died leaving behind no son. But Gopal died leaving behind Ali Box Mondal who is the Respondent No. 1 in this case and three daughters, namely, Chhakiman Bibi Defendant No. 2, Jobeda Bibi Plaintiff No. 8 and Khosjan who is already died and her heirs have been impleaded as Defendant Nos. 3 to 5. Tofi Bibi died leaving behind her three sons. The Plaintiff No. 1 Majudding died leaving behind his successors 9 to 12. The Plaintiff No. 2, 3 and 6 are the heirs of Pari Bibi. The Plaintiff Nos. 4, 5 and 7 are the heirs of

Imajuddin. Tofi died leaving behind her three sons Golam Rasul, Mahiuddin and Atiar Rahamans daughters (originally Defendant Nos. 11, 14 and 15) as her heirs;

In the eve of Moslem Mondal's death his sons and daughters inherited the properties. Tofi got 1/6th shares. The Plaintiff Nos. 1 to 7, 9 and 10 claimed interest through Tofi Bibi. Plaintiff No. 8 claimed 1/5th share of Gopal's 2/6th interest in his suit. It is inter alia alleged that after the death of Moslem Mondal his sons and daughters remained in joint possession of the suit properties. It continued as "ejmali" properties but in the CS Operation the suit properties were, however, wrongly and illegally recorded in the names of two sons of Moslem Mondal, such as Gopal and Hares;

The Plaintiffs further stated in their pleadings that it was not properly recorded in the record-of-right and it represented a wrong entry leaving the daughters of Moslem Mondal, who were also enjoying the suit properties jointly with their brothers. The income from the joint family property was being distributed among the Plaintiffs' predecessors-in-interest as well as the Defendants. But the Plaintiffs demanded partition from the Defendant No. 1 and other Defendants. But, however, they strongly resisted the claim of the Plaintiffs, so, they did not find any other remedy, besides, filing of the present suit for partition.

3. The Defendant No. 1 alone contested the suit. Other Defendants namely, Defendant Nos. 7 to 11, 14 and 15 after filing of their written statement, did not contest the suit. The Defendant No. 1, apart from other pleas, has raised a fundamental question regarding the maintainability of the suit. It was further contended that the suit properties did not belong to Moslem Mondal. The suit properties were acquired by Gopal and Hares. Hares gave away his interest along with the major portion of the suit properties to the Defendant No. 1. The Defendants Nos. 3, 12, 14 and 15 were transposed as Plaintiffs. The Trial Court held that in so far as geneology claimed by the Plaintiffs there could be no dispute by the Defendants. It has further held that the suit properties belonged to Moslem Mondal and it was not partitioned beforehand. The parties have been enjoying as per their convenience but without any partition by meets and bounds. There has been no evidence that there was an exclusion of other co-sharers from the suit properties nor was it established by the Defendant No. 1 that his predecessors-in-interest were in exclusive possession of the suit properties. "Arpan Nama" executed by Defendant No. 1 in favour of Hares and his wife has established that those properties belonged to Moslem Mondal. Since this document was executed against the Defendant No. 1's own interest, it has, therefore, been established that the properties belonged to Moslem Mondal.

4. The Appellate Court has, however, come to the conclusion that the Plaintiff had left with no credible evidence nor the evidence adduced was sufficient to hold that the properties belonged to Moslem Mondal. The recital of the documents exhibits 1 and 2, however, would not raise any irrebutable presumption that the properties belonged to Moslem Mondal. The recital in the document would not exclusively raise a presumption that these properties were

joint family properties. The "Na Debi Patra" exhibit 1 can only be accepted as an act of relinquishment when the person had an interest in the property before such deed was executed. In this case the Plaintiffs having signally failed to produce any credible or believable evidence either oral or documentary to establish that they have a legal right to the properties, their claim for partition could not be granted. The Trial Court, in such background, fell into error by holding that the properties belonged to Moslem Mondal. Accordingly, the Trial Court's observation that the properties belonged to Moslem Mondai has been upset.

5. It has to be presumed that the normal situation or every family is presumed to be joint and the legal presumption is that the joint family continues joint until contrary is proved. Merely because there was severance of joint status would not, however, raise a presumption that there was full, and complete partition of all the joint family properties by meets and bounds. There has been no presumption of a joint family owning any property. In this case as per the Appeal Court's judgment, there was no dispute between the parties as regards the geneology. Therefore, it can safely be held that Moslem Mondal who died in or around 1989 had left with two sons namely, Gopal and Hares and two daughters Tofi and Kaifa. Persons may lie but not the circumstances. In order to prove that the properties belonged to Moslem Mondal, there are many circumstances which have raised irrebutable presumption. Ali Baksh Mondal is said to have executed a deed of relinquishment vide exhibit 1 on November 22, 1935, which is otherwise known as "Na Dabi Patra" in favour of Golam Rosul. In the said document the Defendant No. 1 in no uncertain terms has described his father Gopal and brother of Golam Rosul were brothers and two sisters and the properties originally belonged to Moslem Mondal. This admission made by the Defendant No. 1 when there was no controversy between the Plaintiffs and the Defendant No. 1 and the said admission is against his own interest. In has a strong presumptive value unless it is properly rebutted. The Appellate Court in order to nullify the effect of exhibit 1 made an attempt to explain that this document was executed at a time when there was a demand for payment of loan by a Co-operative Society and, therefore, the Defendant No. 1 to avoid payment of such loan might have created this document. On reading the document it appears that it was not a sale deed but only a deed of relianquishment. The Defendant No. 1 had clearly and unequivocally made a statement that the property belonged to Moslem Mondal where it was enjoyed as ejmaii property. It is no doubt true that in the said document there has been a description regarding partition by convenience but no details had been given as to when such a partition had taken place and which property had fallen to the share of different co-sharers. In a joint family, when a party raises a plea of partition, the burden of proof would lie on such person to establish that such partition had taken place and, therefore, parties lived separately. In this particular case neither the pleadings nor the evidence would establish that there was a partition prior to the filing of the suit. If the Defendant No. 1's version was accepted that it was the

self acquisition of his father as well as Hares, there could be no question of any pre-partition. On such ground also the findings of the appellate Court seems to be untenable and unsustainable in law.

6. The Learned Advocate appearing for the Defendant/Respondent No. 1 has strongly contended that since it was a grant in favour of the father of the Defendant and Hares, therefore, in all fairness the property shall be presumed to be their separate property. In order to substantiate such plea much reliance has been laid upon the kobuliyat purported to have been executed by Hares in favour of Nawab of Murshidabad. By the time the kobuliyat was executed by Hares, Gopal was possibly dead. Hares being the eldest member of the family as representative he must have signed in the kobuliyat. In the document it was described to be a grant by the Nawab. If that be so, the presumption should be raised that the property must have belonged to Moslem Mondal.

7. The Appellants have relied upon the judgment of the Learned Munsif, 1st Court, Berhampore, in Misc. Judicial Case No. 1747 of 1965 u/s 88 of Bengal Tenancy Act. It was with regard to payment of jama towards the occupation of the land. It has been held that it was a joint family property where the heirs of Tofi should have joined as parties and, accordingly, the petition was dismissed. In the said case there was a legal determination as to the nature of the property and also the parties who were entitled to it. This observation goes a long way in proving that the suit properties originally belonged to Moslem Mondal who had two sons and two daughters. The Learned Munsif held that the properties belonged to ejmali on the basis of strong evidence placed by the parties.

8. On a reading of exhibit 2 the "Arpain Nama" purported to have been executed by Ali Baksh Mondal to Hares and also "deed of gift" executed by Hares to Ali Baksh, it appears that those two documents also have great bearing to determine the nature of properties sought to be partitioned, which belonged to Moslem Mondal. Petition by Golam Rosul, son of Kaifa and also objection of Hares exhibit 71 in proceeding u/s 88, Bengal Tenancy Act would unmistakably indicate that the suit properties belonged to Moslem Mondal. In that view of the matter also, the appellate Court appears to have significantly failed to consider the intrinsic value of those documents and wrongly jumped to the conclusion that these properties belonged to Gopal and Hares. No presumption can be raised as regards the nature of the properties from "Arpan Nana" and "Kobuliyat" purported to have executed by Hares and Nawab of Murshidabad.

9. Taking the facts and circumstances of the case into consideration and also on hearing the submission advanced by the Learned Counsels, there can be least hesitation that the properties belonged to Moslem Mondal. In that view of the matter I am unable to agree with the observation of the Learned 1st Appellate Court and accordingly the judgment and decree are hereby set aside and that of the Learned Munsif's judgment and decree are hereby restored. The suit properties be divided between the Plaintiffs and Defendants Tofi's successors will get 1/6th share, Koifa's successors will get 1/6th share, Hares's successors

2/6th and Gopal"s successors will get 2/6th suare. The Defendant No. 1 is directed to devide the properties amicably as per above observation within three months failing which Plaintiffs" may file an application for passing final decree by dividing the properties through a partition commissioner.

10. Accordingly, the appeal is allowed but in the circumstances without costs.

Appeal allowed.