

**(1969) 06 CAL CK 0001**  
**In the Calcutta High Court**

Osman Gazi and Others

APPELLANT

Vs

Hemanta Kumar Halder and Others

RESPONDENT

**Date of Decision :** 20-06-1969

**Acts Referred:**

Transfer of Property Act, 1882 — Section 118, 40, 53A, 54

**Citation :** 74 CWN 355

**Hon'ble Judges :** S.N. Bagchi, J

**Bench :** Single Bench

**Advocate :** Lala Hemanta Kumar and Bankim Chandra Roy 2, for the Appellant; Jitendra Nath Guha and Naresh Chandra Ganguly for the Opp. Party Nos. 1 and 2, Jnan Ranjan Ganguly and Bimalendu Mitra for the Opp. Party No. 3, for the Respondent

**Final Decision :** Dismissed

## **Judgement**

Mr. S.N. Bagchi, J.—These four second appeals arise out of the appellate judgment passed in Title Suits Nos. 225, 226, 227 and 228 of 1957 of the Court of Munsiff at Basirhat at the instance of the Plaintiffs of those suits.

2. In Title Suit No. 225 of 1957 the Plaintiff is Baburali Gazi and the Defendants are Hemanta Kumar Halder and Tarapada Halder and the pro-Defendants are minor Haiderali Gazi represented by his mother guardian Deljan Bibi, Osman Gazi, Pute Gazi, Din Mohammad Gazi, Bahar Ali Gazi and Pagal Chandra Mondal of village Sangrampur.

3. In Title Suit No. 226 of 1957 the Plaintiffs are Osman Gazi, Pute Gazi, Din Mohammad Gazi and Bahar Ali Gazi and the Defendants are Hemanta Kumar Halder and Tarapada Halder and pro-Defendants are Paresh Chandra Mondal, Sripada Biswas and Dharendra Mondal of village Sangrampur.

4. In the Title Suit No. 227 of 1957 the Plaintiffs are Osman Gazi, Pute Gazi, Din Mohammad Gazi and Baharali Gazi and the Defendants are Hemanta Kumar Halder and Tarapada Halder and pro-Defendants are minor Haiderali Gazi

represented by his mother guardian Deljan Bibi, Baburali Gazi, Pagal Chandra Mondal, Nitai Charan Mondal, Sripada Biswas, Paresh Chandra Mondal and Ahad Box Mallick.

5. In Title Suit No. 228 of 1957 the Plaintiff is minor Haiderali Gazi represented by his mother guardian Deljan Bibi and the Defendants are Hemanta Kumar Halder and Tarapada Halder, while the pro-Defendants are Baburali Gazi, Osman Gazi, Pute Gazi, Din Mohammad Gazi, Baharali Gazi, Nitai Charan Mondal, Dharendra Mondal, Sripada Biswas, Paresh Chandra Mondal, Pagal Chandra Bachhar and Ahad Box Mallick.

6. The principal Defendants in all the suits now the Respondents are the same. The Plaintiffs in the different suits are different persons, some of whom in the relative suits are also pro-forma Defendants. Plaintiff, Baburali Gazi in the Title Suit No. 225 of 1957 claims to be a fractional sharer of the several plots of land recorded in several khatians of mouza Sangrampur described in schedule "ka" to "tha" of the plaint. He claims declaration of his title to the lands of the plots of the several schedules to the plaint upon holding that the record of rights prepared and finally published during revisional survey operation relating to the lands in Schedule to the plaint contrary to the Plaintiffs' right, title and interest in such lands were incorrect. He further claims a declaration that the deed of exchange set up by the Defendants 1 and 2 against the Plaintiffs' claim for title to and recovery of possession or in the alternative joint possession of the lands in schedule to the plaint is void, illegal and inoperative. He further claims recovery of possession by evicting the Defendants 1 and 2 from "ga" and "tha" schedule of the plaint. The Plaintiff (T.S. 225/57), Baburali asserts in the plaint that the properties, described in schedule to the plaint, belonged to the Plaintiff. Communal disturbances started at Basirhat on the Dol-Purnima day in 1356 B.S. and spread over to Sangrampur. The Plaintiff left his village home for a few days unprotected and Defendants 1 and 2, evacuees from East Bengal, illegally entered into the Plaintiff's empty house at Sangrampur in Chaitra 1356 B.S., and attempted to take possession of the lands of the Plaintiff with the help of the relatives residing in the same village. Being not able to gain an entry in their house, the Plaintiff lived for some time in the house of his relatives at Fatullapur. Thereafter, as the disturbances subsided the Plaintiff failing to get possession of his own house, raised a new bhita, in plot 2271 and several plots of khatian 445 and began to reside in the newly constructed house. The Defendants 1 and 2 with their friends and relations had been attempting to possess Plaintiff's land forcibly and illegally from 1357 B.S. In spite of the Plaintiff's prayer to authorities for restoration of possession of his bhita land, he was baffled.

7. During the revisional survey operations, Defendants 1 and 2 had set up and unregistered, unstamped and false exchange document and got the Plaintiff's land in suit recorded in their names in the revisional record of rights. The deed of exchange is a false, fraudulent and invalid document, set up by the Defendants 1 and 2 to grab Plaintiff's land in suit. The Plaintiff denied having executed the

alleged deed of exchange and disputed the statements recorded therein. The Plaintiff asserted that he never executed the deed and never gave over possession of the disputed lands to the Defendants in terms of the illegal and invalid deed of exchange. So, the Plaintiff claims recovery of possession of land and house in schedule "ga" and "tha" of the plaint upon evicting the Defendants 1 and 2 therefrom while in regard to land of schedules "ka" to "tha" of the plaint, the Plaintiff claims confirmation of possession and recovery of possession jointly with pro-forma Defendants 3 to 7 upon evicting the Defendants 1 and 2 therefrom.

8. In Title Suit No. 226 of 1957 upon asserting the facts of communal disturbances and all those that are alleged by the Plaintiff in Title Suit No. 225 of 1957, the Plaintiffs claim possession of the land in schedule to the plaint in Title Suit No. 226 of 1957 upon evicting the Defendants 1 and 2 therefrom. The deed of exchange, referred to in plaint in Title Suit No. 225 of 1957, has been challenged in the same terms and upon some allegations as made in the plaint in Title Suit No. 225 of 1957. The revisional record of rights in regard to land to Title Suit No. 226 of 1957 has been challenged in the plaint in Title Suit No. 226 of 1957, as being erroneous depicting untrue state of facts.

9. In Title Suit No. 227 of 1957 the Plaintiffs claim recovery of possession of "ga" to "Cha" schedules lands from which they had been dispossessed by Defendants 1 and 2 upon same-self allegations and assertions of facts as had been made in the plaint in Title Suit No. 225 of 1957. The Plaintiffs claim recovery of ejmali possession of "ka" to "Uma" schedules lands of the plaint with pro-forma-Defendants of Title Suit No. 227 of 1957 upon a declaration that the alleged exchange deed was illegal and inoperative.

10. In Title Suit 228 of 1957 the Plaintiff, a minor, alleges that his mother had no authority, nor she did execute the alleged deed of exchange set up by the Defendants 1 and 2 and prayed for restoration of possession to the lands described in schedule in Title Suit No. 228 of 1957 upon eviction of the Defendants 1 and 2 therefrom who dispossessed the Plaintiff from suit lands upon such allegations and assertions of facts as has been made in the plaint in Title Suit No. 225 of 1957. The principal Defendants common to all these four suits i.e. Defendants Nos. 1 and 2, the Halders, filed separate written statements in the four suits raising more or less the same ground of defence. They contend, inter alia, that during the disturbance in 1950 in East Pakistan it became unsafe for the Defendants Halders (of minority community in East Pakistan) to remain in the said land in safety. In Falgoon 1356 B.S. the Defendants attempted to procure land in India when the Plaintiffs expressed their desire to exchange their lands in Sangrampur for the Defendants' lands in Bhomra village of Khoodna district. The Plaintiffs and the Defendants 1 and 2 entered into a contract of exchange of their respective lands and the plfs executed in favour of the Defendants 1 and 2, a deed of exchange on 15th Chaitra 1356 B.S. in respect of their lands etc. situated in Sangrampur mouza in Basirhat and gave Defendants"

possession of the Plaintiffs" lands, house etc. The Defendants 1 and 2, on the other hand, gave Plaintiffs" possession in their lands in East Pakistan executing a deed of exchange similar to what the Plaintiffs executed in favour of the Defendants. As the registration of the exchange deed was prohibited, the respective parties retained their title deeds but gave some dakhilas, settlement khatians and map of the respective lands in exchange. On 12th Baisakh 1357 B.S. the Plaintiffs executed another deed in favour of the Defendants 1 and 2 as the thumb impression of some of their co-sharers were not very clear and some of the co-sharers did not sign the former document. By retaining their possession of the Defendants" lands situated in East Pakistan on the strength of the exchange deeds, the Plaintiffs were trying to dispossess the Defendants" lands in the schedule to the plaint of each of the suits, and without setting Defendants know that the Plaintiffs had ownership of the plots Nos. 227-275 situated in Sangrampur to which Defendants are entitled to possession under their deed of exchange, the Plaintiffs fraudulently built up their bhita on those plots and instituted this false and harassing suit. The Defendants claim their right but defend their possession in the suit lands on the strength of the exchange deed under the provisions of Section 53A of the Transfer of Property Act. They deny all the material allegations in the plaint.

11. In Title Suit No. 228 of 1957 the Defendants specifically pleaded that the Plaintiffs" mother signed the second deed of exchange on Plaintiff"s behalf. They further contend that as the Plaintiff"s mother abandoned all lands together with homestead without making arrangement for payment of rent, landlords took possession of the land I Title Suit No. 228 of 1957 and settled the said lands with the Defendants 1 and 2. The Defendants claim their possession in the lands in disputes in Title Suit No. 228 of 1957 for more than two years before the institution of the suit and challenge the Plaintiff"s right to get any relief whatsoever against the Defendants in regard to the disputed land.

12. All the four suits were tried analogously upon nine common issues by the learned Munsiff. Issues 1 to 3 were not pressed and were found upon the pleadings in favour of the Plaintiffs of each of the suits. Issues 4 to 8 were taken up together. Issues Nos. 4, 5, 6, 7 and 8 common to all the four suits read as follows:

(4) Have the Plaintiffs any subsisting right, title or interest in the disputed property?

(5) Is the suit barred u/s 53A T.P. Act?

(6) Are the Plaintiffs entitled declaration as prayed for?

(7) Are the Plaintiffs entitled to a decree for confirmation of possession and ejmali possession?

(8) Are the Plaintiffs entitled to a decree for khas possession?

13. Before the learned Munsif the Plaintiffs and the Defendants adduced oral

evidence and proved several documents in support of their respective contentions raised in all those suits. Upon considering the oral and documentary evidence the learned Munsif held that the Plaintiffs failed to prove their case as laid in the plaint of each of the suits. Then the learned Munsif took into consideration the defence version of the case. The learned Munsif observed in his judgment (page 13 of the paper book) after taking into consideration the case as set up by the contending parties in their pleadings and in the evidence adduced orally and through documents as follows: "Thus from the evidence on record and circumstances of the case which is apparent that some such arrangements were entered into and possession was taken by both the parties likewise. The Defendants are within their rights to defend their possession."

14. Furtherdown the learned Munsif in his judgment at page 14 of the paper book: "Accordingly I find that Defendant fulfilled their part of the contract and their possession likewise being referable to contract they are entitled to defend possession u/s 53A T.P. Act and Plaintiffs are not entitled to khas possession of these lands. The Plaintiffs are entitled to confirmation of possession in respect of lads in their possession only. Thus I answer these issues."

15. Upon such finding on the issues above, the learned Munsif decided the issue No. 9 observing that the Title Suit No. 225 of 1957, 227 of 1957 and 228 of 1957 were to be decreed in part while the Title Suit No. 226 of 1957 would fail. Accordingly, the learned Munsif decreed Title Suit No. 225, 226, 227 and 228 of 1957 partially and dismissed Title Suit No. 226 of 1957 on contest with costs. The learned Munsif declared the Plaintiffs' title to Plot Nos. 3346, 3347, 3358 and 3134 in Title Suit Nos. 225, 227, 228 of 1957 and confirmed and Plaintiff's possession therein. The learned Munsif refused recovery of possession in the lands of other plots in other three suits. The present Appellants (Plaintiffs) in these second appeals went in appeal against the judgment and decrees passed in the four suits, before the District Judge, 24-Parganas. The four appeals Nos. 1184 to 1187 of 1960 were heard by a learned Subordinate Judge at 24-Parganas. The Defendants now Respondents before me and Respondents before the Lower Appellate Court filed cross-objections.

16. The appeal and the cross-objections were dismissed by the learned Subordinate Judge affirming the judgment and decree passed by the learned Munsif in each of the four suits. The Plaintiffs of the four suits have now come up in these second appeals against the judgment and decrees passed by the learned Subordinate Judge in appeal. The Defendants 1 and 2 Respondents before the lower Appellate Court now Respondents in these second appeals also filed their cross-objections in these second appeals before this Court.

17. The Four appeals and the relative cross-objections were heard analogously and shall be governed by this judgment. When this appeal was heard initially by me I had to pass an order on 21st of December, 1967. The document, Ext. 0/1 dated 12th of Baisakh 1357 B.S. bears certain thumb impressions. The Plaintiffs now Appellants in all these appeals denied their alleged respective thumb

impressions appearing on the said document. The Defendants asserted that the thumb-impressions were genuine. By a public notice Ext. 7, two documents, Exts. 0 and 0/1 containing certain thumb impressions of the Plaintiffs had been disputed. So, it was found expedient in the interest of justice that thumb impression on Ext. 0/1 should be examined by a finger expert with the admitted thumb impression of the Plaintiffs or some of them. The appeals were kept pending before me and the learned Munsif was directed to order the Plaintiffs to bear the expenses of examination of the thumb impression on Ext. 0/1 by an expert and to send the records with the expert opinion and the evidence, if adduced, before this Court for deciding the appeals on merit. The learned Munsif vide order No. 61 dated 23.2.68 to order No. 68 dated 19.3.68 in the record of Title Suit No. 227 of 1957 carried out the directions of this Court and dispatched the records with the evidence opinion of the hand-writing expert and other relevant documents connected therewith. Then the appeals were placed for further arguments before me. The Defendants-Respondents prayed for taking additional evidence in this Court through the published record of rights relating to some plots in dispute. Those documents were taken in evidence as an additional evidence in this Court as per order dated 30.5.69 and marked Exts. R/1 to R/1A for the Court. For the Appellants in these appeals, Mr. Lala, the learned Counsel, addressed me and Mr. Guha for the Defendants-Respondents gave his reply to Mr. Lala's argument. As regards exchange of possession between the parties to these suits i.e. Appellants and the Respondents 1 and 2 in regard to properties in Sangrampur (India) and Bhomra (Khoolna, East Pakistan), both the learned Munsif and the learned Subordinate Judge came to the concurrent finding of facts. The learned Munsif, as I have already observed at pages 13 and 14 of the judgment in paper book, found that except plots 3346, 3347, 3358 and 3134, Defendants have been in possession and are entitled to defend their possession in other disputed plots since the Plaintiffs got possession of the Defendants' lands in East Pakistan and that such mutual taking over and giving over possession in and of the Hindusthan land and Pakistan land respectively by the Plaintiffs and by the Defendants mutually were referable to the agreements that were entered into by and between the parties. The learned Munsif found that in terms of 53A of the Transfer of Property Act the Defendants were entitled to defend their possession against the Plaintiffs in all the disputed plots except the four plots mentioned above. The learned Appellate Court found that on the deed of exchange the Plaintiffs-Appellants took possession of the properties of the Defendants situated in East Pakistan, while the Defendants Respondents in their turn took possession of the Plaintiffs' land in Hindusthan. Thus both the Courts came to a concurrent finding of fact upon discussing both oral and documentary evidence as regards mutually transference of possession of the Hindusthan and East Pakistan land by the parties to the contract of the deed of exchange. Mr. Lala, the learned Counsel for the Appellants, submitted that the learned Munsif and the learned Subordinate Judge failed to analyse the evidence adduced by the parties in the case in its true perspective, and came to incorrect finding of fact. That contention of Mr. Lala was countered by Mr. Lala

was countered by Mr. Guha, the Counsel for the Defendants-Respondents pointing out that all the relevant evidence turning on the question of possession of the East Pakistan lands by the Plaintiffs and the Hindusthan land by the Defendants have been elaborately considered by both the Courts below and that their view on the question of possession even if erroneous, could hardly be substituted for by any other possible view in these second appeals by this Court. Both the Courts have found that the Plaintiffs now the Appellants took Defendants' lands in the village Bhomra in East Pakistan, while the Defendants are in possession of the disputed lands except four plots in Sangrampur having had taken possession of the same from the Plaintiff. So, this finding of fact arrived at concurrently by the two Courts upon considering both oral and documentary evidence is now accepted by this Court.

18. Then Mr. Lala, the learned Counsel for the Appellants, contended that the document dated 12th of Baisakh, 1357 B.S. Ext. 0/1, apart from any other question, was not a contract within the scope of Section 53A of the Transfer of Property Act, nor was it a document of sale by way of exchange within Section 118 of the Transfer of Property Act. Ext. 0/1 bears thumb impression each under the names of (1) Osman Gazi, (2) Pute Gazi, (4) Baharali Gazi, (5) Baburali Gazi, (6) Deljan Bibi as guardian of the minor Haidar Gazi, and also the signature of one Din Mohammad Gazi. The document (Ext. 0/1) describes the Defendants as recipients while the Gazis as the executants. It is described as binimaynama i.e. the deed of exchange. It is not a deed of sale evident from its recitals. It records mutual exchange of possession of lands, houses etc., in between the executants and the recipients of the document. The document thus records, as it were, a memorandum of transaction whereby the parties had, in pursuance of contract, mutually exchanged possession of their properties, Gazis exchanging their possession in the properties in India for Halders' properties in East Pakistan while Halders exchanging their possession in East Pakistan properties for Gazis' properties in India. In the document, it is further recited that the valid document of transfer by way of sale would be mutually executed by the parties in regard to their respective properties in future, and such documents, when executed, would Ext. 0/1 reference has been made to an earlier document Ext. 0, Ext. 0/1 was executed by the Gazis i.e. the Plaintiffs-Appellants now before me. So, Ext. 0/1 is only a memorandum of a transaction and was signed only by the Gazis but not by Halders, Halders' case is that a document, similar to Ext. 0/1 had been executed by Haldes in favour of the Gazis who did not produce their document while Halders produced the document, Ext. 0/1, so also Ext. 0, that they had received from Gazis. Be that as it may, the fact of mutual exchange of possession in between the Gazis and Halders in respect of Hindusthan and East Pakistan properties has been found, independently of the recitals to that effect in Ext. 0/1, by both the Courts below upon other oral and documentary evidence Ext. 0/1 produced by the Defendants and executed by the Plaintiffs records - (a) the terms of the contract of exchange; (b) the terms of the deed of sale to be executed and registered by the respective parties in pursuance of the contract of

exchange in regard to the lands of the respective parties relating to which the contract of exchange by way of sale had been entered into by the parties. Section 53A of the Transfer of Property Act reads as follows: "Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this Section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

19. Section 54 of the Transfer of Property Act defines a contract for sale and runs as follows:

A contract for the sale of the immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

20. Section 118 of the Transfer of Property Act defines exchange and runs as follows:

When two persons mutually transfer the ownership of one thing for the ownership of another, neither, thing or both things being money only the transaction is called an "exchange".

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

21. So, the transaction under Ext. 0/1, and its replica lying with the Gazis which the Gazis admitted in Ext. 0/1 is only a contract for sale of immovable property entered into by and between the contracting parties, Gazis and Halders to be followed by mutual transfer of the ownership in the immovable property by way of sale at a future date. The terms of the sale can be gathered from Ext. 0/1 and its counterpart lying with the Gazis. The consideration for the contract of sale of the immovable property would be the respective properties of the contracting parties by way of exchange as defined in Section 118 of the Transfer of Property

Act. Gazis would convey their Hindusthan properties in favour of Halders, and Halders would convey their East Pakistan properties in favour of Gazis and the consideration for the sale by way of such exchange would be the respective properties of the contracting parties to the contract for sale. There was thus a contract to transfer between the contracting parties, agreeing thereunder to transfer mutually the ownership of one party in all his immovable properties to the other and vice-versa. Such transaction would be a contract of exchange and the transfer of the property by way of exchange would have to be completed in the manner provided for the transfer of such properties by sale. This contract to transfer the immovable properties of the contracting parties for consideration on sale by way of exchange is itself a personal contract which does not create an interest in the property even though the contract may have reference to land. The second paragraph of Section 40 of the Transfer of Property Act taken with the illustration under that Section establishes two propositions in relation to the present contract viz., that a contract for sale does not create any interest in the land, but is annexed to the ownership of the land and that the obligation can be enforced against a subsequent gratuitous transferee from the vendor or a transferee for value but with notice (1) Rambaran Prosad Vs. Ram Mohit Hazra and Others, .

22. In terms of Ext. 0/1 Gazis apparently contracted to transfer of consideration all their immovable properties in Hindusthan in favour of Halders, while Halders contracted to transfer for consideration all their immovable properties in East Pakistan in favour of Gazis. In Ext. 0/1, it is further recited that sometime in future the Gazis would execute a sale deed in faovour Halder while Halders would execute a sale deed in favour of Gazis and would have those sale deeds registered. The Gazis would sell all their immovable properties situated in India while Halders would sell all tier immovable properties situated in Bhomra in East Pakistan. So, the memorandum of the transaction in Ext. 0/1, pursuant to the contract of sale by way of exchange, arrived at between the parties falls within the scope of Section 53A of the Transfer of Property Act. Mr. Lala submitted that Ext. 0/1 was not a contract "to transfer for consideration any immovable property" within the scope of Section 53A of the Transfer of Property Act. The contract of exchange by way of sale was entered into between the parties to the contract in Hindusthan i.e. India. Under the contract of exchange by way of sale, Halders" East Pakistan immovable property would be the consideration of Gazis" sale of their Hindusthan land to Halders, while Ghazis" Hindusthan land would be the consideration to Halders for their sale of East Pakistan immovable property to Ghazis. So, on the date of the contract of exchange by way of sale, entered into by the parties to the contract i.e. the Gazis and Halders, though the contract was entered into in Hindusthan, the transfer, in pursuance of the contract of exchange, was for the consideration of immovable properties situated in two foreign countries belonging to the contracting parties, Gazis and Halders. The Transfer of Property Act 1982 and the Contract Act 1872 have their application with the bounds of India (Hindusthan) but not beyond. The contract of exchange

by way of sale of immovable property presupposes a consideration for the contract of sale of such properties, and such consideration for the contract of sale of immovable property is the immovable property to be sold by the contracting parties by way of exchange. So, between the contracting parties the contract of sale of immovable property by way of exchange must be backed by consideration which would be the immovable property of the contracting parties, to be exchanged by and between them under a deed of sale to be executed by one of the contracting parties in favour of other and vice-versa.

23. In the present case in relation to the contracting parties i.e. to Gazis, East Pakistan land of Halders on the date of contract would be a land in a foreign country, and to Halders, Hindusthan land of Gazis would be a land of foreign country. So, the consideration i.e. the immovable property in relation to the contracting parties on the date of contract would not be an immovable property within the bounds of India only. To Gazis the foreign land in East Pakistan would be the consideration and to Halders the foreign land in India would be the consideration on the date of the contract entered into by and between Gazis and Halders in India. Upon a such premises Mr. Lala, the learned Counsel for the Appellants submitted that foreign land of the respective contracting parties would be no consideration for the contract, of transfer of such immovable properties that belonged to the respective parties to the contract on the date of the contract, within the scope of Section 53A read with Section 118 of the Transfer of Property Act.

24. In reply Mr. Guha, the learned Counsel for the Defendants Respondents, submitted that by and under the principles of Private International Law, the submissions made by Mr. Lala would not be supported. Mr. Guha contended that the contract to transfer immovable property by way of exchange as entered into by and between the contending parties was a valid one within the scope of Sections 53A and 118 of the Transfer of Property Act, even though the consideration for the contract of transfer of immovable property by way of exchange entered into by and between the parties in India was, in relation to the parties, on the date of the contract immovable property of the respective parties, situated in two foreign countries. The Rules of the Private International Law would support the validity of such a contract of transfer of such immovable property by way of exchange.

26. Let us now examine Ext. 0/1 to find who executed the same. The thumb impressions of Osman Gazi, Baharali Gazi on Ext. 0/1 are found identical with the specimen of their thumb impressions taken by the expert. Osman and Baharali are Plaintiffs 1 and 4 in the Title Suit No. 227 of 1957. So, they cannot deny that they executed Ext. 0/1. Baburali and minor Haiderali or alias Haid Gazi represented by his mother natural guardian Deljan did not appear before the learned Munsif nor take any step, vide order 63 dated 11.3.68 in T.S. 227 of 1957. Pute Gazi, Plaintiff No. 2 in Title Suit No. 227 of 1957 appeared, so also Din Mohammad Gazi. Din Mohammad signed on Ext. 0/1 which was accepted as

genuine by both the Courts below. Pute Gazi's thumb impression on Ext. 0/1 could not be compared. So in T.S. No. 227 of 1957 except Plaintiff No. 2 Putey Gazi all the Plaintiffs i.e. Osman, Din Mohammad and Baharali executed Exhibit 0/1. Baburali Gazi Plaintiff in T.S. No. 225 of 1957 did not appear before the learned Munsif for giving specimen thumb impression as directed by the Court vide. 63 dated 11.3.68 in T.S. No. 227 of 1957. So Baburali Plaintiff in T.S. No. 225 of 1957 executed Ext. 0/1. In T.S. No. 226 of n1957 Osman Gazi, Plaintiff No. 1 Din Mohammad, Plaintiff No. 4 executed Ext. 0/1 but not Plaintiff No. 2, Pute Gazi. In T.S. No. 288 of 1957 minor Haidarali Gazi represented by his mother Deljan, is the Plaintiff. This Deljan did not appear before the learned Munsif as directed by the Court. Her thumb impression as guardian of minor Haiderali or Haid Ali appears on Ext. 0/1. So Haider (minor) through other Deljan executed Ext. 0/1 in T.S. No. 228 of 1957. So, except Pute Gazi Plaintiff No. 2 in T.S. No. 226 of 1957 and 227 of 1957, the Plaintiffs in all other suits executed Ext. 0/1. As found by both the Courts below Gazis took possession of Halders" East Pakistan immovable properties and have been possessing the same, while, as found by both the Courts below, Halders have been possessing all the immovable properties of Gazis in four suits situated in Hindusthan except four plots. So, in terms of the contract of exchange by way of sale, parties to the contract have been in possession of the immovable properties,, Gazis" in possession of East Pakistan properties. Halders" in possession of Hindusthan properties on the basis of the contract of exchange by way of sale under Ext. 0/1.

27. It was contended by Mr. Lala, the learned Counsel for the Appellants, that Deljan as the natural guardian - mother of Haider or Haid Ali had no legal capacity either to execute the contract to transfer Haid Gazi's or Haider's immovable property or to sell such property. Therefore, in regard to the immovable property of Haiderali (minor) Plaintiff in T.S. No. 228 of 1957 the contract to transfer immovable property by way of exchange to be followed by execution of a document on sale, entered into by Deljan for and on behalf of (minor) Haider with the Defendants-Respondents was void. Mr. Guha, the learned Counsel for the Defendants-Respondents, pointed out that in Ext. 0/1, executed by the Gazis including Haider's mother, there is a clear admission that the Defendants-Respondents Halders executed a document in the same terms as in Ext. 0/1, in favour of the Gazis including Haider and that Ext. 0/1 was produced and proved by the Defendants-Respondents while the Gazi, including Haider or as matter of that his mother Deljan did not produce the counterpart of Ext. 0/1 which they had received from Haiders. Mr. Guha further submitted that Halders contracted to sell by way of exchange their East Pakistan property to the Gazis including Haider (minor), and to execute a deed of sale in pursuance of the contract at a future time. Mr. Guha further pointed out that the benefit under the contract in favour of Gazis including (minor) Haider acting through his mother-guardian Deljan had been taken by the Gazis including (minor) Haider and that (minor) Haider as well as other Gazis entered into possession of the Haiders" East Pakistan immovable properties and have been possessing of such land etc.

as found by both the Courts below. Accordingly, Mr. Guha submitted that so long as the Gazis including Haider did not quit and vacate possession of Halders' East Pakistan land etc. making over possession of such land to Halders, Halders could well defend their possession in Hindusthan land of Gazis including (minor) Haider, when Gazis including Haider and Halders in pursuance of the contract to transfer their respective immovable properties, situated in two countries, being foreign countries, in relation to either of the contracting parties on the date of the contract to transfer by way of exchange of such immovable properties, had taken possession of such foreign properties agreeing to execute in pursuance of the contract of exchange the relative sale deeds in respect of such properties of which they had mutually exchanged their possession and had been continuing in possession. Mr. Guha pointed out that the Respondents Halders, on the basis of the contract to transfer immovable properties by way of exchange entered into by and between the contending parties, were not at present claiming title to the Hindusthan land, but they were defending their possession in the Hindusthan land of the Gazis including that of minor Haider could well defend their possession not on the basis of acquisition of title to such land but on the basis of their present possession in the East Pakistan land of the Halders, when both the courts have found that Halders have been possessing Hindusthan land of the Gazis and Gazis have been possessing the East Pakistan land of the Halders in pursuance of the contract, mutually entered into by the parties, to transfer their respective immovable properties for consideration - being the respective immovable properties of the contracting parties - situated on the date of the contract in relation to the contracting parties in two foreign countries.

28. Mr. Guha, the learned Counsel for the Defendants-Respondents, on the line of reasoning advanced in his arguments, submitted that the terms necessary to constitute the transfer of their respective immovable properties by the contracting parties as revealed in Ext. 0/1, could be ascertained with reasonable certainty and that the transferee, I mean the Gazis including minor Haider and Halders had in part performance of the contract taken possession of the immovable properties of the respective contracting parties and had been continuing in possession of such immovable properties, and that the consideration for the contract to transfer the immovable properties of the contracting parties being the immovable properties themselves, the parties to such a contract had in part performance of the contract, though minor Haider's mother Deljan had no contracting capacity as that contended by the Appellants had, and had been taken benefits under the contract and that where had been in the circumstances of the case no failure of consideration or want of consideration evident from the conduct of the parties to the contract, manifested in their acts. Accordingly, Mr. Guha submitted that when the contracting parties had entered into a contract in India and had, in part performance of such contracts, taken possession of the immovable properties which they had contracted to transfer for consideration, being the properties themselves, the Defendants-Respondents, even though Deljan had no capacity to enter into the contract for and on behalf

of the minor Haider could well defend their possession in the disputed land situated in Hindusthan even as against minor Haider, since the doctrine of part performance, in a situation like this was a rule of equity and that no Court of equity would allow minor Haider and the other Gazis to get back their Hindusthan immovable properties from Halders when Gazis including Haider had already taken possession of Halders' East Pakistan immovable properties and had been continuing in possession of such immovable properties. So, Mr. Guha concluded urging that for equitable considerations, in all the disputed plots Halders' possession as against Gazis including minor Haider could well be defended within the scope of Section 53A read with Section 118 of the Transfer of Property Act.

29. What is the law of transfer as well as the law of contract in east Pakistan relating to contract to transfer of immovable property in East Pakistan and transfer of immovable property in East Pakistan? We know the Indian law in those two fields governed by the Indian Contract Act and the Transfer of Property Act. Mr. Lala's contention is that the East Pakistan law relating to contract to transfer of immovable property situated in East Pakistan is not the same as that of the law in India. This contention of Mr. Lala does not appear to me to be sound. All rights over or in relation to immovable properties are governed by the law of the country where the immovable is situated (*Lex Situs*) (*Dicey Conflict of Laws*, 8th Edition, page 519 (Rule 80)). But when a party relies upon any difference between the Indian law and the foreign law, the same is to be proved and in the absence of such proof, the foreign law is presumed to be the same as Indian law (*Halsbury's Law of England*, 3rd Edition, Vol. 15, paragraph 597 foot note (p), page 328).

30. If in the present case, the consideration for the contract to transfer immovable property would have been Hindusthan property belonging to both the contracting parties, who were, in terms of such contract, to execute a deed of sale by way of exchange in respect of such Hindusthan immovable properties in terms of such contracts in favour of the respective transferees under the deed, the property itself to be transferred would have been the consideration for such contracts within the scope of Section 118 read with Section 53A of the Transfer of Property Act. But, in the present case, the consideration for the contract to transfer immovable property, entered into by both the contracting parties, was on the date of the contracts, in relation to the respective properties of the contracting parties, situated in two foreign countries, and the contract of transfer such immovable properties for consideration being the properties themselves, cannot be considered as one beyond the scope of the provisions of Section 53A read with Section 118 of the Transfer of Property Act, and the analogous provisions of such law, presumed to be current in East Pakistan, when the Appellants did not plead nor adduce any evidence to establish that the law in India as embodied in Section 53A, Section 54 read with Section 118 of the Transfer of Property Act was different from the law in the same field as now obtaining in East Pakistan. Neither of the parties to the contract has yet executed a document of transfer i.e. sale of deed in relation to their respective properties

situated in two foreign countries. So, neither of the contracting parties has yet acquired any right, title or interest in relation to the immovable properties of the contracting parties situated in two foreign countries. But both the parties under the contract to transfer their respective immovable properties situated in two foreign countries have acquired a right under such contract which does not create an interest in the property to be transferred even though the contract may have reference to such properties. Such contracts, though annexed to the ownership of the land, create a personal obligation which can be enforced under certain limitations as has been held in *Rambaran Prosad Vs. Ram Mohit Hazra and Others*, . In part performance of such contracts, both the parties under the contract have mutually exchanged their possession in the immovable properties to be transferred by a deed of sale, Gazis making over their possession in Hindusthan lands to Halders, and Halders making over their possession in East Pakistan lands to Gazis. Accordingly, in regard to Hindusthan lands of Gazis in dispute, Halders can well defend their possession in such lands with the scope of Section 53A of the Transfer of Property Act while under the analogous provisions of law, as now obtaining in East Pakistan, the Gazis, if and when occasion would arise, may defend their possession in Halder's East Pakistan lands. As both the parties to the contracts have in their turn performed a part of the contract, each party may, in a properly Court, if not otherwise barred, call upon the other to execute and register the document of transfer in pursuance of the contract entered into by and between the parties in India, when both the parties have placed themselves under the jurisdiction of the Indian Courts. The Indian Courts in such a suit may pass a decree that can be enforced in India as well as in East Pakistan under the law as obtaining in both the countries. Halders in their part, in pursuance of such a decree of Indian Courts, would be directed to execute a deed of sale in regard to their East Pakistan property in East Pakistan, such deed of sale would have to be registered at the registration office in East Pakistan within the local limits of which such East Pakistan property is situated, while Gazis, in pursuance of such a decree, would be directed to execute the deed of sale in favour of Halders and register it in the registration office in India within the limits of which Gazis' immovable properties are situated. Upon execution of such deed of sale, the contracting parties would then acquire right, title and interest over their respective lands that would be covered by the respective sale deeds to be executed in pursuance of the decree is passed by the Indian Court. "Lex Situs" of East Pakistan would govern the making, execution and registration of Halders' document of sale, while "Lex situs" of India would govern the making, execution and registration of Gazis' document of sale. On such documents having been executed rights over the respective properties or in relation to such properties would be governed by the law of the country where such properties are respectively situated. That stage has not yet arrived.

31. In these appeals, the Defendants have not claimed their right, title and interest in the disputed properties situated in Hindusthan which indisputably

belonged to the Appellants. The Defendants-Respondents are defending their possession in the Appellants' properties in term of Section 53A, read with Section 118 of the Transfer of Property Act. Similarly, the Appellants are entitled to defend their possession in the East Pakistan properties as against the Respondents' right to possess such properties belonging to them under the law of East Pakistan which is taken to be the same as in India as already mentioned above.

32. Another question that is to be considered in order to find the validity of the contract to transfer immovable property by way of exchange is to find if there was any exchange control legislation affecting the transaction (Dicey's Conflict of Law, 8th Edition Rule 155, page 894). In this case, neither party brought before the Court any information relating to any exchange control legislation affecting the contract to transfer immovable property for consideration, as in this case the immovable property itself, to be sold by way of exchange by and between the parties situated, at the date of the contract, in two foreign countries, in relation to the contracting parties. Therefore, in absence of any information relating to the exchange control legislation affecting the contracts in question, the contracts would act in personam and would be enforceable in Indian Courts when the parties to the contract have subjected themselves to the jurisdiction of India Courts. In regard to Halder's suit for specific performance of the contract as against Gazis there may be some difficulty. Gazis vide Ext. 0/1, executed the contract to transfer their Hindusthan lands in favour of Halders. Of the Gazis, Haider was a minor. But following such contract vide. Ext. 0/1, Halders took possession of such land. They can well defend their possession as against all Gazis including Haider in Hindusthan land in dispute. But they cannot sue Haider, a minor, for specific performance of the contract to execute and register a sale deed in regard to Hindusthan land in dispute in favour of Halders, though they can get such a decree as against other Gazis. Cheshire in his Private International Law, 7th Edition at page 503, observed - "An English Court has no jurisdiction to adjudicate upon the right of property in, or the right to possession of, foreign immovable, even though the parties may be resident or domiciled in England. This rule is generally based upon the practical consideration that only the Court of the situs can make an effective decree with regard to land". But Cheshire in his treaties at page 510 expressed himself as follows: "A contract is binding, so far as relates to form, if it satisfies the requirements of the *lex loci contractus* or of its proper law. If A and B, two domiciled Englishmen, make a contract in London in such terms that its proper law is that of England, there is no doubt that it is exclusively subject to English law. The mere fact that it relates to foreign land ought not to affect the contractual rights, and liabilities of the parties. If it is one whereby A has agreed to grant to B a mortgage of South African land, an action for breach of contract in the English Court will succeed against A, even though the same action might fail in South Africa. The Court cannot, of course, adjudge that B has actually acquired the rights of a mortgagee, for such acquisition necessitates the observance of certain local

formalities but it can decree that A shall do all that is necessary by South African law to make B mortgagee of the land. The true position, for instance, in (ii) *Bank of Africa, Ltd. v. Cohen* (1909) 2 Ch. 129, would seem to have been that the Defendant was contractually bound to grant the mortgage, and there was no reason why she should not do so".

At page 511 of the treaties, Cheshire considered *Westlake*, and observations of Cozens-Hardy, M. R. in (3) *British Sough Africa Company v. De Beers Consolidated Mines, Ltd.* (1910) 2 Ch. 502 at p. 514, also the decision in (4) *De Beers Consolidated Mines Limited v. British South Africa Company* 1912 AC 52 and succinctly put the law in these terms:

It might, perhaps, be objected that this case i.e. (*British South Africa and Westlake's* statement) refer to the essential, rather than to the formal, validity of a contract, but it would seem that (5) *Re Smith, Lawrence v. Kitson* (1916) 2 Ch. 206, conclusively supports the view that a contract to transfer an interest in land, sufficiently as regards form by its proper law or by the *lex loci contractus*, but insufficient by the *lex situs*, is enforceable.

33. On the question of capacity to transfer and a contract to transfer immovable properties Cheshire at page 512 of his treaties observes: - "It would seem, on principles, that the same distinction between an actual transfer and a contract to transfer must also be relevant in a question of capacity. Where a person contracts in one country to transfer land in another country his capacity should be tested by the proper law of the contract. The difficulty, however, of maintaining this view is that, if the contracting party were subject to some incapacity in the true sense, e.g. minority, by the *lex situs* though not by the proper law, it would be futile to subject him to a decree of specific performance that the local law would forbid him to implement. The most that could be done would be to hold him liable in damages."

34. But the observations of the learned author quoted above would not in my view, stand in the way of the Respondents" defending their possession in the disputed lands, situated in Hindusthan, since the finding of both the Courts below is, which this Court accepts, that in pursuance of the contract to transfer East Pakistan properties of Halders by Halders in favour of Gazis including minor Haider, the Gazis including minor Haider through his mother Deljan, took possession of Haider's East Pakistan properties while Halders in pursuance of the contract executed by Gazis including minor Haider, though his mother Deljan in favour of Halders took possession of the disputed lands. So, both the contracting parties have been taking benefit under the contracts. Equity would not, therefore, favour the Gazis-Appellants to claim their right to possess and to possess the disputed lands in Hindusthan nor will it favour Halders, their right to possess and to possess their East Pakistan lands in East Pakistan, and Gazis can well defend their possession against Halders" East Pakistan lands. Before Gazis including Haider (minor) can deny Halders" claim to defend their possession in their Hindusthan immovable properties, equity would demand Gazis" vacating

and handling over vacant possession of Halder's immovable properties in East Pakistan to Halders. The law as embodied in Section 53A, 54 and 118 of the Transfer of Property Act of India must be presumed to be the same as in East Pakistan also, as the contrary has not been either pleaded, or proved by the Appellants Gazis, before this Court. Section 53A of the Transfer of Property Act and its counterpart in East Pakistan is not an offensive weapon in the hand of one of the contracting parties who, in terms of Section 53A of the Transfer of Property Act, has entered into possession of the immovable property, in pursuance of a contract to transfer of such property by way of exchange, entered into in India by and between the contracting parties. Neither the Halders nor the Gazis can assert their respective right, title and interest in the Hindusthan and in the East Pakistan land respectively since in pursuance of the contract to transfer such properties so situated in two foreign countries at the date of the contract to transfer such properties mutually entered into by and between the contracting parties, the document of transfer of such properties had not been yet executed and registered either by the Gazis in favour of Halders and by Halder in favour of Gazis. But in pursuance of the contract to transfer their respective immovable properties so situated on the date of the contract in the two foreign countries, the contracting parties have exchanged possession in such properties and Gazis have been possessing Halders' East Pakistan properties while the Halders have been possessing Gazis' Hindusthan properties. So, Halders can well rely on the provisions of Section 53A of the Transfer of Property Act and Gazis, if and when occasion would arise, can well defend their possession as against the Halders in regard to the East Pakistan properties. But neither of them can rely on the provision of Section 53A of Transfer of Property Act and its counterpart in the corresponding law of East Pakistan as a weapon of offence to base their respective right, title and interest in the respective lands, situated in Hindusthan and East Pakistan respectively.

35. In these appeals the contentions raised by Mr. Lala, the learned Counsel for the Appellants, as discussed above, are found to be affected by a foreign element which necessitates this Court to look beyond its internal law lest the relevant rules of internal system to which the case most appropriately belongs should happen to be in conflict with that of the forum. Accordingly, the principles of Private International Law as applicable to the facts of the present case have been largely followed.

36. I have already observed the law relating to transfer of property and contract to transfer of immovable property as obtaining in India must be presumed to be the same as in any other foreign countries including East Pakistan unless the party asserting the foreign law to the contrary, proves his assertion to the hilt. Mr. Lala, the learned Counsel for the Appellants, urged that Lex Fori that local law of the place where the Court is situated should be applied in this case, and that the local law, being the Indian Transfer of Property Act and the Indian Contract Act would govern the mutual rights between the contracting parties i.e. the Appellants and the Respondents before this Court, but not the counterpart of

such laws as obtaining in East Pakistan. On that line of reasoning Mr. Lala submitted that on the date of the contract to transfer immovable properties by way of exchange, entered into by and between Gazis and Halders in India, to Gazis and to Halders, East Pakistan and Hindusthan immovable properties respectively could be no consideration for the transfer of such properties, and that the two contracts between the parties were, therefore, void for want of consideration. Mr. Guha assailed this proposition of Mr. Lala submitting that Mr. Lala's contention would not be supported by the Rules of Private International Law. I, therefore, felt tempted to consider the relevant Rule of Private International Law.

37. Considering the Rules of Private International Law that are "rules of justice, equity and good conscience" as discussed earlier in this judgment, I hold that in regard to the disputed lands situated in Hindusthan i.e. Sangrampur, the Respondents can well defend their possession under the provisions of Section 53A of the Transfer of Property Act since the contract of transfer immovable properties mutually entered into by and between the Appellants and the Respondents in India for exchanging their respective properties situated in relation to each of the contracting parties on the date of the contract at two foreign countries is valid and enforceable in law in Indian Courts.

38. The contract to transfer immovable properties, the consideration for the contract being itself the immovable property to be transferred by way of exchange, entered into by and between the contracting parties situated at the date of contract in relation to each of the contracting parties in two foreign countries is a contract for consideration within the scope of Section 53A of the Transfer of Property Act. Now dispute has arisen relating to the Hindusthan immovable properties. The Defendants rely on Section 53A of the Transfer of Property Act, while the Plaintiffs attack the very contract and the memorandum of the contract, alleging that the memorandum of the contract is a forged one. Except Pute Gazi's thumb impression which could not be identified by the expert as being that of his as appearing in Ext. 0/1, the thumb impression of other Plaintiffs now Appellants including that of Deljan, the mother guardian of minor Haider as appearing in Ext. 0/1, cannot but be theirs. So, Ext. 0/1 taken as a whole is not "forgery". The recitals in Ext. 0/1 show that Halders-Defendants-Respondents executed in favour of Gazis a document containing the same terms as in Ext. 0/1 - Gazis did not produce that document. It was their bounden duty to produce such document. The Court shall presume that a document with recitals as appearing in Ext. 0/1 executed by the Halders in favour of the Gazis is with the Gazis. The Gazis have been possessing East Pakistan land of Halders. Halders are in possession of Hindusthan lands at Sangrampur of the Gazis. Therefore, both in law and in equity and under the principles of Private International Law Halders, the Defendants-Respondent, can well defend their possession in the plots in dispute in the four suits.

39. In support of the Defendants-Respondents' cross-objection Mr. Guha

submitted that the learned Munsif in Title Suit Nos. 225 of 1957, 227 of 1957, and 228 of 1957 declared Plaintiffs' title to the four plots being Nos. 3346, 3347, 3358 and 3334 of Khaitian 871 of mouza Sangrampur on the basis of the revisional record of rights, khatian 871 wherein the jabardakhal of the Plaintiffs had been recorded. In a proceeding u/s 44(2a) of the West Bengal Acquisition Act, 1953 at the instance of the Defendants-Respondents the names of the Plaintiffs in regard to their possession in the four plots recorded in revisional khatian No. 871 had been deleted by the order of the Revenue Officer dated 30th April, 1958. The Defendants-Respondents have been recorded in possession of those four plots in the corrected revisional record of rights. During the pendency of these appeals, an application was filed by the Defendants-Respondents in support of their cross-objection to receive the corrected revisional record of rights, khatian 871, in evidence by this Court under the provisions of order 41 Rule 27 of the Code of Civil Procedure. That application was to be heard along with the appeals and the cross objection and was heard by me. I accepted the corrected revisional record of rights and received the same in evidence and marked Exts. R series. The revisional record of rights as corrected, being khatian 871, records possession of Halders in the four plots as well as in other disputed plots. This being the position the oral evidence adduced by the parties is corroborated by the entries in revisional record of rights 871 as corrected. Therefore, the cross-objection prevails.

40. In the result, the appeals fail. The judgment and the decrees passed by the learned Munsif as well as by the learned Subordinate Judge are hereby confirmed with this modification that the Plaintiffs shall not recover possession of the four plots mentioned above evicting the Defendants-Respondents therefrom. The Defendants-Respondents shall get costs in these appeals and cross-objection against the Plaintiffs-Respondents.