

(1956) 02 CAL CK 0012

In the Calcutta High Court

Case No : Appeal from Original Decree No. 79 of 1950

Pankajini Debi and Others

APPELLANT

Vs

Sudhir Dutta and Others

RESPONDENT

Date of Decision : 02-02-1956

Acts Referred:

Bengal Tenancy Act, 1885 — Section 103B(5)

Citation : 60 CWN 793

Hon'ble Judges : Renupada Mukherjee, J;P.N. Mookerjee, J

Bench : Division Bench

Advocate : Apurbadhan Mukherjee, Chandidas Roy Choudhury and Amarnath Banerjee, for the Appellant;Rajendra Bhusan Bakshi, Radhakanta Bhattacharjya and Arabinda Guha, for the Respondent

Final Decision : Allowed

Judgement

P.N. Mookerjee, J.—This appeal is by defendants Nos.5 to 22 and it arises out of a suit for declaration of title and partition; in the alternative, for recovery of a sum of Rs.9,000/- by way of refund of purchase money and damages from defendants Nos.10 and 11. The learned Additional Subordinate Judge, 6th Court, Alipore, who tried the suit has passed a preliminary decree for partition accepting the plaintiff's claim of title to the extent of a 7 annas 6 pies share of the disputed properties. He has dismissed the plaintiff's alternative claim for recovery of the purchase money and damages.

2. Defendants Nos.15 to 22, who contested the plaintiffs title to the suit properties and set up 16 annas" title in themselves, have preferred the present appeal.

3. The facts giving rise to the present litigation may be shortly stated as follows:

4. One Rahamatulla left two sons, Enayetulla and Abdulla. Enayetulla died leaving two widows, Ajimannessa (senior) and Ajimannessa (junior), a son Efajuddin and daughter Kadabanu by the senior wife Ajimannessa Bibi, and a son

Mokshed and three daughters, Hamidan, Sahidan and Rahidan, by the junior wife Ajimannessa Bibi. Kadabanu, Hamidan and Sahidan are dead, so also is Ajimannessa (senior) as also Efajuddin. The later died leaving two sons Arshed and Nauser and three daughters Keshida, Mokshuda and Rashida. These sons and daughters of Efajuddin are defendants Nos.1 to 5 of the present suit and defendants Nos.15 to 22 claim to have purchased the suit properties in 16 annas from them.

5. Of the branch of Enayetulla through Ajimannessa (junior), Hamidan and Sahidan are dead and Mokshed is defendant No.6 and Rahidan defendant No.7.

6. The plaintiff claims title to a 7 annas 6 pies" share of the suit properties through the branch of Abdulla. Abdulla left two sons, Tamijuddin Molla and Menajuddin Molla. Tamijuddin is defendant No.10, Menajuddin is dead and he died leaving a widow Nurjan, who was defendant No.9 and a son Abdur Rashid alias Abdul Rashid Molla, who is defendant No.11. These two defendants Nos.10 and 11 are the vendors of the present plaintiff.

7. During the pendency of the suit, Menajuddin's widow Nurjan, defendant No.9, died and also Nauser, defendant No.2, the latter leaving a widow Sayrajan and a son Ahmed Ali and a daughter Foyzannessa, who were made respectively defendants Nos.12, 13 and 14 in the suit.

8. The plaintiff claims to have purchased 7½ annas of the suit properties from defendants Nos.10 and 11 by a kobala, dated August 27, 1947, which is Ext. 3 in the case. Defendants Nos.15 to 22 claim to have purchased 16 annas of the suit properties by four kobalas, viz., Exts. B to B-3, dated July 24, 1940 (Ext. B1), April 16, 1942 (Ext. B), November 21, 1942 (Ext. B3) and May 18, 1943 (Ext. B2), from the several defendants, defendants Nos.1 to 5, who were Efajuddin's legal representatives at the time. Mokshed claims title to a portion of the suit properties upon the allegation that the said properties belonged to Enayetulla and, upon his death, they devolved upon the two branches of his heirs through his two widows Ajimannessa (Senior) and Ajimannessa (junior).

9. According to the plaintiff, the suit properties were the ancestral properties of the two brothers Enayetulla and Abdulla and from two members (Defendants Nos.10 and 11) of Abdulla's branch, as already stated, the plaintiff purchased their 7 annas 6 pies share of the same.

10. In support of his case the plaintiff primarily relied upon the settlement records. In the relevant settlement khatian, which is Ext. 2 in the present case, the suit properties were recorded in the names of Efajuddin, Ajimannessa. Mokshed, Rahidan, Tamijuddin, Abdur Rashid and Nurjan and the total share of Tamijuddin and Abdur Rashid was stated to be 7 annas 10 gandas that is, 7½ annas which the Plaintiff claims to have purchased by his kobala Ext. 3. It is on this basis that the present suit was instituted by the plaintiff for partition of his 7½ annas for 7 annas 6 pies share of the suit properties and there was, as we have already said, an alternative claim for refund of the consideration money of

Rs.8,700/- of the kobala, Ext. 3, with damages the total claim in that behalf being laid at Rs.9,000/-.

11. The suit was contested by defendants Nos.15 to 22 and also by defendant No.6 on the strength of their alleged titles as indicated above.

12. The learned Additional Subordinate Judge accepted the plaintiff's case on this question of title and passed a preliminary decree for partition in his favour.

13. The principal document, upon which the fate of the plaintiff's suit, so far as title and partition is concerned, really depends, is a deed of release, Ext. D, which was executed by his vendors Tamijuddin and Abdul Rashid, along with the latter's mother Nurjan as far back as September 14, 1938. In that deed of release (Ext. D) which was executed in favour of Efajuddin's branch which eventually came to be represented by the vendors (Defendants orders.1 to 5) of the present appellants (defendants Nos.15 to 22), it was expressly stated that the executants, namely, Tamijuddin, Abdul Rashid and Nurjan, "never had nor have any sort of title or possession" in inter alia the two C.S. dags Nos.404 and 405 which are the subject matter of the present suit and that the entry in the settlement record (Ext. 2) recording their names in respect of the said dags was "absolutely incorrect". It is not necessary for our present purpose to refer to any other portion of the said deed of release, Ext. D.

14. Defendants Nos.15 to 22 relied, in particular, upon this deed of release (Ext. D) for the purpose of showing that the plaintiff's claim of title to any share of the suit properties was entirely unfounded. The Learned Additional Subordinate Judge, upon the view that "title to land cannot pass by admission" and that a mere deed of release would not be effective to pass such title, rejected the said defendants' contention and, having held that the release (Ext. D) was insufficient to pass title, he finally concluded that the presumption of the settlement record (Ext. 2) in the plaintiff's favour had not been rebutted, and, in that view, he decreed the plaintiff's claim for partition. As a necessary corollary the plaintiff's alternative claim for refund and damages was dismissed.

15. The propriety of the learned Subordinate Judge's view that the release (Ext. D) was of no avail to the appellants, upon which his whole judgment is based, is challenged in this appeal and Mr. Apurbadhan Mukherjee, appearing for the defendants-appellants, has contended that, although it is quite true that a mere deed of release would not defeat or extinguish title to land, that principle would apply only where there was some such title vested in the executant or executants of the deed of release, but, in the present case, there being no proof that the executants of the deed of release (Ext. D) had ever any title to the suit properties, that deed Ext. D would not be hit by the above principle of law. He has further contended that, in any event, the admission in the deed of release (Ext. D) that the executants thereof had no title or possession in the two relevant C.S. Dags Nos.404 and 405 and that the settlement entry to the contrary was incorrect was clearly relevant, - and sufficient also in the facts of

this case, - to rebut the presumption of the settlement record (Ext. 2), recording the names of those executants in respect of the said dags.

16. We have given the matter our best consideration and we think that there is considerable force in the above submissions of Mr. Mukherjee and they should be accepted. We shall presently give our reasons for this view.

17. It may be conceded - and, indeed, there can be no dispute on the point, - that the settlement record (Ext. 2) would raise a presumption that defendants Nos.10 and 11 had title to a 7 annas 10 gandas or its equivalent 7 annas 6 pies share of the suit properties but that presumption would clearly be rebutted by the admission of the said defendants themselves in the deed of release, Ext. D, that the said entry was wrong and that they had no such title or possession in the suit properties. This will be quite a legitimate use of the deed of release (Ext. D) which will not contravene the decisions of this Court in the cases of *Jadu Nath Poddar v. Rup Lal Poddar*, [(1906) ILR 33 Cal 967]; and *Dharam Chand Boid and others v. Monji Shahu and others* [(1912) 16 IC 440], or the later case of *Mathura Mohan Saha v. Ram Kumar Saha*, [(1916) ILR 43 Cal 790], or the principle, enunciated therein, that title or title to land does not pass by admission when the statute requires a deed of transfer and that a mere release is ineffective to pass title. The use of the admission for the purpose of rebutting the presumption of the settlement record would not be to use it to pass or extinguish title and this is certainly not using the deed of release (Ext. D) as a document of title, either creating or extinguishing or transferring title to land. Such use would not be hit by any of the above decisions or the earlier decision of the Privy Council in the case of *Mussammat Oodey Koowar v. Mussummat Ladoo*, [(1870) MLA 585], where stress was laid on the distinction between a mere release on the one hand and a conveyance or a contract to convey on the other.

18. To explain ourselves we would add a few lines.

19. The settlement record is not a document of title. It does not create or extinguish title of land. At the most, it may be relevant as some evidence of title to the recorded Dags and may raise a presumption of title by virtue of the statutory presumption of correctness attaching to its entries u/s 103B(5) of the Bengal Tenancy Act. Such evidence, however, is rebuttable and so also the presumption and they may be effectively rebutted by production of contrary evidence. An admission by the party (in whose favour the settlement entry stands) declaring that he had or has no title or possession in the disputed property and that the settlement entry to the contrary effect in his favour is incorrect, save where such admission can be explained or shown to be wrong, usually binds him and it is normally the best evidence against him on the point [vide L.R. 34 IA 27, pages 35-36, *Rani Chandra Kunwar v. Chandhri Narpal Singh and others*], and it is certainly relevant and ordinarily quite sufficient to rebut the presumption of correctness of the record of rights. The so-called presumption of title which entirely rests upon the presumption of correctness of the settlement record would therefore go as a necessary consequence and the khatian entry as

evidence of the party's title would be practically valueless as against his own contrary admission. There is no question of transfer or extinction of title which presupposes an existing title. The question is of proof or disproof of title and rebuttal of the evidence in that behalf, furnished by the Record of Rights. For that purpose the admission is certainly relevant and in the normal course of things it ought to prevail over the Record. Ext. D, therefore, would rebut the Settlement Khatain (Ext. 2) in the present case.

20. It is thus clear that, on the question of title, the plaintiff can derive no assistance from the Record of Rights (Ext. 2) and, there being no other evidence (barring some highly interested and/or worthless oral testimony, utterly unworthy of credit), on which the plaintiff's claim of title can be supported, that claim must be rejected. We, accordingly hold that the plaintiff, on the materials before the Court, has failed to establish his title to any share of the suit properties and his present suit, so far as it is for declaration of title and partition, must fail.

21. The above view is not opposed to *Narak Lal v. Thagoo Lal* [(1911) 13 IC 455], where, apart from the fact that the release was a suspicious document, there were various circumstances and materials to be considered on the question of title and for such consideration the case had to be remanded to the lower appellate Court. That case, therefore, is clearly distinguishable.

22. We are not called upon in this case to pronounce upon the respective rights of the contesting defendants - (Defendant No.6, representing Enayetulla's branch through Ajimonnessa (junior), including the said lady herself, and Defendants Nos.15 to 22, claiming through his other branch, represented by Defendants Nos.1 to 5) - as between themselves and it is enough for our present purpose to dismiss the plaintiff's claim for declaration of title and partition. In the suit there was no prayer by any of these defendants for declaration of their title inter se or partition. They merely prayed for dismissal of the plaintiff's suit. It also appears that a separate suit for partition has been instituted by Mokshed (Defendant No.6) in which Defendants Nos.15 to 22 have been impleaded. In these circumstances, we do not deem it proper - and it is certainly not necessary in this case - to say anything on the rival claims of the said defendants inter se and we make no observation on the point.

23. It is necessary now to turn to the plaintiff's alternative claim for refund of the consideration money of his kobala. Ext. 3, namely, Rs.8,700/- with damages to the extent of Rs.300/- as claimed in the plaint, the total figure being Rs.9,000/-. This claim, as we have already said, was made against the plaintiff's vendors, defendants Nos.10 and 11. In the kobala, Ext. 3, there is a clear provision that, if the title conveyed thereby be found to be defective, the purchaser, namely, the present plaintiff, would be entitled to refund of the entire consideration money of Rs.8,700 together with interest and compensation for all losses and damages whatsoever. There was no doubt some defence set up by the vendors, defendants Nos.10 and 11, to this part of the plaintiff's claim to the

effect that the whole amount of the consideration money (Rs.8,700/-, as mentioned in the kobala Ext. 3), had not been received by them, but we are not impressed by the evidence, adduced in support of that defence. In the kobala (Ext. 3) we find an endorsement of the Sub-Registrar that Rs.5,800/- was paid in his presence. We also find that the balance amount, namely, Rs.2,900/- was paid to the vendors, defendants Nos.10 and 11, under a separate receipt, Ext. 5, on the date of the Baina, August 21, 1947. In these circumstances and in the light of the evidence which has been adduced in this case, we are inclined to hold that there was full payment of the entire consideration money of Rs.8,700/- of the kobala, Ext. 3, by the plaintiff to his vendors, defendants Nos.10 and 11, and that the plaintiff is entitled, in the events which have happened, to a refund of the said amount.

24. We also hold that, in the circumstances of this case and in view, particularly, of the express provision in the kobala, Ext 3, to that effect, the plaintiff is further entitled to interest or damages, but, as the claim in that behalf was limited in the plaint to the sum of Rs.300/-, we are unable to allow him anything more on this account.

25. The plaintiff, therefore, will be entitled to a decree for a total sum of Rs.9,000/- as against defendants Nos.10 and 11 on his alternative claim and his suit should stand decreed to that extent. Order XLI, Rule 33 of the CPC contains sufficient warrant for the making of this decree in the present case and we feel amply justified in applying the said provision to the facts before us.

26. In the result we allow this appeal, set aside the preliminary decree for partition, passed by the learned Additional Subordinate Judge, as also the declaration of title, made by him in the plaintiff's favour, and dismiss the plaintiff's claim in that respect, namely, his claim for partition including his claim of title to the suit properties, but we grant him (the plaintiff) a decree for a sum of Rs.9,000/- against Defendant Nos.10 and 11, Tamijiddin Molla and Abdur Rashid Molla, who are Respondents Nos.11 and 12 in this appeal, on his alternative claim for refund of the purchase money and damages. The decree of learned Additional Subordinate Judge is varied and modified accordingly.

27. In the circumstances of this case, we are also inclined to give the plaintiff his costs against defendants Nos.10 and 11 in the Court below and we order accordingly. Defendants Nos.15 to 22 will get their costs in the Court below from the plaintiff. They will also get half the paper book costs incurred by them in this Court from the plaintiff respondent. Except as stated above, the parties will bear their own costs in this Court and also in the Court below.

Renupada Mukherjee, J.

28. I agree.