

(2009) 02 CAL CK 0028

Calcutta High Court

Case No: S.A. No. 139 of 2005 with S.A. No. 140 of 2005

Sunity Chatterjee and Others

APPELLANT

Vs

Mobarak Khan and Others and
Akbar Khan and Others

RESPONDENT

Date of Decision: Feb. 17, 2009

Acts Referred:

- Evidence Act, 1872 - Section 114(g), 74, 75, 76, 77

Citation: (2010) 6 RCR(Civil) 791

Hon'ble Judges: Sadhan Kumar Gupta, J

Bench: Single Bench

Advocate: Haradhan Banerjee and Mr. Ranjit Kumar Das, for the Appellant; Ashis Bagchi and Mr. Pradip Kumar Panja, for the Respondent

Judgement

Sadhan Kumar Gupta, J.

Both the Second Appeals have been preferred against the judgment passed by the learned Civil Judge, Senior Division, Kalna in Title Appeal Nos. 18 of 1998 and 19 of 1998 which were preferred against the judgment passed by the learned Civil Judge, Junior Division, Kalna in Title Suit Nos. 147 of 1991 and 80 of 1992, which were heard analogously.

2. Case of the plaintiffs of T.S. No. 147 of 1991 is that the "Ka" schedule properties originally belonged to Najir Khan, Ujir Khan, Ahad Khan and Jahad Khan. Najir Khan, Jahad Khan had 8 Ana share in those properties while Ujir Khan, Jahad Khan and Ahad Khan were the owners of the 8 Ana share of those properties. The properties were accordingly recorded in the C.S. Record of Rights.

3. Ujir Khan was the sole owner of the "Kha" schedule properties. He transferred the same to his wife Tinu Bibi under life interest in the year 1332 B.S. by registered deed. After the death of Tinu Bibi, the "Kha" schedule properties devolved upon Jahad and the plaintiff Nos. 1 to 4 who are the legal heirs of Jahad.

4. Ujir, Ahad and Jahad were the original owners in respect of the "Ga" schedule properties and their names accordingly were recorded. After the demise of Ujir Khan, Jahad Khan inherited his shares and accordingly he became the owner of the "Ga" schedule properties to the extent of 10 Ana 13 Gandas 1 Kara 1 Kranti share. After the demise of Jahad Khan said properties were inherited by Ershad Ali Khan and Torab Ali Khan. Plaintiff Nos. 5 to 11 are the heirs of Ershad Ali Khan and Torab Ali Khan and they were in possession of the "Ga" schedule properties.

5. Najir Khan sold out his 8 Ana share in the "Ka" schedule properties to Tinkari Chatterjee, Tarakeswar Chatterjee and Khudiram Chatterjee and their names were recorded in the C.S. record of rights. After the death of Tinkari, Tarakeswar and Khudiram Chatterjee, those lands were recorded in the R.S. Khatian in the names of their legal heirs who are defendant Nos. 1 to 21.

6. According to the plaintiffs the "Ka", "Kha" and "Ga" schedule properties were never sold in auction in the proceeding of P.D. case being No. 381 of 1937-38 and Gopika Sundari and Kiran Bala Devi never purchased those lands in the auction proceeding of the aforesaid P.D. case. It is the case of the plaintiffs that Tinkari Chatterjee managed to create a false sale certificate in respect of the "Ka", "Kha" and "Ga" schedule suit properties of T.S. No. 147/1991 as well as in respect of the properties as mentioned in T.S. No. 80 of 1992. By way of producing the said false document, they managed to get their names recorded in the R.S. Khatian and at present the defendants have disclosed the existence of the said sale certificate claiming that the suit properties were purchased by their predecessor in the auction sale held on 24/5/1938. According to the plaintiffs, although Ahad Khan was the 1/3rd owner of the properties he was not made a party in the sale proceeding. It is the specific case of the plaintiffs that there was no rent due to the Jaminder and as such there was no reason whatsoever for initiating the certificate proceedings against the owners of the suit properties. On the basis of such false document, the defendants claimed themselves to be the owners of those properties and when the defendant No. 23 claimed himself as a Bargadar in the "Ga" schedule properties, at that time the plaintiffs came to know about the existence of such false document. According to the plaintiffs, the names of Tinkari and Tarakeswar should have been recorded in respect of the "Ka" schedule properties to the extent of 8 Ana shares and remaining 8 Ana shares should have been recorded in the names of Ujir, Ahad and Jahad Khan in the C.S. record of rights. They have further claimed that the "Kha" schedule properties should have been recorded in the names of Ujir, Ahad and Jahad Khan in the C.S. record of rights to the extent of 16 Anas share and the "Ga" schedule properties i.e. Plot No. 4012 should have been recorded in the R.S. Khatian in the names of Bimalakanta Chatterjee, Sudhir Kumar, Tarakeswar Chatterjee and Khudiram Chatterjee as permissive possession in the R.S. Khatian. Taking advantage of the wrong entries in the C.S. and R.S. Khatian in respect of all the said properties, the defendant Nos. 1 and 7 started claiming full ownership in respect of those properties. Under such circumstances, the plaintiffs were compelled to file the

present suit.

7. The case of the plaintiffs of T.S. No. 80 of 1992 is that Ujir Khan, Ahad Khan and Jahad Khan were the 8 Anas" owners in respect of the "Ka" schedule properties as mentioned in the plaint. It was accordingly recorded in the C.S. record of rights in Khatian No. 120 of Tulla Mouja. "Kha" schedule property is the part of the "Ka" schedule property of this suit and said "Kha" schedule property was sold out. Tinkari Chatterjee, Tarakeswar Chatterjee and Khudiram Chatterjee purchased the same by paying consideration money. Accordingly, their names were recorded in the C.S. Khatian as Khangdang. Ultimately, on 24/5/1938 in the P.D. case No. 381 of 1937-38 the properties covering the entire "Jama" were sold out in auction. The grandmother of the plaintiffs viz. Gopika Sundari Devi and Kiran Bala Devi purchased the "Ka" schedule property in the said auction and started possessing the same. As such, the entire "Ka" schedule properties should have been recorded in the R.S. record of rights in the names of Gopika Sundari Devi and Kiran Bala Devi. However, due to mistake, those properties were recorded in the Column No. 13 in the names of Ujir Khan, Ahad Khan and Jahad Khan although they had no right, title and interest in respect of those properties at the time of R.S. record of rights. In the R.S. in respect of plot No. 4012 it has been wrongly recorded in Column no. 23 that Tarakeswar, Khudiram, Bimala Kanta and Sudhir Kumar Chatterjee were in permissive possession ("Anumati Dakhal") in respect of the said plot instead of recording as Khangdang. Present plaintiffs have claimed that they are the heirs of Gopika Sundari Devi and they also purchased the share of Kiran Bala Devi and thereby became the owners of the suit properties. The Khans had no right, title and interest in respect of those properties in view of the facts stated above. However, taking advantage of the wrong recording of the suit properties, the principal defendants are trying to dispossess the plaintiffs from the suit properties and as such finding no other alternative; they have filed the present suit praying for declaration as well as permanent injunction.

8. The defendants of both the suits contested the same by filing written statements wherein the allegations as made out in both the plaints were denied materially. The case, as made out in the plaint of T.S. No. 147 of 1991 and T.S. No. 80 of 1992 were in fact reiterated in the written statements by the concerned defendants.

9. The learned Trial Court was pleased to try both the suits analogously as the facts of both the suits are inter-related. Upon considering the pleadings of the parties, the learned Trial Court framed several issues and thereafter was pleased to decree both the suits in part.

10. Being aggrieved and dissatisfied with the said judgment of the learned Trial Court, the plaintiffs of T.S. No. 147 of 1991 preferred two separate appeals before the learned First Appellate Court who in turn was pleased to consider both the appeals analogously and disposed of both of them by passing the impugned judgment. The learned First Appellate Court was pleased to set aside the judgment,

so passed by the learned Trial Court and was pleased to allow both the appeals and thereby dismissed the Title Suit No. 80 of 1992 and decreed the Title Suit No. 147 of 1991 and declared the right, title and interest of the plaintiffs of that suit and accordingly passed an order of permanent injunction against the defendants of that suit and the plaintiffs of T.S. No. 80 of 1992. As the plaintiffs of T.S. No. 80 of 1992 are aggrieved by the said judgment of the learned first Appellate Court, so they have preferred these two Second Appeals against the said judgment. By the order of this Court, both the Second Appeals were considered together. At the time of admission of the appeals, it appears, that no substantial questions of law were framed. As it is now the settled position that a Second Appeal cannot be disposed of without framing the substantial question of law, so by the order dated 25/7/2007 this Court after hearing the learned advocates for both the sides and after perusing the relevant materials, framed the following substantial questions of law:

I) Whether the First Appellate Court acted illegally in not relying upon the Exhibit "A" series, though the same are old documents and have not been challenged by either of the parties?

II) Whether the First Appellate Court committed substantial error in law in not placing reliance upon the entries in the settlement record and other documents and thereby refused to declare the title of the appellants in respect of the suit property?

III) Whether the First Appellate Court committed substantial error in law in not taking into consideration of the fact that Gopika Sundari and Kiran Bala made over possession of the suit property in favour of the appellants which fact conclusively proves the title of the appellants in the property in question?

IV) Whether the First Appellate Court committed substantial error in law in discarding the Exhibit "A" and "B" series by overlooking the admission made in paragraphs 6 and 7 of the plaint of Title Suit No. 147 of 1991 ignoring the provision of 58 of the Indian Evidence Act, 1872?

V) Whether the First Appellate Court committed substantial error in law in ignoring the provision of sections 74 to 77 read with sections 90 and 114(g) of the Evidence Act in considering the legality of the Exhibit "A"?

VI) Whether the First Appellate Court committed substantial error in law in deciding the possession of the parties in respect of the suit property in view of the fact that the plaintiff in Title Suit No. 147 of 1991 admitted that the appellants were in possession as "ejmal" with them?

11. It has already been pointed out that two separate suits were filed by the parties claiming right, title and interest of the properties as mentioned in the schedule of the plaints of both the suits. It may further be pointed out that the claims as made by the parties of both the suits in respect of the properties are common. The plaintiffs of T.S. No. 80 of 1992 have claimed that they have acquired right, title and

interest in respect of "Ka" schedule properties consisting of 11 plots. The "Kha" schedule property of the suit plaintiff is within "Ka" schedule properties of that suit. Out of those 11 plots as mentioned in the "Ka" schedule of T.S. No. 80 of 1992, the plaintiffs of T.S. No. 147 of 1991 have claimed right, title and interest of "Ka", "Kha" and "Ga" schedule properties consisting of Plot Nos. 2186, 2187, 2194, 2159, 792, 1743 and 4012. Now, so far as this divergent claims of the parties in respect of the same properties are concerned, we are to see as to who are the actual owners of those properties and in whose favour the right, title and interest in respect of those properties can be declared.

12. In order to come to a decision in this respect we are to go back to the original position in respect of the suit properties i.e. as to who were the original owners of those suit properties. It is the admitted position that Ujir Khan, Ahad Khan and Jahad Khan were the half owners of the properties in dispute. Rest half of the suit properties belonged to Najir Khan who sold his share to Khudiram, Tinkari and Tarakeswar and this claim has been admitted in para 4 of the plaint of T.S. No. 147 of 1991. Be that as it may, since the share of Najir Khan is not in dispute we are not concerned with that share so far as this hearing is concerned. Our consideration is in respect of the 50% share of the suit properties which originally belonged to Ujir Khan, Ahad Khan and Jahad Khan. It may be pointed out here that the plaintiffs of T.S. No. 147 of 1991 are the heirs of Ujir Khan, Ahad Khan and Jahad Khan. So, under normal circumstances the plaintiffs of T.S. No. 147 of 1991 should be treated to be the owners in respect of the suit properties as mentioned in the "Ka", "Kha" and "Ga" schedule of T. S. No. 147 of 1991. However, the plaintiffs of T.S. No. 80 of 1992 have claimed that by way of auction purchase in a sale certificate case, the shares of Ujir Khan, Ahad Khan and Jahad Khan in the suit properties were purchased by Kiran Bala Devi and Gopika Sundari Devi. So far as "Kha" schedule properties of T.S. No. 80 of 1992 consisting of Plot Nos. 2186, 2187, 2194 and 4012 are concerned, the plaintiffs of that suit prayed for declaration. So it appears that the plaintiffs of T.S. No. 80 of 1992 have claimed that the interest of the predecessors of the plaintiffs of T.S. No. 147 of 1991 extinguished by virtue of the sale certificate issued in favour of Kiran Bala Devi and Gopika Sundari Devi. There is no dispute that by way of purchase as well as by way of inheritance the plaintiffs of T.S. No. 80 of 1992 are now claiming to be the owners of the "Ka" and "Kha" schedule properties of T.S. No. 80 of 1992. As such, in view of such divergent claims we are to see as to whether the right, title and interest of Ujir Khan, Ahad Khan and Jahad Khan actually extinguished or not by virtue of the sale certificate. The sale certificate has been produced at the time of hearing and the same has been marked as Exhibit - A. It appears from the sale certificate that the entire "Ka" schedule properties of T.S. No. 80 of 1992 were auction purchased by those two ladies. According to the learned advocate for the respondents, by virtue of this sale certificate it cannot be said that Kiran Bala Devi and Gopika Sundari Devi acquired title in respect of those properties. As per law, argued the learned Advocate, the sale certificate does not

create any title. In this respect he has cited decisions reported in AIR 1944 305 (Nagpur) wherein it was held that a sale certificate is merely prima facie evidence of title and not conclusive. The learned advocate further cited another decision reported in Calcutta Law Journal Vol. 9 page 346 (Braja Nath Pal v. Joggesswar Bagchi & Ors.), wherein the Hon"ble Division Bench held that a sale certificate does not create title but is merely evidence of title. In the decision reported in Calcutta Law Journal Vol. 7 page 387 (Khobhari Singh v. Ram Prosad Roy & Anr.) same principle was laid down. By citing those decisions, Mr. Bagchi, learned advocate for the respondents argued that by virtue of the said sale certificate the plaintiffs of T.S. No. 80 of 1992 cannot claim that they have acquired title in respect of the properties as mentioned in the schedule of the said sale certificate. According to him, in order to establish title in respect of the properties in question, covered by the sale certificate, a party is to prove that the sale certificate was acted upon and actual physical possession was handed over in favour of the purchaser.

13. Mr. Banerjee, learned advocate for the appellants while not disputing the proposition of law, as enunciated by those decisions, argued that the sale certificate cannot be brushed aside simply because other follow up steps could not be proved. In this respect, he has relied upon a decision reported in AIR 1922 PC 252 (Ramabhadra Naidu v. K. Naicker), wherein it has been held to the effect:

"Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. If there is no ambiguity in the words of a certificate of sale, the object of the certificate would be defeated if it was possible to change its" plain meaning by reference back to other documents on which the decree is based".

14. According to Mr. Banerjee since the sale certificate was issued pursuant to the auction sale which took place in the year 1938 and as such there should not be any reason to presume that the sale certificate was not acted upon. According to him, the sale certificate is clear proof in respect of the claim of his clients that by virtue of the said sale certificate they had acquired title in respect of the properties as mentioned in the sale certificate. In this respect, he has drawn by attention to the fact that after the sale certificate was issued, the names of the purchasers or their heirs were recorded in the C. S. as well as in R.S. record of rights, although not in proper column. This fact according to Mr. Banerjee, establishes that the sale certificate was actually acted upon and the purchaser obtained possession of those properties. I fully agree with the argument of Mr. Banerjee in this respect. Mr. Bagchi, learned advocate for the respondents argued that unless the entire record of the certificate case is produced before the Court, it cannot be proved that pursuant to the sale certificate, possession was handed over and the sale certificate was actually acted upon. It may be pointed out here that the certificate case was of the year 1938 and it is very difficult, if not impossible for the appellants to produce the records of that case at such a distance of time. Mr. Banerjee in this respect has drawn my attention to the Exhibit - 3 which is the information slip as filed by the

respondents before the Court below. It appears that in the said information slip answer was given by the concerned department to the effect "particulars of the information are not found from the available office record". Mr. Banerjee argued that this is sufficient that the record is not available in the concerned department now. On the other hand, Mr. Bagchi argued that the answer does not disclose that the record in question is not available. Be that as it may, since Mr. Bagchi's client is claiming that the sale certificate was not acted upon and possession was not delivered by virtue of the said certificate, so in that event if the case record was available, then the respondents could have been taken steps for production of the case record before the Court in order to dispel any doubt whatsoever in this respect. This is required since the appellants have been able to establish prima facie that they have acquired right by virtue of the said sale certificate. In order to counter this prima facie position it was incumbent upon the respondents to take step for production of the case record, if it was at all available, so that the claim of the appellants could have been easily disputed. No step, however, has been taken in this respect by the respondents and as such, I am of the opinion that there is no reason whatsoever to disbelieve the sale certificate which is Exhibit - A.

15. That apart it has already been pointed out that the sale certificate was issued in the year 1938. As per provisions of section 90 of the Indian Evidence Act the documents being ancient in nature should not be discarded. Section 90 of the Evidence Act provides as follows:

"Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is not that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to be executed and attested."

16. So far as this sale certificate is concerned, it appears that the appellants produced the same before the Court. It is quite natural that the sale certificate should have been in the custody of the appellants by virtue of their inheritance and subsequent purchase. As such, I do not find anything wrong in the sale certificate being in the custody of the appellants. As the sale certificate is about more than 70 years old, I find no reason to disbelieve the same. To my mind, it should be presumed that the sale certificate i.e. Exhibit - A is a genuine document and the entry in the record of rights suggests that it was acted upon. If that is so, then in that event there cannot be any doubt that the appellants have acquired right, title and interest in respect of the properties as mentioned in the sale certificate.

17. It appears that the learned First Appellate Court did not believe the claim of the appellants and discarded the sale certificate. According to the learned First Appellate Court, no relief could be granted in favour of the appellants on the basis of the sale certificate as said document, according to him, did not inspire his

confidence. I fail to understand this reasoning of the learned First Appellate Court to discard a public document in this way without assigning any reason whatsoever. It is the settled position that in order to reject a particular document which has prima facie credibility, a Court is supposed to give his reasoning. Instead of giving any reasoning in this respect, the learned First Appellate Court whimsically discarded the Exhibit - A by stating that it did not inspire his confidence. Why the sale certificate did not inspire confidence of the learned First Appellate Court, it has not been explained by giving any reason whatsoever. As a Court, it is not open on the part of the learned First Appellate Court to discard this document in such a manner. As such, I am of opinion that the learned First Appellate Court was not at all justified in not placing reliance upon the Exhibit - A and this action on the part of the learned Court below had certainly resulted in the gross miscarriage of justice.

18. It further appears that the learned First Appellate Court relied much on the oral evidence of the witnesses in order to hold that the plaintiffs of T.S. No. 147 of 1991 are in possession of suit properties. In doing so, the learned Court in fact ignored the recording as made in the record of rights and also the sale certificate. The approach of the learned First Appellate Court in this respect appears to be not proper. When documentary evidence is available in respect of the claim of possession, as made by the parties, there was no justification to ignore that evidence by way of placing reliance on the oral evidence of some interested persons.

19. Be that as it may, I have already pointed out that the appellants have been able to prove that by virtue of the said sale certificate the "Ka" schedule property of T.S. No. 80 of 1992 was purchased by Kiran Bala Devi and Gopika Sundari Devi and from them same devolved upon the appellants by way of inheritance and by way of purchase and they are now the owners of those properties. It further appears from the plaint of T.S. No. 80 of 1992 that the plaintiffs have prayed for declaration of title in respect of "Kha" schedule properties consisting of Plot Nos. 2186, 2187, 2194 and 4012. I have already pointed out that those properties were recorded prior to the sale certificate in the name of Ujir Khan, Ahad Khan and Jahad Khan in equal shares. In the sale certificate it appears that names of the Debtors were mentioned as Ujir Khan, Mohammad Khan and Jahad Khan. Wherefrom the name of Mohammad Khan came into the sale certificate is not very clear. However, fact remains that nowhere in the sale certificate it has been mentioned that Ahad Khan was also a debtor so far as those properties are concerned. If that is the position, then by the said sale certificate it cannot be said that Ahad Khan's share was also sold out. As such, Ahad Khan's share should be left out, so far as the suit, properties are concerned, as claimed by the appellants. Under such circumstances, I think that the appellants should get declaration of title in respect of the 2/3rd share of the properties as mentioned in the "Kha" schedule of the plaint of T.S. No. 80 of 1992 (i.e. Minus the share of Ahad Khan) and said suit, as filed by the appellants should be decreed in part accordingly.

20. So far as the "Ka" schedule properties of T.S. No 147 of 1991 are concerned, it appears that title was claimed in respect of .70, .49 and 2.59 decimals in respect of Plot Nos. 2186, 2187 and 2194. I have already pointed out that in respect of those three plots the plaintiffs of T.S. No. 80 of 1992 had acquired .17, .12 and .65 decimals by virtue of the said sale certificate. So the respondents can get declaration of their right, title and interest in respect of plot No. 2186 to the extent of 53 decimals (.70 - .17 = .53); in respect of Plot no. 2187, .37 decimals (.49 - .12 = .37) and in respect of Plot no. 2194, 1.94 decimals (2.59 - .65 = 1.94). So far as plot No. 2159 of this schedule is concerned, it appears that the entire area of .07 decimals of this plot is covered by the sale certificate. However, since Ahad was not a party in the certificate proceeding, so the respondents can only acquire Ahad's share in respect of this plot.

21. So far as the "Kha" schedule property of T.S. No. 147 of 1991 is concerned, it appears that those two plots viz. 792 and 1743 are fully covered by the sale certificate. If we look into the evidence of P.W. 1, it will appear that he has admitted therein that Ujir Khan was the sole owner in respect of those two plots. Since those two plots have already been sold out in the auction and sale certificate was issued in favour of the appellants, so I think that the respondents being the heirs of Ujir Khan cannot claim any right, title and interest in respect of those two plots.

22. So far as the "Ga" schedule properties of T.S. No. 147 of 1991 is concerned, it appears that the entire area of this plot being No. 4012 was sold in auction and it is covered by the sale certificate. As such, prima facie it appears that the respondents have got no claim in respect of this plot at present. However, since it has already been pointed that in the sale certificate Ahad's name was not there, so it should be presumed that this share of Ahad was not sold in the said auction. The necessary consequences will be that the appellants being the plaintiffs of T.S. No. 80 of 1992 have acquired 2/3rd share in respect of this plot No. 4012 and title in respect of rest 1/3rd share in respect of that plot should be declared in favour of the respondents i.e. the plaintiffs of T.S. No. 147 of 1991. In my opinion, both the suits should be decreed in part accordingly. It may be pointed out here that the learned Trial Court actually decreed both the suits in part, but the reasoning as given by the learned Trial Court in this respect is not at all convincing and to my mind the part decree as given by the learned Trial Court in favour of the parties should not stand and a fresh decree, as discussed above, should be passed in order to do complete justice in between the parties. In this respect, this Court has taken recourse to the provision of Order 41, Rule 33 of the CPC in order to do complete and fair justice in between the parties.

23. Therefore, from the discussion above, I am of opinion that both the appeals should be allowed in part and both the suits should be decreed in part accordingly, as per discussion made above.

24. The questions as framed in connection with these appeals are answered accordingly.

25. In the result, both the appeals being S.A. No 139 of 2005 and S.A. No. 140 of 2005 are allowed in part. The right, title and interest of the appellants/plaintiffs of T.S. No. 80 of 1992 in respect of 2/3rd share of plot Nos. 2186, 2187, 2194 and 4012 are declared. Right, title and interest of the respondents/plaintiffs of T.S. No. 147 of 1991 in respect of the three plots viz. 2186, 2187 and 2194 are declared to the extent of .53 decimals, .37 decimals, 1.94 decimals so far as those plots are concerned. In addition to that right, title and interest of the plaintiffs of T.S. No. 147 of 1991 to the extent of 1/3rd share for the plots No. 4012 and Plot No. 2159 is declared. The prayer for declaration of title in respect of the "Kha" schedule properties of T.S.No. 147 of 1991 in respect of Plot Nos. 792 and 1743 is rejected.

26. Both the sides are restrained by an order of permanent injunction from disturbing the possession of either of the side in respect of their respective shares, as have been declared by this judgment.

The parties are to bear the respective costs of these appeals.

Send a copy of this judgment along with L.C.Rs of both the suits at once to the Court below for information and taking necessary action.

Xerox certified copy, if applied for, be handed over to the parties on urgent basis.