
Duli Bibi and Others Vs State of West Bengal and Others

S.A. No. 678 of 1967

Court: Calcutta High Court

Date of Decision: March 20, 1978

Acts Referred:

Constitution of India, 1950 " Article 39#Transfer of Property Act, 1882 " Section 129, 54#West Bengal Estates Acquisition Act, 1953 " Section 10(2)

Citation: 82 CWN 703

Hon'ble Judges: B.C. Ray, J

Bench: Single Bench

Advocate: Nani Coomar Chakraborty and Mohammad Taher Ali, for the Appellant; Amaresh Chakraborty, for the Respondent

Final Decision: Dismissed

Judgement

B.C. Ray, J.

This appeal is by the plaintiffs against the judgment and decree passed in Title Appeal No. 27 of 1966 by the Additional

District Judge, Second Court, Burdwan affirming the judgment and decree passed in Title Suit No. 149 of 1964 by the Munsif, Kalna. The only

question that requires to be decided in this appeal is whether the Hebanama executed by a person governed by the Mohammedan Law which

does not require any writing and registration requires to be registered under the provisions of the Bengal Tenancy Act. The facts of the case in a

nutshell is that the suit property originally belonged to one Saharddi Mondal who died leaving behind him his widow, five sons and three daughters.

The plaintiffs 1 to 5 are his sons, plaintiff No. 6 is his widow and plaintiffs 7 to 9 are the three daughters. In Baisakh, 1346 B.S. Saharddi Mondal

made an oral gift of the properties described in Schedules E to H in favour of the plaintiff Nos. 6 to 9 and also delivered possession thereof to the

donees and since then the plaintiff Nos. 6 to 9 are in exclusive possession of the properties. Saharddi Mondal died in 1369 B.S. after the date of

vesting but he did not submit any return in respect of the lands owned by him. The plaintiffs, however, submitted return of the lands in schedule A

to D and surrendered the lands described in Schedule (A1). In the circumstances the properties in Schedule E to H cannot vest in the State. A

notice u/s 10(2) of the West Bengal Estates Acquisition Act had been served on the plaintiffs. Hence the plaintiffs brought an action being Title Suit

No. 149 of 1964 praying for declaration of their title to the suit land in schedule A to H of the plaint and for permanent injunction restraining the

defendants, State of West Bengal from interfering with their title and possession of the disputed lands.

2. The trial court held that the story of oral Heba in favour of the plaintiffs 6 to 9 had not been proved. He also found that Saharddi Mondal was in

possession of the said property. It was also held that the lands described in Schedule (A1) and E to H were in excess of the ceiling prescribed by

the Act and the same being not retained vested in the State. The suit was, accordingly, decreed only with respect to lands in Schedules A to D.

3. Against the said judgment and decree the plaintiffs preferred an appeal being Title Appeal No. 27 of 1966. On 23rd of August, 1966, the

Additional District Judge, Second Court, Burdwan dismissed the appeal and affirmed the judgment and decree of the trial court holding that the

disputed property being an occupancy holding of the Raiyat the transfer of such a holding cannot be made except by a registered instrument.

Muslim Personal Law cannot override the provisions of Section 26(C) of the Bengal Tenancy Act and as such oral Heba must fail.

Feeling aggrieved by this judgment and decree the instant appeal has been preferred by the plaintiffs.

4. Mr. Nani Koomar Chakraborty, learned advocate appearing in support of the appeal has raised a three-fold contention. The first dimension of

his submission is that under the Mohammedan Law an oral Heba is valid and in support of his submission Mr. Chakraborty has referred to the

provisions of Section 147 of the Mohammedan Law which provides that writing is not essential to the validity of the gift either movable or

immovable property. He has further submitted that though under the Transfer of Property Act a transfer by way of gift requires to be registered yet

the provisions of the Transfer of Property Act are not applicable to the case of gift where Mohammedan Law applies. Basing his arguments on this

Mr. Chakraborty has submitted that even in the case of transfer of occupancy Raiyati interest the Muslim Personal Law will prevail and not the

provisions of the Bengal Tenancy Act. In this connection Mr. Chakraborty referred to the decisions reported in Nasib Ali Vs. Wajed Ali, and

relying on the said decision he submitted that the decision in Srimatijan and Another Vs. Fulja Khatun and Others, is not a correct exposition of

law on this point. The second dimension of Mr. Chakraborty's argument is that even if it is assumed that Bengal Tenancy Act applies to the case of

transfer of occupancy holding by a person to whom Mohammedan Law applies yet gift or Heba has been excepted or has been excluded from the

operation of Section 26(C) of the Bengal Tenancy Act as gift is included in the word ""bequest"". In this connection Mr. Chakraborty has referred to

Saunders's Words and Phrases Vol I to show the meaning of the word ""bequest"". Reference was also made to Halsbury's Laws of England, 3rd

edition Vol. 39. The last dimension of Mr. Chakraborty's submission is that at the time when the suit was instituted the Bengal Tenancy Act was

repealed and as such its provisions cannot be invoked to nullify the oral Heba made in favour of the plaintiffs Nos. 6 to 9 by the donor Saharddi

Mondal. Before proceeding to decide the merits of the contentions raised on behalf of the appellant it is necessary and proper to state certain

relevant facts. Saharddi Mondal had lands admittedly above the ceiling and he died on 25th of Ashar, 1369 B.S., that is, after the date of vesting

of Raiyati interest in the State which is 14th April, 1955. The oral Heba according to the plaintiffs have been made by Saharddi in respect of the

properties described in schedule E to H in favour of the plaintiffs 6 to 9 and delivered possession to them. The suit was instituted on June 5, 1964

by the plaintiffs for declaration of their title and confirmation of possession. The disputed properties of schedules E to H are admittedly not retained

by submitting return in form B. So if the oral Heba is not valid the properties will vest in the State. Section 147 of the Mohammedan Law provides

that a gift of immovable property in order to be valid is not required to be made by any writing. Section 149 of Mohammedan Law lays down 3

essentials of the gift i.e. (a) declaration of gift by the owner, (b) an acceptance of the gift by the donee or on behalf of the donee either expressly or

by implication and (c) the gift must be accompanied by delivery of possession of subject of the gift by the donor to the donee. In Nasib Ali Vs.

Wajed Ali, it has been held that no written instrument is required to make a gift valid. In the instant case the oral Heba has been made in respect

of occupancy Raiyati interest of Saharddi. Section 26C of the Bengal Tenancy Act specifically provides that every transfer of such occupancy

Raiyati interest shall be made by registered instrument, except in the case of "bequest" or sale) in execution of decree etc. According to the

provisions of Bengal Tenancy Act every transfer of occupancy Raiyati interest in order to be valid must be by a registered instrument. It has been

urged that the provisions of this Section are not applicable to the case of oral gift where the Mohammedan Law is applicable. It has also been

submitted that Article 39 of the Constitution protects all existing laws which are not inconsistent with the provisions of the Constitution and as such

Mohammedan Law which is a pre-Constitution law being not inconsistent with the provisions of the Constitutional law is protected and the same

will govern all transfers by way of gift and Section 26(C) of the Bengal Tenancy Act will have no application to such cases. This contention is not

sustainable inasmuch as the Bengal Tenancy Act which is a special statute dealing with the holdings of Raiyats and under-Raiyats as well as the

made of transfer of such holding will prevail over the personal law of the Mohammedans which is a general law applicable to the Mohammedans in

inspect of inheritance, succession, transfer etc. A similar question cropped up in a case reported in Srimatijan and Another Vs. Fulja Khatun and

Others, . It was observed in that case that the decision reported in Nasib Ali Vs. Wajed Ali, referred to hereinbefore was not applicable to the

case of gift of occupancy holding as in that case such a question was not raised. It was also held that Section 26(C) of the Bengal Tenancy Act

was in very large and wider term and as such it was not possible to limit its operation by taking away any particular class of transfer outside the

scope of this provision. The words ""every transfer"" used in the said section was held to include the transfer by a Mohammedan and as such in case

of a transfer by a Mohammedan the transfer must be in accordance with the requirements provided in Section 26(C) of the Bengal Tenancy Act. It

is pertinent to mention in this connection Section 54 of the Transfer of Property Act which provides that an instrument of transfer of immovable

property of the value of Rs. 100/- and upwards must be registered. Section 129 of the said Act specifically lays down that the provisions of the

Transfer of Property Act shall not be applicable to gifts of immovable property to which Mohammedan Law applies. This, in my opinion, confirms

the position that the Transfer of Property Act which is a special Act dealing with the transfer of Property would have been applicable to transfers

by Mohammedans unless the operation of this Act has been expressly excluded by the provisions of Section 129 of the said Act. I, therefore, hold

on a conspectus of the decisions cited above that the gift of an occupancy Raiyatee interest in order to be valid has to be made by a registered

instrument as enjoined by Section 26 (C) of the Bengal Tenancy Act. The submission that gift or Heba is excepted from the mischief of Section 26

(C) of Bengal Tenancy Act as "bequest" includes gift is not tenable in view of the provisions of sub-section 2 of section 26(C) of the said Act

which clearly shows that the word "bequest" as used in sub-section (1) of Section 26(C) refers to will and not to gift. In Saunder's Words and

Phrases the meaning of the word "bequest" as made out in Halsbury's Laws of England has been quoted. Bequest means in ordinary sense gift of

money or a chattel but with a proper controlling context is capable of meaning a devise of land. In Halsbury's Laws of England, 3rd edition, Vol.

39 page 1016, it is stated that the terms "legacy" and "bequest" in their ordinary sense are used of a gift of money or a chattel, but with a proper

controlling context are capable of meaning a devise of land. According to Osborn's Concise Law Dictionary, 4th Edn. at page 116 the word

devise means a gift of land or other reality by will, either specific or residuary. On a consideration of the provisions of Section 26(C) of the Bengal

Tenancy Act as well as the meaning of the word "bequest" as given in the authoritative books and dictionary referred to above I hold that bequest

does not include gift and it refers only to will. Therefore, all gifts to which Mohammedan Law is applicable are required to comply with the

provisions of Section 26(C) of the Bengal Tenancy Act if the subject matter of the gift is occupancy Raiyati interest. This contention is, therefore,

over ruled. The contention that the suit being instituted in 1964 when the Bengal Tenancy Act was repealed the said provision of Section 26 (C) of

the said Act cannot be invoked is also not tenable for the simple reason that the oral gift was made in Baisak, 1346 B.S. when the Bengal Tenancy

Act was in operation and as such the gift must conform to the requirements specified in Section 26(C) of the Bengal Tenancy Act and this being

not so the gift cannot be held to be a valid gift. I therefore hold that the oral gift made by Saharddi in favour of the plaintiffs Nos. 6 to 9 is not a

valid gift and as such no title can pass on it's basis to the donees.

For the reasons aforesaid the appeal fails and is therefore dismissed. The judgment and decree of the courts below are hereby affirmed. There will,

however, be no order as to costs.