

Probhat Chandra Kanrar and ors. Vs. Sm. Rani Bala Kanrar and ors.

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Court : Kolkata

Decided On : Jul-19-1988

Reported in : AIR1989Cal202,(1989)2CALLT18(HC)

Judge : Padma Khastgir and ;L.M. Ghosh, JJ.

Acts : [Evidence Act, 1872](#) - Sections 68 and 90

Appeal No. : F.A. No. 284 of 1982

Appellant : Probhat Chandra Kanrar and ors.

Respondent : Sm. Rani Bala Kanrar and ors.

Advocate for Def. : Dutta, Adv.

Advocate for Pet/Ap. : Mullick, Adv.

Disposition : Appeal allowed

Judgement :

L.M. Ghosh, J.

1. In the 3rd Court of the Subordinate Judge, Howrah, the plaintiffs filed a suit for partition. The properties are set out in Schedules 'A' and 'B' of the plaint. The learned Subordinate Judge decreed the suit in part.

2. Not accepting the judgment and decree, some of the defendants have preferred this appeal.

3. It is not disputed that one Surendra Nath Kanrar was the common ancestor of the parties. There is also no dispute as regards the majority of the plots, that those plots belonged to late Surendra Nath Kanrar. Surendra Nath Kanrar left four sons namely, Ram Chandra Kanrar, Lakshman Chandra Kanrar, Bharat Chandra Kanrar and Netai Chandra Kanrar. Netai Chandra Kanrar was the plaintiff 1. On his death, his heirs have been substituted. The plaintiffs 2 to 7 are the heirs of Lakshman Chandra Kanrar. The defendants 1 to 10 are the heirs of Ram Chandra Kanrar and the defendants 11 to 16 are the heirs of Bharat Chandra Kanrar. It is also not disputed that the four sons of Ram Chandra Kanrar acquired one-fourth share each in the properties, set out in 'A' and 'B' Schedule of the plaint. In the plaint, it is mentioned that some portions of the properties out of plot No. 238 of the 'B1' Schedule were acquired in land acquisition proceedings and compensation money was distributed amongst the co-sharers as per their shares respectively. With regard to plots Nos. 360 and 361, which are Items Nos. 6 and 7 respectively of the 'A' Schedule properties of the plaint, it is the plaintiffs' case that there are about 1 lac bricks, which were manufactured by late Surendra Nath Kanrar. By registered deed dt. the 23rd July, 1968, the defendants 11 to 16 sold their 1/8th share in those very plots, namely. Plots Nos. 360 and 361, to the plaintiff 1. So in those plots, the plaintiff No. 1 claims 3/8th share and the rest of the plaintiffs claim 1/4th share.

4. The defendants 2 to 7, 9 to 12, 13, 14, 15 and 16 have filed one set of written statement. The defendants 1 and 8 have filed another set of written statement. Substantially, the defences of both the sets of the defendants are the same. It is not disputed by the defendants that the parties acquired generally the shares as mentioned in the plaint. It is only stated that by a deed of gift, dt. 10-9-47, Ram Chandra Kanrar got from his father plots Nos. 71 and 71/621 and the demarcated southern half of plot 70 of the 'B' Schedule of the plaint. Another point taken by the defendants is that the suit is bad, for partial partition. Some of the plots have been shown in the written statements are said to have been the joint properties and not brought within the hotchpotch. In the written statement of the defendants 1 and 8,

it is pointed out that the heirs of Bharat Chandra Kanrar, that is, the defendants 11 to 16, sold to Ram Chandra their 1/8th share in plots 360 and 361 of Khatian No. 417, by Kobala dt. 23-7-68, like the transfer by the some defendants in favour of the plaintiff No. 1. With regard to the bricks stacked on Plots Nos. 360 and 361, it is the submission of the defendants that they belonged to Ram Chandra exclusively, who got them manufactured at his costs, and got the letters R. C. K. inscribed on them.

5. These are the main contentions between the parties.

6. The learned court below did not accept the plea of partial partition. With regard to the said deed of gift, in favour of Ram Chandra, the learned Trial Court held that, that document was of no use to the defendants 1 to 10. In the matter of the establishment of their title on the basis of the deed of gift, that is to say, the learned Trial Court rejected the deed of gift and allowed shares according to ordinary devolutions.

7. At the outset, the question of partial partition may be resolved. From the judgment of the Trial Court, it appers that the only contention as to non-inclusion of some of the properties was with regard to plot No. 21 of Khatian No. 505. It is recorded that there was no controversy raised as to non-inclusion of any other property. So we are confined to plot No. 21, while considering the aspect of partial partition. As regards Plot No. 21, it is the plaintiffs case that Lakshman alone had acquired the property. The learned Trial Court accepted that view. Indeed that position is supported by the documents on record. Ext. 4C is the certified copy of the record of right in respect of Plot No. 21 and that stands in the name of Lakshman alone. Ext. 3 series also support the same conclusion. The rent receipts are all in the name of Lakshman. As against that, there is no document to show that Surendra Nath Kanrar had acquired the property. We are of the view that the learned Trial Court had rightly rejected the plea of partial partition on the ground of non-inclusion of plot No. 21. The suit is not bad for partial partition.

8. The main contention is a,bout the deed of gift, Ext. G. That is a deed executed by Surendra Nath Kanrar in favour of Ram Chandra in respect of Items 5, 6 and 7 of the 'B' Schedule and half of Items 1 and 2 of the said 'B' Schedule. If the deed

of gift be accepted, the plaintiffs could not have any interest in Items 5, 6 and 7 and in half of Items 1 and 2. Whether the deed of gift, Ext. G, is to be accepted or not is now to be considered.

9. One objection against the acceptance of the said deed of gift, Ext. G, was that the document was not proved in accordance with the provision of Section 68 of the Evidence Act. That view found favour with the learned court below. In answer, the defendants submitted that under Section 90 of the Evidence Act, the court could accept the document as authentic, notwithstanding the non-compliance of the provision of Section 68 of the Evidence Act. Indeed, it appears that there is no conflict involved in between Sections 68 and 90 of the Evidence Act. Section 68 lays down the normal Rule for proof of documents, such as deeds of gift, will etc. Section 90 of the Evidence Act is regarding presumption as to document 30 years old. Under Section 90, where any document, purporting or proved to be 30 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 in that person's handwriting. It may be noted that Section 90 gives a discretion to the court to presume about the genuineness of certain documents. Now whether or not this presumption is to be made in favour of a particular transaction, will depend upon the facts of the case. In this case, we notice that this document, 30 years old, was acted upon all throughout and, presumably, within the knowledge of the plaintiffs. P. W. 1, coming to depose for the plaintiffs, has answered that no objection was raised against the withdrawal of compensation money by Ram Chandra alone. From Ext. C, the certified copy of the award, it appears that the award stood in the name of Ram Chandra in respect of plots 70, 71 and 71/621. Not only an award was made in favour of Ram Chandra but also the award money was withdrawn by Ram Chandra without any objection from any quarters. From Exts. B-11 and B-12, the records of right, we find that the plots covered by the deed of gift, were recorded in the names of Ram Chandra and others, Ram Chandra's ten annas share having been shown there. That is another instance that the deed of gift was acted upon. P. W. 1 has merely stated in evidence that as far as he thinks his grandfather did not execute any deed of gift, as alleged in the written statement. Then he adds that the signatures, purporting to be of Surendra

Nath and appearing in the impugned deed of gift were not of Surendra Nath, This' evidence that the signatures were not of Surendra Nath is not sufficient to throw overboard an ancient document and the subsequent event on the basis of that document. We feel that it is a fit case where the presumption under Section 90 should be made, notwithstanding Section 68 of the Evidence Act.

10. Mr. Dutt, appearing for the respondents, has referred to the decision reported in 31 Cal WN 215 : (AIR 1927 Cal 102) for the proposition that it was essential for the parties, claiming through the deed of gift to prove that all the processes, for compliance of the provision of Section 68 of the Evidence Act, were exhausted. It is no doubt observed that merely taking out summons and warrant is not enough to comply with the provision of Section 68, but the processes of the court, such as mentioned in Order 16, Rule 10, C.P.C. have all got to be exhausted. This decision is also cited by the learned Advocate for the appellant. It is in that very decision that regardless of the question as to whether the document in question forms the foundation of the party's right or whether it is sought to be used as a piece of evidence, the court may in a proper case rely on the presumption contained in Section 90 of the Evidence Act. Therefore, the position is fortified that notwithstanding Section 68 of the Evidence Act, the court in a proper case can make a presumption under Section 90 of the Evidence Act. The two provisions, Sections 68 and 90 of the Evidence Act, do not militate against each other. Therefore, the right of the court to presume under Section 90 is not controlled or curtailed by Section 68 of the Evidence Act. We have already observed that whether or not the presumption should be made, will depend upon the facts of the particular case. These -facts have already been discussed and on the basis of these facts, we are inclined to make the presumption. Thus, the case reported in 31 Cal WN 215 : (AIR 1927 Cal 102) in no way affects the proposition that a document, 30 years old may be presumed to be genuine and authentic.

11. The next case cited by Mr. Dutt is reported in (1936) 40 Cal WN 151. That merely lays down the proposition that in a case where attestation, according to law is specifically denied but the signing of the document required to be attested is not so denied it is necessary to call at least one attesting witness to prove execution. That undoubtedly is the law and it is never disputed. The further question whether

a document could be presumed to be genuine under Section 90 of the Evidence Act, did not fall for consideration in that case. Necessarily this decision cited is otiose.

12. The next case cited is 49 Cal WN 377 : (AIR 1945 Cal 350). We do not find that is also of any materiality for our present purpose. It is observed that it is only after exhausting all the means to secure the attendance of an attesting witness under Order 26 Rule 10 of the C.P.C. that the foundation is laid for proving attestation under Section 69 of the Evidence Act. Once again, the question of presumption under Section 90 of the Evidence Act, did not crop up in that case.

13. Mr. Mallick, the learned Advocate for the appellants, on the other hand has for the appellants, on the other hand has relied on the decision reported in 31 Cal WN 215 : (AIR 1927 Cal 102), already discussed, and AIR 1942 All 425. In the Allahabad decision, it was laid down that to decide the genuineness of old documents, the important consideration should be whether they were acted upon or not or whether they were supported by possession or not and too much importance could not be attached to resemblance of signatures or to the opinion of experts about them. With respect, we agree and this seems to lay down the correct test. We have already discussed that the document was acted upon and the adversary did not object when on the basis of the document, Ram Chandra withdrew the compensation money in respect of the award for land acquisition. We do not find there are any grounds for rejecting this ancient document, Ext. G. It has been pointed out that there is a discrepancy between the English and the Bengali dates, as appearing in Ext. G. We do not think that this discrepancy alone render the document nugatory. If the document was manufactured, there also the discrepancy was not likely to occur. Therefore, nothing material turns on more discrepancy, as to dates. The document cannot be invalidated on the ground of this discrepancy. While coming to the decree for partition, the properties covered by the deed of gift have to be taken into consideration and so far as they go to Ramchandra alone, they are to go out of the ambit of the partition decree.

14. Now there is again some controversy regarding some bricks. The learned trial court has found that the bricks lying on plots 360 and 361 exclusively belonged to

Ram Chandra Kanrar. We find no reason to upset that decision. It is in evidence that the letters R. C. K. are inscribed on the bricks. As a matter of fact, P, W. 1 has clearly admitted that Ram Chandra himself manufactured the bricks; but, he added, that whatever Ram Chandra did in relation thereto, he did so as the Karta. When we find that P. W. 1 himself had admitted that the bricks were manufactured by Ram Chandra himself, and that the bricks bear the inscription R. C. K., we are of the view that the learned court below had sufficient materials for accepting that those belonged to Ram Chandra exclusively. There are some movable properties, brought within the hotchpotch of 1 the partition suit.-They are Items 20 and 21, As regards those Items, not much has been developed during evidence. There is no clear evidence that they exist in that form up to now, that they belonged to Surendra, has also not been clearly proved. Once again, the learned trial court was correct in disallowing the prayer for partition in respect of those items.

15. After this disposal of the ramifications, we come to the conclusion that the plaintiffs can get a decree for partition in a preliminary form in respect of those items. 1, 2, 4, 5, 8 to 18, 22 to 24 of 'A' Schedule properties and in the remaining portion left out after acquisition of part of Item No. 3 of Schedule 'B' of the plaint. The plaintiffs cannot get any decree for Item No. 3 of the 'A' Schedule, because it , is now an admitted position that the property has since been acquired and compensation received by the parties according to shares. With regards to Items Nos. 6 and 7 of the 'A' Schedule properties also, the plaintiffs are entitled to get a decree, but their shares would be some what different than those what would follow from the ordinary devolution, because the defendants 11 to 16 sold their 1/8th share to the plaintiffNo. landsotheplaintiffNo. 1 series have acquired 3/8th share in those two items and the defendants 1 to 10 have acquired another 3/8th share by purchase from the same defendants 11 to 16. The plaintiffs 2 to 7 would have remaining 1/4th share in those two plots. It has been observed before that the plaintiffs cannot get any decree for items 20 and 21 of the 'A' Schedule properties. The plaintiffs cannot also get any decree for demarcated southern half of plots 70 and 70/650, described in the 'B' Schedule properties. In Ext. G, the deed of gift, it is clearly set out that Ram Chandra got the southern demarcated portion out of the two plots, which are Items 1 and 2 of the 'B' Schedule properties. We have to accept that demarcation, because out of the demarcated portion

allotted to Ram Chandra, there has been some acquisition. So it comes to this that the northern demarcated half of these two plots are available for partition and the plaintiffs would be entitled to get decree for that northern half of Items 1 and 2. There is no question of granting any decree for Item No. 4 of the 'B' Schedule properties, since it is also admitted that these properties had been acquired and compensation distributed to the parties according to the shares. There cannot be any question of further partition. Then, the plaintiffs are entitled to get a decree in respect of plot 258 of Khatian No. 465 (.70 decimal), plots 241 and 243 of Khatian No. 214 (.78 decimal and .44 decimal) and plot No. 258 of Khatian No. 379 (.58 decimal).

16. The plaintiffs are to get decree accordingly and the appeal is to be allowed accordingly.

17. There is a cross-objection regarding the bricks. We have upheld the learned court's finding that the bricks belonged to Ram Chandra alone. Therefore, the cross-objection is to be dismissed.

18. The appeal is allowed. The judgment and the decree of the learned court below are modified in the manner set out hereinafter. It is declared that the plaintiffs 1 series, have 1/4th share and the plaintiffs 2 to 7 have 1/4th share, and together the plaintiffs have half share in the properties of Items 1, 2, 4, 5, 8 to 18 and 22 to 27 of the 'A' Schedule properties and in northern demarcated half of Items 1 and 2 of the 'B' Schedule properties and in the remaining portion of Item No. 3 of the 'B' Schedule properties, the defendants 1 to 10 group have 1/4th share and the defendants 11 to 16 group have 1/4th share in those properties. In items 6 and 7 of the 'A' Schedule properties, the plaintiffs 1 series have 3/8th share and the plaintiffs 2 to 7 group have 1/4th share and the defendants 1 to 10 have 3/8th share. The parties to effect amicable partition according to the shares described above within sixty days and the plaintiffs be given exclusive possession to the extent of their shares declared in their favour within that time, failing which, the plaintiffs will be entitled to pray for the appointment of an Advocate Commissioner for effecting partition by metes and bounds and for making the decree final, The plaintiffs' claim for Item No. 3 and Items 19 to 21 of the 'A'

Schedule properties and for Items 4 to 7 of the 'B' Schedule properties and for the southern demarcated half of Items 1 and 2 of the same 'B' Schedule properties is hereby dismissed. The cross-objection is also dismissed. The parties to bear their own costs.

Padma Khastgir, J.

19. I agree.

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