PATNA HIGH COURT

Abdul Kabir

Vs

Jamila Khatoon

A.F.O.D. No. 387 of 1946

(Meredith and Ramaswami, JJ.)

05.01.1950

JUDGMENT

Ramaswami, J.

1. In the suit, which is the subject of this appeal, the plaintiffs claimed that on 16-2-1938, they had purchased holding No. 221 of Giridin town, area about 3 bigahs 8 kathas, by registered kobala from defendants 4 and 5, Md. Ishaw and Abdul Jabbar. The relationship of the parties will appear from the following pedigree. The plaintiffs alleged that defendants 4 and 5 had previously sold 3 kathas of holding No. 224 to Mohammad Qasim who in his turn sold to Guldasta and Mt. Bibban (defendants 2 and 3). After having made the purchase, defendants 2 and 3 encroached upon holding No. 221, built houses and garages thereon, cut down the trees of the orchard and appropriated the fish from the tank. The plaintiffs, therefore, asked for a declaration of their title to holding No. 221 described in schedule of the plaint and for possession thereof. Defendants 2 and 3 contested the suit on the ground that defendants 4 and 5 had no title to the land in dispute. When Bulaki died, his father Mohan Mian was alive and so inherited one-sixth of Bulaki's share. In lieu of the share, Mohan obtained 2 1/4 bighas, of which he made a verbal gift to his daughter Mt. Bibban. The latter also purchased about 3 kathas from Md. Qasim and obtained settlement of 2 kathas from Equitable Goal Company. After amalagamating all the portions, Mt. Bibban constructed dwelling houses, garages and sunka well. Defendants 2 and 3 denied that they made any encroachment on holding No. 221. Mossomat Jamila, defendant 1 alleged that Bulaki made an oral gift of the entire holding in her favor at the time she was married.

2. Upon these contentions, the learned Subordinate Judge held that the plaintiffs were entitled to 0/9/4 share of holding No. 221 and that defendants had made encroachment. As the plaintiffs failed to prove the exact measure of encroachment, the learned Subordinate-Judge refused to grant decree for ejecting the defendants. Against this decree, the plaintiffs have preferred this appeal. A cross-objection has been filed on behalf of defendants 1, 2 and 3.

3. The first question to be examined is whether Ishaq and Jabbar had legal right to convey the entire sixteen annas share of holding No. 221 by the registered kobala. On behalf of the respondents, it was argued that Jabbar and Ishaq could make a valid transfer only of their shares

and not of Hasiba or Jamila, who did not execute the kobala. It was pointed out that in the petition of compromise (Ex. 7) the two sisters had agreed that the Jharia property should be sold to Md. Qasim, but as regards the Giridih property, the sisters had only authorised Abdul Jabbar to be the manager on their behalf. For the appellants, it was argued that since sisters had been benefited by the sale the brothers had the legal right to convey their shares, that they had implied authority to sell for the benefit of the joint estate. The argument has some attraction but it is invalid, for, the compromise petition expressly confers upon the two brothers the right to manage and not the right to sell the properties. In view of the express stipulation in the compromise decree, it is not possible to hold that there was an implied contract by which the two sisters authorized the brothers to sell.

4. On behalf of the appellants it was stated that subsequent to the execution of the kobala, Mt. Habiba executed a registered deed of relinquishment with respect to her share, in favor of Jabbar. It was argued that Jabbar acquired through this document the undivided share of Hasiba in property in dispute. But it is apparent that Hasiba executed the deed of relinquishment on 28-3-1938, before Jabbar and Ishaq redeemed the mortgage. The challan (Ex. 20a) shows that the mortgage amount was deposited in Court on 29-11-1938. For the respondents, it was maintained that Mt. Hasiba merely relinquished her share in the equity of redemption, that such a relinquishment was not valid under Mohammadan law. This contention is based mainly on the authority of two Bombay cases, *Mohinuddin v. Manchershah*[1], and *Ismail v. Ramji Sambhaji*[2], in which it was held that property in possession of a mortgagee, and not in the actual possession of the donor was incapable of being the subject of a gift according to the rule of Mohammadan law. But the authority of these cases is highly doubtful. In his celebrated treatise Mr. Ameer Ali observes that the Bombay High Court has misconceived the Mohammedan law:

> "This view, it is respectfully submitted, is founded upon an erroneous apprehension of the Hanafi law, under which seisin is requisite for hypothecation. According to the correct view of the Hanafi doctrine on the subject there is nothing in it to preclude the mortgagor from granting his equity of redemption to another. And, as the property forms the security for the debt, the transferee obtains the right to redeem the property subject to the payment of the debt" (Mohamedan Law Vol. I, 4th Edn., p. 66).

5. In an Allahabad case, *Anwari Begum v. Nizamuddin Shaha*[3], the High Court in accordance with this view held that the gift of property attached by the Collector for arrears of revenue and taken possession of by him under a local law was valid :

> "There is no doubt that the principle of Mohammedan law is that possession is necessary to make a good gift, but the question is, possession of what? If a donor does not transfer to the done, so far as he can, all the possession which he can transfer, the gift is not a good one. As we have said above there is, in
> our judgment, nothing in the Mohammedan law to prevent the gift of a right to property. The donor must, so far as it is possible for him, transfer to the done that which he gives, namely, such rights as he himself has; but this does not imply that where a right to property forms the subject of a gift, the gift will be invalid, unless the donor transfers what he himself does not possess, namely the corpus of the property. He must evidence

> the reality of the gift by divesting himself, so far as he can, of the whole of what he gives."

The same principle has been laid down in *Tara Prasanna v. Shandi Bibi*[4], in which the High Court held that the gift of land in possession of the mortgagee was valid and that possession in connection with Mohammadan law of gift meant such possession as the nature of the subject of the gift is capable of.

6. In the present case, I am satisfied that the deed of relinquishment (Ex. 3) is, upon its true construction, a deed of gift of Mt. Hasiba of her share in favor of Jabbar. In my opinion, the Calcutta and Allahabad decisions are correct and the gift made by Mt. Hasiba of a mere equity of redemption is valid under the Mohammadan law and effectively conveyed that title of Mt. Hasiba to her brother Jabbar. If this conclusion is correct, it follows that Section 43, T. P. Act would directly operate and the plaintiffs would be entitled to the share of Mt. Hasibi in the property in dispute. In *Tilakdhari Lal v. Khedan Lal*[5], Lord Buckmaster stated the rule of estoppel by deed as follows:

> "If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes."

The principle of 'feeding by estoppel' is based also on the equitable doctrine that a man who has promised more than he can perform must make good his contract when he acquires the power of performance. In *Holroyd v. Marshall*[6], the House of Lords decided that if the future goods which were to form the subject of a future sale or mortgage were sufficiently earmarked at the time of the contract and were such that equity might decree specific performance of it, equity will place the property in a state of anticipatory isolation so as to give the beneficial interest therein to the intended transferee, directly the property comes into existence or falls into the hands of the intending transferor.

7. It is then necessary to examine the claim of defendants 2 and 3 that they had title to the land in dispute on account of an oral gift said to have been made by Mohan. According to the defence case, Mohan was alive when Bulaki died and acquired one sixth share of the inheritance of Bulaki. The defendants allege that in lieu of his share of inheritance, Mohan obtained 2 1/2 bighas of land of which he made an oral gift to Bibban. In support of their case, the defendants exhibited rent receipts (Exs. E to E5) of which Ex E3 is most important. In this receipt it is stated that after the death of Bulaki, Mohan was mutated for 2 1/2 bighas with the boundaries stated therein. Exhibits E4 and E5 are the receipts granted by Abdul Hamid (D. W. 6) who stated that he was one of the co-sharers entitled to rent. For the appellants, it was maintained that these receipts were forged. It was pointed out that in Ex. E3 the western boundary is described as "pond and land of Bulaki that was given to Jamila Khatoon". It appears unusual in the first place that the area and the boundaries of the land should be specified in the rent receipt. That the description of the western boundary is false is apparent from the fact that Jamila Khatoon did not contest the case though she filed written statement. She alleged that Bulaki had made oral gift of the entire holding No. 221 at the time of her marriage. But her case is falsified by the important circumstance that in the partition suit Jamila asserted that holding No. 221 (Old

holding No. 172) was joint property and that she had merely share therein. Since the claim of Jamila is false it is impossible to hold that Ex. E-3 is a genuine document. It follows that no reliance ought to be placed on the rent receipts produced by the respondents. In my opinion the learned Subordinate Judge rightly held that Mohan was not alive at the time of the death of Bulaki and that Mohan made no gift of the land in dispute to Bibban.

8. As regards the one-third share of Ishaq, there is evidence that Ishaq executed a baimoqasa deed on 7-11-1930 in favor of his wife Mt. Naboolan in lieu of her dower debt. Soon after, Naboolan died and the share devolved upon her minor daughter Mt. Tahrunnissa, Md. Ishaq husband and Mt. Hajra as sharers and Israil, Nikael and Israfeel three brothers as residuaries. The share of Mr. Ishaq was four annas, but Mt. Tahirunnissa the minor daughter died later on and her eight annas share accrued to Ishaq. At the time Ishaq executed the sale-deed he was, therefore, entitled only to 12 annas out of his one-third share in the property in suit. On behalf of the appellants, it was nevertheless argued that the baimoqasa deed was benami and not acted upon. It was also pointed out that on 23-1-1943 Mt. Hajra, Israil, Nikael and Israfeel executed a deed of release in favor of the plaintiffs (Ex. 9). But it is important to notice that these executants have not been impleaded in the suit and it is impossible to decide in their absence whether the baimqasa deed is benami or whether the deed of release is a genuine document. Upon the facts proved, it must be held that the plaintiffs have acquired title only to 12 annas out of the share of Ishaq.

9. On behalf of the respondents the argument was stressed that since Mt. Hajra, Israil, Nikael and Israfeel have not been impleaded, the plaintiffs cannot get a decree for ejectment. But this argument is not tenable. Although a co-sharer by himself cannot get, against a trespasser, a decree for ejectment from the whole of the land, he can get a decree for joint possession to the extent of his share. He has to work out his further rights by means of a suit for partition. Vide *Hulodhur Sein v. Gooroo Das Roy*[7], *Radha Proshad v. Esuf*[8], and *Naresh Chandra v. Haydar Sheikh Khan*[9], In the last case Rankin C.J., observed as follows:

> "A theoretical and highly important question is raised as to whether or not one co-sharer can maintain a case of trespass in the absence of other co-sharers against the trespasser so as to get an order of eviction as distinct from an order of joint possession with the trespasser. That is a matter which has long been considered in this Court. The position as regards the execution of such an
> order and that position as regards the theory of the matter have, In practice, been in this Court dealt with by giving a decree for joint possession together with the trespasser and leaving it to the plaintiff to work out his further rights by a suit for partition, I do not think that there is anything unusual in the form of the decree." In the present case, therefore, I am of opinion that the plaintiffs ought to be granted a decree for joint possession for twelve annas share with defendants 1, 2 and 3 of the land in suit,

10. The next question to be investigated is, what did the sale-deed (Ex. 1) purport to convey to the plaintiffs ? The document describes the property sold as "a piece of land" within the compound walls, wherein the orchard and the tank, "situate at Giridih within the Municipal area of Giridih," beating holding No. 221 constituting dar-mokarrari interest of the declarants situate

as per boundaries, specified below :

North House of Sakhawat and others.	South Passage for coming in and going out.	East road and hous

On behalf of the appellants it is pointed out that no area is mentioned in the deed, that the respondents have not exhibited Municipal registers to show whether holding No. 221 had the boundaries as stated in the document. The respondents stated that the boundaries to the north, west and south are correct but boundary to the east has been wrongly mentioned. They asserted that holding No. 221 contained no orchard but only a tank and measured less than one bigha. It is apparent on a perusal of the kobala that the land conveyed is described not only (1) as holding No. 221 but (2) as containing an orchard and a tank (3) with the boundaries specified. For the appellants, learned advocate said that the Municipal register was not available. Even if it be assumed that the Municipal boundaries are not consistent with the boundaries as described in the sale deed, it does not follow that the holding number will prevail against the other descriptions stated in the document. In this context, it is necessary to reiterate that the land conveyed is described in the kobala as containing an orchard and a tank. In my opinion, the leading description is the statement of the boundaries and the statement that the land is situate within compound walls containing an orchard and a tank. The statement of holding No. 221 is supplementary and is not dominant. Where the description is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter intended, while the latter does not apply to any subject, the erroneous part should be rejected on the maxim false demonstratio non nocet. The principle is that so much of the description as has no application being laid aside as mere surplusage what remains is sufficient to identify the thing really meant.

11. In the present case, other evidence on the record supports the appellants' case that the land conveyed is about 3 bighas in area and comprises the orchard and tank within the compound walls. In the plaint of the present suit the land is described as comprising an orchard and a tank, holding No. 221, measuring 3 bighas with the boundaries given in the kobala. In the plaint of the partition suit, (Ex. 6), the land is described as "within the compound walls of the orchard and tank, holding No. 172" and with the same boundaries as stated in the kobala. The deed of release (Ex. 9) executed by Mt. Hajra also described the disputed land as laying "within the compound walls of the orchard, holding No. 221, area about 2 bighas" and with identical boundaries. The same boundaries are ascribed to the land in dispute by Mt. Hasiba in the deed of relinquishment (Ex. 3) dated 28-3-1938. In Ex. 9 (a), the deed of release executed by Ishaq and Jabbar also the land is described as comprising 3 bighas with the boundaries stated in the kobala. In this context, reference should be made to the survey Khatian (Ex. i) in which the land is described as belonging to Skh. Bulaki laying east of the pond of Skh. Bulaki and comprising area of 0.99 acres. Upon a proper construction of the kobala (Ex. 1) therefore, it is plain that the land conveyed included 0.99 acres equal to 2 1/2 bighas, with the boundaries stated therein and comprising an orchard and a tank within the boundary walls.

12. Upon these grounds, it is manifest that the plaintiffs should be granted a declaration that they

are entitled to 0-12-0 annas share of the land in dispute as described in schedule 'kha' of the plaint. The plaintiffs are also entitled to a decree for joint possession of twelve annas share with defendants 1, 2 and 3 of the land in dispute.

13. Accordingly, I should allow this appeal and order that the plaintiffs should be granted a decree in the above terms with proportionate costs against the contesting defendants in both the Courts. The cross objection is dismissed.

Meredith, J.

14. I agree.

Appeal allowed.

Cases Referred.

[1] 6 Bom. 650
[2] 23 Bom 682: (1 Bom L.R. 177)
[3] 21 ALL. 165: (1899 A. W.N. 8)
[4] 49 Cal. 68: (AIR (9) 1922 Cal. 422)
[5] 47 i. A. 239: (A.I.R. (8) 1921 P. C. 112)
[6] (1860-62) 10 H. L. C. 191 : (33 L. J. Ch. 193)
[7] 20 W.R. 126
[8] 7 Cal. 414: (9 C.l.R. 76)
[9] 49 C. l. J. 83: (a.i.R. (16) 1929 Cal. 28)