

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain,
Chief Justice
Mr. Justice Hasan Foez Siddique
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

CIVIL APPEAL NO.93 OF 2010.

(From the judgment and order dated 13.10.2008 passed by the High Court Division in Civil Revision No.1576 of 2003.)

Kanai Chandra Das being dead his heirs-
Reba Rani and others

Appellants.

:

=Versus=

Sree Nipendra Chandra Mondal

:

Respondent.

For the Appellants :

Mr. Harun-Or-Rashid, Advocate instructed
by Mr. Chowdhury Md. Zahangir,
Advocate-on-Record.

For the Respondents :

Mr. Shahidul Islam, Advocate instructed by
Mr. Nurul Islam Bhuiyan, Advocate-on-
Record.

Date of hearing on : 20.01.2021 & 26.01.2021.

Date of judgment on : 02.02.2021.

J U D G M E N T

Hasan Foez Siddique, J: This appeal is directed against the judgment and order dated 13.10.2008 passed by the High Court Division in Civil Revision No.1576 of 2003 discharging the Rule.

The facts involved in the appeal, in short, are that the land described in lot No.1 of the schedule Ka to the plaint belonged to Gadadhar, Gaur and Netai. Before C.S. operation Netai died leaving his widow Gyanoda Sundari Dasya. C.S. record was finally published in the names of Gadadhar, Gaur Chandra and Gyanoda Sundari. The land of lot No.2 in the schedule “Ka” to the plaint belonged to Gadadhar and Gaur in equal share

and their names were published in C.S. Khatian. The land of lot No.3 of the schedule 'Ka' belonged to Gadhdhar, Gaur Chandra, Thakur Das and Netai in equal share. C.S. record of right was prepared in the names of Gadadhar, Gaur Chandra Thakur Das and Gyanoda Sundari. The land of lot No.4 of the schedule 'Ka' to the plaint belonged to Gadadhar, Gaur Chandra, Thakur Das and Netai in equal share. Sre rupa and Sreedhar had 8 annas share. The co-sharers effected partition of the land as described in lots No.3 and 4 of the schedule 'Ka' to the plaint before C.S. operation amicably. On basis of said amicable partition, Thakur Das got the land of C.S. Plots No.6, 44, 102 and 120 of the lot No.3. Gadadhar, Govinda and Gyanoda also got their shares from lot No.3. Sre rupa and Sreedhar got their shares from lot No.4 and Plot No.98. Thakur Das got his share from plot No.100. The lands of Plots No.11 and 99 were possessed by Gadadhar and Gyanoda exclusively. Gadadhar, Gaur and Gyanoda got the lands described in the schedule 'Kha' and lots Nos.3 and 4. The lot Nos.1 and 2 of 'Kha' scheduled land are same land of lot Nos.1 and 2 of the schedule 'Ka' to the plaint. Thakur Das died leaving two sons Rasaraj and Basanta. Basanta died leaving only daughter Matangini who gave birth of a son. Matangini enjoyed the property of her father during her life time. After the death of Gyanoda, land of lot Nos.1,3,4 of the schedule 'Kha' was vested to Gadadhar and Gaur as reversioner. Since Thakur Das died before Gyanoda his sons did not get any share from Gyanoda. The land of 'Kha' schedule was possessed by Gaur and Gadadhar. Gadadhar died leaving only son Gajendra who possessed his share along with Gaur. Gaur had only daughter named Niroda, who was given in marriage with Gupi Mandal of village Monoharpur. Since her husband neglected her, Niroda started living at her

paternal house. Thereafter, Gupi died and her father Gaur Chandra arranged marriage of Niroda second time with Krishna Das Mohanta of village Prasadpur. Niroda gave birth of a son, the plaintiff No.1. When the plaintiff No.1 was aged above 3/4 years, Krishna Das Mahanta and Niroda started living with her father in a joint mess. Gaur died leaving only daughter Niroda and her son plaintiff No.1 and, thus, 8 annas interest of Gaur of 'Kha' scheduled land was devolved upon Niroda as life interest and Niroda possessed the same. Niroda was illiterate and depended with Gajendra and possessed her share through him. During S.A. operation, Niroda through Gajendra tried to record the land in her name and after the publication of the S.A. record-of-right, Gajendra died leaving behind three sons, defendant Nos.1,2 and 3. When R.S. operation was started, Niroda gave the responsibility of preparing record to the defendant Nos.1,2 and 3 and handed over all papers to them. The plaintiff No.1 used to cultivate 'Kha' scheduled land separately and Niroda used to cultivate her rest land through defendant Nos.1,2 and 3. Niroda Bala gifted .52 acre of land from plot No.119 and 1.16 acres of land from plot No.97 of Bagdhuna mouza to the plaintiff No.1 by executing and registering a deed of gift on 12.06.1972. In 1977, Niroda died leaving behind only son plaintiff No.1 and the plaintiff No.1 inherited the property left by Gaur Chandra including 2.13 acres of land obtained through his mother by the deed of gift and possessed the same in ejmali with the defendant Nos.1,2 and 3. Gaur proposed the defendant Nos.1,2 and 3 to effect partition of the land but they refused to do so on the plea that the land of 'Kha' schedule was not recorded in the name of the mother of the plaintiff No.1 and declared that the plaintiff has had no right, title and interest in the suit land. After collecting the Khatian

of the suit land, the plaintiff No.1 came to know about the actual facts of the record that during R.S. operation a small portion of the suit land was recorded in the name of Niroda Bala and the remaining land was recorded in the names of the defendant Nos.1,2 and 3 and as such, the plaintiffs were constrained to file the suit.

The defendant Nos.1-3 contested the suit by filing written statement denying the material allegations contending that the suit land belonged to Paban who died leaving behind four sons namely, Gadadhar, Thakur Das, Gaur Chandra and Netai Chandra. Thakur Das used to live in separate mess and other three brothers namely, Gadadhar Mandal, Gaur Chandra and Netai Chandra used to live in joint mess and possessed the land in ejmali. Netai died leaving behind wife Gyanoda, brothers Gadadhar and Gaur. The land of lot No.1 of the schedule 'Ka' to the plaint was recorded in the names of Gadadhar, Gaur and Gyanoda Sundari in C.S. operation and the land of lot No.2 of the schedule 'Ka' was recorded in the names of Gadadhar and Gaur Chandra in equal share. The land of lot No.3 of the schedule 'Ka' was recorded in the names of Gadadhar, Gaur, Thakur Das and Netai Chandra in equal share. Since Netai died before C.S. operation, the said land was recorded in the names of Gadadhar, Gaur, Thakur Das and Gyanoda in C.S. Khatian. The land of lot No.4 of 'Ka' scheduled land belonged to Gadadhar , Gaur, Thakur Das and Netai to the extent of 2 annas share each and Sreeup and Sreedhar to the extent of 4 annas each. The land of lot Nos.3 and 4 of the schedule 'Ka' to the plaint in respect of C.S. plot No.6, 44, 102, 12 was recorded separately in the name of Thakur Das and the remaining land was possessed by Gadadhar, Gaur and Gyanoda in ejmali. The land of lot No.4 in respect of C.S. plot No.98 was

recorded in the names of Sree rupa and Sreedhar. Thakur Das got .11 acre of land of plot No.100 and after the death of Sree rupa and Sreedhar their heirs have been possessing the same and they are necessary party in the suit. After the death of Gyanoda her share was devolved upon Gadadhar and Gaur. Gajendra used to live with Gaur in join mess. The suit was liable to be dismissed.

The trial Court, upon consideration of the evidence on record, by its judgment and decree dated .04.06.1997, decreed the suit holding that Kanai was the legitimate son of Niroda and his father was Krishna Das, thereby, it decreed the suit in respect of 9.04½ acres of land. The contesting defendants preferred appeal and the appellate Court, by its judgment and decree dated 28.11.2002, allowed the appeal upon setting aside the judgment and decree of the trial Court and dismissed the suit. Then the plaintiff filed a civil revisional application in the High Court Division and obtained the Rule. The High Court Division, by the impugned judgment and order dated 13.10.2008, discharged the Rule. Thus, the plaintiffs have preferred this appeal upon getting leave.

Mr. Harun-or-Rashid, learned Advocate appearing for the appellants, submits that the trial Court upon proper appreciation of the evidence on record held that Kanai Chandra Das is the legitimate son of Krishna Chandra Das and Niroda but the appellate Court upon misreading and misconstruing the evidence reversed the said finding. The High Court Division, without considering the points regarding misreading and misconstruction of the evidence, erroneously discharged the Rule. He submits that Kanai Chandra Das, being the legitimate son of Krishna Chandra Das and Niroda Bala, is entitled to get decree in respect of his

share, the appellate Court and the High Court Division erred in law in setting aside the well reasoned judgment of the trial Court.

Mr. Shahidul Islam, learned Advocate appearing for the respondents, submits that Niroda Bala left her house with one Kalu Sardar. Kanai Chandra Das is the son of said Kalu Sardar. The last court of facts and the High Court Division rightly passed the impugned judgments.

It is the case of the plaintiffs that plaintiff Kanai Chandra Das is the son of Krishna Chandra Das and his wife Niroda Bala. The contesting defendants contended that Niroda left her house with one Kalu Sardar and Kanai was not the son of Krishna Chandra Das and Niroda Bala rather he was an illegitimate son of Kalu Sardar so the plaintiff No.1 was not entitled to inherit the property left by Niroda.

It is the duty of the Court to be more careful to examine the case of the defendants in view of the consequences of such defence. We are conscious that an innocent child may be the victim of our decision. In such circumstances, the Court has to consider diverse aspects including presumption under section 112 of the Evidence Act. The legal presumption as per provision of section 112 of the Evidence Act has the effect of throwing the burden of proving the illegitimacy of a child satisfying its requirements on the person interested in making it out. This provision has been treated by the Apex Courts of the sub continent as the general law determining the legitimacy is the questions involving rights of inheritance. The presumption being highly followed by law, the proof of non-access must be clear and satisfactory. In the case of Shamlal @ Kuldip Vs. Sanydev Kumer and others, (2009) 12 SCC 454, it was observed that the presumption cannot be displaced by mere balance of probabilities or any

circumstances creating doubt. Even the evidence of adultery by wife which though amounts to very strong evidence, it, by itself, is quite sufficient to repel this presumption and will not justify finding of illegitimacy if husband has had access. The defendants by adducing reliable evidence failed to prove that the plaintiff is not the son of Niroda and Krishna Das. In this regard, evidence of P.W.2 is relevant here, who, aged about 81 years, stated that Niroda, after the death of her first husband Gupi Mandal, remarried Krishna Das and while she was living with Krishna Chandra Das, she gave birth of a son named Kanai, the plaintiff and 3 /4 years thereafter, Krishna Chandra Das died. It appears that on 12.06.1972(ext.3), that is, about 14 years before filing the suit, Niroda executed and registered a deed of gift to plaintiff Kanai Chandra Das son of late Krishna Chandra Das. In that deed she, inter alia, stated, “----- আমার দুর্ভাগ্য বশতঃ বিবাহিত স্বামী উক্ত গুপি মন্ডল পরলোক গমন করার পর আমার পিতা শ্রী গৌর মন্ডল মান্দা থানার অন্তর্গত প্রসাদপুর গ্রাম নিবাসী মৃত শ্যাম গোসাই এর পুত্র কৃষ্ণচন্দ্র দাস এর সহিত পুনরায় বৈষ্ণব মতে দ্বিতীয় বার আমার পিতা আমাকে বিবাহ দিয়াছিলেন বর্তমানে আমি জাতীতে বৈষ্ণব ও আমার দ্বিতীয় স্বামীর ঔরষজাত ও আমার গর্ভজাত একমাত্র পুত্র উক্ত গ্রহীতা শ্রীমান কানাই চন্দ্র দাস তুমি আমার জীবন সর্বস্ব তুমি ব্যাতিত আর আমার কেহই নাই বর্তমানে আমার বয়স ৭৫ পঁচাত্তর বৎসর অতিক্রম হইত চলিল ----- ।” Such recital of an old document clearly goes to show that plaintiff Kanai is the son of Saroda and Krishna Das. The revisional Court failed to give any weight to the recital of ext.3. It is not case of the defendants that the recitals contained in exhibit-3 do not reflect the true facts. The presumption which exists with regard to the recitals in old documents should prevail. The defendant contended that Kanai was not the son of Niroda and Krishna Chandra Das. The defendants have failed to

rebutte the presumption proving that plaintiff No.1 was not the son Krishna Chandra Das and Niroda by adducing reliable evidence.

It appears from the judgment of the appellate Court, the last Court of facts, without considering evidence, particularly, the evidence of P.W.2, and recitals in exhibit-3 erroneously held that Kanai was not the son of Niroda and Krishna Das. This finding is not based on legal evidence and both the Courts have failed to give due weight of the presumption under Section 112 of the Evidence Act. It is denying the truth. “Truth must triumph” is the hallmark of justice.

In such view of the discussions made above, the appellate Court and the High Court Division have committed error of law in holding that Kanai was not the son of Krishna and Niroda. In fact, the defendants have tried to make out the case only to deprive the plaintiff from the property without any legal evidence that Kanai was not the son of Krishna and Niroda.

Accordingly, we find substance in this appeal. Thus, the appeal is allowed.

The judgments of the appellate Court as well as the High Court Division are hereby set aside and those of the trial Court is restored.

C.J.

J.

J.

J.

The 02nd February, 2021.

M.N.S./words-2362/