

**CIVIL APPEAL**

**PRESENT: THE HON'BLE MR. JUSTICE KALIDAS MUKHERJEE**

**S.A. 637 OF 1996**

**JUDGMENT ON: 19.4.2010.**

**Rahela Khatoon Bibi & others**

**Vs.**

**Rahamatannessa Bibi & another**

**POINTS:**

DECLARATION-Some co-sharers not made parties-Decree for declaration and permanent injunction whether be granted-'kabuliyats' have no bearing on the main issue involved in the suit, whether be permitted to adduced as additional evidence-Code of Civil Procedure, 1908 O 41 R 27.

**FACTS:**

The suit property comprises of a tank and its bank. Pisciculture is done in the said tank and there are fruit bearing trees on the bank of the tank. After having inherited the suit property, the plaintiffs are in possession of the same. Under the circumstances, the plaintiffs instituted the suit praying for declaration of title and for permanent injunction against the defendants.

The learned Judge upon consideration of the entire materials on record came to the finding that the plaintiffs failed to establish their right, title and interest in the suit property and, as such, they were not entitled to get any relief and dismissed the suit allowing thereby the appeal after setting aside the judgment and decree passed by the learned Trial Court. Being aggrieved by the said judgment and decree passed by the learned First Appellate Court, the plaintiffs have preferred the instant Second Appeal.

**HELD:**

But the question arises whether in a suit for declaration of title and permanent injunction the plaintiff Nos. 2 to 12 can be granted a decree for declaration and permanent injunction. As per plaintiffs' averment Samser and Ershad jointly owned the property and plaintiff Nos. 2 to 10 are the heirs of plaintiff No. 1 and plaintiff Nos. 11 and 12 are the heirs of Ershad Ali Mondal. From the evidence of P.W. 1 it appears that there are the two other legal heirs who have not been brought on record. Since the property was, allegedly, held by Samser Ali Mondal and Ershad Ali Mondal jointly, the learned Judge of the First Appellate Court rightly held that the suit must fail for the non-joinder of two other legal heirs. In absence of the two heirs no effective adjudication can be made.

Para-14

Having regard to the materials on record the alleged 'kabuliyats' have no bearing on the main issue of title involved in the suit. There is therefore, no ground to allow the application under Order 41 Rule 27 Civil Procedure Code filed by the appellants.

Para-18

**CASES CITED:**

1. M/S. Ceean International Private Limited Vs Ashok Surana and another AIR 2003 Calcutta 263.
2. Sri Lakhi Baruah and others Vs. Sri Padma Kanta Kalita and others AIR 1996 SC 1253

FOR THE APPELLANT: Mr. Zafirul Islam

FOR THE RESPONDENTS: Mr. S. P. Roy Chowdhury  
Mr. Ramprokash Banerjee

## **THE COURT:**

1. This appeal is directed against the judgment and decree passed by learned Additional District Judge, 14<sup>th</sup> Court, Alipore in Title Appeal No. 763 of 1985 reversing thereby the judgment and decree passed by the learned Munsif at Bangaon in T.S. No. 134 of 1982.
2. The case of the plaintiffs/appellants, in short, is that the suit property comprises of a tank and its bank. Pisciculture is done in the said tank and there are fruit bearing trees on the bank of the tank. The suit property belonged to Samser Ali Mondal and Ershad Ali Mondal each having equal share therein. Their names were duly recorded in Sundarban Verification Settlement record of the year 1355 B.S. and it was finally published. They duly paid rent to the State of West Bengal. After their death, the plaintiff Nos. 2 to 10 being the legal heirs of Samser Ali Mondal and plaintiff Nos. 11 & 12 being the legal heirs of Ershad Ali Mondal inherited the property. After having inherited the suit property, the plaintiffs are in possession of the same. The defendants have no interest in the suit property. They are trying to create disturbance in the possession of the plaintiffs. Under the circumstances, the plaintiffs instituted the suit praying for declaration of title and for permanent injunction against the defendants.
3. The case of the defendants/respondents, in short, is that the suit is defective for non-joinder of necessary parties. The suit property belonged to Shamsuddin Karikar. After his death his property devolved upon his daughter, that is, the defendant No. 1 and the other two daughters namely Basirannessa and Fazirannessa and the son Arshed Ali and wife Fatezanbib. The defendants being

the legal heirs of Shamsuddin Karikar are in joint possession of the suit property. Samsar Ali Mondal or Ershad Ali Mondal had never any interest or possession in the suit property.

4. The learned Trial Court decreed the suit holding that the plaintiffs had their right, title and interest in the suit property. The learned Trial Court relied on the entry in the record of rights. During the pendency of the suit, plaintiff No. 1 died and the other plaintiffs prayed for expunction of the name of the plaintiff No. 1 on the ground that the other plaintiffs being the legal heirs of plaintiff No. 1 were already on record. On the question of abatement, learned Trial Court held that after the death of plaintiff No. 1 the right to sue of plaintiff Nos. 2 to 10 survived and the suit did not abate. The defendants being aggrieved, preferred appeal and the learned Judge of the First Appellate Court after hearing the parties set aside the judgment and decree passed by the learned Court below and dismissed the suit, holding that upon the death of plaintiff No. 1 the right to sue of the plaintiff Nos. 2 to 10, if any, survived and the suit did not abate, but, as this was a suit for declaration and permanent injunction, the plaintiffs No. 2 to 10 could not get such a decree in the suit in the absence of the other legal heirs. The learned Judge held that in this respect the suit must fail. It was further held that the plaintiffs conspicuously remained silent in the plaint as to how their predecessors-in-interest acquired the suit property. The learned Judge held that P.W. 1 admitted in cross-examination that Shamsuddin Karikar, the predecessors-in-interest of the defendants, was the original owner of the suit property and there was no document to show as to how the predecessors-in-interest of the plaintiffs acquired

the suit property. The learned Judge upon consideration of the entire materials on record came to the finding that the plaintiffs failed to establish their right, title and interest in the suit property and, as such, they were not entitled to get any relief and dismissed the suit allowing thereby the appeal after setting aside the judgment and decree passed by the learned Trial Court. Being aggrieved by the said judgment and decree passed by the learned First Appellate Court, the plaintiffs have preferred the instant Second Appeal.

5. In this appeal by the order dated 16.7.1997 of the Division Bench, the following substantial questions of law were formulated:

- “1 For that the Court of Appeal below has erred in law in holding that the suit has abated as a whole on the death of the plaintiff No. 1 ignoring the fact that other plaintiffs who are also co-sharers of the deceased plaintiff, the suit cannot abate as a whole.*
- 2. For that the Court of appeal below has further erred in law in not holding that the application of the remaining plaintiffs stating that the plaintiff No. 1 having died issueless and other plaintiffs are already on record, substitution was not necessary having been allowed by the trial court, the defendants are estopped from challenging the position at a subsequent stage.*
- 3. For that in any event, if at any subsequent stage, it transpired that the plaintiff No. 1 had left other heirs on her death, defect, if any could have been cured by adducing them as parties at any subsequent stage of suit or appeal.*
- 4. For that the trial court having found that Shamsuddin Karikar, predecessor-in-interest of the defendants was a different person altogether from Shamsuddin Ahmed who was the original owner of the property in dispute, the Court of appeal below ought to have upheld the findings of the trial court instead of reversing it in as much as, the*

*appeal court was also not convinced about the locus standi of the defendants to contest the suit.*

5. *For that the Court of Appeal below erred in law in not taking into account the plaint case that the predecessor-in-interest of the defendants took settlement of the lands in question from Shamsuddin Ahmed and they were in possession of the same since 1355 B.S. as borne out by the Record of Right since 1355 B.S.*
  6. *For that the Court of Appeal below ought to have held that the presumption of correctness of Record of Rights not having been rebutted by cogent evidence by the defendants the principle that possession follows from title should have been upheld.*
  7. *For that the Court of Appeal below ought to have held that even if the plaintiffs did not produce any document in support of their title, they were perfectly entitled to get a decree for declaration of their title by virtue of their possession of the suit property for more than statutory period of limitation.*
  8. *For that even assuming that the defendants were actual owners of the disputed property, but not admitting, the suit ought to have been decreed at least on the ground that the defendants failed to show their acts of possession of the suit property within 12 years as required under the Limitation Act.*
  9. *For that the Court of Appeal below not having coming to any independent findings of fact as different from those of trial court, the judgment of the appeal court is not a proper judgment of reversal.*
  10. *For that the judgment and decree of the lower appellate court is against the materials on record, erroneous, and not a proper judgment of reversal.*
  11. *For that the judgment and decree of the lower appellate court is otherwise bad, illegal and liable to set aside.”*
6. The learned Counsel appearing on behalf of the appellants submits that Samser and Ershad, the predecessors-in-interest of the plaintiffs/appellants were the

previous owners of the suit property and their names were recorded in the record of rights. As regards the question of abatement, the learned Counsel submits that after the death of plaintiff No. 1 the other plaintiffs being the legal heirs of plaintiff No. 1 were already on record and the learned Court below passed an order regarding that fact expunging thereby the name of the plaintiff No. 1. It is contended that although there are some other legal heirs of plaintiff No. 1 as told by P.W. 1 in cross-examination who were not impleaded in the suit, the suit as framed would not abate, in as much as, the rights of the other plaintiffs to sue survived. It is submitted that the entire suit would not abate.

7. The learned Counsel for the appellants further submits that the appellants have filed an application under Order 41 Rule 27 of the Code of Civil Procedure praying for permission to adduce the additional evidence, namely, the two registered 'kubuliyats' of the year 1933 wherefrom it would appear that the predecessors-in-interest of the plaintiffs acquired the suit property. It is contended that the said two documents being thirty years old cannot be called in question and in the interest of justice the suit may be sent back on remand before the learned Court below with a direction to take additional evidence and decide the matter afresh.
8. The learned Counsel for the appellants has referred to and cited the decisions reported in *AIR 2003 Calcutta 263 [M/S. Ceean International Private Limited Vs. Ashok Surana and another]*; *AIR 1996 SC 1253 [Sri Lakhi Baruah and others Vs. Sri Padma Kanta Kalita and others]*.

9. The learned Senior Counsel appearing on behalf of the respondents submits that Samser Ali and Ershad Ali had no interest in the suit property and it has been admitted by P.W. 1 in his cross-examination that Shamsuddin Karikar, the father of the defendants was the owner of the suit property. It is contended that, admittedly, Shamsuddin was the owner of the suit property and there was no document to show as to how the plaintiffs' predecessors-in-interest acquired the suit property.
10. On the question of abatement, it is contended on behalf of the respondents that as it is a suit for declaration of title and permanent injunction based on the co-ownership of Samser and Ershad, no effective adjudication can be made in absence of the other legal heirs of plaintiff No. 1 as appearing from cross-examination of P.Ws. As regards the application under Order 41 Rule 27 of the Code of Civil Procedure, it is submitted that the description of the property as mentioned in the schedule of the plaint does not tally with that as mentioned in the 'Kubuliyat'. It is submitted that the suit was instituted in the year 1982 and after such a long time it cannot be said that inspite of the exercise of due diligence the plaintiffs could not trace out the document. It is contended that in view of the provision contained in Section 99 of the Code of Civil Procedure and the provisions contained in Order 41 Rule 27 of the Code of Civil Procedure, the application for adducing additional evidence cannot be allowed.
11. The plaintiffs' contention is that the property belonged to Samser Ali Mondal and Ershad Ali Mondal, that is, the predecessors-in-interest of the plaintiffs. The plaintiffs relied upon the entry in the record of rights of the year 1355 B.S. The



plaintiff No. 1 died during the pendency of the suit and a petition was filed before the learned Trial Court to the effect that the legal heirs of the deceased plaintiff No. 1 were already on record and, as such, there was no need for further substitution in place and stead of plaintiff No. 1. The learned Trial Court after hearing the parties allowed the prayer and the name of the deceased plaintiff No. 1 was expunged vide order No. 35 dated 30.5.1984. From the cross-examination of P.W. 1 Mehaboob and P.W. 2 Imdadul it appears that Momdi @ Mamda Khatoon and Abed Ali are the full sister and brother respectively of plaintiff No. 1. These two legal heirs of deceased plaintiff No. 1 have not been brought on record. The learned Trial Court held that after the death of plaintiff No. 1 the right of the plaintiff Nos. 2 to 10 survived and, as such, there was no abatement of the suit. The learned First Appellate Court on this point held that those legal heirs of the plaintiff No. 1 were not brought on record, but, the right, title and interest of the plaintiff Nos. 2 to 10 in the suit property, if any, survived and the suit could not abate. But the learned Judge of the First Appellate Court held that as it was a suit for declaration of title and permanent injunction, plaintiffs could not get such decree as the other legal heirs of the plaintiff No. 1 were not brought on record and the suit, therefore, must fail.

12. The provision of Order 22 Rule 2 runs as follows:-

***“R.2. Procedure where one of several plaintiffs or defendants dies and right to sue survives. – Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made***

*on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.”*

13. In the suit as framed by the plaintiffs, their claim is based on inheritance from the alleged previous owner Samser Ali Mondal and Ershad Ali Mondal. Admittedly, the plaintiff No. 1 died during the pendency of the suit and on the prayer of the other plaintiffs, the name of the deceased plaintiff No. 1 was expunged by the Court vide order No. 35 dated 30.5.1984. The question arises whether the right to sue of the rest of the plaintiffs survived or not. As per the averment made by the plaintiffs in the plaint, the plaintiff Nos. 2 to 10 being the heirs of Samser Ali Mondal allegedly inherited the property. So as per the pleadings of the plaintiffs, the right of plaintiff Nos. 2 to 10 to sue survived and the suit as a whole cannot abate.

14. But the question arises whether in a suit for declaration of title and permanent injunction the plaintiff Nos. 2 to 12 can be granted a decree for declaration and permanent injunction. As per plaintiffs' averment Samser and Ershad jointly owned the property and plaintiff Nos. 2 to 10 are the heirs of plaintiff No. 1 and plaintiff Nos. 11 and 12 are the heirs of Ershad Ali Mondal. From the evidence of P.W. 1 it appears that there are the two other legal heirs who have not been brought on record. Since the property was, allegedly, held by Samser Ali Mondal and Ershad Ali Mondal jointly, in my considered view, the learned Judge of the First Appellate Court rightly held that the suit must fail for the non-joinder of two other legal heirs. In absence of the two heirs no effective adjudication can be made.

15. As to the question of title, the plaintiffs' claim is based on alleged inheritance from Samser and Ershad, but, in the plaint there is no averment as to how they acquired the suit property. Since both parties are claiming title to the suit property, the absence of pleading in the plaint and also evidence as to the derivation of title by Samser and Ershed assumes much importance.
16. It is the contention of the defendants that the suit property belonged to Shamsuddin Karikar and the defendants are his heirs. P.W. 1 in his evidence has stated that Samser Ali and Ershad Ali got the suit property from Shamsuddin Karikar and Shamsuddin Karikar was the father of defendant No. 1. P.W. 1 has further stated that he has not filed any paper to show about taking settlement of the suit property by Samser Ali and Ershad Ali from Shamsuddin Karikar. It is, therefore, an admitted fact that the defendants' predecessor-in-interest Shamsuddin Karikar was the previous owner of the suit property. On the question of derivation of title of Samser and Ershad, there is, therefore, no evidence. Needless to say that mere recording of the names of Samser and Ershad in the Sundarban Verification Settlement Record of 1355 B.S. would not, ipso facto, prove their title to the suit property. The learned Judge of the First Appellate Court also discussed about the possession and disbelieved the case of the plaintiffs. There is no ground to interfere with the findings of the learned Judge of the First Appellate Court in this regard.
17. The learned Counsel appearing for the appellants submits that the appellants have filed an application under Order 41 Rule 27 of the Code of Civil Procedure praying for adducing additional evidence. It is contended that the appellants have

submitted the Xerox copy of the two registered 'Kabuliyats' wherefrom it would appear that the name of Shamsuddin was Shamsuddin Ahamed and not Shamsuddin Karikar. On perusal of the schedule of the property as contained in the said registered 'Kabuliyat' it would appear that it does not tally with that of the suit property as given in the plaint. The schedule of the 'kabuliyat' on the face of it cannot be said to be identical with that of the plaint. Moreover, in the application under Order 41 Rule 27 of the Code of Civil Procedure it has been averred in para 3 of the plaint that on scrutiny from the old papers kept so long in a separate tin box the said documents could not be traced out earlier and it would appear that one 'kabuliyat' was executed and registered on 21.12.1933 in respect of the suit property by Shamsuddin Ahamed, son of late Chhaku Mondal in favour of Samser Ali Mondal. In para 4 it has been averred that on the very same date another 'kabuliyat' was executed and registered by Shamsuddin Ahamed Mondal, son of late Chhaku Mondal in favour of Samser Ali Mondal. It has been stated in the said application that such evidence was not within the knowledge of the petitioners and could not be traced out even after exercise of due diligence.

18. It appears that the suit was instituted in the year 1982. It was decreed by the learned Trial Court and in the First Appellate Court the decree was reversed. At this stage the contention that the said two documents could not be traced out earlier, is not tenable at all. Furthermore, the contention that the Shamsuddin Ahamed was the owner of the suit property cannot be believed in view of the evidence of P.W. 1. In view of the clear admission of P.W. 1 that their

predecessors-in-interest got the property from Samsuddin Karikar, the father of the defendants, it cannot be said that the real name of Shamsuddin was Shamsuddin Ahamed and not Shamsuddin Karikar. The learned Counsel appearing on behalf of the appellants has cited the decision reported in AIR 2003 Calcutta 263 (Supra). But having regard to the materials on record I find that the alleged 'kabuliyats' have no bearing on the main issue of title involved in the suit. The other decision reported in AIR 1996 SC 1253 (Supra) was cited to show the presumption of genuineness of said document. In view of the discussion aforesaid, I find that the said two decisions would not come in the aid of the contention of the learned Counsel of the appellants. There is therefore, no ground to allow the application under Order 41 Rule 27 Civil Procedure Code filed by the appellants.

19. Having heard the learned Counsel of both sides and on perusal of the materials on record, I find that there is no ground to interfere with the findings of the learned Judge of the First Appellate Court. The First Appellate Court was justified in passing the impugned judgment and decree. There is no merit in this appeal.
20. The appeal, therefore, stands dismissed. The impugned judgment and decree are hereby affirmed. There will be no order as to costs.
21. The CAN No. 3433 of 2002 is also dismissed.

22. Let a copy of this judgment along with the L.C.R. be sent to the learned Court below immediately.

23. Urgent Photostat certified copy, if applied for, be handed over to the parties as early as possible.

(Kalidas Mukherjee, J.)