IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

S.A. 406 of 2016
CAN 1 of 2016
CAN 2 of 2018
CAN 3 of 2023

MINATI BHADRA & ORS.
VS.
DILIP KR. BHADRA & ORS.

For the Appellants	: Mr. Prantick Ghosh, Adv. Mr. Siddhartha Sarkar, Adv. Mr. Hirak Roy, Adv. Mr. Prasad Bhattacharyya, Adv.
For the Respondents	: Mr. Rwitendra Banerjee, Adv. Mr. Prasun Mukherjee, Adv. Mr. Kanchan Ray, Adv.
Hearing concluded on	: 5th October, 2023
Judgement on	: 19th October, 2023

Siddhartha Roy Chowdhury, J.:

1. Challenge in this appeal is to the judgement and decree passed by learned Additional District Judge, 1st Court, Jangipur, Murshidabad in Title Appeal No. 14 of 2013 passed on 16th March, 2016; by the impugned judgement learned Appellate Court was pleased to set aside the order of dismissal passed by learned Trial Court dated 27th September, 2012 and decreed the suit in the preliminary form.

2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.

3. Briefly stated, depicting himself as son of Chabi Rani Bhadra and Aswini Bhadra, the plaintiff filed the suit for partition stating, *inter alia,* that Chabi Rani Bhadra was the original owner of the suit property which was acquired by purchase and Chabi Rani died intestate on 15th March, 1984 and she was survived by her husband Aswini and son Dilip Kumar Bhadra who thus acquired the property by inheritance.

4. Aswini Bhadra married for the second time. Minati Bhadra is his second wife and in that marriage he fathered two children - Payel @ Munmun Bhadra, daughter and Swadhin Kumar Bhadra, son. After the birth of Swadhin Kumar Bhadra, defendant no. 3, the behaviour of the step mother of the plaintiff towards him was completely changed; she started instigating Aswini against the plaintiff. On 12th March, 2003 Aswini Kumar Bhadra died intestate leaving behind him surviving the plaintiff and defendant no. 3 as his sons defendant no. 2 as his only daughter and defendant no. 1 as his widow.

5. After the demise of Chabi Rani Bhadra the plaintiff acquired the half share in the suit property and he acquired 1/8th share by way of inheritance after the demise of Aswinin Kumar Bhadra. Having found inconvenience in enjoying the property jointly with the defendants the plaintiff approached the defendants for amicable settlement but his proposal was turned down, inasmuch as the defendants denied right title interest of the plaintiff over the suit property. It is admitted that Aswini Kumar Bhadra sold and transferred the entire property which he acquired on the death of his first wife in favour of the defendant no. 1 by sale. Hence the suit.

6. The defendants contested the suit by filing joint written statement denying all material averments of the plaintiff. It is the specific case of the defendants that Chabi Rani Bhadra was not the biological mother of the plaintiff. The plaintiff is the son of elder brother of Aswini, his father was Amulya Kumar Bhadra and mother was Gouri Rani Bhadra. Chabi Rani Bhadra was survived by her husband Aswini as her sole legal heir and after the demise of Chabi Rani Bhadra, Aswini married the defendant no. 1 who gave birth to defendant nos. 2 and 3.

7. Aswini Died intestate leaving behind him surviving defendant nos. 1, 2 and 3 as his legal heirs. During his lifetime Aswini Kumar Bhadra sold and transferred the suit property by executing the deed of sale in favour of the defendant no. 1 and she acquired the absolute interest in the property by purchase. Learned Trial Court after considering the evidence on record was pleased to dismiss the suit.

8. The plaintiff challenged the judgement of learned Trial Court in Title Appeal No. 14 of 2013. Learned First Appellate Court was pleased to reverse the judgement of learned Trial Court and acknowledging the status of the plaintiff as son of Chabi Rani Bhadra and Aswini. Learned First Appellate Court further held that plaintiff has right interest and possession over the suit property and is entitled to decree for partition in respect of his share. Aggrieved thereby the defendants preferred the appeal.

9. Mr. Prantick Ghosh, learned Counsel for the appellant impeaching the impugned judgement submits that learned First Appellate Court failed to appreciate the evidence on record. It is submitted by Mr. Ghosh that the plaintiff Dilip Kumar Bhadra was not the biological son of Chabi

Rani Bhadra and Aswini Bhadra. Chabi Rani Bhadra did not have any child. It is further contended that in absence of any document the paternity of Dilip Kumar Bhadra, is to be determined taking lumen from Section 50 of the Evidence Act which says :-

> *"50. Opinion on relationship, when relevant.—When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860). Illustrations*
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> *(a) The question is, whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife, is relevant.*
>
> *(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant. Comments Contradiction in evidence of relationship of witness of triffle nature, not material in a partition suit; Gowhari Das v. Santilata Singh, AIR 1999 Ori 61."*

10. It is admitted by Mr. Ghosh that Malati Sarkar who happens to be the sister-in-law of Chabi Rani adduced evidence as D.W. 2. Her husband was the elder brother of Chabi Rani and as D.W. 2 she stated on oath that Chabi Rani had no issue. Malati Sarkar had no reason to adduce evidence denying her relationship with plaintiff. She spoke the truth and the truth is that Chabi Rani had no issue.

11. It is further adverted by Mr. Ghosh that P.W. 2 was thoroughly cross-examined and she stood the test of cross-examination. The plaintiff, since has failed to adduce any evidence to prove that he was the biological son of Chabi Rani Bhadra, learned First Appellate court had no reason to pass the judgement impugned ignoring the testimony of D.W. 2. Learned First Appellate Court got swayed by documentary evidence particularly Exhibits-7, 8 and 9. These entries in the public record, according to Mr. Ghosh, cannot have a better probative value than that of the information given by D.W. 2 as to the relationship.

12. To buttress his point Mr. Ghosh places his reliance in the judgement of ***DOL GOBINDA PARICHA VS. NIMAI CHARAN MISHRA*** reported in **AIR 1959 SC 914**, Hon'ble Apex Court held :-

> *6. We proceed to consider the second question first. The Evidence Act states that the expression " facts in issue " means and includes any fact from which either by itself or in connection with other facts the existence, non- existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follow; "evidence" means and includes (1) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry ; and (2) all documents produced for the inspection of the Court. It further states that one fact is said to be relevant to another when the one is connected with the other in any one of the ways referred to in the provisions of the Evidence Act relating to the relevancy of facts. Section 5 of the Evidence Act lays down that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and 'of such other facts as are declared to be relevant and of no others. It is in the context of these provisions of the Evidence Act that we have to consider s. 50 which occurs in Chapter 11, headed " Of the*

Relevancy of Facts Section 50, in so far as it is relevant for our purpose, is in these terms:-

> *"S. 50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact."*

On a plain reading of section 50 of the Evidence Act, it becomes quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The two illustrations appended to the section clearly bring out the true scope and effect of the section. It appears to us that the essential requirements of the section are-(I) there, must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a, case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3)but the person whose opinion expressed by conduct is relevant must be a, person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship ; in other words, the person must fulfill the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than more retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. Now, the " belief " or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or

outward behaviour as evidence of the opinion held is relevant and may, therefore, be proved. We are of the view that the true scope and effect of section 50 of the Evidence Act has been correctly and succinctly put in the following observations made in Chandu Lal Agarwala v. Khalilar Rahman (1):-

"It is only opinion as expressed by conduct which is made relevant. This is how -the conduct comes in. The offered item of evidence is the conduct', but what is made admissible in evidence is' the opinion', the opinion as expressed by such conduct)The offered item of evidence thus only moves the Court to an intermediate decision : its immediate effect is only to move the Court to see if this conduct establishes any I opinion' of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer 'the opinion ', the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the 'opinion'.

When the conduct is of such a tenor, the Court only gets to a relevant piece of evidence, namely, the opinion of a person. It still remains for the Court to weigh such evidence and come to its own opinion as to the factum probandum-as to the relationship in question." We also accept as. correct the view that s. 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship: Lakshmi Reddi v. Venkata Reddi (1).

7. It is necessary to state here that how the conduct or external behaviour which expresses the opinion of a person coming within the meaning of s. 50 is to be proved is not stated in the section. The section merely says that such opinion is a relevant fact on the subject of relationship of one person to another in a case where the court has to form an opinion as to that relationship. Part 11 of the Evidence Act is headed " On Proof ". Chapter III thereof contains a fascicule of sections relating to facts which need not be proved. Then there is Chapter IV dealing

with oral evidence and in it occurs s. 60 which says inter alia :- " S. 60. Oral evidence must, in all cases whatever, be direct; that is to say-

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds."

If we remember that the offered item of evidence under s. 50 is conduct in the sense explained above, then there is no difficulty in holding that such conduct or outward behaviour must be proved in the manner laid down in s. 60; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it; and so on. The conduct must be of the person who fulfils the essential conditions of s. 50, and it must be proved in the manner laid down in the provisions relating to proof. It appears to us that that portion of s. 60 which provides that the person who holds an opinion must be called to prove his Opinion does not necessarily delimit the scope of S. 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under s. 50 or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute

conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of s. 60. This, in our opinion, is the true inter-relation between s. 50 and s. 60 of the Evidence Act. In Queen Empress v. Subbarayan (1) Hutchins, J., said :-

"That proof of the opinion, as expressed by conduct, may be given, seems to imply that the person himself is not to be called to state his own opinion, but that, when he is dead or cannot be called, his conduct may be proved by others. The section appears to us to afford an exceptional way of proving a relationship, but by no means to prevent any person from stating a fact of which he or she has special means of knowledge.

While we agree that s. 50 affords an exceptional way of proving a relationship and by no means prevents any person from stating a fact of which he or she has special. means of knowledge, we do not agree with Hutchins, J., when he says that the section seems to imply that the person whose opinion is a relevant fact cannot be called to state his own opinion as expressed by his conduct and that his conduct may be proved by others only when he is dead or cannot be called. We do not think that s. 50 puts any such limitation."

13. Refuting such contention Mr. Rwitendra Banerjee, learned Counsel for the respondent submits that learned First Appellate Court was absolutely justified; rather learned First Appellate Court was left with no other option but to reverse the judgement of learned Trial Court because of the admission made by defendant no 1 in her oral testimony as D.W. 1. Smt. Minati Bhadra while adducing, during cross-examination stated that "Dilip was not living with his father Aswini at the time of my marriage with Aswini". It is further contended by Mr. Banerjee that Dilip appeared in the examination conducted by Board of Secondary Education

and he has filed his Admit Card for the year 1976, 27 years prior to the institution of suit Exhibit-7, 8, 8/1 and 8/2 are sufficient to prove the relationship of Dilip with Aswini. That apart in various documents admitted as Exhibit-11, Exhibit-12 and Exhibit-13, came into existence during the life time of Amulya are sufficient to establish the relationship between Dilip and Aswini. It is further contended by Mr. Banerjee that Exhibit-A the title deed produced by the defendants was executed on 21st August, 2002 and registered on 26th August, 2002. The recital of the deed says that Aswini in order to secure the future of his second wife, Minati Bhadra decided to transfer the property, but at a consideration of Rs. 8,00,000/-. Evidence is to be considered from the point of view of human probability. An old man having intention to secure the future of his wife, in his absence would have transferred the property by way of deed of gift instead of transferring the same by sale, at a consideration of Rs. 8,00,000/-.

14. Section 50 of the Evidence Act says that Court has to from the opinion as to the relationship between two persons, expressed by conduct, as to the existence of such relationship.

15. Oral testimony of D.W. 2 is not indicative of any such conduct, based on which it can be said that Dilip was not the biological son of Aswini. During cross-examination she could not remember the name of the father of Dilip. From her cross-examination we find that D.W. 2 claimed to have attended the marriage ceremony of Dilip. D.W. 2 is claiming to be the sister-in-law of Chabi Rani and if Chabi Rani Bhadra was the mother of the plaintiff, D.W. 2 as paternal aunt, had every reason to participate in the marriage ceremony of Dilip Bhadra, the plaintiff.

16. Chapter-II of the Indian Evidence Act is all about the relevancy of facts. Section 35 and Section 50 both come under that chapter.

While Section 35 of the Evidence Act says about relevancy of public record or an electronic record made in performance of duty, Section 50 is relevancy of opinion on relationship.

What would happen if there is conflict between the document admissible under Section 35 and oral evidence as to conduct under Section 50?

17. D.W. 2, Malati Sarkar, claiming herself as the sister-in-law of Chabi Rani Bhadra, stated that she had no issue. First wife of Aswini died on 15th March, 1984. Exhibit- 7, 8, 8/1 and 9 are the Admit Card, Mark Sheet of Board of Secondary Education wherein Aswini has been depicted as father of Dilip Bhadra, the plaintiff. Even D.W.1 Minati Bhadra during cross-examination stated the following :-

> "In 1984 my marriage was solemnized with Aswini Bhadra in the month of Jyastha. Dilip Bhadra was not living with his father Aswini Bhadra at the time of my marriage with Aswini Bhadra."

18. On one hand D.W. 2 Malati Sarkar, without indicting any conduct, opined that Dilip, the plaintiff is not the son of Aswini, on the other hand, there are documents admitted on evidence as Exhibit-7, 8, 8/1 and 9 suggest Aswini is the father of the plaintiff. In this factual backdrop, admission of D.W. 1 Malati Bhadra, that Dilip did not use to stay with his father Aswini, when she got married, gives an extra edge to the case of the plaintiff and the balance tilts in favour of him.

19. Hon'ble Supreme Court in ***BABLOO PASI VS. STATE OF JHARKHAND*** reported in **(2008) 13 SCC 133** held :-

> "28. *It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. (See: Birad Mal Singhvi Vs. Anand Purohit [19688 Supp SCC 604])"*

20. Hon'ble Supreme Court in ***KAREWWA VS. HUSENSAB KHANSAHEB WAJANTRI*** reported in **(2002) 10 SCC 315** held :-

> *"3. Learned counsel then urged that presumption of the correctness of an entry in the revenue record is a rebuttable presumption. The appellant rebutted the presumption by stating in his written statement that respondent No. 1 came into possession of the land on the basis of agreement for sale executed in the year 1972 and, therefore, the entry in the revenue record that the respondent was a tenant of the land in the year 1973 is incorrect. We do not dispute the legal position as stated by the learned counsel for the appellant, but the presumption of correctness of an entry in revenue record cannot be rebutted by a statement in the written statement. Mere statement of fact in the written statement is not a rebuttal of presumption of correctness of an entry in the revenue record. The respondent was recorded as a tenant in*

the revenue record in the year 1973 and under law the presumption is that the entry is correct. It was for the appellant to rebut the presumption by leading evidence. The appellant has not led any evidence to show that entry in the revenue record is Incorrect. We, therefore, do not find any merit in the contention"

21. Hon'ble Apex Court in ***MOHD. SALIM VS. SHAMSUDEEN*** reported in **(2019) 4 SCC 130** held :-

"7. Mr. Guru Krishnakumar, learned Senior Counsel, taking us through the material on record, submitted that the Trial Court and the High Court were not justified in decreeing the suit, inasmuch as the plaintiff himself had admitted that he was born in the year 1949, whereas his alleged father Mohammed Ilias expired in the year 1947. Therefore, the plaintiff could not be treated as the son of Mohammed Ilias. He further submitted that since Valliamma was a Hindu by religion, she would not have any right over the property of Mohammed Ilias, and consequently the plaintiff would not get any share in the property of Mohammed Ilias.

9. It is also not in dispute that Defendant No. 8, Saidat is the widow (first wife) of Mohammed Ilias. She has clearly admitted in her written statement that Mohammed Ilias married Valliamma, Defendant No. 9, and out of the said wedlock, the plaintiff was born. Exhibit A3 is the birth register extract of the plaintiff maintained by the statutory authorities, which indicates that the plaintiff is the son of Mohammed Ilias and Valliamma. It is a public document. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law in accordance with which such book, register or record is kept, is itself a relevant fact, as per section

35 of the Indian Evidence Act, 1872. Exhibit A3 being a public document is relevant to resolve the dispute at hand. Additionally, a specific pleading was found in the plaint that Mohammed Ilias and Valliamma were living together as husband and wife in House No. T.C.13 of Poojappura Ward in Thiruvananthapuram, which has not been denied in the written statement of the defendants.

10.As per Exhibit A3 mentioned above, the plaintiff was born on 01.07.1124 M.E. (12.02.1949 as per the Gregorian Calendar) and the same has not been seriously disputed. Admittedly, Mohammed Ilias died on 10.09.1124 M.E. The said date corresponds to 22.04.1949 in the Gregorian Calendar, as seen from the Government Almanac, which cannot be disputed inasmuch as it is a public record maintained by the Trivandrum Public Library (Government of Kerala). Thus, it can be concluded that the plaintiff was born two months prior to the death of Mohammed Ilias.

11.Under these circumstances, in our considered opinion, the Trial Court and the High Court were justified in concluding, based on the preponderance of probabilities, that Valliamma was the legally wedded wife of Mohammed Ilias, and the plaintiff was the child born out of the said wedlock."

22. Hon'ble Supreme Court in the case of ***M. YOGENDRA VS. LEELAMMA N.*** reported in **(2009) 15 SCC 184** held :-

"20. Before the Court, evidence in different forms may be adduced. Information evidence may be one of them. But the purpose of arriving at a conclusion as to whether a valid marriage has been performed or not, the Court would be entitled to consider the circumstances thereof. There may be a case where witnesses to the marriage are not available. There may also be a case where documentary evidence to prove

marriage is not available. It is in the aforementioned situation, the information of those persons who had the occasion to see the conduct of the parties they may testify with regard to the information they form probably the conduct of the persons concerned.

21. Section 50 of the Evidence Act in that sense is an exception to the other provisions of the Act. Once it is held that the evidence of Neelamma and Kamalamma were admissible evidence not only from the point of view that they were the persons who could depose about the conduct of Dodananjundaiah and Yashodamma. So far as their status is concerned without keeping in view the close relationship were also witnesses to various documents executed by Yashodamma. The evidence in this behalf in our opinion is admissible.

22. The learned trial judge has noticed and relied upon a large number of documents. It has not been contended before us by Mr. Chandrashekhar that those documents were not admissible in evidence. Some of the documents being registered documents would rest their own presumption of correctness. School records could be admissible in evidence in terms of Section 35 of the Indian Evidence Act."

23. When documentary evidence is available the oral testimony of D.W. 2 is not sufficient to rebut the probative value of Exhibit- 7, 8, 8/1 and 9.

24. Thus, I am of the view that oral testimony of D.W. 2 is not sufficient to belie or outweigh the evidentiary value of Exhibit-7, 8 and 9 which unerringly indicate the relationship between Aswini and Dilip as father and son. Therefore, I do not find any reason to interfere with the judgement impugned. The appeal does not merit any consideration and is

dismissed however, without cost. Pending applications, if any, stand disposed of.

25. Let a copy of this judgement along with lower Court record be sent down to the learned Trial Court immediately.

26. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)