

**HIGH COURT OF TRIPURA
AGARTALA**

RSA 41 OF 2005

- 1. Shri Ranjit Debnath,**
S/o Late Hari Mohan Debnath.
- 2. Shri Bikramjit Debnath,**
S/o Late Hari Mohan Debnath.
- 3. Shri Sanjit Debnath,**
S/o Late Hari Mohan Debnath.

**All residents of village Yejakhawra,
P.O. Baburbazar, P.S.- Kailashahar,
North Tripura.**

- 4. Smti. Kalpana Debnath,**
D/o Late Hari Mohan Debnath,
W/o Shri Mahendra Debnath,
Resident of Kaulikura (Gournagar),
P.S. Kailashahar, North Tripura.
- 5. Smti. Nilima Debnath,**
D/o Late Hari Mohan Debnath,
W/o Shri Akhil Debnath,
Resident of Rajnagar, P.S. Fatikroy,
North Tripura.

.. Appellant-Plaintiffs.

- Vrs -

- 1 (a) Smt. Sabitri Das,**
W/o Lt. Balaram Das.
- 1 (b) Shri Bipul Das,**
S/o Lt. Balaram Das.
- 1 (c) Smt. Krishna Das,**
D/o Lt. Balaram Das.
- 1 (d) Smt. Shampa Das,**
D/o Lt. Balaram Das.

**Residents of Srirampur, P.O. Srirampur,
P.S. Kailashahar, North Tripura, 799277.**

- 2. Smt. Chinu Bala Das,**
W/o Late Rashamay Das of
Village Srirampur, P.S. Kailashahar,
North Tripura.
- 3. Sri Rama Das,**
S/o Late Rashamay Das of
Village Srirampur,
P.S. Kailashahar, North Tripura.
- 4. Shri Ratan Das,**
S/o Late Rashamay Das of
Village Kinnirchar, P.O. Srirampur,
P.S. Kailashahar, North Tripura.
- 5. Smt. Ratna Das,**
D/o Late Rashamay Das,
W/o Shri Nitai Sabdakar,
Of Village Ranganti, P.O. Ranganti,
PS- Kailashahar, North Tripura.
- 6. Shri Sunil Chandra Das,**
S/o Late Rajani Kanta Das of
Village Srirampur,
P.S. Kailashahar, North Tripura.
- 7. Shri Anil Chandra Das,**
S/o Late Rajani Kanta Das,
Manu Electrical Office,
PS Manu, Dhalai.
- 8. Shri Benoy Bhushan Debnath,**
S/o Late Sashi Bhushan Debnath of
Village Srirampur, P.S. Kailashahar,
North Tripura.
- 9. Shri Mohit Lal Das,**
S/o Late Mati Lal Das of
Village Srirampur,
P.S. Kailashahar,
North Tripura.

.. Respondent-Dependents

**BEFORE
THE HON'BLE MR. JUSTICE S.C. DAS**

For the appellants

: Mr. P.B. Dhar, Mr. H. Bhowmik,
Ms. P. Dhar, Mr. R. Debbarma,
Mr. H. Debbarma,
Advs.

For the respondents : Mr. D. Chakraborty, Sr. Adv.
Mr. H. Laskar, Adv.

Date of hearing : 01.12.2014

Date of delivery of judgment and order : 06.01.2015

Whether fit for reporting : Yes

JUDGMENT & ORDER

This second appeal, under Section 100 of the Code of Civil Procedure, 1908 is directed against judgment and decree dated 31.03.2005 and 05.04.2005 respectively, passed by learned Addl. District Judge (Fast-track Court), North Tripura, Kailashahar in Title Appeal No.14 of 1993 whereunder the learned Addl. District Judge upheld the judgment and decree of dismissal dated 30.08.1993 in Title Suit No. 25 of 1986, passed by learned Assistant District Judge (Civil Judge, Sr. Division), Kailashahar.

2. Heard learned counsel Ms. P. Dhar for the appellants and learned counsel Mr. H. Laskar for the respondents.

3. The second appeal has been admitted for hearing on the following substantial questions of law.

"1. Whether the conclusion drawn by the appellate court that the suit land covered by old Jote No.14 and not by

old Jote No. 39 is based on no evidence?

2. Whether the appellate court can determine the fate of the appeal on the basis of sole opinions of the Survey Commissioner given in his report?

3. Whether the appellate Court has jurisdiction to enter into question, which falls outside the parameter of enquiry laid down in the order of remand?"

4. Smt. Sushama Debnath (since deceased), the predecessor of the present appellants (herein-after mentioned as plaintiff) originally instituted Title Suit No.40 of 1974 in the Court of the then Munsiff, Kailashahar on 02.09.1974 and subsequently the suit was re-numbered as T.S.25 of 1986 when it was transferred to the Court of the Assistant District Judge (Civil Judge, Sr. Division), Kailashahar, North Tripura and the suit was filed against Balaram Das (since deceased), the predecessor of the present respondent Nos.1(a) to 1(d) and the other respondents arrayed in the present appeal as defendants (herein-after mentioned as defendants) seeking declaration of right, title and interest as well as recovery of khas possession of the suit land described in the 2nd schedule of the plaint which is part of 1st schedule of the plaint and also prayed for mesne profit @ Rs.50/-.

4.1 The litigation between the parties has a checkered history that the plaintiff instituted the suit on 02.09.1974 in the Court of Munsiff, Kailashahar seeking declaration of right, title, interest and recovery of possession of the suit land described in 2nd schedule of the plaint and also for mesne profit and the suit was registered as T.S.40 of 1974. Learned Munsiff, Kailashahar by judgment dated 29.04.1980, passed in T.S. 40 of 1974 decreed the suit in favour of the plaintiff.

The defendants preferred first appeal against the judgment and decree dated 29.04.1980 in the Court of Subordinate Judge, Kailashahar, North Tripura which was numbered as T.A.12 of 1980 and the learned Subordinate Judge by judgment dated 30.09.1980 set aside the judgment and decree passed by the trial Court and remanded the case to the trial Court for fresh trial after framing two more issues as suggested by the appellate Court. The suit was thereafter transferred to the Court of learned Subordinate Judge, North Tripura, Kailashahar and it was renumbered as T.S. 25 of 1986 by order dated 11.08.1986 passed in the record of the suit and learned Subordinate Judge took up the trial. In course of trial as per direction of the appellate Court in T.A.12 of 1980, two more issues were framed and Survey Commissioner was appointed for local inspection of the suit land. The learned Subordinate Judge by impugned judgment and decree dated 30.08.1993 dismissed the suit of the plaintiff and thereafter

the plaintiff preferred Title Appeal No.14 of 1993. The learned Addl. District Judge, North Tripura, Kailashahar by judgment and decree dated 30.06.1995 allowed the appeal and decreed the suit in favour of the plaintiff.

The defendants preferred second appeal in the then Gauhati High Court, Agartala Bench, Agartala against appellate judgment and decree dated 30.06.1995 which was registered as RSA 30 of 1995 and the Hon'ble High Court by judgment dated 27.08.2002 allowed the second appeal and set aside the judgment and decree of the appellate Court dated 30.06.1995 and remanded the case to the first appellate Court for fresh hearing and disposal according to law. Thereafter the learned Addl. District Judge (Fast-track Court) by impugned judgment dated 31.03.2005 passed in T.A. 14 of 1993 dismissed the appeal and upheld the judgment and decree dated 30.08.1993 passed by learned Subordinate Judge in T.S.25 of 1986.

Hence, this second appeal on the aforesaid substantial questions of law.

5. This is a long fought litigation over a small plot of land between the plaintiff and the defendants. The original suit was instituted in the year 1974. The trial Court first decreed the suit in favour of the plaintiff. On appeal the first appellate Court remanded the case to the trial Court directing to formulate two more issues and to appoint Survey

Commissioner to determine the issues and thereafter Survey Commissioner was appointed and the report was taken on record and in the meantime, the case was transferred to the Court of Subordinate Judge, Kailshahar, North Tripura and the learned Subordinate Judge by impugned judgment and decree dated 30.08.1993 dismissed the suit. Against the dismissal, the plaintiff preferred Title Appeal No.14 of 1993 in the Court of the District Judge and the learned Addl. District Judge by judgment dated 30.06.1995 allowed the appeal and decreed the suit in favour of the plaintiff. The defendants preferred second appeal and the second appeal was allowed and the case was remanded back to the appellate Court for deciding afresh and the appellate Court by the impugned judgment dated 31.03.2005 dismissed the appeal.

6. Let us briefly state the case of the plaintiff and the defendants.

6.1 The plaint as well as the written statements are all in Bengali language. I have carefully gone through the plaint and the written statements since Bengali language is known to me.

6.2 The plaintiff, *inter alia*, contended that the suit land described in first schedule of the plaint originally belonged to one Indramani Debnath who by executing a registered Sale-Deed dated 13th Falguna, 1357 B.S. which corresponds to 1947 A.D., sold the suit land measuring 5

kani, 19 gandas and 1 kara to Binodini Devi (Exbt.3). Binodini Devi by executing two registered Sale-Deeds dated 17.01.1974 (Exbt.1 and Exbt.2) sold out the suit land to the plaintiff. It is the case of the plaintiff that the suit land was recorded in Khatian No.285, Plot No.441 in the name of Binodini Devi, the predecessor of the plaintiff and the plaintiff after purchase of the suit land cleared it and constructed house and was possessing the suit land by doing all acts of possession. The defendants have got land in the adjacent western side of the land of plaintiff and there was no practical demarcation between the land of the plaintiff and the defendants. On 04.03.1974, the defendants entered into the land described in second schedule of the plaint measuring 1 kani, 5 gandas which is a part of plaintiff's land recorded in Plot No.441 and thereby dispossessed the plaintiff from the second schedule land. The plaintiff applied for demarcation and accordingly, the land of the plaintiff and the defendants were demarcated and it was found that the defendant dispossessed the plaintiff from 1 Kani, 5 gandas of land of Plot No.441. The plaintiff, therefore, filed the suit for declaration of right, title interest and recovery of khas possession and also for mesne profit @ Rs.50/-.

7. Defendant Nos. 1, 2, 3 and 4 filed a joint written statement, *inter alia*, contending that the plaintiff never possessed the suit land described in 2nd schedule of the plaint and that it was all along with the possession of the defendants

and their predecessor Baikuntha Das. The defendants contended that they acquired title by adverse possession over the suit land and hence, the suit is barred by law of limitation. It is the further case of the defendants that uncle of defendant Nos.1 to 4 namely Baikuntha Das (since deceased), was the owner of jote No.14/13 and that Baikuntha got settlement of the jote in Plot Nos. 438,445,446,447,451,479,506 of Khatian No.102 measuring 2.86 acres but subsequently at the time of attestation survey settlement, that land was reduced to 2.27 acres and Plot Nos.438/1208 and 506/1101 were created in the name of Baikuntha Das in Jote Khatian No.14/13. That Baikuntha sold out 10 gandas of land to one Arabinda Bhattacharjee and thereafter on 04.10.1967, by a registered Deed of Gift, Baikuntha Das gifted 5 kani, 2 gandas, 2 krantas and 1 dhur of land to defendant Nos. 1 to 4. Arabinda Bhattacharjee sold out 10 gandas of land to defendant No.6 Mohitlal Das and Mohitlal Das was possessing the land. The defendant Nos. 1 to 4 also sold out 5 gandas of land to defendant No.5 Binoy Bhusan Debnath and Binoy Bhusan Debnath have been possessing the land. It is contended by the defendants that they have been possessing the suit land for 35/40 years and that the plaintiff with a view to grab the suit land, at the time of settlement operation recorded it in her name surreptitiously which should be corrected and the record should be prepared in the name of the defendants.

8. The defendant Nos. 5 and 6 also contested the case by filing written statement contending that from the date of their respective purchase, they have been possessing the suit land exercising all acts of possession.

9. In course of trial, ultimately, the following issues were framed by the trial Court for decision:-

- i. Is the suit maintainable in the present form?
- ii. Is the suit barred by limitation?
- iii. Does the suit land appertain to Khatian No.285, Dag No.441 as claim of the plaintiff?
- iv. Whether the suit land is covered by old jote No.14 of Mouja Kailashahar standing in the name of Baikuntha Das or whether the suit land is covered by old jote No.39 of Mouja Kailashahar standing in the name of Indramani Debnath?
- v. Whether the Sale Deed dated 17.1.1974 A.D. executed in favour of the plaintiff conferred any right, title and interest in the suit property upon the plaintiff?
- vi. Has the plaintiff any right, title and interest over the suit land?
- vii. Is the story of possession and dispossession advanced by the plaintiff true?
- viii. Is the plaintiff entitled to a decree for declaration and recovery of possession?
- ix. Whether the parties are entitled to get any other relief or reliefs?

10. In course of trial, husband of the plaintiff examined himself as P.W.1. on behalf of the plaintiff and also examined four more witnesses namely P.W.2 Sujit Kumar Pal,

P.W.3 Jatindra Debnath, P.W.4 Bimalendu Dutta and P.W.5 Paramananda Debnath.

11. The plaintiff also proved the following documents in support of her case—

- i. Ext.1-Sale Deed No.100 dt.17.1.74, by Benodini Devi to Shushama Debnath.
- ii. Ext.2-Sale Deed No.99 dt. 17.1.74 by Benodini Devi to Shushama Debnath.
- iii. Ext.3-Sale Deed No.679 dt. 13.11.1357 T.E. by Indramani Debnath to Benodini Devi.
- iv. Ext.4-Khatian No.285 in favour of Benodini Devi.
- v. Ext.5 (series) 4 Nos.-Revenue Receipts No.39379, 137061, 133505 and 377917.
- vi. Ext.6-Report of demarcation vide No. 80/SUR/ SDO/KLS dt. 17.4.74.
- vii. Ext.7-Certified copy of Map of Srirampur.
- viii. Ext. 8(series)-Khatian No.369(i) and 369(2) in the name of plaintiff.

12. Defendant No.1 examined himself as D.W.1; defendant No.5 examined himself as D.W.3; defendant No.6 examined himself as D.W.9 and they have examined 8(eight) more witnesses namely D.W.2 Surendra Kr. Deb, a Deed Writer; D.W.4 Kantai alias Upendra Debnath; D.W.5 Umesh Chandra Malakar; D.W.6 Pulin Chandra Mahishya Das; D.W.7 Kala Miah; D.W.8 Sarada Ch. Das; D.W.10 Rakhal Das and D.W.11 Bhupendra Das.

13. In support of their case, defendants proved the following documents:-

- i. Ext.A-Gift Deed No.5089 dt.4.10.67 A.D. by Baikuntha Das to Balaram Das & Ors.
- ii. Ext.B-Sale Deed dt.4.10.1967 No.5090 by Baikunthanath Das to Haripada Bhattacharjee.
- iii. (Wrongly not marked 'C').
- iv. Ext.D-Sale Deed No.1-258 dt.1.2.74 by Balaram Das to Binoy Bhusan Nath.
- v. Ext.E(series)-Khatian No.4(jote Khatian) in the name of Baikuntha Das.
- vi. Ext.F(series)-Rent receipts No.30 and 10.
- vii. Exbt.G-Sale Deed No.1-4019 dt.15.7.72 by Haripada Bhattacharjee to Mohit Lal Das.

14. The Survey Commissioner's report, map and field book dated 29.01.92 have been marked as Exbt.CI, Exbt.CII and Exbt.CIII.

15. The trial Court decided issue No. I and III in favour of the plaintiff and thereafter based on the decision of Issue No.IV, the trial Court decided rest of the issues against the plaintiff and hence dismissed the suit. The appeal filed by the plaintiff i.e. T.A.14 of 1993 has been dismissed by the learned Addl. District Judge(Fast-track Court) by judgment dated 31.03.2005 and in the appellate judgment, as I find, the appellant Court did not at all discuss and consider the pleadings, evidence and materials on record and dismissed the

appeal only relying upon the finding of the trial Court on Issue No.IV. The appellate Court's judgment, therefore, can not at all be termed as a reasoned judgment on appreciation of the pleadings and evidence on record and it may be termed as a perverse judgment and therefore, I think it proper to meticulously go through the evidence and materials on record.

16. Learned counsel Ms. P.Dhar appearing for the plaintiff has submitted that the plaintiff proved her case by adducing chronological documentary evidence of title and that has been ignored by the trial Court as well as the appellate Court. The trial Court simply based on the ultimate observation of the Survey Commissioner in Exbt.CI and arrived at a finding that the suit land is a part of jote No.14 of Baikuntha Das. She has also submitted that it is undisputed fact that Indramani Debnath was the jotedar of jote No.39 and Baikuntha Das was the jotedar of jote No.14. She has contended that Indramani Debnath sold out the land of jote No.39 to Binodini Devi and Binodini Devi in turn sold out the land to the plaintiff. Khatians were prepared in the name of Binodini Devi and thereafter Shushama Debnath, the plaintiff. The defendants claimed that they got the suit land along with other land from Baikuntha Das by way of a Gift dated 4.10.67 but no Khatian was prepared in the name of the defendants. She has contended that the Survey Commissioner without any relevant record and the map of jote No.39 and jote No.14 suddenly arrived at a conclusion that jote No.39 was created

taking out land from jote No.14 and that the suit land originally was a part of jote No.14. The trial Court and the appellate Court without adverting to the material facts and evidence arrived at a wrong finding simply based on the Survey Commissioner's report marked Ext. CI.

17. Learned counsel Mr. Laskar, on the contrary, has submitted that the plaintiff as well as the defendants both produced documents of title. Since the documentary and oral evidence adduced by both side was not sufficient to decide the issue, the first appellate Court in T.A. No. 12 of 1980, directed to formulate issue as to whether the suit land described in 2nd schedule of the plaint appertains to jote No.39 or jote No.14 and that has to be ascertained by appointing a Survey Commissioner and accordingly, numerous Survey Commissioners were appointed and ultimately reports submitted by Survey Commissioner Priyalal Dey has been exhibited and marked as Ext.CI and that has been relied by the trial Court as well as the appellate Court. While both the trial Court and the appellate Court arrived at a concurrent finding of fact, this Court in a second appeal need not interfere in the concurrent finding and the appeal may be dismissed.

18. I have already mentioned above the substantial questions of law formulated in this second appeal. There is no doubt that under Section 100 of the CPC, the power of the High Court while exercising the jurisdiction in a second appeal

is limited and court will not disturb the concurrent finding of the facts as a general principle of law, but there are exceptions of that principle, namely where both the courts below failed to appreciate the oral and documentary evidence properly to reach their findings, which goes to the root of the matter, the High court in the second appeal has the jurisdiction to look into the factual aspect of the suit and decide the issues afresh. It is true that in a second appeal a finding of fact even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue.

19. It is a settled law that perversity itself is a substantial question of law for adjudication in a second appeal. The trial Court decided issue No.III in favour of the plaintiff holding that the suit land appertains to Khatian No.285, Plot No.441 as claimed by the plaintiff. That Khatian No.285 was prepared in the name of Binodini Devi, the predecessor of the plaintiff. Ext.8 series are the Khatians in the name of the plaintiff after her purchase from Binodini Devi. Those Khatians were prepared based on document of title. So, as I find while deciding Issue No.IV, the trial Court ignored the documentary evidence adduced by the plaintiff and also ignored his own decision of Issue No.III and thereby arrived at a perverse

finding. As already stated earlier, the appellate Court did not at all consider the pleadings and evidence of the parties and simply considered the decision of the trial Court in respect of Issue No.IV and dismissed the appeal. The judgment of the appellate Court is, therefore, no judgment in the eye of law.

20. The plaintiff contended that the suit land originally belonged to Indramani Debnath vide his jote No.39 of Mouja Srirampur. The defendants in their written statements contended that the suit land is a part of jote No.14/13 in the name of Baikuntha Das. What is stated about the jote No. in the written statement is found to be contrary to what is stated in Ext.A i.e. Gift Deed executed by Baikuntha Nath Das in favour of defendant Nos. 1 to 4. In that Deed in the description of land it has been mentioned that Baikunthanath Das and/or Baikuntha Das gifted the land of jote No.14/23 to the defendant Nos. 1 to 4.

21. Burden lies on the plaintiff to prove his/her case. That burden cannot be shifted on the defendants. The plaintiff has to discharge his/her burden adducing documentary/oral evidence to prove his/her case. Issues in a civil suit are framed on the basis of the claim of the plaintiff which is denied or disputed by the defendants. The plaintiff claimed that Indramani Debnath was the jotedar of original Jote No.39 and by Ext.3 he sold the suit land to Binodini Devi within specific boundary as mentioned in the deed. Ext.4, the finally

published Khatian No.285 of Mouja Srirampur shows that the purchased land of Binodini Devi measuring an area of 2.38 acres was recorded as per the Title Deed in the name of Binodini Devi in Plot No.441. That Khatian still stands good and has not been challenged in any manner. Exbt. 1 and 2 shows that Binodini Devi sold out the land she purchased from Indramani Debnath which was recorded in Khatian No.285, Plot No.441, to the plaintiff and the physical possession was handed over to the plaintiff by dint of those Deeds dated 17.01.1974. Exbt.8 series are two Khatians No.369/1 and 369/2 of Mouja Srirampur prepared in the name of the plaintiff and that Khatian No.369/1 further shows that as against Hal Plot No.687, previous Plot No.441, the defendant Nos. 1 to 4 forcefully possessing 0.02 acres from the year 1385 B.S. and the defendant No.5 possessing 0.09 acre as against Hal Plot No.689 of previous Plot No.441 from the year 1385 B.S. Khatian No.369/2 shows that as against Hal Plot No.690 of previous Plot No.441, the defendant No.6 Mohitlal Das forcefully possessing 0.18 acres from 1385 B.S. Exbt.5 series are the rent receipts in the name of Binodini Devi which shows that after purchase of the land from Indramani Debnath as per the record of right prepared in her name she paid revenue. The Title Deeds and khatians, therefore, clearly established that the land of Khatian No.285, Plot No.441 belonged to Binodini Devi, the predecessor of the plaintiff which she got on purchase from Indramani Debnath and Khatian was prepared

in the name of Binodini Devi and after her sale to the plaintiff, Khatians were prepared in the name of the plaintiff wherein some portions of the land have been shown to be in forceful possession of the defendants from the year 1385 B.S. The plaintiff purchased the suit land on 17.1.74 and khatian Nos. 369/1 and 369/2 were prepared in her name. She instituted the suit on 02.09.74 i.e. after a few months of her purchase alleging that she has been dispossessed from the land described in second schedule of the plaint and the Khatians prepared in her name shows that a portion of the land measuring total 0.29 acres are in possession of the defendants.

22. The defendants, on the contrary, only produced their Title Deeds. The defendant Nos. 1 to 4 produced Exbt. A, the Gift Deed executed by Balaram Das on 4.10.1967. No Khatian is produced by the defendants to show that as per their Title Deed the land was recorded in their name and they were physically found in possession. Similarly the defendant Nos. 5 and 6 also proved their Title Deed but no Khatian prepared in their name.

23. Section 46 of the Tripura Land Revenue and Land Reforms (for short, TLR and LR) Act, 1960 clearly prescribes that every person acquiring any right in any land shall report his acquisition of such right to the village accountant within 3(three) months from the date of such acquisition and the

village accountant shall give at once a written acknowledgement in the prescribed format for such report to the person making it. It is a mandatory provision of the TLR and LR Act. For ready reference, Section 46 of the TLR and LR Act is reproduced which reads as follows:-

“46. Register of mutations.

(1) There shall be maintained for every village a register of mutations in such form as may be prescribed.

(2) Any person acquiring by succession, survivorship, inheritance, partition, purchase, gift, mortgage, lease or otherwise any right in land or, where such person acquiring the right is a minor or otherwise disqualified, his guardian or other person having charge of his property, shall report his acquisition of such right to the village accountant within three months from the date of such acquisition and the village accountant shall give at once a written acknowledgement in the prescribed form for such report to the person making it.

(3) The village accountant shall enter the substance of every report made to him under sub- section (2) in the register of mutation and also make an entry therein respecting the acquisition of any right of the kind mentioned in sub- section (2) which he has reason to believe to have taken place and of which a report has not been made under the said sub- section and, at the same time, shall post up a complete copy of the entry in a conspicuous place in the village and shall give written intimation to all persons appearing from the record of rights or the register of mutations to be interested in the mutations and to any other person whom he has reason to believe to be interested therein.

(4) Should any objection to an entry made under sub- section (3) in the register of mutations be made either orally or in writing to the village accountant, he shall enter the particulars of the objection in the register of disputed cases and shall at once give a written acknowledgement in the prescribed form for the objection to the person making it.

(5) The objections made under sub- section (4) shall be decided on the basis of possession by the competent authority and orders disposing of objections entered in the register of disputed cases shall be recorded in the register of mutations by the competent authority

(6) After the entries in the register of mutations have been tested and found correct, the entries shall be transferred to the record of rights and shall be certified by such officer as may be prescribed in this behalf."

24. The defendants after their alleged acquisition of title by dint of the Gift Deed and the purchased Deed marked as Ext. A, B and D, never approached the competent Revenue Authority for recording their name in the Khatian and for payment of land revenue. They claimed that the suit land described in second schedule of the plaint is a part of jote No.14/23 and/or 14/13 as mentioned in their pleadings as well as in Exbt.A i.e. Gift Deed of defendant Nos. 1 to 4. One jote Khatian in the name of Baikuntha Das has been produced which shows that it was of jote No.14. Under different plots that jote No. was created in the name of Baikuntha Das but neither any map of jote No. 14 nor any subsequent Khatian in the name of Baikuntha Das after the TLR and LR Act came into force has been produced by the defendants.

25. While the defendants were claiming that the suit land is a part of jote No.14/23, burden lies on them to prove producing material documents that the suit land is a part of jote No.14/23 and not of jote No.39. To substantiate the claim of the defendants no material documents placed by the

defendants whereas the plaintiff placed the map of the relevant plots of Mouja which is marked as Ext.7 and it shows the existence of plot No.441 in the western part on which the plaintiff has been dispossessed by the defendants.

26. The trial Court while deciding Issue No.IV taken into consideration the Survey Commissioner's report. I have meticulously gone through the report of the Survey Commissioner which is marked as Ext.CI i.e. the report submitted by one Priyalal Dey, Survey Commissioner, dated 27.12.1991. Record shows that before Priyalal Dey was appointed as Survey Commissioner, two more Survey Commissioners were appointed and they also submitted report. One of that Survey Commissioners was Surendra Pal who was examined in Court on 19.04.1978 and another Sri Amulya Kr. Dutta. The reports of Survey Commissioners submitted previously were not accepted and the last report submitted by the Survey Commissioner Priyalal Dey has been exhibited and marked as Exbt.CI. The map and field book marked as Exbt.CII and Exbt.CIII respectively. The Survey Commissioner also clearly observed that the suit land which has been described in schedule II of the plaint appertains to Plot No.441 of Khatian No.285 but in the concluding paragraphs of the report he has arrived at a conclusion taking into consideration the plot Nos. of jote No.14 that jote No.39 was created subsequently carving out land from jote No.14. On the basis of what that decision was taken by Survey

Commissioner is not at all substantiated. What was necessary for the Survey Commissioner was to consult the original jote Khatian of both jote Nos. 39 and 14/23 and then to consult the map of those two jotes after superimposing the one with the other. Nothing has been done. Jote No.39 and 14 were old jote before TLR & LR Act,1960 came into force. After TLR and LR Act came into force, first cadastral survey and settlement operation and then revisional survey settlement operation throughout the State were conducted. The defendant Nos. 1 to 4 as alleged got the land from Baikuntha Das in the year 1967 while the cadastral survey settlement operation was going on. But no Khatian has been prepared in the name of the defendants. The defendant Nos. 5 and 6 also purchased the land at the relevant point of time but no Khatian was prepared in their name. The plaintiff purchased in the year 1974 from Binodini Devi and Khatian was prepared in her name. Binodini purchased in the year 1947 A.D. and Khatian was prepared in her name. What comes out from the above is that the plaintiff proved her case adducing material documentary evidence whereas, the defendants failed to prove so. The Survey Commissioners report that the suit land was a part of original jote No.14 is just an assumption and presumption and based on no material document.

27. A suit has to be decided on the basis of oral as well as documentary evidence. Survey Commissioners report cannot have a superior value than that of the other evidence

gathered during trial. The report of Survey Commissioner has to be read in evidence like that of other evidence on record. There is nothing in law that the report of a Survey Commissioner has to be treated as gospel truth, over and above, the other evidence on record though it suffers from inherent infirmity. A Survey Commissioner is appointed to make a field inquiry to help the Court in arriving at a correct decision of the controversy regarding claim and counter claim. The Survey Commissioner is bound to make the inquiry based on the documents filed by both side. The plaintiff produced her document of title and Khatians. The defendants only produced the document of jote No.14 but no map produced. In the absence of any such document produced by the defendants, the observation of Survey Commissioner is found to be a perverse observation based on no material and therefore, liable to be discarded from consideration. The trial Court failed to appreciate the report of the Survey Commissioner in its proper perspective and arrived at a wrong and perverse finding.

28. In my considered opinion, the suit ought to be decided on the basis of the documentary evidence produced by the parties. Actually, as I find, the mistake was committed by the first appellate Court in Title Appeal No.12/1980 which has remanded the case for fresh trial after formulating issue as to whether the suit land is a part of jote No.39 or a part of jote No.14. Regarding records and measurement of the suit

land there is no controversy. The plaintiff claimed that she got it by purchase from Binodini Devi and Binodini got it by purchase from original jotedar Indramani Debnath and that has been clearly established by the documentary evidence adduced by the plaintiff. The defendants claimed that the suit land described in second schedule of the plaint have been adversely possessing by them but no evidence adduced to establish the adverse possession and no issue also was framed as to whether the defendants possessing the suit land adversely though there was a pleading in the written statement of defendant Nos. 1 to 4. The claim of the defendants is that the suit land is a part of jote No.14/23 but there is no evidence to support it. Since the Survey Commissioners report cannot be accepted as a Euclid's theorem, the trial Court and the appellate Court, in my considered opinion, arrived at a wrong finding based on the report of the Survey Commissioner. The material issues, therefore, decided in favour of the plaintiff that the plaintiff has proved her case that the plaintiff has got right, title and interest over the suit land.

29. Regarding dispossession, the plaintiff in the plaint stated that she has been dispossessed on 04.03.1974. In the oral evidence P.W.1, the husband of the plaintiff and other witnesses stated that the defendants dispossessed the plaintiff from the suit land putting bamboo fencing etc. Immediately after a few months of purchase, the plaintiff instituted a suit

for recovery of possession. The entries made in the remarks column (Column No. 24 of Ext.8 series i.e. Khatian No.369/1 and 369/2) shows that the defendants possessing the particular portion of land of original plot No.441, Hal plot Nos.687,689 and 690 from 1385 B.S. which means after the purchase of the plaintiff those defendants entered into possession of those part of the suit land and the plaintiff instituted the suit within the period of limitation based on title.

30. A title holder is to be generally presumed to be in possession unless contrary is proved. Ext.1 and 2 and the Khatians prepared in the name of the plaintiff clearly reveals that the predecessor of the plaintiff Binodini Devi handed over possession to the plaintiff and the plaintiff possessing the suit land after purchase. The entry made in the Khatian shows that she has been dispossessed from 0.29 acres of land of plot No.441. Since the dispossession was within 12 years from the date of purchase by the plaintiff, the plaintiff rightly claimed recovery of possession based on title and the plaintiff is entitled to get recovery of possession. The trial Court as well as the appellate Court failed to consider the documentary as well as the oral evidence in its right perspective and regarding Issue No.VII, the trial Court based on the decision of Issue No.IV arrived at a wrong finding.

31. Regarding mesne profit, the plaintiff practically adduced no evidence. In the plaint she claimed mesne profit

of Rs.50/-. Nothing is mentioned whether it is per year or per month or otherwise. No issue was also framed by the trial Court and the plaintiff also did not insist for framing any issue in respect of mesne profit and therefore, the plaintiff is not entitled to get any mesne profit.

32. Accordingly, the appeal is allowed. The judgment and decree dated 30.08.1993 passed by learned Assistant District Judge (Civil Judge, Sr. Division) in Title Suit No.25 of 1986 and the judgment and decree dated 31.03.2005 and 05.04.2005 respectively, passed by learned Addl. District Judge (Fast-track Court) in Title Appeal No.14 of 1993 are set aside and quashed.

33. The suit of the plaintiff is decreed.

34. The right, title and interest of the plaintiff in the suit land described in second schedule of the plaint is declared. The defendants are directed to hand over vacant possession to the plaintiff within 3(three) months. If the defendants failed to hand over possession, the plaintiff will be entitled to get recovery of possession in accordance with law.

35. The second appeal accordingly stands disposed of.

36. Send down the L.C. records along with a copy of this judgment.

JUDGE