

**IN THE HIGH COURT OF TRIPURA
AGARTALA**

RSA.NO. 30 OF 2011

1. Smt. Charubala Roy,
wife of late Kshirode Lal Roy,
2. Sri Pramatha Roy @ Manna,
son of late Kshirode Lal Roy
3. Sri Subrata Roy,
son of late Kshirode Lal Roy
4. Sri Satyendra Roy @ Gutu Roy,
son of late Kshirode Lal Roy

(the defendant-appellant Nos. 1, 2 & 4 are represented by
their constituted attorney, the defendant-appellant No.3)
-all are residents of Shibnagar, Motor Stand, P.O. Agartala,
P.S. East Agartala, District : Tripura West

..... Defendant-Appellants

-V E R S U S-

1. Sri Manik Lal Saha
2. Sri Madanlal Saha @ Babul
3. Sri Riman Saha ***
son of late Swapan Saha,
resident of Shibnagar, Motorstand, P.O. Agartala,
P.S. East Agartala, District : West Tripura
4. Sri Amal Saha @ Abha
5. Sri Shyamal Saha
6. Sri Bimal Saha
7. Sri Tapan Saha
8. Sri Pradip Saha
9. Sri Dilip Saha
10. Sri Santosh Saha
11. Sri Prantosh Saha
-Sl.Nos.1, 2 and 4 to 11 are sons of late Manindra Lal Saha,
resident of Shibnagar, Motor Stand, P.O. Agartala, P.S. East
Agartala, District Tripura West.
12. Smt. Dipali Saha,
daughter of late Manindra Lal Saha ,
wife of Sri Radheshyam Saha, Aralia,
P.O. Agartala College, P.S. East Agartala,
District Tripura West

13. Smt. Pratima Saha,
daughter of late Manindra Saha,
wife of Sri Sushil Roy,
Natunnagar, P.O. Airport,
P.S. District : Tripura West
14. Smt. Nilima Saha,
daughter of late Manindra Lal Saha,
wife of Sri Tapan Saha,
P.O. Reshambagan, P.S. East Agartala,
District : Tripura West
15. Smt. Bijali Saha
16. Smt. Purnima Saha
17. Smt. Anima Saha
18. Smt. Suma Saha

(*** (Plaintiff-respondent No. 3 is the legal heir of the deceased original plaintiff-respondent No. 3, Swapan Saha)

-all are daughters of late Manindra Lal Saha of Shibnagar, Motor Stand, P.O. Agartala, P.S. East Agartala, District Tripura West

.....Plaintiff-Respondents

**B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA**

For the appellants : Mr. D.R. Choudhury, Advocate

For the respondents : Mr. R. Dutta, Advocate

Date of hearing,
judgment & order : 19.06.2015

Whether fit for reporting : **No**

JUDGMENT & ORDER

Heard Mr. D. R. Choudhury, learned counsel appearing for the appellants as well as Mr. R. Dutta, learned counsel appearing for the plaintiff-respondents.

[2] This appeal arises from the judgment and decree dated 22.04.2011 delivered in T.A. No. 41 of 1996 by the District Judge, West Tripura, Agartala. At the time of admitting this appeal the following substantial questions of law were formulated by this Court, by the order dated 21.01.2013.

(I) Whether the court below misread the evidence while retuning the findings as regards the possession? and

(II) Whether the defendants (the appellants herein) could rebut the presumption of possession in view of Exbt. 2 document (finally published Khatian)?

[3] This appeal has got a chequered history. Initially the suit being T.S. No. 123 of 1987, filed by the plaintiff respondent was dismissed by the judgment and decree dated 29.03.1996, observing that the suit was not maintainable for want of cause of action.

[4] While dismissing the suit it has been observed that the appellants are in possession as claimed by the defendant No. 4 (DW-1) and duly corroborated by Amjad Ali (DW-2).

More so, in the cross examination, their statements in the examination-in-chief could not be shaken. Thus, the trial court has observed that the plaintiffs had got no possession over the suit land. So the plaintiff should have come for recovery of possession and in that event the period of limitation would have been 12 years.

[5] For the suit, related to the appeal, the period of limitation began to run on and from 21.07.1969 and expired on 1st day of 1981. The suit was instituted on 22.7.1987 and hence the suit has been determined to be barred by limitation. Against that judgment, the first appeal being T.A. No. 41 of 1996 filed by the plaintiff was also dismissed. By the judgment and decree dated 22.05.1998, the appellate court dismissed the appeal basically on the ground that the plaintiff failed to correspond the land described in the Sale Deed by which he purchased the land (Exbt-1) with the suit land as described in the plaint.

[6] It has been further observed that the Khatian, the record of right, which has been introduced in the evidence as Exbt-2 even does not support the claim of the plaintiff as in the Khatian it has been recorded that on the North, CS Plot No. 49 which according to the plaintiff is the suit land. There is no land covered by CS Plot No. 50 which is under possession of one

Rajani and his name also did not figure in the description of the suit land. The defendant-appellants have denied that the suit land was the purchased land of the plaintiff and attracted by the Sale Deed (Exbt-1). Hence the appellate court dismissed the appeal by affirming the finding of the trial court as stated but for different reasons.

[7] The concurrent finding of fact borne in the said judgment and decree dated 22.05.1992 was again challenged by the plaintiff-respondent by filing an appeal under Section 100 of the C.P.C., in the Gauhati High Court , Agartala Bench, being S.A. No. 47 of 1998. By the judgment and order dated 08.08.2008, the judgment of the first appellate court was set aside. However, the case was remanded for fresh hearing by the first appellate court observing as under:

"3. The plaintiff appellant had filed the suit before the learned Civil Judge, Junior Division, Court No. 2, Agartala for declaration of his right, title and interest, confirmation of possession and perpetual injunction. The case of the plaintiff was that he had purchased the suit land from Smti. Ramala Bala Saha who was the widow of the owner of the land late Makhan Lal Saha by way of registered sale deed No. 11659 dated 27.08.1959. The defendants contested the suit with a counter pleadings that their husbands/father had also purchased the same land by a registered deed on 31.07.1969. However, after going through the judgments of the lower court I find that the suit of the appellants has been basically

dismissed on the ground that there was gross discrepancy in the boundary of the land described in the schedule of the plaint vis-à-vis the sale deed.

4. Admittedly, the defendants did not prove the sale deed which was the basis of their defence. On the other hand, the plaintiff's case was based on the documentary evidence like purchase deed and Khatian. In a number of judgments from the Hon'ble Supreme Court it has been held that documentary evidence will prevail over the oral evidence. One can refer to the judgment reported in AIR 1972 SC 814(Mahanth Bhagwan Bhagat v. Girija Nandan Bhagat and others) (1972) 1 SCC 486:AIR 1978 SC 300 (Murarka Properties (P) Ltd and Another v. Beharilal Murarka and Others, (1978)1 SCC 109, AIR 1973 SC 1299 (Sri Bhimeshwara Swami Varu Temple v. Pedapudi Krishna Murthi and Others) : (1973) 2 SCC 261, AIR 1974 SC 1059 (Phiroze Bamanji Desai v. Chandrakant M. Patel and Others)(1974) 1 SCC 661 & AIR 1972 SC 486. However, in the case before me, the learned District Judge has affirmed the trial court's judgment solely on the ground of certain discrepancy on the western side of the suit land. In my considered opinion, if the identity of the land can be proved through other means, a party should not be denied the decree of title if it is otherwise proved on documentary or oral evidence.

5. The above apart, the trial court had also dismissed the suit on the ground of limitation. However, the learned District Judge has not addressed the issue of limitation. On this ground also the judgment of the first Appellate court is untenable.

6. In the case of Bondar Singh and Others v. Nihal Singh and Others reported in (2003)SCC 161 their lordships of the Apex Court have held that if the findings of the subordinate courts on facts are contrary to the evidence on record and are perverse, such findings can be set aside by the High Court in second appeal. Their lordships have further observed that a High Court cannot shut its eyes to perverse findings of the courts below.

7. After going through the impugned judgment, it appears to me that the suit has been dismissed on a very weak ground of little discrepancy in one side of the suit land. At the same time, the documentary evidence of title has been practically left out of consideration. Hence the impugned judgments are untenable in law as well as on facts.

[Emphasis supplied]

[8] It appears from the findings, returned in S.A. No. 47 of 1998 that the High Court has categorically observed that the impugned judgment was an outcome of misreading of the evidence on record. The District Judge, West Tripura, Agartala, by the impugned judgment has observed as under:

"It is an undisputed fact that the suit land along with other lands originally belonged to Makhan Lal Saha, Jotedar. The simple case of the plaintiff was that he purchased the suit land along with other lands from the legal heirs of Manindra Chandra Saha by dint of a registered Sale Deed executed on 27.08.1959 and got physical possession of the suit land. The purchased land was in two plots measuring 5 gandas and 16 gandas respectively. During survey and settlement operation his

purchased land was recorded in Khatian No. 5 of mouja Jogendranagar and in that Khatian the piece and parcel of land measuring 5 gandas was recorded in Plot No. 38 for an area of 5 gandas 10 dhurs and the piece and parcel of 16 gandas of land was recorded in Plot No. 49 measuring an area of 10 gandas 1 kranta.

In support of his claim, he has proved the original purchased Deed dated 27.08.1959 which was marked as Exbt-1 and the finally published Khatian No. 5 mouja Jogendranagar which was marked as Exbt. 2. He also proved the original Revenue Receipt which was marked as Exbt. 3.

The defendants resisted the claim of the plaintiff on the ground that the land of Plot No. 49 were not part and parcel of Jote No. 226 and that it was a piece of land of Jote No. 4 belonged to the same owner Makhan LaL Saha and that the predecessor of the defendant namely, Kshirode Lal Roy purchased 9 gandas 2 Karas of land of Jote No. 4 from the legal heirs of Jotedar Makhan Lal Saha by a registered deed dated 21.07.1969. Neither the Sale Deed nor any Khatian was produced by the defendants in support their case. They prayed for adducing additional evidence at the appellate stage but ultimately, declined. Defendants, therefore, failed to establish that they purchased land from the legal heirs of Makhan Lal Saha as claimed by them and that the land Plot No. 49 was purchased by them. Even if, they have purchased any such land, it was after 10 years of the purchase by the plaintiff and therefore, any such purchase cannot have any consequence on the purchase of the plaintiff.

Where the title to the immovable property established by dint of documentary evidence i.e Title

Deed and the Khatian prepared during survey and settlement was to be appreciated by the Court of law, such evidence cannot be thrown overboard simply because of a discrepancy in the boundary.

I have already re-produced the description of suit land as stated in the plaint at the very inception of this judgment. The Sale Deed of plaintiff was of 1959 i.e before the TLR&LR Act came into force. The land used to be described with jote number and mouja at that point of time. In the Sale Deed, it has been clearly mentioned that it was of Jote No. 226 and in second item of description of 16 gandas of land in Exbt. 1, the boundary was described thus :

by the North – Gopal Dey,

by the South – Tilla and of Gopal Dey,

by the East – Gopal Dey,

by the West – Purchaser's own land.

According to Exbt.1, the plaintiff purchased 16 gandas of land within the aforesaid boundary. But at the time of preparation of record of right during survey and settlement operation, 10 gandas 1 Kranta of land was recorded in Plot No. 49 out of that alleged 16 gandas of land purchased by the plaintiff and so, it was clear that the quantity of land was reduced at the time of preparation of record of right during survey settlement operation. The western boundary of the suit land was in conflict with the western boundary, as aforesaid. This boundary discrepancy diverted the mind of the Ld. Trial Judge and thereby the Ld. Trial Judge was inclined to dismiss the suit which in my view was totally a wrong decision taken by the Ld. Trial Judge. The purchase of the land was in the year 1959. The suit was filed in the year 1987 i.e almost about after

28 years and by lapse of time boundary was supposed to be changed to some extent and for the reason of such discrepancy in one side of the boundary, it was totally unreasonable and illegal for the trial court in dismissing the suit discarding the documentary evidence of title and possession. The plaintiff by adducing oral and documentary evidence established his right, title and interest over the suit land. The plaintiff has stated that he was possessing the suit land in exercising all acts of possession cultivating and producing paddy. In his examination-in-chief he stated that he was possessing the same through cultivation.

In cross examination, he stated that presently he was not cultivating the land and that 20/25 years ago it was cultivated and paddy seeding were grown and that he has now filled up the land with earth filling. That statement does not infer that the plaintiff was not in possession of the suit land. The oral evidence of P.W 2 and D.W.2 cannot create any doubt regarding possession of the plaintiff in view of the entry in the Survey Settlement record. There was a presumption of correctness of the settlement record as prescribed in Section 43 (3) of TLR&LR Act, 1960. The revenue record i.e. Exbt. 2 was the proof of possession of the plaintiff in the suit land. Burden lies on the defendants to prove the contrary but the defendants has failed to bring on record any such documentary evidence to contradict the documentary evidence adduced by the plaintiff".

[Emphasis supplied]

[9] Based thereon, it has been held that the plaintiff has established right, title and interest and possession over the suit land and accordingly, the suit has been decreed, by

granting the decree of perpetual injunction. Mr. D. R. Choudhury, learned counsel appearing for the appellants has submitted that whether the plaintiff was in possession at the time of institution of the suit has not been proved by the plaintiffs. Moreover, the plaintiffs have proved their possession through one Bargader, namely, Amjad Ali.

[10] It has been contended for the appellant that the witness adduced by the plaintiff namely, Kripa Sindhu Roy (PW-2), has categorically stated in his cross examination that 14/15 years before he saw one Muslim person namely, Amjad Ali cultivating the land for growing paddy and other crops but in the same breath, he had stated that in whose land Amjid Ali was doing the cultivation, he cannot say with certainty.

[11] From Manindra Lal Saha (PW-1) he came to know that he was the owner of the suit land. Thereafter, Mr. Choudhury, learned counsel appearing for the appellants has clearly admitted that the defendants did not file any documentary evidence for showing that they were the owner of the said land. Their claim was limited to the extent that they were in the possession of the suit land and there had been no occasion to venture dispossession of the plaintiffs or posing any threat for dispossession as they were already in possession over the suit land at the time of institution of the suit. In

respect of possession Mr. Choudhury, learned counsel for the appellants has relied on the testimonies of DWs 1 and 2.

[12] DW-1, Sri Subrata Ranjan Roy, is the defendant No. 4, who has stated that he does know the Plot No. 49 is having the boundary on the North one Rajani Saha at present and on the South Road and thereafter Mukunda Rishidas, on the East Road thereafter, Gopal Dey and according to him Plot No. 49 measures 9 and half /10 gandas of land. After purchasing the land, the defendants were possessing the suit land. They were growing the oilseed and paddy and they were doing cultivation through the Bargader from the year 1969. His father Kshirode Lal Ray, since deceased, purchased the suit land from Smt. Ramala Bala Saha.

[13] DW-1 has further stated that he has submitted the purchase deed. However, the said deed was not introduced in the evidence. According to him, Amjad Ali, is the Bargader who was doing barga in the suit land. In the cross examination he has stated that on the basis of the purchase deed and on the basis of the possession, he has stated that the Plot No. 49 is not attracted by the suit land. He denied any episode of attempting dispossession of the plaintiffs from the suit land.

[14] DW-2, Md. Amjad Ali who has stated on 16.03.1996, the day of recording the deposition, that from

about 7/8 years before he had been doing barga in the suit land of Kshirode Babu. Even he was doing the barga in the land of the plaintiffs since 7/8 years before.

[15] DW-2 has given the description of the land in which he was doing barga in the following manner. By North Subrata Roy & others, by South Subrata Roy and others, by East Road then Gopal Dey, by West Subrata Roy and others and he has made a plain and positive statement. The plaintiffs never possessed the said land. He has also clarified that the plaintiff's land situates in the Eastern side of the barga-land of Kshirode Babu, at a distance of 10/11 Kanis.

[16] Mr. Choudhury, learned counsel appearing for the appellants has thereafter contended that the possession has been proved by the defendants and hence the confirmation of possession as granted by the impugned judgment cannot be sustained. While refuting such submission, Mr. R. Dutta, learned counsel appearing for the plaintiff-respondents has submitted that the oral testimony of DW-2 cannot get precedence over Khatian (Exbt.2) where the possession has been recorded in the name of the plaintiff and nobody has challenged that. Even no such claim has been advanced by the defendants.

[17] That apart, he has stated that the original plaintiff has categorically asserted how he had been maintaining his possession over the suit land. But he had also stated that initially he started cultivating the land. Later on, he stopped cultivating but he had developed the land for other purpose. The isolated statement of PW-2 cannot be used in the manner as has been sought to be used by Mr.Choudhury, learned counsel. PW-2 in the same breath has stated that he saw Amjad Ali doing barga over the suit land but thereafter, he has also stated that he does not know over whose land Amjad Ali was doing barga. If those 2(two) statements are read together, this Court may come to the conclusion that PW-2 was not sure over which land Amjad Ali doing the barga and if the statement of Amjad Ali is keenly read it can be gathered that he was doing barga over the land, of which he has given boundary, for the last 7/8 years, whereas the suit was instituted 9 years before of his recording the statement. Moreover, it appears that Amjad Ali is a tutored witness inasmuch as in the written statement, the defendants did not introduce Amjad Ali as their Bargader, even though they carried out amendment in the written statement.

[18] Mr. Dutta, learned counsel appearing for the plaintiffs while summarising his submission has contended that if the defendants are believed, then it has to be held that they

do not know how they are in possession on the suit land. In one breath, they have stated that on the basis of the purchase deed, they are possessing the land from sometime in 1969 and thereafter, when they failed to introduce that the purchase deed in the evidence, they introduced a new story. The story of possessing the land by cultivating it through the Bargader has only been introduced, all on a sudden, by way of introduction of DW-2. Such episode being entirely de-hors the pleadings in the written statement can hardly be believed by the court.

[19] Having situated thus, Mr. Dutta, learned counsel appearing for the respondents has submitted that there is no infirmity in the impugned judgment which calls for interference from this Court. He has further submitted that the defendants have miserably failed to rebut the presumption which may be drawn by this Court under Section 43(3) of the TLR&LR Act, 1960, inasmuch as the evidence relating to the possession over the suit land is so weak that cannot take away the substance of the entry made on the basis of the inquiry as per provisions of the TLR&LR Act.

[20] Having scrutinized the records and with due regard to the submissions made by the learned counsel for the parties this Court does not find that the first appellate court misread the evidence while returning the findings that the plaintiff now

represented by the legal heirs, has proved both the title and possession over the suit land.

[21] Even this Court is of the considered opinion that the defendants have failed to probablize their claim of possession over the suit land and as such the presumption that flows from the entry in the Khatian (Exbt-2) has been left unrebutted.

[22] Hence, the first appellate court has correctly allowed the suit granting the reliefs i.e. the decree of declaration of title, alongwith the decrees of confirmation of possession and the perpetual injunction against the defendants.

Accordingly, this appeal being devoid of merit, stands dismissed. Draw the decree accordingly. Send down the LCRs thereafter.

JUDGE

A. Ghosh.