

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE SIDE
APPELLATE SIDE

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS

FA 12 of 2017

Swapan Kumar Majhi
Vs.
Narayan Chandra Majhi & Ors.

Appearance:

For the Appellant : Mr. Rwitendra Banerjee, Adv.
Mr. Shibasis Chatterjee, Adv.
Mr. A. Roychowdhury, Adv.
Mr. Devdutta Pathak, Adv.
Mr. Sandip Kundu, Adv.

For the Respondents : Mr. Siddhartha Lahiri, Adv.
Mr. Subrata Santra, Adv.

Judgment On : **27.7.2023**

Harish Tandon, J.:

An instant appeal arises from a judgment and decree dated 23rd April, 2014 passed by the learned Civil Judge (Senior Division) Ghatal in title suit no. 29 of 2008 whereby and whereunder the suit was decreed on contest declaring that the plaintiff/respondent has 1/3rd share and the defendants therein are the owner to the extent of undivided 2/3rd share in respect of the

suit property and further directed to the parties to make an amicable partition by metes and bounds within a stipulated time.

The plaintiff/respondent filed a suit for declaration of their share to the extent of 1/3rd in respect of the subject property and separation thereof by partition to be divided by metes and bounds. The undisputed facts unfold from the record is that one Kartick Majhi, Avay Majhi and Gopal Majhi jointly owned 1/3rd share (5 Anna 6 Gonda 2 Kora 2 Kranti) of the suit property and the rest of the suit property i.e., 2/3rd share (10 Anna 13 Gonda 1 Kora 1 Kranti) are owned and possessed by Khetra Majhi and Mahendra Majhi. The plaintiff/respondent claimed title through the owners of 1/3rd share and the defendants/appellants are claiming their right, title and interest by way of inheritance through the owners of 2/3rd shares.

According to the plaintiff/respondent, the aforesaid three owners namely, Kartick, Avay and Gopal all along owned and possessed the undivided 1/3rd share in respect of the property out of which the Gopal being a bachelor and subsequently died, his share devolved upon the surviving brothers. It is alleged by the plaintiff/respondent that the said Kartick and Avay Majhi sold, transferred and conveyed the undivided 1/3rd share in respect of the suit property in favour of the Rajendra Nath Majhi who executed a deed of gift in favour of his wife namely, Sudharani Majhi. The Sudharani Majhi during her life time executed and registered the deed of gift in favour of the donees namely, Malati Rani Majhi, Alok Kumar Majhi and Pulak Kumar Majhi who after accepting the deed of gift sold, transferred

and conveyed the said undivided 1/3rd share to Narayan Chandra Majhi, the plaintiff/respondent herein.

On the other hand, the contesting defendants/appellants traced their title through the owners of the undivided 2/3rd share by way of an inheritance and denied categorically that the said Kartick and Avay never sold, transferred and conveyed their undivided 1/3rd share in respect of the joint property to Rajendra Nath Majhi.

On the conspectus of the aforesaid stands taken in the respective pleadings, the parties adduced evidence and it goes without saying that several deeds relating to the aforesaid undivided 1/3rd share were produced and marked exhibit in the suit. The plaintiff/respondent banked upon the deed of gift executed by Rajendra in favour of his wife namely, Sudharani in order to support his stand that Rajendra who was the owner of the said undivided 1/3rd share had divested his right, title and interest by executing and registering the deed of gift in favour of his wife namely, Sudharani. Subsequent deeds executed by Sudharani and her grand-children and the sale in favour of his plaintiff are also marked exhibits in the said suit.

It is pertinent to record that the deed affecting their right, title and interest of the original owners namely, Kartick and Avay in favour of Rajendra was not produced. Even a recital of the deed of gift executed by Rajendra in favour of his wife Sudharani does not contain any statement relating to the sale having affected in favour of Rajendra by the said Kartick and Avay Majhi. The first witness of the plaintiff in his cross-examination categorically deposed that he cannot say how Rajendra got the property nor

he had any such deed. He further deposed that he never saw Kartick and Avay and therefore is unable to throw any light thereupon. Interestingly, the 4th witness of the plaintiff being the son of the Rajendra in his cross-examination deposed that he cannot say how his father got the property nor have seen any such deed in respect of the suit property.

On the other hand, the first witness of the defendant categorically averred that they being the descendants of Khetra and Mahendra who admittedly owned and possessed 2/3rd share in respect of a joint property never divested their right, title and interest during their life time. It is further deposed that they never heard from the neighbour that the Kartick and Avay averred sold, transferred and conveyed their undivided 1/3rd share in respect of the said property to Rajendra.

The learned Judge in the Trial Court have simplicitor proceeded on the basis of the record of rights exhibited in the said suit and ultimately held that the plaintiffs have a right, title and interest to the extent of undivided 1/3rd share in respect of the suit property. It is further held that since the contesting defendants/appellants did not challenge the aforesaid deeds namely, the gift deed executed by Rajendra in favour of Sudharani and the subsequent deeds, it is too late in a day to contend that they did not acquire any right, title and interest in respect of the aforesaid shares.

It is not in dispute that the CS and RS Record of Rights are standing in the name of the original owners but the LR Record of Right stands in the name of a subsequent purchaser. The common thread one can visualise from the stand of the contesting parties that the Kartick and Avay had

undivided 1/3rd share in respect of the property. On the other hand, Khetra Majhi and Mahendra Majhi had two undivided 2/3rd share in respect thereof.

The point which involves in the instant appeal is whether the Record of Right can be regarded as a document of title or in other words, the entry made in the record of right is a determinant factor in deciding the title of the rival parties.

According to Mr. Banerjee, learned Advocate appearing for the appellant the Entry made in the record of right raises a presumption of accuracy under the Rule of Evidence but not the conclusive evidence on title and placed reliance upon a Single Bench Judgment of this Court rendered in case of a ***Kazi Mohammad Hossain vs. Sibram Bandopadhaya*** reported in ***(1965-66) 70 CWN 1066***. Mr. Banerjee further submits that the Court cannot shift the onus of the defendant who have asserted that the original owner never divested their right, title and interest in favour of Rajendra to prove the self- same as it is a primary duty of the plaintiff to prove his title and placed reliance upon a judgment of the Supreme Court in case of ***Union of India & Ors. vs. Vasavi Cooperative Housing Society Ltd. & Ors.***, reported in ***(2014) 2 SCC 269***. According to Mr. Banerjee the concept of proving title and the effect of entry made in the record of rights are two distinct concepts and operate in a separate field.

Per contra, Mr. Lahiri, learned Advocate appearing for the plaintiff/respondent submits that the defendant never claimed any right, title and interest in respect of the undivided 1/3rd share; rather admitted

that the same belong to Kartick and Avay from whom his predecessors acquired the right, title and interest and, therefore, cannot lay any claim thereupon. He arduously submits that in absence of any specific defence or a rival title in respect of the undivided 1/3rd share, the contesting defendant/appellants are precluded from raising any disputes on title. He further submits that several deeds which are marked exhibits touching upon the title of the property has not been questioned nor any counter claim is filed to declare such title as *null* and *void* and, therefore, even if the plaintiff/respondent has not produced the original deed executed in favour of Rajendra, it will not defeat the claim of the plaintiff as a co-sharer to seek partition.

The only point involved in the instant appeal in our opinion is whether the findings recorded by the Trial Court that the plaintiff/respondent is the owner of the undivided 1/3rd share based upon the entry made in the record of right can be justified in law.

It admits no ambiguity in our mind that the moment the partition suit is filed for declaration of shares and separation thereof by metes and bounds, the plaintiff/respondent admits the right, title and interests of the defendants in respect of the joint property. The moment the property is joint even if the co-sharers are possessing the same, such possession is not only in commensurate with the shares they held in the joint property but also on behalf of the co-sharers. The possession being the ninth principle of title yet the title has to be proved on the basis of the instrument effecting thereupon recognised in law. It is a specific stand of the contesting

defendants/appellants that the Kartick and Avay being the original owner never executed any deed of sale in favour of Rajendra. The moment such stand has been taken, the plaintiff/respondent asserting title through the said admitted owner has to prove by cogent evidence that the same was divested in accordance with law. The person who asserts title in respect of the property be it joint or separate has to prove by cogent evidence and it admits no ambiguity that the safest course of proving a title is by producing the title deed executed and registered in accordance with law. The moment the title is clouded, any subsequent deeds executed on assumption of the title having acquired cannot stand independently but depended upon the fall out of the parent deed. The plaintiff in the deposition have categorically stated that he never saw such title deed executed in favour of Rajendra nor he is in possession of such title deed. Even no attempt was made to produce the said title deed during the currency of the suit, even in an appeal there is no application filed seeking an additional evidence disclosing the said parent title deed but the argument appears to have been advanced on the basis of the record of rights produced before the Trial Court and from a part of the record.

The Single Bench in case of **Kazi Mohammad Hossain** (*supra*) held that the presumption of the accuracy of the entry in the record of right is merely a rule of evidence and such presumption does not create any title nor extinguishes the title and, therefore, cannot be said to be conclusive in the following:

“12. The presumption of accuracy is a rule of evidence. So far as the Evidence Act is concerned Section 4 and Section 114 of the Evidence Act deal with presumption. There are also other sections with which we need not be troubled in this appeal. Presumptions may be of fact or of law or may be of mixed fact and law. Here it is a presumption of law which means only this that law creates an artificial presumption permitting the court to draw the inference whenever the requisite facts as stated in the law are present. But it is at best a presumption and no more. The presumption of accuracy of the entry in the record of rights does not create or extinguish title but only raises a presumption which again is not conclusive and can be rebutted by evidence. The presumption of law in favour of the accuracy of the entry in the record of rights follows from the fact that such record is prepared after due publicity and notification and upon hearing objectors and interested parties. The entry in the record of rights made after such a procedure, therefore, is presumed to be correct until the contrary is proved by evidence. There cannot in my view, therefore, be any longer a presumption when the point in issue has already been decided on evidence between interested parties by a decision of the Civil Court. It is so not only because the Civil Court is better equipped and has larger powers to call for all evidence within the bounds of law so that the law even recognises that the statutory presumption in favour of the accuracy of the record of rights can be rebutted in such Civil Court by producing evidence to the contrary but also because the decision of the Civil Court inter parties is res judicata and binding upon the parties and can only be questioned by way of appeals and revision from that court as provided by the laws of the country, and not by non-judicial forum. A decision of the Civil Court is res judicata subject, of course, to appeals and revision between the parties. A statutory presumption cannot operate and prevail against res judicata. A subsequent entry in the record of rights which is made either by ignoring the Civil Court decision or by disregarding it cannot carry a presumption of accuracy because such a presumption can only arise where

there has been no previous adjudication of the question by a properly constituted Civil Court. After such an adjudication by a competent Civil Court of the very point the matter passes beyond the stage where presumption can operate and no scope for operation of presumption is left. No doubt, where the record of rights is made prior to the decision in the Civil Court, then it is for the Civil Court to presume the accuracy of that record of rights until the contrary is proved by evidence. If the Civil Court is satisfied on evidence that the entry in the record of rights is erroneous then it is for the Civil Court to say so and it is the only forum which can pronounce judgment on the correctness or otherwise of the entry in the record of rights.”

The Apex Court in case of **Sawarni (SMT) vs. Inder Kaur (SMT) & Ors.** reported in **(1996) 6 SCC 223** held that the mutation in the revenue record neither confers title upon the person nor takes away the same as its effect is to make a person liable for land revenue in these words:

“7. Having heard the learned counsel for the parties and having scrutinised the judgment of the trial Judge as well as that of the lower appellate court, we find sufficient force in all the contentions raised by the learned counsel for the appellant. At the outset, it may be noticed that the plaintiff had filed the suit claiming half interest for herself and claiming half interest in favour of the husband and sons of Roori and, therefore, the learned Additional District Judge was wholly in error to hold that the plaintiff could not have filed the suit in question. In view of the rival stand of the parties the main question that arose for consideration was whether Roori was the daughter of Gurbax Singh or Inder Kaur, Defendant 5 was the daughter of the same Gurbax Singh? The learned trial Judge after elaborate discussion of the evidence on record both oral and documentary came to the positive conclusion that it was Roori who was the daughter of Gurbax Singh as alleged by the plaintiff and not Inder Kaur. The lower appellate court

without focusing its attention on the weighty reasons advanced by the trial court and without examining the materials on record in that respect even did not set aside the said finding of the trial Judge and yet reversed the decree of the trial Judge. We have no hesitation to come to the conclusion that the said judgment of the Additional District Judge is wholly unsustainable in law. The crucial point being as to who was the second daughter of Gurbax Singh, namely Roori or Inder Kaur, and the trial Judge having come to the positive conclusion that it was Roori who was the second daughter of Gurbax Singh, the lower appellate court was not justified in not considering the material evidence as well as the reasons advanced by the trial Judge and merely coming to the conclusion that the evidence on the file does not prove Roori to be the daughter of Gurbax Singh. Further, the lower appellate court has not come to any positive finding that Inder Kaur was the daughter of Gurbax Singh. He has been swayed away by the so-called mutation in the revenue record in favour of Inder Kaur. Mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. The learned Additional District Judge was wholly in error in coming to a conclusion that mutation in favour of Inder Kaur conveys title in her favour. This erroneous conclusion has vitiated the entire judgment. That apart, as it would be seen, the learned trial Judge had considered the oral evidence adduced on behalf of the parties to establish the respective stand as to who was the second daughter of Gurbax Singh and on perusal of the same came to the conclusion that it was Roori who was the second daughter of Gurbax Singh. The Additional District Judge has not even discussed anything about the said oral evidence and the reasonings advanced by the learned trial Judge in coming to the conclusion that it was Roori who was the second daughter of Gurbax Singh. Non-consideration of the oral evidence adduced by the parties, by the lower appellate court vitiates the ultimate conclusion on the question whether Roori was the daughter of

Gurbax Singh or not. It is further seen that Gurdip Kaur, widow of Gurbax Singh had executed a Will in respect of the entire estate in favour of the plaintiff and Roori and after the death of Gurdip Kaur a succession certificate had been issued by the civil court under the Indian Succession Act, 1925 in favour of the plaintiff and the said Roori. The said succession certificate and rights flowing therefrom cannot be ignored. Admittedly no attempt has been made by Defendants 1 to 4 annul the succession certificate on the grounds available under the Succession Act. The Additional District Judge committed serious error of law in not considering the said Will and the succession certificate in question which unequivocally clinches the matter and thereby the ultimate judgment of the Additional District Judge is vitiated. The High Court also was in error in not examining these questions and dismissing the second appeal in limine.”

The aforesaid principles of law has been reiterated in a subsequent decision of the Supreme Court in case of **Balwant Singh & Anr. vs. Daulat Singh (Dead) By LRS. & Ors.** reported in (1997) 7 SCC 137 in the following:

“27. In the circumstances, we are of the opinion that the trial court erred in assuming that by Mutation No. 1311, the widow divested herself of the title to the suit property by treating the mutation as gift and conveying title. Further it has not applied uniform test in appreciating the mutation entries. In one place, the trial court has accepted mutation entries in toto even for conveying title but in the other place, the trial court was not prepared to accept the mutation entries by expressing some doubt about it. It is to be stated that this Court in Gurbaksh Songh v. Nikka Singh has held that entries in mutation must be taken as correct unless the contrary is established. Here the trial court has shifted the burden on the appellants to prove the entries as correct. The trial court has failed to apply the same

yardstick that it had applied to Mutation No. 1311 to Mutation No. 1348. Assuming for the sake of the argument, that Mutation No. 1348 was on the basis of misunderstanding of the judgments in the earlier proceedings, that having been allowed to remain unaltered without challenge, cannot be brushed aside as worth nothing. Anybody affected by such entries should have challenged the same as provided under the law. In the absence of that, the entries cannot be ignored. Be that as it may, we have already noticed that mutation entries do not convey or extinguish any title and those entities are relevant only for the purpose of collection of land revenue. That being the position, Mutation No. 1311 cannot be construed as conveying title in favour of Balwant Singh and Kartar Singh or extinguishing the title of Durga Devi in the suit property. Consequently, the title to the suit property always vested with the widow notwithstanding Mutation No. 1311. Viewed in this manner, the decision in the earlier proceedings namely, decree in Suit No. 194 of 1955 even assuming that it operates as res judicata, will not be of any avail to the contesting respondents (plaintiffs) in the present suit because the reliefs sought in the prior proceeding was for a simple declaration that the 'mutation gift' of 1954 would not affect the reversionary rights of the reversioners. As noticed already, mutation entries will not convey or extinguish title in the property. Therefore, under Mutation No. 1311 neither Balwant Singh and Kartar Singh acquired title nor Durga Devi's title in the property got extinguished. The earlier court proceedings did not and could not convey title in favour of the reversioners, as the relief sought was for a simple declaration as mentioned above. If no title as such was passed on under the alleged 'mutation gift', the limited right of the widow in the property would get enlarged on the coming into force of the Hindu Succession Act, 1956."

In case of **M.T.W. Tenzing Namgyal & Ors. vs. Motilal Lakhotia & Ors.**, reported in **(2003) 5 SCC 1** the Apex Court has succinctly held that

there is no abstract proposition of law that the entry in the record of right raises a presumption of its correctness, the moment the party have adduced an evidence in support of incorrect entry, it loses his effect and the title has to be decided on the basis of the valid document in the following:

“35. In Sita Ram Bhau Patil this Court held: (SCC p. 54, para 21)

‘21. With regard to the record-of-rights counsel for the appellant said that presumption arises with regard to its correctness. There is no abstract principle that whatever will appear in the record-of-rights will be presumed to be correct when it is shown by evidence that the entries are not correct. Apart from the intrinsic evidence in the record-of-rights that they refer to facts which are untrue it also appears that the record-of-rights have reference to the mutation entry that was made by the Circle Officer on 30-1-1956. Counsel for the respondent rightly contended that no presumption could arise for two principal reasons. First, the oral evidence in this case nullified the entries in the record-of-rights as showing a state of affairs opposed to the real state of affairs and, second, no notice was ever given to the respondent with regard to mutation proceedings. Therefore the respondent is right in contending that no presumption can validly arise from the record-of-rights.’ ”

In view of the law enunciated in the above report the finding of the Trial Court that the moment the name of the plaintiff-respondent is recorded in LR Record of Rights even though it appears inconsistent with the entries made in CS and RS Record of Right, the later must prevail is not a rule of universal application. It is somewhat settled that the plaintiff has to proceed on the basis of his own case and bring the cogent evidence in support thereof and cannot take the advantage of the weakness of the defence case.

In a suit for partition a co-sharer has every right to deny the title of the person claiming to be a co-sharer as there is no concept of plaintiff and defendant in a suit for partition. The moment the property is joint, it creates a title in every inch of said property and there is no fetter on the part of the contesting defendants to raise a plea that the plaintiffs have no right, title and interest in respect thereof. We do not find any fetter on the part of the defendants in taking a defence that the plaintiffs do not acquire a valid right, title and interest in respect of the joint property and, therefore, the contention of the plaintiff/respondent in this regard is unacceptable.

The matter can be viewed from another angle, a person can divest his right, title and interest in favour of another person provided he has a right, title and interest in respect of an immovable property. The **legal maxim *nemo dat quod non habet*** can be applied in such situation whereby a person cannot give what he does not have. The Rajendra could not prove the title in respect of the undivided 1/3rd share and even if he has executed a deed of gift in favour of his wife, Suradhani who in turn executed a further deed of gift in favour of the donees who later on sold the property to the plaintiff squarely come within the mischief of the said legal maxim. It is a paramount duty of the plaintiff to prove the title on production of the parent title deed i.e., the sale deed executed by the admitted owners in favour of Rajendra and having not done so it is not necessary that the subsequent deeds are required to be challenged by the defendants. The moment the edifice of the title collapse, all subsequent deeds are the consequences of such fall out.

We thus find that the approach of the Trial court in deciding the suit on the basis of the record of right is contrary to law and, therefore, cannot be sustained. The judgment and decree of the Trial Court is hereby set aside. The suit filed by the plaintiff/respondent is hereby dismissed. In view of the findings recorded hereinabove, the appeal is allowed.

There shall, however, be no order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)