

IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

S.A.T. 78 of 2022

CAN 1 of 2022

with

S.A.T. 80 of 2022

JNANESH CHANDRA DUTTA ROY @ BABLU DUTTA & ANR.
VS.

JYOTISH CHANDRA DUTTA ROY & ORS.

For the Appellants : Mr. Probal Mukherjee, Sr. Adv.
Ms. Shebati Datta, Adv.

For the Respondents : Mr. Saptangshu Basu, Sr. Adv.
Mr. Tanmoy Mukherjee, Adv.
Mr. Pinaki Brata Ghosh, Adv.
Mr. Saumyajit Ghosal, Adv.

Hearing concluded on : 1st August, 2023

Judgement on : 9th August, 2023

Siddhartha Roy Chowdhury, J.:

1. Challenge in this appeal is to the judgement and decree passed by learned Additional District Judge, Fast Track, 4th Court, Alipore in Title Appeal No. 302 of 2000. By the impugned judgement learned First Appellate Court reversed the judgement and decree passed by learned Trial Court dismissing the Title Suit No. 175 of 1982.
2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.
3. Briefly stated, the plaintiff Jyotish Chandra Dutta Roy, Santosh Kumar Dutta Roy, Priyo Sankar Dutta Roy filed Title Suit No. 75 of 1982

against the defendants Jnanesh Chandra Dutta Roy and Subhas Dutta Roy for declaration injunction and recovery of *Khas* possession. It is contended, *inter alia*, that the plaintiffs and the proforma defendant no. 3 are the full blood brothers and sons of Jogendra Chandra Dutta Roy, since deceased, by his first wife. The mother of the plaintiffs and proforma defendant no. 3 died in the year 1944 and in the year 1945 Jogendra Chandra Dutta Roy married for the second time to one Smt. Bina Pani, mother of defendant nos. 1 and 2. Since the second marriage of their father put plaintiff no. 1 to a difficult situation, he left his house in the year 1949, came to India and started earning his bread on his own. In the year 1950 as displaced person, he was allotted the suit property by the Refugee Rehabilitation Department where upon the plaintiff no. 1 constructed a *Kancha* structure and started living therein along with his family members. Subsequently, within a year or two he brought his full blood brothers and sisters to him and severed all connection with his father, step-mother, step-brothers and step-sisters who were living in the then East Pakistan. Plaintiff no. 1 made his fortune and earned money through business. In the year 1950, the suit property was allotted in favour of the plaintiff no. 1. In the year 1956 final survey was held and on representation of the plaintiff no. 1 the names of his other brothers i.e. plaintiff nos. 2 and 3 were recorded together with proforma defendant no. 3 as the joint allottees in respect of the suit property. The plaintiffs constructed a Pucca building replacing the portion of Kancha construction in the year 1968-69. On or about 1964-65 the plaintiffs came to know that defendant no. 2 was living in his maternal uncle's house at Ranaghat in a very distress

condition. He was 13-14 years of age. The plaintiff no. 1 brought him to his house. Father of the plaintiffs died in Bangladesh in the year 1972. All the brothers and sisters of defendant nos. 1 and 2 finally came to India as refugees and took refuge to a temporary camp in Meghalaya. Thereafter, the defendant no. 1 requested the plaintiff no. 1 to allow him to stay in the suit house and out of pity and sympathy the plaintiffs allowed them to stay as licensee. The plaintiff no. 1 maintained them, helped the defendant nos. 1 and 2 to settle in life by doing business. Till 1980 they stayed together in the joint family though as licensee without license fee. Subsequently, after constructing his own house at 6A, North Road, Calcutta-32 the plaintiff no. 1 shifted there. On 29th November, 1982 the defendant nos. 1 and 2 made an unsuccessful attempt to construct a building after demolishing and removing the Kancha portion claiming themselves as co-sharers of the property in suit. Hence the license granted to the defendant nos. 1 and 2 was revoked. The plaintiff by filing this suit prayed for declaration of title in respect of suit property, decree for permanent injunction restraining the defendants from changing the nature and character of the suit property and decree for recovery of *Khas* possession.

4. The defendant nos. 1 and 2 contested the suit by filing written statement denying all material allegations made against them. According to defendants they are the co-owners of the property having equal share as that of the plaintiffs. The plaintiffs in collusion with the Refugee Relief Rehabilitation Department manufactured and/or changed the records and got their names inserted after deleting the name of the mother of the defendants since deceased. The suit,

according to defendants, is bad for non-joinder of necessary party. The Refugee Relief Rehabilitation Department, State of West Bengal is the necessary party. Proforma defendant no. 3 is a citizen of Bangladesh and plaintiff no. 1 since has deserted the suit property, cannot be said to have any right title interest over the same. The defendants prayed for dismissal of the suit.

5. Jnanesh Chandra Dutta Roy, Subhas Dutta Roy, the defendants of Title Suit No. 75 of 1982 along with Dilip Dutta Roy filed a suit against the plaintiffs of Title Suit No. 75 of 1982 as well as against the Refugee Relief Rehabilitation Department seeking declaration of their 3/4th share in the suit property, their entitlement to get Arpan Patra or deed of gift from State of West Bengal and for further declaration that the recording of name of defendant no.1 is bad in law coupled with prayer for permanent injunction restraining the state from handing over and issuing the Arpan Patra in favour of the defendants. The contention of the plaintiffs and defendants of Title Suit No. 175 of 1982 are identical to their pleadings in Title Suit No. 75 of 1982.
6. After considering the pleadings as well as the evidence of the parties learned Trial Court was pleased to dismiss both the suits. It was held that in absence of any deed of gift the parties cannot be said to have acquired any title in respect of suit property.
7. Aggrieved by and dissatisfied with the said judgement of learned Trial Court the plaintiffs of Title Suit No. 75 of 1982 preferred Title Appeal No. 302 of 2000 while the plaintiffs of Title Suit No. 175 of 1982 preferred Title Appeal No. 228 of 2000. Both the appeals were disposed of by a common judgement and Title Appeal No. 228 of 2000 filed by the

plaintiffs of Title Suit No. 175 of 1982 was dismissed on contest without cost and Title Appeal No. 302 of 2000 filed by the plaintiffs of Title Suit No. 75 of 1982 was allowed. Learned First Appellate Court was pleased to declare the plaintiffs right to possess the suit property along with proforma defendant no. 3. The defendants were directed to quit and vacate the suit property by 31st May, 2022 delivering peaceful vacant possession to the plaintiffs.

8. Impeaching the judgement impugned Mr. Probal Kumar Mukherjee, learned Senior Counsel representing the appellants submits that influx of refugees from the then East Paksitan, due to socio-political turmoil, created a huge problem and in order to address such crisis, State of West Bengal prepared scheme with the object to rehabilitate the displaced persons and their family members. Memo no. 2429/17-Rehab/2P-82-79 dated 23rd April, 1981 issued by the Refugee Relief Rehabilitation Department, Government of West Bengal inter alia says that the object of the State to provide support to displaced persons and as a measure of rehabilitation of displaced families, homestead plots were/are being allotted in G.S. Colonies or squatting in approved squatters colonies were/are being regularised with the clear intention that beneficiaries of the allotment will be all the members of the family on record though the allotment order was issued in the name of one member of the family as *Karta* or de-facto head of the family who might have been eldest brother or else as per composition of the family as recorded at the time of allotment of the plots. Although allotments could not/cannot be made to a family in the abstract sense it follows and it is confirmed that the allottee in a case obtained the allotment order on

behalf of the other members who were shown as comprising the family as well.

9. Mr. Mukherjee submits that intention of the State Government as expressed through this memorandum is to include every member of the displaced family. Therefore, the defendants of Title Suit No. 75 of 1982 being the members of the family where Jyotish Chandra Dutta Roy was the de-facto head, cannot be excluded and/or deprived of the benefit extended by the State Government for the rehabilitation of the displaced families.
10. It is further submitted by Mr. Mukherjee that Exhibit-1 is not the document of allotment, it is given in reply to the letter written by Jyotish Chandra Dutta Roy on 2nd December, 1981. Though it is pleaded that in the year 1950 the suit property was allotted in favour of the plaintiff no. 1 the letter of allotment was not produced. The letter of allotment or the document prepared during physical survey of 1956 has not been produced before the Court. Mr. Mukherjee takes me to the testimony of P.W. 1. During evidence-in-chief P.W. 1 Sri Santosh Dutta Roy stated that the defendant nos. 1 and 2 used to reside in the joint mess, they came to Meghalaya in the year 1971-72. In the year 1980, Jyotish Chandra Dutta Roy used to maintain the defendant and Jyotish Chandra Dutta Roy lent support to them and helped them to establish in life. This testimony of P.W. 1, according to Mr. Mukherjee, is the admission that the defendants and plaintiffs were the family members and Jyotish Chandra Dutta Roy, plaintiff no. 1 was the de-facto head of the family. But with the establishment of the fact that the defendants and the plaintiffs used to stay in the same family, in the joint mess

under the care and protection of Jyotish Chadra Dutta Roy, by virtue of the deeming provision made in the circular of Refugee Rehabilitation Department, the benefit percolates to the defendants/appellants as well.

11. Refuting such contention of Mr. Mukerjee, Mr. Saptangsu Basu, learned Senior Counsel representing the plaintiffs submits that it is the specific claim of the defendant that the suit property was allotted in the name of Jyotish Chandra Dutta Roy and their mother Bina Pani, since deceased, but they have failed to substantiate the same. On the contrary, from the documentary evidence Exhibit-8 and Exhibit-9, it is evident that the defendant no. 1 was a student of Netrokona College, Mymensingh Bangladesh in the year 1972 even he maintained savings bank account with Sonali Bank of Bangladesh. While adducing evidence as D.W. 1 the defendant has admitted the fact. Exhibit-7, the certified copy of the deposition of defendant no. 1 in C-790/82 dated 13th November, 1982 demonstrates that he was a resident of Bangladesh in the year 1972, therefore, by no stretch of imagination it can be said that he was the family member of Jyotish Chandra Dutta Roy in the year 1956 when the physical survey was conducted by the State of West Bengal through Refugee Rehabilitation Department. The land was allotted to the refugees and/or displaced persons as on 1950 and after physical survey, in the year 1956 the names of the members in occupation were registered after physical verification. Since the defendant no. 1 did not leave or was not compelled to leave Bangladesh he cannot be held to be refugee. Therefore no benefit under the scheme can be said to have been percolated upon the defendants.

12. It is further contended by Mr. Basu though Jnanesh Chandra Dutta Roy as D.W. 1 stated that he used to come to India but he failed to produce any document like passport, visa etc. to support his claim. Therefore, his claim cannot be considered to be correct particularly if the same is considered in contradistinction with Exhibit-7, the testimony of Jnanesh Chandra Dutta Roy in C-790/82 and Exhibit-10, the discharge order passed by learned S.D.J.M., Netrokona against the accused person in a case filed by the defendant no. 1. Mr. Basu further submits that the defendants failed to prove their case that the land was allotted in the name of their mother as well together with Jyotish Chadra Dutta Roy. They are the step-brothers of the plaintiffs and they were never the members of the family of the plaintiffs. Therefore, learned First Appellate Court was absolutely justified in passing the order impugned. To buttress his point Mr. Basu relied upon the judgement of Co-ordinate Bench in ***Smt. Bina Basak & Ors. vs. Sri Bipul Kanti Basak & Ors. S.A. No. 518 of 2018*** reported in **2015 (4) WBLR 908**.
13. From the attending facts of the case it is admitted that the plaintiffs and defendants of Title Suit No. 75 of 1982 are the step-brothers. It is also admitted that Jyotish Chandra Dutta Roy came to India in the year 1950. It is equally correct to say that the defendants made out a specific case in their written statement that the plot was allotted jointly in the name of Jyotish Chandra Dutta Roy and their mother Bina Pani, since deceased, which they have failed to establish.
14. From the pleadings as well as from the oral testimony of the P.W. 1, Santosh Dutta Roy it transpires that the defendants started residing together with the plaintiffs in the suit property. During his evidence-in-

chief P.W. 1 stated that at the age of 12 years, defendant no. 2 was brought to their house from Ranaghat by Jyotish Chandra Dutta Roy in 1964-65. The defendants came to Meghalaya and took shelter in Baghmara Camp in 1971-72.

The testimony of P.W. 1 Santosh Dutta Roy as referred to hereinabove, is more than sufficient to hold that the defendants, particularly defendant no. 2 was residing in the suit property long before 1980, the alleged grant of license.

Jnanesh Dutta Roy appeared in the examination as a private candidate in 1972, as Exhibit-8 suggests, Exhibit-10 would show the criminal proceeding was initiated in 1972; Exhibit-9, the statement of account does not suggest that he was in Bangladesh immediately before the alleged license was granted.

According to P.W. 1, the defendants started residing with them it was on the basis of license given by Jyotish Chadra Dutta Roy in 1980 without any license fee. But it is quite surprising to see that the licensees were allowed to take food together with the licensor, even Jyotish Chadra Dutta Roy took the pains to maintain the licensees and to support them so that they could settle in life. Rather these facts demonstrate that Jyotish Chadndra Dutta Roy considered the defendants, his step-brothers as his family members and discharged his duty as elder brother. Otherwise he had no reason to extend his support towards the defendants or to shoulder the responsibility for their sustenance.

15. Nowhere in the scheme prepared by the State of West Bengal, Refugee Relief Rehabilitation Department family is defined. In Black's Dictionary (11th Edition) 'family' means n. (14c)

1. A group of persons connected by blood, by affinity, or by law, esp. within two or three generations.

2. A group consisting of parents and their children.

3. By extension, a group of people who live together and usu. have a shared commitment to a domestic relationship.

16. If we consider the manner of living of the parties to the suit taking lumen from the meaning of family as stated hereinabove, we feel no hesitation to hold that the parties to this suit were family members.

17. Refugee is someone who flees or is expelled from a place because of political or religious persecution. The evidence of P.W. 1 as well as the pleadings of the plaintiffs would show that Jyotish Chadra Dutta Roy did not leave the country because of any political or religious persecution or because of war or was expelled from a place. He was compelled to leave the house as he was not maintaining good relation with his step-mother. Therefore, Jyotish Chandra Dutta Roy cannot be considered to be refugee or displaced person. However, he took refuge in Kolkata, constructed a home for himself and got the land allotted in his favour in the year 1950 by the paramount title holder, the State of West Bengal. In the year 1956, at his instance, according to plaintiffs, their names were incorporated in the register. But neither the letter of allotment nor the said register was produced before the Court. Therefore, the claim of the plaintiffs that they are the allottees cannot be said to have been proved as well.

18. True it is the defendants failed to prove their case but that does earn a laurel to the plaintiffs. Plaintiffs are bound to prove their case. As the relevant documents regarding allotment of land given in 1950 of 1956 are not produced, learned First Appellate Court ought to have drawn up adverse inference under illustration (g) of Section 114 of the Evidence Act. Had the documents been produced, those would have thrown light on the issue in controversy. In this regard, we can profitably rely upon the decision of Hon'ble Apex Court in the case of **GOPAL KRISHNAJI KETKAR VS. MOHAMED HAJI LATIF & ORS.** reported in **AIR 1968 SC 1413**, wherein it is held :-

“Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In Murugesam Pillai v. Manichavasaka Pandara Sannadhi, 44 Ind App 98 at p. 103=(AIR 1917 PC 6 at p. 8) Lord Shaw observed as follows:

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to, the, Courts the best material for its decision.. With regard to third parties, this may be right enough-they have no responsibility for the conduct of the suit but with regard to the parties to the suit it is, in their Lordships' opinion an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in

their possession which would throw light upon the proposition."

19. Exhibit-1 was issued in response to the letter given by the Jyotish Chadra Dutta Roy on 2nd December, 1981 to the Refugee Rehabilitation Commissioner seeking information as to the enumeration of members of e-plot 3 but it was given subsequent to the filing of the suit, cause of action for the suit as we find from the plaint, arose on 29th November, 1981 and on 16th December, 1981. Therefore, this document Exhibit-1 cannot be relied upon and for the same reason the certificates produced by D.W. 1 and admitted as Exhibit 'Ka' and 'Kha' cannot be considered being post suit documents.

20. The decision of the Co-ordinate Bench in *Smt. Bina Basak (supra)* is of no help to the plaintiffs, since facts of this case is not in pari-materia with the case at hand.

21. The State of West Bengal in order to alleviate the trauma of the displaced persons framed the scheme for rehabilitation of those who were compelled to leave their home and hearth. The memo no. 3492/17Rehab/2P-82/79 dated, Calcutta, the 23rd April, 1981 says :-

"No. 3492/17-Rehab/2P-82/79 Dated, Calcutta the 23rd April, 1981

*From : The Deputy Secretary to the
 Government of West Bengal*

*To : 1. The Refugee Rehabilitation Commissioner, West Bengal,
 10, Camac Street, Calcutta-700 017
 2. The District Magistrate/Deputy Commissioner*

Sub : Allotment of plots and conferment of right and title.

The undersigned is directed by order of the Governor to say that as a measure of rehabilitation of displaced families, homestead plots were/are being allotted in G.S. Colonies or squatting in approved

squatters colonies were/are being regularised with the clear intention that the beneficiaries of the allotment will be all the members of the family on record through the allotment order was issued in the name of one member of the family as 'Karta' or defacto head of the family who might have been the eldest brother or else as per composition of the family as recoded at the time of allotment of the plots. Although allotments could not/cannot be made to a family in the abstract sence, it follows and it is confirmed that the allottee in a case obtained the allotment order on behalf of the other members who were shown as comprising the family as well.

2. The undersigned is, therefore, directed to say that the conveyance deeds lease-hold or free-hold as may be approved from time to time, which have not yet been executed, shall have to be executed by all the persons who were shown as comprising the family his legal heirs, if any was dead, if the actual allotment order was not issued in favour of a common propositors or if there was not common propositor amongst the person whose names were recorded in the allotment register as comprising the family.

3. The cases where deeds have already been executed and registered in favour of one member excluding the other members of the family, the rehabilitation of the other members of the family shall also be deemed to be covered by the allotment, even though it was made to one member of the family as Karta or defacto head of the family. In such cases, the allotment will be in the nature of a constructive trustee for the other members of the family. He will be found in a fiduciary character to project the interests of the other members of the family, as he was well aware of the fact that the allotment to him was made for the rehabilitation of all the members of the family including the allottee and he held the allotment for the benefit of all the members of the family on record.

4. The undersigned is to add that all pending cases may be disposed of on the principle/clarification as given above.

*Sd/ R.C. Ganguly,
Deputy Secretary"*

22. The document unerringly demonstrates that allottee is obtained allotment order on behalf of the other members, who were shown as comprising the family. Since the letter of allotment issued in 1950 or the register, recording the names of the persons after physical verification in 1956 are withheld and Jyotish Chadra Dutta Roy who would have been the best witness did not appear in the witness box to adduce evidence, the evidence of P.W. 1 the brother of Jyotish Chandra Dutta Roy cannot be said to be sufficient to hold that the names of the plaintiffs are recorded are “refugees” or “displaced persons” and rehabilitation scheme should enure to the benefits of the plaintiffs only. The defendants were permitted to stay in the suit property by Jyotish Chandra Dutta Roy.
23. Learned First Appellate Court fails to appreciate the spirit and object of the notification that ensures the benefit of all the members of the refugee family.
24. Therefore, neither the plaintiffs nor the defendants can claim a higher pedestal. Admittedly the State Government being the paramount title holder is yet to issue *patta* or execute in deed conferring title in respect of the suit property. The plaintiff no. 1 was considered as refugee by the State of West Bengal. The other plaintiffs who are full blood brothers and the defendants who are the step-brothers of the plaintiff no. 1 being family members are entitled to rehabilitation and they have right to possess the property in suit, unless otherwise determined by the paramount title holder. Therefore, in my humble opinion, learned First Appellate Court had no reason to reverse the judgement of learned Trial Court. The impugned judgement passed by

learned First Appellate Court should be set aside, which I accordingly do. Consequently, the appeal is allowed. The judgement of learned Trial Court stands restored with this CAN 1 of 2022 stands 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.)