

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.554 of 2018

- 1.1. Ranjit Singh @ Ranjit Kumar Singh, Son of Late Rajendra Rai @ Rajendra Singh, resident of South of Jail, Charkhambha Gali, P.S. Arrah Town, District-Bhojpur.
- 1.2. Sunita Devi, Wife of Late Ravi Ranjan Singh, daughter-in-law of Late Rajendra Rai @ Rajendra Singh, resident of South of Jail, Charkhambha Gali, P.S. Arrah Town, District-Bhojpur.
- 1.3. Rohit, Son of Late Ravi Ranjan Singh grandson of Late Rajendra Rai @ Rajendra Singh, resident of South of Jail, Charkhambha Gali, P.S. Arrah Town, District-Bhojpur.
- 1.4. Kumar Rituraj, Son of late Ravi Ranjan Singh, Grandson of Late Rajendra Rai @ Rajendra Singh, resident of South of Jail, Charkhambha Gali, P.S. Arrah Town, District-Bhojpur.
- 1.5. Ragini Singh, Daughter of Late Rajendra Rai @ Rajendra Singh, wife of Anil Singh, resident of Ahirpurwa, P.s.-Arrah Town, District-Bhojpur.
- 1.6. Shilpa, Daughter of Late Ravi Ranjan Singh, Granddaughter of Late Rajendra Rai @ Rajendra Singh and W/o Satya Prakash Roy, resident of Village-Chhotki Singhi, P.S. Town Thana, District-Bhojpur.

... .. Appellant/s

Versus

1. The State Of Bihar through the Collector, Bhojpur at Arrah.
2. Mr. Afzal Amanullah, Son of Late Nehaludin Amanullah, Resident of Village Machhua Toli, P.S. Ara Nagar, District- Bhojpur, Presently at House No. 133, Patliputra Colony, P.S.- Patliputra, Town and District Patna 800013.
3. Mr. Aashmuddin Amanullah, Son of Late Nehaludin Amanullah, Resident of Village Machhua Toli, P.S. Ara Nagar, District- Bhojpur, Presently at House No. 133, Patliputra Colony, P.S.- Patliputra, Town and District Patna 800013.
4. Mr Jallaluddin Amanullah, Son of Late Nehaludin Amanullah, Resident of Village Machhua Toli, P.S. Ara Nagar, District- Bhojpur, Presently at House No. 133, Patliputra Colony, P.S.- Patliputra, Town and District Patna 800013.
5. Nadira S. Phatiullah, Daughter of Late Nehaluddin Amanullah, Resident of Village Machhua Toli, P.S. Ara Nagar, District- Bhojpur, Presently at House No. 133, Patliputra Colony, P.S.- Patliputra, Town and District Patna 800013.
6. Warika Asaraf, Daughter of Late Nehaluddin Amanullah, Resident of Village Machhua Toli, P.S. Ara Nagar, District- Bhojpur, Presently at House No. 133, Patliputra Colony, P.S.- Patliputra, Town and District Patna 800013.
7. Jakira Naim, Daughter of Late Nehaluddin Amanullah, Resident of Village Machhua Toli, P.S. Ara Nagar, District- Bhojpur, Presently at House No. 133, Patliputra Colony, P.S.- Patliputra, Town and District Patna 800013.



8. Arifa Alam @ Arifa Rehan Amamullah, Daughter of Late Nehaluddin Amanullah, Resident of Village Machhua Toli, P.S. Ara Nagar, District-Bhojpur, Presently at House No. 133, Patliputra Colony, P.S.- Patliputra, Town and District Patna 800013.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Dharmesh Kumar Shrivastava, Advocate
For the Respondent nos. 2 to 8	:	Mr. Syed Firoz Raza, Advocate Mr. Arun Kumar Prasad, Advocate Mr. Jawed Gaffar Khan, Advocate Mr. Azhar Hussain, Advocate Mr. Darain Alam, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
CAV ORDER

10 20-12-2024 Heard Mr. Dharmesh Kumar Shrivastava, learned counsel appearing on behalf of the appellants and Mr. Syed Firoz Raza, learned counsel appearing on behalf of respondent nos. 2 to 8 under Order XLI Rule 11 of the Code of Civil Procedure (for brevity 'the Code').

2. Originally, the plaintiff namely, Rajendra Rai filed this Second Appeal against the judgment and decree dated 26.09.2018 passed by Learned 3rd Additional District Judge, Bhojpur at Arrah in Title Appeal No. 88 of 2014, whereby the lower appellate court dismissed the appeal and affirmed the judgment of the trial court dated 21.08.2014 passed by learned Munsif, Arrah, in Title Suit No. 86 of 1991.

3. The sole plaintiff/appellant died during the pendency of this Second Appeal and was substituted by his heirs *vide* order dated 05.09.2022.



4. Rajendra Rai, the father of the appellants filed the aforesaid Title Suit to declare that the suit land belongs to the plaintiff who perfected right over the same and the survey entry with respect to the land is wrong and also by way of amendment prayed for declaring that the order dated 24.07.2007 passed by the District Superintendent of Survey, Bhojpur at Arrah in Survey Appeal No. 165 of 1989 with respect to the suit land is wrong and illegal as well as craved for cost of the suit.

5. The case of the plaintiff/appellant is that the land mentioned in Schedule-A of the plaint was the *Bakasht* land of the ex-intermediary, namely, Md. Yunus and the land of Schedule-B of the plaint as *Gairmajarua* land recorded in Cadestral survey of record of right. It is further case of the plaintiff that the land of Schedule-A and Schedule-B of the plaint was settled orally to Late Jurawan Rai, who was the father of the plaintiff, for cultivation in the year 1351 Fasli (1944) and since then, the plaintiff's father Late Jurawan Rai had been coming in actual physical possession of the said land till his death. It is further pleaded that the ex-landlord Md. Yunus, who was the landlord of Tauzi No. 291, issued rent receipt to Late Jurawan Rai on payment of rent of the said land admitting him as raiyat of the said land. The father of the plaintiff came in possession of the land of Schedule-B of the plaint in the year 1351 Fasli as the



land of Schedule-A was a part and parcel of the land.

6. It is further case of the plaintiff that after vesting of Zamindari, the ex-landlord submitted Return to the Government of Bihar mentioning the name of Late Jurawan Rai, the father of the plaintiff, as the tenant of the land of Schedule-A and Schedule-B and Register-II had also been prepared. Accordingly, the father of the plaintiff had been paying the rent to the Government of Bihar after vesting of the Zamindari. Since the settlement of the suit land, the father of the plaintiff and after his death, the plaintiff has been using the land for fisheries, growing Singhara, fruits and vegetables etc. on the suit land and also contended that the plaintiff has constructed three rooms and is running a garage as well as deals with motor parts.

7. During the Revisional Survey, khata No. 317, plot no. 714 part and plot no. 732 has been carved out from Cadestral Survey khata no. 1539, plot no. 10703 and khata no. 1520, plot no. 10704 respectively. It is further contended that the plaintiff besides the other rights have acquired title by virtue of adverse possession because the plaintiff and his father had been coming in peaceful possession over the suit land for more than 30 years openly and continuously without interference to the knowledge of State of Bihar. It is further pleaded that in the Revisional Survey, the suit land has been illegally recorded in the name of



State of Bihar and order dated 24.07.2007 passed by the District Superintendent of Survey and Settlement, Bhojpur in Survey Appeal No. 165 of 1989 in favour of defendant nos. 2 to 7 is wrong, illegal and inoperative. The cause of action arose in the year 1351 Fasli (1944) when the ex-landlord Md. Yunus settled the land with the father of the plaintiff and also on 14.06.1988, the date on which the Assistant Settlement Officer, Arrah rejected the Objection Petition No. 34 of 1988. The notice under Section 80 of the Code has been served to the State of Bihar, the Collector of the District, Bhojpur on 06.02.1991, hence the suit.

8. After knowledge of the filing of the suit, defendant nos. 2 to 8 voluntarily appeared in the Court on 03.06.2008 through their counsel and filed their written statement.

9. The defendants raised objection with regard to the suit being barred under the provision of Section 34 of the Specific Relief Act and also bad for the documents, on which the plaintiff has based his title and claim not filed along with the plaint and even despite after the order of the court fixing the date for filing of the documents. No documents have been filed along with this plaint which is gross violation of the provision of law as laid down under Order VII Rule 14 Sub Rule 1 & 3 of the Code. No copy of the plaint was served upon these defendants. The aforementioned irregularity and failure to comply the



provision of law clearly go to show the malafide and misconceived nature of the suit.

10. Further case of the defendants is that the plaintiff has claimed settlement from the ex-intermediary, namely, Md. Yunus on the basis of an alleged oral settlement and rent receipts granted to plaintiff's father, but no such receipts have been filed by the plaintiff. It is further contended that the plaintiff has failed to file the Return filed by the said ex-intermediary at the time of vesting under Bihar Land Reforms Act, 1950 (for brevity 'B.L.R. Act') to avoid the facts recorded therein which contradicts his baseless claim. The plaintiff has avoided to file his alleged documents for fear of those being contradicted and falsified by the actual condition of the land itself being dealt with by the ex-intermediary and his temporary lease from the year 1944 as well as the order of court of law in this connection.

11. It is further case of the defendants that the ex-intermediary, namely, Md. Yunus had filed an application for fixation of rent under Section 6 of B.L.R. Act in the year 1956, but no steps had been taken in this regard by the authorities concerned and the ex-intermediary Md. Yunus died in the year 1968. Thereafter, his son, namely, N. Ammanullah, the father of the defendants filed a fresh petition which was ultimately disposed of in his favour by the learned Collector, Bhojpur,



Arrah on 01.02.1993 vide Revenue Appeal No. 6 of 1992-93.

12. Further case of the defendants is that at the stage of draft publication during Revisional Survey proceeding, the land in the suit was mentioned as *Gairmajarua Aam* in the year 1985 against which objection was filed by the said N. Ammanullah, defendants' father. The plaintiff also filed an objection. Both objections were rejected by Assistant Settlement Officer, Arrah whereupon appeal was filed bearing Municipal Survey Appeal No. 171 of 1988 and 165 of 1989 respectively before Superintendent of Survey and Settlement, Bhojpur, Arrah. Further case of the defendants is that the State initiated a proceeding under Bihar Land Encroachment Act for removal of alleged encroachment against a private person over a part of plot no. 10703. Some part of plot no. 10703 is subject matter of the instant suit. In the said proceeding, the Collector by a detailed and reasoned order, had held Plot no. 10703 as well as Plot no. 10704 and 10705 to be in the possession of defendants' predecessor-in-interest who also had title to it.

13. On appeal filed by the defendants and plaintiff before Superintendent of Survey and Settlement, Bhojpur, Arrah, the same was heard and finally decided in favour of the present defendants upholding the khas character and possession of ex-intermediary and ordered for correction of survey khatian by



the Superintendent of Settlement, Bhojpur on 27.04.2007 and rejected the claim of the plaintiff. The further case of the defendants is that in the year 1965, a land acquisition proceeding in respect of a portion of the suit land was started and compensation was paid to Md. Yunus but no objection was raised by the plaintiff or his father. It is further contended that the *Bakasht* character of land was neither denied by the plaintiff nor possession of the same by ex-intermediary was rebutted and as such even from before 1946 and in support of the baseless claim of the plaintiff, no documents have been filed along with the plaint. The denial of khas character of land in the written statement filed by the defendant no.1(State of Bihar) is also rendered baseless after the decision of the Collector in Revenue Appeal No. 6 of 1992-93 and order of Superintendent of Survey, Arrah dated 24.07.2007 and as such, objection is no longer tenable. Lastly, the defendants contended that the suit is fit to be dismissed.

14. Upon completion of pleadings and upon consideration of rival contention of the parties, the trial court framed issues and decided the suit on the basis of evidence and materials on record. Learned trial court arrived at the findings and dismissed the suit on contest without cost by its judgment and decree dated 21.08.2014 holding that the suit land was



Bakasht land of ex-intermediary Md. Yunus. The claim of plaintiff through oral settlement has not been proved by the plaintiff. The Plaintiff has not filed Return in the suit to show that Late Jurawan Rai was declared as *Raiyat*. The rent receipt produced by the plaintiff is without order of authority and the signature and seal of the office and officer on the said receipt is lacking which has not been supported either by oral evidence or any revenue clerk/officer. The plaintiff has not proved his case before the Settlement Officer as well as Superintendent of Survey and Settlement with regard to his possession. Both the objection petition and appeal filed by the plaintiff were dismissed by survey authority. The learned trial court observed that on the basis of Pleader Commissioner's report, the plaintiff is in possession of the suit land but only the possession does not create ownership. It is well laid down principle that on coming of valid title holder the possessor has to leave the possession. Hence, the plaintiff has failed to prove his case and issue nos. 4, 5 & 6 have been decided against the plaintiff.

15. On the other hand, the defendants have succeeded in disapproving the case of the plaintiff on the basis of oral evidence as well as documentary evidence such as Exhibit- A/1 which is compromise decree of Rent Suit No. 61 of 1947 and Temporary Registered Lease dated 24.11.1945 (Exhibit-B/1) in



favour of Abdul Shakur and Abdul Hamid. The said rent suit was filed for realisation of rent which was disposed of by a compromise decree dated 15.09.1947 with regard to the suit land. The ancestor of the defendants also filed Title Suit No. 185 of 1950 against Dharikshan Ahir and Bajaj Ahir wherein the Pleader Commissioner was appointed who submitted his report on 10.12.1950 and inspected the Plot no. 10703, Plot no. 10704 and Plot no. 10705 and submitted his report before the concerned court. In the aforesaid suit, compromise decree was passed in favour of the ex-intermediary. Defendants also filed Exhibit-C which is detail of the land which shows that Mauza Hamidpur Tauzi No. 291 Khewat no. 4 belongs to ex-intermediary. Column 8, specially mentioned the khas possession of the land of the intermediary including Plot no. 10704, Plot no. 10705 and Plot no. 10703. On that basis, the learned trial court has held that on the basis of Exhibit-C, it is apparent that on 29.01.1956, the ex-intermediary, who is admittedly ancestor of the defendants, was in possession of the suit land. Moreover, in the land acquisition proceedings for part of the suit land acquired for widening of Arrah Bypass road through Case No. 33/v of 1964-65 by order dated 20.03.1966 (Exhibit-D), the ancestor of the defendants was paid compensation with regard to the part of the suit land. The rent



was also fixed pursuant to Return filed by the ex-intermediary, ancestor of the defendants by order dated 01.02.1993 passed in Revenue Appeal No. 6 of 1992-93 (Exhibit-D/4). The defendants also filed Exhibit-D/2 which is order of Superintendent of Survey, Bhojpur, Arrah dated 27.04.2007, whereby Plot nos. 10703, 10704 and 10705 were held to be in favour of the defendants on the basis of Return filed as khas possession and fixation of rent in favour of the defendants. Exhibit-D/3 is order dated 01.12.2008 to 28.02.2009 passed in Miscellaneous Case No. 1 of 2008-09 by Anchaladhikari, Arrah wherein it has been clearly stated that the name of Jurawan Rai, the father of the original plaintiff was nowhere mentioned in any Jamabandi. Defendant 2nd set also filed survey khatian (Exhibit-G) of old khata no. 1539 and old khata no. 1520 (Exhibit-G/2). It appears from those document that in old khata no 1539, the name of the ancestor of the defendants was mentioned. Old Khata no. 1539 was mentioned as *Gairmajarua Malik* and khata no. 1520 mentioned as *Bakasht Malik Maulvi Md. Yunus* and others. New Khata No. 624 and 714 in Municipal Survey Khatian (not final), the name of the defendants have been mentioned which has been carved out from old survey Khata No. 1539 and 1520.

16. On the contrary, the plaintiff did not file any material evidence to show that the State has accepted him as



raiyat. So far issue nos. 1, 2 & 7 are concerned, the plaintiff had no valid cause of action and reason to file the present suit and further the suit of the plaintiff is not sustainable and he is not entitled to get any relief sought in the plaint. Accordingly, issue nos. 1, 2 & 7 were decided against the plaintiff. Issue no. 3 was disposed as not pressed by the party and accordingly, dismissed the suit.

17. Aggrieved by the impugned judgment and decree passed in Title Suit No. 86 of 1991 on 21.08.2014, the plaintiff/appellant filed Title Appeal No. 88 of 2014. The defendant 2nd Set also filed cross objection in Title Appeal No. 88 of 2014 against issue no. 4 partly in favour of the plaintiff and partly against the cross objector.

18. After hearing the parties, the learned lower appellate court formulated points for consideration in the Title Appeal and dismissed the same and allowed the Cross Objection filed by the defendant 2nd Set.

19. Against the aforesaid judgment and decree of the learned court of appeal below, the instant Second Appeal has been filed by the plaintiff/appellant/appellant.

20. Learned counsel for the appellants has submitted that the learned courts below have not properly considered the evidence of the parties and, therefore, the findings are vitiated. It



is submitted that both the courts below failed to appreciate that a raiyat can be conferred the status of raiyat by oral settlement by ex-landlord of *Gairmajarua* or *Gairmajarua Malik* land or that any kind of land which is in his khas possession. Learned counsel for the appellants has further submitted that oral settlement made prior to the cut of date i.e. 01.01.1946 followed by grant of rent receipt would create a legally valid *raiya* right in favour of the settlee of the said land. The name of the father of the original plaintiff was recorded in the revenue record of the State of Bihar after vesting of Zamindari (Estate) despite that defendant 2nd Set did not take any steps for fixation of rent as per the provision of B.L.R. Act for long 30-35 years after vesting of estate by the heirs of ex-landlord to claim the land which was already settled with a raiyat. The oral settlement in favour of original plaintiff's father has not been challenged by the defendant 2nd set. The courts below failed to appreciate that the oral settlement followed by grant of rent receipts in favour of raiyat is proof to establish that there was a relationship of landlord and tenant between the parties. The documentary evidence adduced on behalf of the plaintiff has been wrongly misinterpreted. Learned counsel vehemently submitted that after settlement, motor garage was constructed. There were tenants also living in the rooms constructed by the plaintiff which proves



his possession over the suit land. It is submitted that most of the proceedings have been decided in favour of the ex-landlord being quasi-judicial authority. The learned courts below wrongly relied upon the findings of those authorities which has vitiated the said judgment and decree. Rent receipts issued in the name of Jurawan Rai has not been considered properly. It is further submitted that the written statement of the defendants 2nd set has been filed by the power of attorney holder, namely, Manoj Singh who appeared as witness for the defendant 2nd set in contravention of legal provision and the settled law. The evidence of power of attorney holder, who deposed as D.W.-1 and entire pleadings as incorporated in the written statement of the defendant 2nd set was not properly considered by the courts below. The power of attorney cannot depose in place of the principal.

21. Reliance has been placed in the case of ***Janki Vashdeo Bhojwani and Anr. Vs. IndusInd Bank Ltd. And Ors.*** reported in ***(2005) 2 SCC 217*** wherein the Hon'ble Apex Court has held that:-

“Power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case, he can state on oath but he cannot appear as a witness on behalf of the



party in the capacity of that party.”

22. Reliance has also been placed in the case of ***Hero Vinoth (minor) v. Seshammal*** reported in ***2006 (5) SCC 545***. Further reliance has been placed in the case of ***State of Rajasthan and others vs. Shiv Dayal and Another*** reported in ***2019 (8) SCC 637***, wherein the Hon’ble Apex Court has held that :-

“ ‘Concurrent finding of fact’ is usually binding on the High Court while hearing the Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the Code”). However, this rule of law is subject to certain well-known exceptions mentioned infra.”

23. According to learned counsel for the appellants, the oral settlement of the suit land followed by rent receipts has wrongly been discarded by both the courts below. The Pleader Commissioner appointed during the pendency of the suit has found the possession of the original plaintiff/appellant. The courts below have wrongly relied upon the documents adduced by the defendant 2nd set which were passed by quasi-judicial authorities. Learned lower appellate court wrongly decided the findings with regard to the possession of the suit land in favour



of defendant 2nd set.

24. Per contra, learned counsel for the defendant 2nd set/respondents has submitted that it is admitted fact that the ancestor of the defendant 2nd set was the ex-intermediary and at the time of vesting of Zamindari, filed Return (Exhibit-C) showing land including the land in suit as *Bakasht* land. It was accepted by the State of Bihar and accordingly, rent fixation case was filed under B.L.R. Act and rent was fixed in favour of the ancestor of the defendant 2nd set. Moreover, in Survey Appeal No.171 of 1988, the order was passed in favour of defendant 2nd set by the Superintendent of Survey and Settlement upholding the khas character and possession of the ex-intermediary and ordered for correction of the survey record by the Superintendent of Settlement. The rent receipts are also to be issued in favour of defendant 2nd set and earlier in favour of predecessor-in-interest. The decree of Rent Suit No. 61 of 1947 (Exhibit- A/2–A/3) and registered temporary lease deed (Exhibit-B and Exhibit- B/1) also proves the possession of the defendant 2nd set. The Pleader Commissioner report dated 10.12.1950 filed in Case No. 185 of 1950 by Maulvi Md. Yunus and others Vs. Dharikshan Ahir and others shows that the land in suit was in possession of ancestor of defendant 2nd set which falsify the case of the oral settlement in the year 1944 i.e. 1351 Fasli. Not only the above documents,



but also a land acquisition proceeding was started in which ancestor of the defendant 2nd set had been paid compensation with regard to the acquired land which was part of the suit land. It is further submitted that a proceeding under Public Land Encroachment Act was initiated by the State against private party for removal of an alleged encroachment over a part of Plot nos. 10703 and 10704. On appeal by private party in which predecessor-in-interest of defendant 2nd set intervened, Encroachment Appeal No. 7 of 1986-87 was allowed in favour of intervenor predecessor-in-interest of defendant 2nd set. The learned Collector held that the land in question is not a public land but it was *Bakasht Malik* land on the basis of Return filed by the ancestor of the defendant 2nd set under Section 5, 6, 7 of the B.L.R. Act. The order of the Collector was challenged in C.W.J.C. No. 7820 of 1994 which was disposed of on 09.02.1995 and subsequently Civil Review being Civil Review No. 53 of 1995 was filed which was disposed of on 05.11.1996 wherein this Court did not interfere with the order and further directed that possession as per the Collector's order shall be maintained so long as any decision is taken by the civil court.

25. Learned counsel for the defendant 2nd set/respondents further argued on the point of Cross Objection that the trial court wrongly came to the conclusion regarding



issue no. 4 partly with regard to the possession only on the basis of Pleader Commissioner's report appointed in the suit. It is further contended that Exhibit-5 to 6 reveals that the said Pleader Commissioner had held local inspection on 13.04.1993 and the defendant 2nd set were impleaded as party in the said suit for the first time on 31.08.2007 by the plaintiff *vide* lower court order dated 24.07.2007. The said Pleader Commissioner was examined on behalf of the appellants as P.W.-13 and in his cross-examination, he stated that the defendant 2nd set was noticed by him and notice with regard to the inspection of the spot was given to their counsel in the court. This statement and appearance of the defendant 2nd set itself falsify the Pleader Commissioner report. The lower court wrongly presumed on the basis of Pleader Commissioner's report that the plaintiff is in possession whereas the defendant 2nd set were not even party to the suit at the material time of said local inspection by the Pleader Commissioner. Exhibit-D/1 is order of the learned Collector who had observed in its order dated 01.08.1994 that defendant 2nd set were found in possession of land in question by the local revenue officer in the year 1992.

26. Learned counsel for the defendant 2nd Set/respondents has submitted that the original plaintiff/appellant in the present case has based his title on oral settlement which



remained unproved. There is concurrent findings of fact by both the courts below that the plaintiff has failed to prove his title on the basis of oral settlement as pleaded. In so far as the submission of the appellants that the defendant 2nd set have failed to enter the witness box rather their power of attorney holder has entered the witness box and was examined as witness and as such, adverse inference could be drawn against the defendants is concerned, the Court is not always bound to raise adverse inference against the party unless it is satisfied that there is willful withholding of some relevant facts on the part of party which is within his personal and exclusive knowledge. If the necessary facts in order to prove the defence are already on record and has been proved by other evidences on the record or by documentary evidences including public documents on record, the court is not bound to draw adverse inference for failure of the defendants to enter the witness box. In the present case, the factual defence required to prove are well proved from other oral and documentary evidence particularly, the public documents including Zamindari Return (Exhibit-C), Rent Fixation Order (Exhibit-D/4) in favour of ancestor of defendants, Order of Superintendent of Survey and Settlement (Exhibit-D/2), the Order of Land Acquisition case in favour of ancestor of the defendant 2nd set (Exhibit-D), Compensation Award passed in



Land Acquisition Case in favour of Ancestor of Defendant 2nd set (Exhibit-E), Cadestral Survey Khatiyan (Exhibit-G), Municipal Survey Khatiyan (Exhibit-G/1), Judgment and decree of Rent Suit No. 61 of 1947 (Exhibit-A/2 and Exhibit-A/3), Registered Temporary Lease dated 24.11.1945 and 09.04.1945 (Exhibit-B/1 and Exhibit-B/2) etc. and there is no material fact in defence which was exclusively within the personal knowledge of the contesting defendants so as to compel to draw the adverse inference against them for their failure to enter witness box. The appellant being the plaintiff has brought the suit for declaration that the suit land belongs to the plaintiff and he has perfected right of the same and the survey entry with respect to the suit land is wrong and also for declaring that order passed by the Superintendent of Survey in Survey Appeal No. 165 of 1989 in respect of the suit land is wrong and illegal. However, the plaintiff could succeed only on the strength of his title so pleaded, and not on the weakness of the case of the defendants, if any. The plaintiff has based his title on oral settlement which has not been proved.

27. After hearing the submissions made on behalf of the parties and upon perusal of impugned judgment of the learned courts below, it transpires that it is admitted fact that the ancestor of defendant 2nd set/respondents was the ex-



intermediary of the suit land. The original plaintiff/appellant has filed suit for declaration that the suit land belongs to the plaintiff and he has perfected right over the suit land and also for declaration that entry in Municipal Survey Khatiyani is wrong as well as order passed by the Superintendent of Survey in Survey Appeal No. 165 of 1989 in respect of the suit land is wrong and illegal. The burden is on the plaintiff to establish his title to the suit property in order to be entitled to a decree of declaration of title. Reliance may be made on the decision reported in **(2019) 6 SCC 82 (para 44) (Jagdish Prasad Patel v. Shivnath), 2024 (1) BLJ SC 37 (Para 24) (P. Kishore Kumar vs. Vittal K. Patkar), (2004) 7 SCC 708 (Sayed Muhammed Mashur Kunhi Koya Thangal v. Badagara Jumayath Palli Dharas Committee & Ors.), (2015) 8 SCC 672 (para 33)** in the case of **State of M.P. v. Ushadevi**. The plaintiff in the present case has based his title on oral settlement which remained unproved. There is concurrent finding of facts by both the courts below that the original plaintiff/appellant has failed to prove the title on the basis of oral settlement as pleaded, and the plaintiff/appellant has not succeeded in proving that the said finding in that respect is perverse. Thus, it is held that the plaintiff has not been able to prove his claim of title on the basis of oral settlement. The appellants argued that the defendant 2nd set/respondents have



failed to adduce evidences in the suit and his power of attorney holder has entered in witness box and was examined as witness, and as such, adverse inference should be drawn against the defendants concerned, needs to be pointed out that the principle behind drawing of adverse inference is largely based upon the 'best evidence theory' which postulates that a court can draw adverse inference against a party who withholds the best evidence in his possession. But this principle of drawing adverse inference cannot be put in a straight jacket formula and it depends upon the facts and circumstances of each case. The court is not always bound to raise adverse inference against a party unless it is satisfied that there is willful withholding of some relevant facts on the part of the party which is within his personal and exclusive knowledge. If the necessary facts in order to prove the defence are already on record, and has been proved by other evidences on the record, or by documentary evidences including public documents on record, the court is not bound to draw adverse inference for failure of defendants to enter the witness box. Reliance is placed for the above proposition of law on the decision reported in **2012 (2) PLJR 859 para 11 (Rajendra Poddar & Anr. v. Smt. Shakuntala Devi & Anr.)** . In the present case, the factual defence required to be proved are well proved from other oral and documentary evidences



particularly the public documents including Zamindari Return (Exhibit-C), Rent Fixation Order (Exhibit-D/4) in favour of ancestor of defendants, order of Superintendent of Survey and Settlement (Exhibit-D/2), the order of Land Acquisition case in favour of ancestor of the defendant 2nd set (Exhibit-D), Compensation Award passed in Land Acquisition Case in favour of ancestor of Defendant 2nd set (Exhibit-E), Cadestral Survey Khatiyani (Exhibit-G), Municipal Survey Khatiyani (Exhibit-G/1), Judgment and decree of Rent Suit No. 61 of 1957 (Exhibit-A/2 and Exhibit-A/3), Registered Temporary Lease dated 24.11.1945 and 09.04.1945 (Exhibit-B/1 and Exhibit-B/2) etc. and there is no material fact in defence which was exclusively within the personal knowledge of the contesting defendants so as to compel the court to draw adverse inference against them for their failure to enter witness box. The question of drawing an adverse inference against a party for his failure to appear in court as witness could arise only when there is no other evidence on record to prove the facts required to be proved. Reliance for the above proposition can be placed on the decision of the Hon'ble Apex Court in the decision reported in ***AIR 1981 SC 2235 (Pandurang Jivaji Apte v. Ramchandra Gangadhar Ashtekar (dead) by Lrs. And others)*** .

28. In so far as the finding of possession observed by



the learned trial court partly in favour of the original plaintiff/appellant based only on the report of Pleader Commissioner is concerned, the learned trial court erred in holding so far as the Pleader Commissioner who visited the spot on one stray occasion, at the material time of the said local inspection, defendant 2nd set were not even party to the suit, can only report physical feature and his report cannot be looked into for finding possession in favour of a particular party in view of the decision reported in **2000(1) PLJR 231 (Jayanti Kuer & Ors. v. Laxmichand Upadhyay & Ors.)** which held that a Pleader Commissioner will not be in a position to determine the question as to who is in possession of the property as it is to be decided on the basis of evidence adduced and it is not his function to report the possession of a party. Moreover, the Pleader Commissioner had held local inspection on 13.04.1993 and the defendant 2nd set were impleaded as party in the present suit for the first time on 31.08.2007 *vide* order dated 24.07.2007. However, the plaintiff could succeed only on the strength of his title as pleaded and not on the weakness of case of defendants, if any. The burden is on the plaintiff to establish his title to the suit property which he miserably failed to establish claim of title on the basis of oral settlement. Both the courts below have concurrently held that the plaintiff has failed to prove his title on



the basis of oral settlement.

29. The learned appellate court rightly allowed the Cross Objection of the defendant 2nd set/respondents on the point of possession of the plaintiff on the basis of material evidence available on record.

30. Considering the aforesaid facts and circumstances of the case as well as materials on record, it is quite apparent that the impugned judgments and decree of the courts below are covered by the findings of fact and no question of law, much less substantial questions of law, arises for consideration in the instant Second Appeal.

31. Accordingly, this appeal is dismissed at the stage of hearing under Order XLI Rule 11 of the Code of Civil Procedure.

(Khatim Reza, J)

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