

# IN THE HIGH COURT OF SIKKIM

R.F.A. No. 8 of 2000

Date of Decision : 27<sup>th</sup> September 2000.

Bir Bahadur Rai  
Resident of Uttar Regu Busty  
Post Office and Police Station  
Rangli, in the East District  
of Sikkim.

... Appellant/  
Defendant.

VERSUS

Aringdas Rai  
son of Late Charandas Rai  
resident of Dalepchand Busty  
Post Office and Police Station  
Rangli in the East District of  
Sikkim.

... Respondent/  
Plaintiff.

Coram :

The Hon'ble Mr. Justice Anup Deb, Judge.



Present: Mr. N.B. Kharga, Advocate for the appellant.

Mr. A. Moulik, Advocate for the respondent.

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### **JUDGMENT**

#### **DEB. J.**

This appeal is directed against the judgment and decree passed by the Civil Judge, East Sikkim at Gangtok on 30<sup>th</sup> October 1999 in Civil Suit No. 14 of 1985 by which the Suit was decreed in favour of the respondent-plaintiff.

2. The fact of the case as set out in the plaint is that the suit property belonged to one Riki Dhan who had two sons Rajman and Chandras. Rajman died in 1933. Chandradas died in 1943. Rajman had one son Padam Dhoj and one daughter Dhanrupi. Chandradas had only one son Aringadas who is the plaintiff in the suit and respondent in the appeal.



Dhanrupi died issueless. Padam Dhoj left his house around in the year 1955 and since then there is no trace of his existence. Respondent-plaintiff's case is that Riki Dhan was the owner of the properties mentioned in Schedule-'M'. Since Dhanrupi died issueless and Padam Dhoj has sustained civil death because of being traceless for over 30 years, the other half of the 'M' schedule properties devolved upon the respondent-plaintiff who thus became the owner of the suit property. 'M' schedule properties have been broken up to Schedule 'A' to 'K'. Properties mentioned in Schedule 'A' was in occupation of one Chandra Bahadur till 1970 as Adhiyar. Thereafter, Bir Bahadur Rai, appellant who is defendant No. 1 in the Suit has been inducted in those properties by the respondent as Adhiyar under him. Schedule 'A' comprises three plots being Nos. 102 to 104. A house was existing in a portion of plot No. 102 where the appellant was permitted to reside. The said house was, after sometime, demolished by the appellant who constructed a new house thereon. Respondent-plaintiff objected to it. The appellant also committed theft of cardamom fruits. Respondent drew the attention of the



Panchayat and through their intervention the matter was settled. Ultimately, the appellant filed a petition, being Misc. Case No. 78 of 1981, before the Prescribed Authority. As its decision on 9<sup>th</sup> February, 1984 went against the respondent, he filed writ petition No. 13 of 1984 which was disposed of on 16<sup>th</sup> March 1985 with the observation that since the appellant was in possession of the same land the respondent should not dispossess him without taking recourse to the procedure established by law. The respondent filed the present suit in the year 1985 praying for a decree for declaration of his right title and interest over 'M' Schedule of lands, for permanent injunction against Bir Bahadur Rai appellant/defendant No. 1 restraining him from disturbing peaceful possession of the respondent/plaintiff over Schedule 'A' lands and also for recovery of possession of Schedule A lands by evicting the appellant/defendant No. 1 therefrom. The schedule 'A' land set out in the plaint reads as follows: -

"All that entire plots of land comprising of dry and cardamom fields situated at Block Uttar Rigu, Elaka Rigu District East



Sikkim falling under Khasra No: 84 Plot Nos: 102, 103 and 104 measuring about 0.4200, 0.1860 and 2.600 hectares respectively which fall within the same compound are butted and bounded as follows: -

North: -Boundary of Plot Nos 105 and 108 of this plaintiff.

South: - Boundary of Plot No: 101 of the plaintiff.

East : - Boundary of Plot No: 108 of the plaintiff.

West: - Boundary of Plot No: 105 of the plaintiff. ”

The house is situated inside plot No.102 to its South corner. (The house and the land in the schedule is shown by red lining).


The ‘M’ schedule land as set out in the plaint reads as follows: -

“All that entire plots of lands comprising of dry and cardamom fields situated at Block Uttar Rigu, Elakha, Rigu Dist: Gangtok, popularly known as “Sudamlakha” under Khasara No: 84, Plot Nos: 101, 102, 103, 104, 105 and 108 measuring 4.4760, .4200, .1860, .2600, 8.3040 and 4.9340 Hectors respectively; which as per survey operation of 1950-52 falls under Khasara No: 59, plot Nos: 18, 22, 23, 24 and 24/520 measuring 20.38, 2.16, 5.00, 16.70 and 2.28 acres respectively. (Schedule A to K lands fall inside this Schedule M land).”

3. The case of Bir Bahadur Rai, appellant-defendant No. 1, as made out in the written statement, is denial of respondent/plaintiff, Aringdas Rai's right title and interest over any of the properties mentioned in



Schedule 'A' or 'M'. According to appellant, the entire property belonged to Rajman Rai who had a son Daulat, besides the other son Padam Dhoj and daughter Dhanrupi. The appellant was the son of Daulat and Asar Bahadur Rai was the son of Dhanrupi Raini. Daulat died sometime in 1950 leaving the appellant/defendant No. 1 as sole heir. Though the appellant/defendant No. 1 admitted that Padam Dhoj became traceless since 1955, he asserted that while Dhanrup died in 1970, she had a surviving son Asser Bahadur. The appellant/defendant No. 1 further claimed that he became the sole owner over the properties mentioned in the schedule of the written statement. The appellant- defendant No. 1 denies the claim of the respondent-plaintiff and other defendants that defendant Nos. 2 to 10 are Adhiyars with respect to the properties mentioned in Schedule 'B' to 'J'. The appellant/defendant No. 1 made out a counter claim over all the properties besides the properties described in Schedule-A of the plaint. But he did not stick to the counter claim.



4. Mr. N. B. Kharga, learned Counsel appearing for the appellant argued that respondent-plaintiff had claimed the suit land as his own being the properties of his grand father. But subsequently respondent-plaintiff has come forward with the case that the same property belongs to Padam Dhoj and being the nearest relation he is entitled to succeed to the same. The suit was remanded for limited purpose to ascertain about the relationship of Padam Dhoj, Charandas and Aringdas. To determine the limited question, the respondent examined two witnesses Jardas Rai and Birkhaman Das who are his relatives and respondent-plaintiff produced a document dated 15<sup>th</sup> February 1966 which is exhibit P.P.1. PW Jardas admits in his cross examination that it is true that there is no thumb impression of Dhanrupi Raini on exhibit P.P.1. He also stated that the existence of exhibit P.P.-1 was not mentioned in the document of 8<sup>th</sup> August 1983 for mutation and he had not signed the said document as a member of the Panchayat. Birkhaman Das Rai is the next witness. Witness Birkhaman Das is the father-in-law of the respondent-plaintiff who married his only daughter. He is not a signatory to the P.P.1. He



does not know the name of Padam Dhoj and mentions him as Padam Das. Mr. Kharga argued that the genuineness of the document exhibit P.P.1 is doubtful. It does not bear the thumb impression of the executant. It is also not possible-how a person who knows about the value of old documents will keep such an important document about the property in negligent manner. He had kept all the rent receipts properly except this vital document. The other independent living persons who are still alive have not been examined. Mr. Kharga argues that the appellant, as per the evidence of the respondent-plaintiff and others, was inducted as an adhiyar. The khatian parcha of Padam Dhoj in the remarks column shows the name of appellant as kabjadar in respect of plot Nos.102 and 108. The survey took place in 1975-78 when his possession has been recorded for seven years. The suit was filed in 1985 and this covers the prescribed period of 12 years. The appellant has perfected his right in respect these two plots which will be evident from the documents filed by the respondent-plaintiff himself. The genuineness or otherwise of the document exhibit P.P.1 is doubtful for other reasons and the appellant-





defendant doubts that it has been subsequently made out after the case was remanded back to the trial Court for finding this limited question of relationship. The relationship of the respondent-plaintiff with Charandas and Padam Dhoj has also been made out in this document and has connected the same with the respondent-plaintiff. If such a document was made and was in existence previously then it ought to have come out in the pleadings or in the evidence of the respondent-plaintiff earlier. It was the case of the respondent-plaintiff previously that the land belonged to him and that it was wrongly recorded in 1975 survey in the name of Padam Dhoj Rai. It was in the possession of Dhan Rupai Raini. After the death of Dhan Rupai Raini the panchayat and the elders gave the said property to the respondent-plaintiff. But the case now made out is completely different and therefore, no reliance should be placed upon the document exhibit P.P.1.


5. Mr. A.Moulik, learned Counsel appearing for the respondent-plaintiff has drawn attention of the Court to paragraph 5 of the Judgment



passed in Civil Review Application No. 5 of 1998 which reads as follows:-

“5. So far as the claim of Defendant No.1 is concerned regarding ownership over the land in question, it has been held in the judgment that the Defendant No.1 failed to establish that. That becomes a closed chapter which would not be reopened before the trial Court.”

After the case was remanded back to the trial Court for hearing on the aforesaid question regarding relationship of Chandradas Rai with Rajamn Rai; the respondent-plaintiff led evidence in the case on 27<sup>th</sup> September 1999. The appellant-defendant No.1 had to lead evidence on 7<sup>th</sup> October 1999. However, on 7<sup>th</sup> October 1999 the appellant-defendant No. 1 represented by a lawyer could not produce his witnesses on his behalf. On the other hand, the appellant-defendant No.1 submitted that he was unable to bring his witness as the witness was not in a condition to depose due to illness. Mr. Moulik submitted that one witness was lying ill, there was no bar for the appellant-defendant to produce another witness. However, he was given time till 11<sup>th</sup> October 1999 to produce witness to support his defence. On 11<sup>th</sup> October 1999 the appellant-defendant No.1




neither produced witness nor he had made any prayer for examination of witness on commission or any prayer for summoning any witness or prayer for a date to examine any witness was made by the appellant-defendant and it cannot be said that the appellant-defendant No.1 was not given sufficient opportunity to lead evidence in support of his case. Mr. Moulik agued that after considering the evidence on record and keeping in mind the Judgment of the trial Court passed in Civil 1<sup>st</sup> Appeal No. 1 of 1998 and the Judgment of Civil Review Application No. 5 of 1998, the Civil Judge had considered the statements of the witnesses namely Jarda Rai and Birkhaman Das. After duly considering the statements on oath of these two witnesses, the Civil Judge delivered Judgment on 30<sup>th</sup> October 1999 and had come to definite finding that Charan Das was the brother and co-sharer of Rajman Rai. Mr. Moulik argued that appellant in his appeal did not urge any point indicating fault with the judgment and orders of the Civil Judge. Mr Moulik has drawn attention of the Court to the paragraph 34 of the judgment dated 30<sup>th</sup> October 1999 which reads as follows :-



“34. Nevertheless, it must be noted that PW-2, has also deposed that the defendant No.1 is also related to him being the husband of PW-2's grand daughter. This fact in my opinion mitigates the possibility of PW-2 being an interested party and hence PW-2 can thus be relied upon by this Court as an independent witness.”

Mr. Maulik argues that the trial Court observed that witness Jardas Rai is well conversant with the family ties of the parties. According to witness Jardas Rai, he knows the sons of Rikidhan Rai, who are Charandas Rai and Rajman Rai and who have already died. Rajman Rai has one son and one daughter, Padamdhoj and Dhan Rupai Rai. The trial Court has observed that the relationship between Charandas Rai and Rajman Rai as brothers has been established. Under cross-examination this fact has not been controverted. The trial Court at paragraph 38 of the Judgment has given finding that the respondent-plaintiff has been able to establish the fact that Riki Dhan Rai has two sons Charandas Rai and Rajman Rai. At paragraph 41, the trial Court has come to conclusion that the issue, namely the relationship between Charandas Rai and Rajman Rai as brothers and co-sharer has been proved and established in favour of the



plaintiff. Witness Jardas Rai has categorically stated that he knows the sons of Rikidhan Rai who are Charandas Rai and Rajman Rai, both of whom are no more. He has further established that Charandas Rai has one son, who is the respondent-plaintiff. Rajman Rai has one son and one daughter. He further stated that Bir Bahadur Rai, appellant-defendant No.1 has migrated from Nepal. This witness does not know any one, named Lakhman Rai and Daulat Rai. In cross-examination, nothing could be brought out by the appellant-defendant No.1 to support that witness Jardas Rai is an interested witness and that he has not brought out the truth in his evidence. In cross-examination, only some formal suggestion has been given to this witness and the witness has just denied such suggestions. Except such negative suggestion, no concrete evidence has come forward from the witness to support the case of the appellant. Mr. Moulik argued that the relationship between Charandas Rai and Rajman Rai has also been proved by the respondent-plaintiff. The relevant portion of the deposition of Aringdas Rai reads as follows :-



"The suit land originally belonged to late Rikidhan Rai who obtained the law from the Maharaja of Sikkim about 100 years ago. Late Rikidhan had two sons namely Charandas Rai and Rajman Rai. I am the only living son of Charandas Rai. Rajman Rai had only one son Padamdhoj Rai who is traceless for the last about 32 years and he has no issue as he was not even married. Rajman had only one daughter namely Dhanrupi Raini. Dhanrupi died in the year 1971 without being married and she had led the life of a Sannyashi. After the death of my grandfather the suit land devolt upon my father Charandas Rai he being the eldest son. Rajman died expired before 10 years of the death of my father Charandas Rai. My father died in the year 1943. I have been enjoying the suit land from my very childhood along with my father, uncle and grandfather. The suit land according to the 1951 record stands recorded in my name."

Mr. Moulik has drawn attention of the Court to the relevant portion of the deposition of the plaintiff as PW which reads as follows :-

"I enjoyed the suit lands even during the life time of Padamdhoj Rai and Dhanrupi Raini. I was in joint family with Padamdhoj Rai and as such I was in possession of the suit land as owner with them. On the death of Dhanrupi Raini I performed all her death rites."


Mr. Moulik argued that the deposition of PW Sangay Tshering will show that the relationship between Charandas Rai and Rajman Rai has also



been proved by the evidence of the PW Sangay Tshering and relevant portion reads as follows :-

"I know Padamdoj Rai who happened to be the son of Rajman Rai. Charandas Rai was the father of Aringdas Rai. Charan Das Rai and Rajman Rai are brothers. I know both Charandas and Rajman. Both of them are dead. Charandas Rai is the elder brother. Charan Das Rai and the Rajman are the full blood brothers. Padamdhoj had one sister named Dhanrupi who is also dead. Whereabout of Padamdhoj is not known since about 30/35 years. Both Padamdhoj and his sister were unmarried."

Mr.Moulik argued that Aringdas Rai is a "BANTWA" Rai and his grandfather Rikidhan Rai is also a "BANTWA" Rai whereas Bir Bahadur is a "KULUNG" Rai. This statement of PW-3 Ram Karan Das Rai was not controverted by appellant-defendant No.1. Therefore, the relationship of Aringdas Rai son of Charandas Rai with another son of Rikidhan Rai namely Rajman Rai is established beyond reasonable doubt. Mr. Moulik has argued that the khatiyani parcha relating to the suit land shows the name of the respondent-plaintiff as the owner. The khatiyani parcha shows that the respondent-plaintiff has all along paid rent relating to the suit land. Document signed by the respondent-



plaintiff and the appellant-defendant No.1 shows that the appellant-defendant No. 1 is an Adhyar under the respondent-plaintiff. Exhibit P-12 is an application by the appellant-defendant No.1 to the Chief Minister. In this application he never claimed himself as the relative of Padamdhoj Rai or that of Dhanrupi Raini. On the other hand, the respondent-plaintiff Aring Das Rai has kept him in his sister's land. The said sister is none but Dhanrupi Raini, the daughter of Rajman Rai. Mr. Moulik argued that at no point of time, in none of the litigations between the respondent-plaintiff and the appellant-defendant No.1, the appellant-defendant No.1 had ever claimed as the relative of late Padamdhoj Rai or that of Dhanrupi Raini. Mr. Moulik argued that in paragraph 13 of the Judgment passed in Civil 1<sup>st</sup> Appeal No.1 of 1998, the High Court observed that the appellant-defendant No.1 never claimed ownership over any portion of the suit land by virtue of inheritance or by way of adverse possession.





6. Vide judgment dated 30<sup>th</sup> January 1997 passed by the Civil Judge, East in Civil Suit No.14 of 1985, the case of Aringdas Rai, the respondent-plaintiff was dismissed. Thereafter, the respondent-plaintiff preferred an appeal before the High Court. Vide judgment dated 7<sup>th</sup> September 1998 passed in Civil First Appeal No.1 of 1998 (Aringdas Rai v. Bir Bahadur Rai), the High Court allowed the appeal and the judgment and decree passed by the trial court was set aside and the case was remanded to the trial court for deciding the issue whether Charan Das was the brother and co-sharer of Rajman Rai. For this purpose, the High Court also held that the parties should be given opportunity to adduce further evidence. The operative part of the Judgment dated 7<sup>th</sup> September 1998 is reproduced below :-

“20. Coming down to the case of Plaintiff it must be noted that in the instant case he has first to establish his title over the property which is possible only if he can tie up Chandradas with Rajman as claimed by him in his plaint and evidence; but the evidence in this respect is not thoroughly independent and trustworthy. The Plaintiff's case would have failed for want of such evidence but that would keep the dispute between the parties alive which is not desirable. The Plaintiff should be given a chance to prove this



aspect of the case before the trial Court with right to the defence to try to disprove the claim. It is, hence,

*O R D E R E D*

that the Appeal be and the same is allowed on contest without costs. The judgment and decree passed by the learned trial Court is set aside and the case is remanded back to the trial Court for deciding the issue whether Chandradas was the brother and cosharer of Rajman. For that purpose the parties should be given opportunity to adduce further evidence. After coming to a decision on the aforesaid point and in consideration of the observations made in the body of this judgment regarding other points, the learned trial Court would finally decide the case."

Thereafter, Aringdas Rai, the appellant in Civil 1<sup>st</sup> Appeal No. 1 of 1998 and respondent herein filed a Review application being Civil Review Application No.5 of 1998 with the following prayers :-

"In the circumstances the petitioner most humbly prays that Your Lordship may be graciously pleased enough to consider this review petition and review the judgment and orders passed on 7.9.98 in Civil Appeal No: 1 of 1998 and be further pleased to pass the following orders to the effect :-

- a) to consider and hold that on the basis of the evidence on record both oral and documentary it has been proved and established that Charandas Rai was the full brother of Rajman Rai and accordingly Charandas Rai was a co-sharer



with Rajman Rai in respect of the properties left by Rikidhan Rai the father of Charandas Rai and Rajman Rai;

- b) to consider and hold and declare that the petitioner plaintiff has been able to prove that even independently of the relationship between Charandas Rai and Rajman Rai, he is the owner of 8 annas share in the suit properties and he is entitled to get declaration to that effect.
- c) to consider and hold that the petitioner/plaintiff has proved that he has right, title and interest on the entire suit property and he is entitled to get a decree in the suit to that effect;
- d) to consider and hold and pass a decree in the suit for the reliefs as prayed for by the petitioner/plaintiff in the suit;
- e) to pass any other order/orders which the Hon'ble court may deem fit and proper in this case in the interest of justice."

In Civil Review Application No. 5 of 1998 this Court observed that while dealing with the judgment of the trial Court, it never rejected the evidence either oral or documentary available within the record to establish the plaintiff's interest over the suit property. The only deficiency as noted by this Court was that a little more evidence on behalf of the plaintiff was/is necessary to prove the plaintiff's case conclusively. That is the reason for which the case was remanded to the trial court for



giving opportunity to the plaintiff. In paragraph 5 of the judgment passed in the Review application, this Court held so far as the claim of the defendant No. 1 is concerned regarding ownership over the land in question, it has been held in the judgement that the defendant No. 1 failed to establish that. That becomes a closed chapter which would not be re-opened before the trial court. Paragraphs 2 to 7 of the Judgment dated 7<sup>th</sup> November 1998 passed by this Court in Civil Review Application No. 5 of 1998 (Aringdas Rai, appellant-petitioner -vs- Bir Bahadur Rai & Ors.) are reproduced below :-

“2. There was a dispute between the Appellant/Petitioner and the Respondent No.1. Traversing through various litigations the Appellant ultimately came to this Court with Civil Appeal No.1 of 98 which was disposed of by this Court on 07.09.1998 by an order of remand to the lower Court for a limited purpose.

3. The Appellant has come up with this Review Petition with the contention that the ownership of atleast 8 annas share of Charandas in the suit properties should have been specifically declared in the Appellate Court judgment. It has further been contended that from the evidence on record the Appellate Court should have held that Charandas was the brother of Rajman.

4. It is the contention of the Petitioner that there are sufficient materials on record to hold that Charandas and Rajman




were two brothers inheriting equal interest over the suit properties from common ancestor. In the judgment it has been clearly indicated that it is the Plaintiff (Appellant here) who is to prove his title over the suit properties. It has been observed in the judgment that the evidence on record are not sufficient to come to a definite conclusion. This Court while dealing with the judgment never rejected the evidence, either oral or documentary available within the record to establish the Plaintiff's 16 annas interest over the suit properties. The only deficiency as noted by this Court was that a little more evidence on behalf of the Plaintiff was/is necessary to prove the Plaintiff's case conclusively. That is the reason for which the case was remanded to the trial Court for giving opportunity to the Plaintiff.

5. So far as the claim of Defendant No.1 is concerned regarding ownership over the land in question, it has been held in the judgment that the Defendant No.1 failed to establish that. That becomes a closed chapter which would not be reopened before the trial Court.

6. We may note once again that before the trial Court, on remand, the Plaintiff would get scope to get his case proved in conclusive manner by producing additional evidence. Defendant No.1 has however been given an opportunity to rebut the evidence which might be adduced by the Plaintiff before the trial Court after remand.

7. Therefore, we find little ground to reopen the matter on the application for review. We cannot accept the plea of the Appellant that the matter should be settled by this Court itself by reviewing its judgment on the basis of the evidence on record as otherwise the matter would get delayed."




7. The trial court, therefore, decided the issue whether Charan Das was the brother and co-sharer of Raj Man Rai and it is only for this limited purpose that the case was remanded and the parties were given opportunity to adduce further evidence.

8. The plaintiff by way of further evidence produced a document dated 15<sup>th</sup> February 1966 executed by Dhan Rupri Raini in the presence of witnesses in respect of the suit property. Two witnesses Jardas Rai and Birkha Man Rai were examined on 27<sup>th</sup> September 1999. The defendant did not produce any witnesses and cross-examined these witnesses.

Witness Jardas Rai in his deposition has stated that he knows the sons of Riki Dhan as Charan Das Rai and Raj Man Rai. As per this witness, Charan Das had one son, i.e Aring Das, the respondent-plaintiff. Raj Man Rai had one son called Padam Dhoj Rai and one daughter named Dhan Rupri Raini. This witness further deposed "Padam Dhoj became



traceless and was not married. Dhanrupi also did not marry. She died in 1971. Bir Bdr. Rai Def. No.1 has migrated from Nepal. I do not know anybody named Lhakman Rai and Daulat Rai.” This witness further deposed that the document dated 15<sup>th</sup> February 1966 was prepared by Dhan Rupai Raini in presence of witnesses by which the suit property was given to the plaintiff being the ‘hawkala’ in presence of witnesses such as Sukman Rai, Mandal, Kesherman Gurung, Sanman Rai, Man Bahadur Rai and Witness Jardas Rai himself and that exhibit P.P.1 was scribed by one M.B. Tamang on the request of Dhan Rupai Raini. Jardas Rai identified and proved his signature on exhibit P.P.1 as exhibit P.P.1 ‘a’ and the signature of Mandal Sukman Rai as exhibit P.P.1 ‘b’, Kesherman Gurung’s signature as exhibit P.P.1 ‘c’ and signature of San Man Rai and Man Bahadur Rai as exhibit P.P.1 ‘d’ and P.P.1 ‘e’ respectively. Exhibit P.P.1 ‘f’ was identified as the signature of the scribe M.B. Tamang and exhibit P.P.1 ‘g’ was identified as the partially visible thumb impression of Dhan Rupai Raini. This witness deposed that the scribe no longer resides in Sikkim and of the four, other witnesses only San Man Rai is



still alive but is aged 75 years and hard of hearing. Trial Court recorded that the learned Counsel for the defendant No. 1 strongly objected to the document dated 15<sup>th</sup> February 1996 being exhibited and marked as exhibit P.P.1 and to the identification of exhibit P.P.1 by PW-1, and the identification of exhibit P.P.1 'c' to P.P.1 'g'. After a thorough discussion the trial court is of the view that reliance cannot be pressed on the documents dated 15<sup>th</sup> February 1966 and while rejecting the said document the trial court observed as follows :-

“37. .... the plaintiff has not been able to satisfy this Court as to how the same 'has miraculously been produced at this stage despite the fact that it pertains to the root of the dispute between the parties and which dispute has been adduced and advanced before several forum. Further, the plaintiff's claim that he was unable to produce the same earlier but has only "very recently recovered one document dated 15.2.66 from the waste paper basket after a great search" is a most unconvincing explanation especially when it pertains to so vital a document, and hence in my opinion by no stretch of imagination can a Court of law rely on such a document.”

9. Under cross-examination, this witness stated that he does not know the name of the father of Riki Dhan Rai or when Riki dhan died. He does





not know the wife of Charan Das as he had never seen her. Charan Das died in the year 1943 when witness Jardas Rai was aged about 7 years. In cross-examination, he further admitted that Aringdas Rai, the respondent-plaintiff is his brother and he also admitted that the plaintiff's contention that the suit land stands recorded in his name in the first survey operation in 1950-54 and the second survey operation of 1979-80 is correct. In the cross-examination, this witness has stated "statement of the plaintiff that he is the owner of suit land but in the survey operation of 1979-80 the said land was wrongly recorded in the name of Padam Dhoj Rai is a correct statement of the plaintiff. It is also correct that when the suit land was wrongly recorded in the name of Padam Dhoj Rai the plaintiff had made a complaint to the Amin. The statement of the plaintiff that, though the suit land was wrongly recorded in the name of Padam Dhoj Rai, but he is in continuous possession from his childhood is a correct statement. The suit land is the personal property of plaintiff inherited from Charan Das Rai. The statement of the plaintiff that the suit land never belonged to Padam




Dhoj Rai is a correct statement. It is not a fact that my above statement are false statement.”

10. Birkha Man Das, another witness was examined on 27<sup>th</sup> September 1999. He deposed that the respondent-plaintiff Aringdas Rai is his son-in-law and that the defendant No.1 Bir Bahadur Rai is the husband of his grand daughter. He further stated that he had seen Riki Dhan Rai in his childhood and that Charan Das Rai and Raj Man Rai were the two sons of Riki Dhan Rai. According to this witness, Aringdas Rai, the respondent-plaintiff is the son of Charan Das and Padam Dhoj Rai and Dhan Rupini are the son and daughter of Raj Man Rai. Padam Dhoj Rai went missing and remained unmarried. This witness stated that Dhan Rupini died about 30 years ago and was a Lamini (nun) and was not married. He has also stated that he does not know anyone by the name of Lakman or Daulat Man Rai. It is also stated that the respondent-plaintiff has been cultivating the land since he was 9 to 10 years old. Under cross-examination, Birkha Man Das stated that one Hari Das Rai is his own son



and he lives at Dalapchen and cultivates his own land at Rigu. Besides cultivating his own land he does not cultivate any other land of any other person. Aring Das Rai, respondent-plaintiff has not filed the suit against the son of this witness, Hari Das Rai in respect of the suit land of the present case. This witness under cross-examination admitted that respondent-plaintiff is the husband of his only daughter. He does not know the wife of of Riki Dhan Rain or about his brothers. He does not know when Riki Dhan expired. He does not know the wife of Charan Das Rai or when either of them died, nor does he know where Charan Das used to live during his life time.


11. Oral evidence of the respondent-plaintiff's witnesses examined by the trial Court clearly goes to establish the relationship between Charan Das and Padam Dhoj Rai as brothers. Jardas Rai proved that the respondent-plaintiff and Padam Dhoj Rai were brothers being sons of Charan Das Rai and Raj Man Rai, who in turn were the sons of Riki Dhan Rai. The respondent-plaintiff's witness Jardas in his evidence had clearly



established that the father of the respondent-plaintiff Charan Das Rai and Raj Man Rai are brothers. The witness is related to the respondent-plaintiff and knows all family ties of the respondent-plaintiff. Jardas Rai is a village elder and is well acquainted with his villagers and was also a witness. Birkha Man Das is 86 years old and shows that witness Birkha has knowledge of the family ties of both parties. Witness Birkhaman had seen Riki Dhan and deposed that Charan Das and Raj Man are the two sons of Riki Dhan and Aring Das, respondent-plaintiff is the son of Charan Das while Raj Man had a son called Padam Dhoj Rai and daughter Dhan Rupri Raini. The evidence of both witnesses cannot be disregarded. The evidence of these two witnesses established that Charan Das Rai and Raj Man Rai are brothers. I agree with the conclusion reached by the learned trial Court that both the witnesses Jardas Rai and Birkha Man Rai produced by respondent-plaintiff are elderly persons of the village and there is no reason that their evidence is to be doubted as the witness, Jardas Rai is 65 years old and witness Birkhaman Das is aged 86 years. Jardas Rai and Birkhaman Das are related to the respondent-



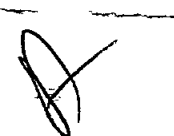
plaintiff as Jardas is plaintiff's brother and Birkhaman is plaintiff's father-in-law. Birkhaman Das has also deposed that the appellant-defendant No.1 Bir Bahadur Rai is also related to him being the husband of Birkhaman Das's grand daughter. Therefore, Birkhaman Das cannot be said to be interested witness and evidence of Birkhaman Das was rightly relied upon the trial Court as an independent witness. As regards the evidence of Jardas Rai, it also clearly goes to show that he is conversant with the family ties of the parties. Jardas Rai has deposed "I know the sons of Riki Dhan Rai, they are Charan Das and Rajman Rai, both of whom are no more." Jardas Rai also stated that Rajman had one son and one daughter named Padam Dhoj Rai and Dhan Rupai Raini. The evidence of Birkhaman Das in establishing the relationship between Charan Das Rai and Rajman Rai as brothers is clear as he deposed " I also know Charan Das and Rajman Rai who are the two sons of Riki Dhan Rai." Under cross-examination, this fact has not been controverted and there is nothing in cross-examination of Birkhaman Das to demolish that



statement and therefore, the trial Court has rightly relied upon the evidence of these witnesses. The trial Court came to the conclusion that the plaintiff has been able to establish the fact that Riki Dhan Rai had two sons Charan Das and Raj Man Rai, as is evident from the oral evidence adduced by plaintiff's witnesses before the trial Court. Paragraph 39 of the judgment of the trial Court is reproduced below :-

"39. At this state I would like to briefly refer to the relevant observations of the Hon'ble High Court in Civil Appeal No.1/98 Aringdas Rai Vs/- Bir Bahadur Rai and another, in that the Hon'ble High Court held that

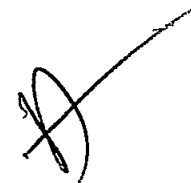
- (a) Padam Dhoj Rai must be presumed to be dead, under the given circumstances (Para 8)
- (b) Dhan Rupi Raini dies issueless (Para 9)
- (c) That the claim of acquisition of title over the property by way of adverse possession is belated and casual in nature. The evidence in this respect is very scanty. Defendant No.1 put main stress on long possession but we have already noticed that mere long possession cannot confer title (Para 11).
- (d) The status of defendant No.1 cannot be more than an 'adhiayar' (Para 19) " as till before 1984 the defendant No.1 never claimed ownership, rather he accepted the



plaintiff as the owner of the property and himself as an 'Adhiyar' under him." (para 13)"

In Civil Review Appeal No. 5 of 1998 Aringdas Rai Vs/- Bir Bahadur Rai and others this Court held that so far as the claim of defendant No.1 (appellant) is concerned regarding ownership over the land in question, it has been held in the judgment passed in Civil 1<sup>st</sup> Appeal No. 1/98 that the defendant No.1 (appellant) failed to establish that. That becomes a closed chapter which would not be reopened before the trial Court.

12. Records show that the respondent-plaintiff led evidence in the case before the trial Court on 27<sup>th</sup> September 1999. The appellant-defendant had to lead evidence on 7<sup>th</sup> October 1999. But the appellant did not produce his witnesses on 7<sup>th</sup> October 1999. The appellant-defendant submitted that he was unable to bring his witness as the witness was not in a condition to depose due to illness. One witness may be lying ill, but there was no bar for the appellant-defendant No. 1 to produce another witness. The appellant was represented by lawyer all through in



the trial Court. However, the appellant was given time till 11<sup>th</sup> October 1999 to produce witness to support his defence. On 11<sup>th</sup> October 1999, the appellant neither produced witness nor he applied for examination of witness on commission. This is a Civil Suit of 1985. I am of the view that sufficient opportunity was given to the appellant by the trial Court and he did not avail of it.

13. I hold that Charan Das Rai was the brother and co-sharer of Raj Man Rai. I am in full agreement of the findings of the trial Court. I am also in the agreement with trial Court that respondent-plaintiff is entitled to the reliefs as claimed by him and enumerated in paragraph 21(i), (ii) and (iii) of the plaint.

14. In the result, the appeal is dismissed. However, there will be no order as to costs.

  
(ANUP DEB)  
JUDGE

27/9/24