

THE HIGH COURT OF TRIPURA
AGARTALA

RSA No.27 of 2013

Sri Haralal Sutradhar,
son of late Suresh Sutradhar,
village & P.O. Fulkumari No.2,
Sub-Division: Udaipur,
P.S. Radhakishorepur,
District: South Tripura, presently Gomati

.....Appellant

- Vs -

- 1. Smt. Sunati Paul,**
Wife of late Kumud Bihari Paul,
resident of village & P.O. Phulkumari No.2,
Sub-Division: Udaipur,
P.S. Radhakishorepur,
District: South Tripura, presently Gomati
- 2. Sri Uttam Paul,**
son of late Kumud Bihari Paul,
resident of village & P.O. Phulkumari No.2,
Sub-Division: Udaipur,
P.S. Radhakishorepur,
District: South Tripura, presently Gomati
- 3. Sri Sajal Paul,**
son of late Kumud Bihari Paul,
resident of village & P.O. Phulkumari No.2,
Sub-Division: Udaipur,
P.S. Radhakishorepur,
District: South Tripura, presently Gomati
- 4. Sri Bijan Paul,**
son of late Kumud Bihari Paul,
resident of village & P.O. Phulkumari No.2,
Sub-Division: Udaipur,
P.S. Radhakishorepur,
District: South Tripura, presently Gomati
- 5. Sri Tapas Paul,**
son of late Kumud Bihari Paul,
resident of village & P.O. Phulkumari No.2,
Sub-Division: Udaipur,
P.S. Radhakishorepur,

District: South Tripura, presently Gomati

- 6. Smt. Mani Paul,**
daughter of late Kumud Bihari Paul,
resident of village & P.O. Phulkumari No.2,
Sub-Division: Udaipur,
P.S. Radhakishorepur,
District: South Tripura, presently Gomati
- 7. Smt. Manju Paul,**
daughter of late Kumud Bihari Paul,
wife of Sri Dulal Chandra Deb,
resident of village & P.O. Phulkumari No.2,
Sub-Division: Udaipur,
P.S. Radhakishorepur,
District: South Tripura, presently Gomati

.....**Respondents**

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

For the appellant : Mr. S. Kar Bhowmik, Advocate

For the respondents : Mr. S.M. Chakraborty, Senior Advocate
Ms. P. Sen, Advocate

Date of hearing : **13.01.2017**

Date of delivery of Judgment and order : **28.02.2017**

Whether fit for reporting : **No**

Judgment and Order

This is an appeal under Section 100 of the CPC from the judgment dated 24.04.2013 delivered in Title Appeal No.03 of 2012 by the District Judge, South Tripura, Udaipur. By the order dated 10.07.2013, the following substantial questions of law were framed by this court for hearing of the appeal:

- “(i) Whether the certified copies of partition deed No.5044 of 1978 marked Ext.3, certified copy of the sale deed No.5219 marked Ext.7, certified copy of the sale deed No.426 marked Ext.8 have been admitted illegally waiving the prescription of Section 65 of the Evidence Act? and**
- (ii) Whether the non-arraigning of Subodh Chandra Paul, a co-sharer in terms of Ext.3, the partition deed No.5044 of 1978 has vitiated the impugned judgment?”**

2. The plaintiff-respondents filed the suit being Title Suit No.1 of 2011 in the court of the Civil Judge, Senior Division, South Tripura, Udaipur [as it then was] for declaration of right, title and interest and for recovery of the possession of the suit land as described in the Schedule-B in the plaint measuring more or less 0.09 acre. The plaintiffs have clearly stated that the father of the plaintiff No.2 and 7 and husband of the plaintiff No.1 namely Kumud Behari Paul along with his brother Subodh Chandra Paul purchased a tract of land measuring 0.90 acre by the registered sale deed dated 24.09.1976 and thereafter by the deed of partition, the land was amicably separated between those two brothers. By virtue of the said partition deed under No.5044 the predecessor of the plaintiffs got the land measuring 0.55 acre and the said land has been recorded as C.S. Plot No.1243 pertaining to Khatian No.385 of Mouja Fulkumari, Sub-Division-Udaipur. A part of the said land had been forcibly occupied by the defendant-appellant on 16.02.2012, during the lifetime of Kumud Behari Paul. Kumud Behari Paul untimely died on 01.04.2006. After death

of Kumud Behari Paul, the plaintiffs as legal heirs of Kumud Behari Paul demanded the vacant possession of the suit land by a notice issued on 24.06.2010. The notice was duly received by the defendant-appellant on 29.06.2010. The defendant-appellant by filing the written statement has stated inter alia as under:

"That, admittedly Kumud Behari Paul was the trueful owner in possession of the suit land and he is urgent need of cash money to mitigate the marriage ceremony of his eldest daughter- Smt. Manju Paul sold the entire suit land on 03/12/1993 A.D. to the defendant on receipt of settled consideration money of Rs.13,000/- (Rupees thirteen thousand) in cash from the defendant and on that day said Kumud Behari Paul on receipt of consideration money and handed over the possession of the suit land to the defendant in presence of local people of that locality, namely Subal Sutradhar, Smt. Rangmala, Sri Bibhas Saha and others. Since purchase defendant had started to possess the suit land as owner without any sort of disturbance from any corner within the knowledge of the Kumud Behari Paul and his family members and local people."

3. It has been further asserted in the written statement that after completion of the marriage ceremony of the daughter of Kumud Behari Paul, the defendant on 02.02.1994 along with the local people namely Subal Sutradhar visited the house of Kumud Behari Paul and requested him to execute and register the sale deed for the suit land in his favour, but said Kumud Behari Paul had brazenly denied to execute and register the sale deed for the suit land in his favour by stating that he would not execute and register the sale deed unless an additional sum of Rs.5000/- be paid to him beyond the settled consideration money of

Rs.13,000/-, but the defendant failed to accommodate him complying with such illegal demand of Rs.5000/- and raised protest against such conduct. Then Kumud Behari Paul told the defendant to return the consideration money received by him amounting to Rs.13,000/-. At that stage also the defendant raised protest. The entire episode did occur, in presence of the witnesses. Having stated thus, the defendant has claimed that from 02.02.1994, the defendant had started to possess the land adversely denying the right title and interest of Kumud Behari Paul. Since the suit has been filed on 03.01.2011, the plaintiffs do not have right to recover as for recovery of possession the period of prescription is 12(twelve) years for the day when the possession becomes adverse.

4. The trial court after recording the evidence, by the judgment dated 20.12.2011 dismissed the suit holding inter alia:

"I have considered the averment made by both sides relating to admissibility of the secondary evidence in respect of Ext. 3, 7 & 8. As per section 65 of Evidence Act which says that case in which secondary evidence relating to document may be given – secondary evidence may be given of existence, condition or contents of document in the following cases :

Section 65(a) of the Evidence Act shows that cases in which secondary evidence relating to of a document is admissible.

(i) When the original is shown or appears to be in the possession or power- of the person against whom the document is sought to be proved or (ii) of any person who is out of reach of, or not subject to, the process of the court or (iii) of any person legally bound to produce it, when

such person does not produce it after notice i.e. notice under Section 66.

The plaintiffs of this case failed to state in evidence or in his plaint that how the case falls under Section 65(a) of the Evidence Act. Subodh Ch. Paul is admittedly brother of late Kumud Behari Pal and the defendants of this case is one Haralal Sutradhar who is no way connected with Sudobh Ch. Paul. Subodh Ch. Pul is not the opposite party in this present case and the plaintiff of this case also fails to prove that said Subodh Ch. Paul is out of reach or not subject to process of the court or Subodh Ch. Paul is legally bound to produce it after notice. The plaintiff of this case has failed to bring the case U/S 65(a) of the Evidence Act relating to production of secondary evidence in support of the partition deed and the sale deed. Hence, the secondary evidence laid by the plaintiffs side in support of Ext. 3,7 & 8 cannot be taken into evidence. Moreover, secondary evidence of contents of a document is admissible until non-production of the original is accounted for, so as to bring it within one or other of the cases provided for under section 65 of the Indian Evidence Act. Also party is entitled to give other secondary evidence of the contents of the original when non-production of original is satisfactorily accounted for. The plaintiffs of this case merely stated in his para-2 of their plaint that registered sale deed and the original partition deed is in custody of Subodh Ch. Paul. But the plaintiff of this case failed to issue any notice upon the said Subodh Ch. Paul for production of the same. Moreover a private sale deed which has been registered cannot be said to a public document within the meaning of Section 74(2) of the Evidence Act. As the sale deed is a private document, the contents of the secondary evidence of sale deed must be proved either by calling the volume book from the Sub-Registrar Office where it was registered or by bringing the case within Section 65 of Indian Evidence Act. As it has been already discussed above that in the plaintiffs of this case has failed to bring his case within the meaning of Section 65(a) of the Evidence Act and there is no step on behalf of the plaintiff's side for calling of volume book etc. from Sub-Registrar Office for proving the registered sale deed and partition deed which is a fault on the part of the plaintiffs side for which he should not get any benefit. Merely production of certified copy of sale deed cannot prove the contents of it. The basis or the foundation must be laid by the parties for production of said certified copy of sale deed. The plaintiffs of this case failed completely to prove Ext.3, 7 & 8 though he was having ample opportunity to issue notice upon said Subodh Ch. Paul under whose custody the original sale deed and partition deed were lying and also as the

plaintiff failed to prove the sale deed and partition deed by calling the volume book from the Sub-Registrar Office. Hence, the plaintiff of this case, in my opinion has failed to prove the contents of Ext. 3,7 & 8 respectively, on the basis of which the plaintiffs of this case are claiming right, title and interest over the suit land.”

It has been further observed in the said judgment dated 20.12.2011, that even though the plaintiff was dispossessed on 16.12.2000, but the plaintiffs had not taken any step against the defendant. Thus, dispossession on 16.12.2000 from the suit land, according to the trial court, is doubtful.

5. Being aggrieved by the said judgment dated 20.12.2011, the plaintiffs preferred an appeal under Section 96 of the CPC in the court of the District Judge, South Tripura, Udaipur being Title Appeal No.3 of 2012. After hearing the parties, by the impugned judgment dated 24.04.2013, the judgment dated 20.12.2011 has been reversed holding that the origin of the title comes out from the evidence even the defendant has contended that on 03.12.1993 for urgent requirement of money for purpose of marriage of his elder daughter, he had proposed to sell the suit land on consideration of Rs.13,000/-, in presence of witnesses and he took over the possession of the suit land. But the land could not be transferred. But according to the plaintiffs, the suit land was forcibly occupied by the defendant. PW-1, Uttam Paul has stated that the defendant had forcibly occupied the suit land and began to construct hut there on. PW-2, Parimal Shil stated that

the defendant forcibly occupied the suit land on 16.12.2000. Such statement has also been supported by Jatindra Debnath, PW-3. The trial court did not, according to the first appellate court, consider the registered sale deed and the registered partition deed on the plea that it is not admissible under Section 65 of Evidence Act as for admitting a secondary evidence, the requirement of law has not been followed. Apart that document, khatian No.385 which is a public document was admitted in the evidence. Since the original sale deed or the partition deed was not produced by the plaintiffs, the plaintiffs' case was not believed by the trial court. While reversing the said finding, the first appellate court has observed as follows:

"It is also proved from the evidence on record that the defendant-respondents on the plea of purchasing the land entered into the suit land evicting the plaintiff-appellants. In one hand they claimed adverse possession. Again stated that the suit land was purchased by them. So, better title of the plaintiff-appellants is established by evidence. Record of right is created in favour of the plaintiff-appellants. So, on careful scrutiny and analysis of the evidence it is proved that the plaintiff-appellants have better title and interest over the suit land and they are entitled to get a decree declaring their right, title and interest and recovery of possession."

[Emphasis added]

6. In that perspective, the first appellate court has held that the trial court has committed serious error in admitting those certified copies of the sale deeds [Exbt.7 and 8] and the partition deed [Exbt.3]. It has been clearly observed in the impugned judgment that the plea that the defendant purchased the suit land

has been counteracted by their claim of adverse possession. The defendant was blowing hot and cold in the same breath. Thus, the defendant has no right, title and interest over the suit land and he is to be considered as a trespasser over the suit land. Thus, the plaintiffs are entitled to get a decree of recovery. Hence, this judgment dated 24.04.2013 is under challenged in this appeal.

7. Mr. S. Kar Bhowmik, learned counsel appearing for the appellant has strenuously submitted that the title over the suit land has not been legally proved as the basic documents were not admitted in the evidence. While admitting the certified copies of the sale deeds and the partition deed [Exbt.7, 8 and 3 respectively] the procedure as laid down under Section 65 of the Evidence Act was not followed.

8. Mr. Kar Bhowmik, learned counsel has defended the judgment dated 20.12.2000 passed by the trial court. He has further referred to a few decisions in support of his contention that unless the requirement of Section 65 of Indian Evidence Act is observed, the secondary evidence cannot be admitted in the evidence. For the appellant, the following decisions have been relied on. **Bidhan Paul vs. Paresh Chandra Ghosh** reported in **AIR 2002 Gauhati 46**, **Narattam Das vs. Md. Masadar Ali Barbhuiya** reported in **1991 (1) GLR 197** and **J. Yashoda vs. K. Shobha Rani** reported in **2007(5) SCC 730**. In all those judgments it has been held that a private sale deed or a partition

deed cannot come within the meaning of Section 74(2) or for that purpose under Section 77 of Evidence Act. In the matter of private documents, not being the public documents, the condition of Section 65 shall be observed before secondary evidence can be admitted. Secondary evidence or the content thereof cannot be admitted without production of the original being first accounted for in such a manner as provided in Section 65 of the Evidence Act.

9. Mr. Kar Bhowmik, learned counsel appearing for the appellant has further submitted that the record of right is not a proof of title. In this regard, he has relied on a decision of the apex court in **Narain Prasad Aggarwal (Dead) vs. State of Madhya Pradesh** reported in **(2007) 11 SCC 736**, where it has been held thus:

"Record of right is not a document of title. Entries made therein in terms of Section 35 of the Evidence Act although are admissible as a relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt or dispute that such a presumption is rebuttable."

[Emphasis added]

10. In the restatement of law as was enunciated in **State of U.P. vs. Amar Singh and Others** reported in **(1997) 1 SCC 734**, the apex court had held as under:

"It is settled law that mutation entries are only for the purpose of enabling the State to collect the land revenue from the person in possession but it does not confer any title to the land. The title would be

derived from an instrument executed by the owner in favour of an alienee as per the Stamp Act and registered under the Registration Act."

11. To support the plea of adverse possession Mr. Kar Bhowmik, learned counsel has relied on a decision of the apex court in **Parsinni(Dead) and Others vs. Sukhi and Others** reported in **(1993) 4 SCC 375**, where the apex court had occasion to observe as under:

"Party claiming adverse possession must prove that his possession must be 'nec vi, nec clam, nec precario' i.e. peaceful, open and continuous. The possession must be adequate, in continuity, in publicity and in extent to show that their possession is adverse to the true owner. When the appellants claimed title to the suit lands it is sufficient for them to show that their possession is over and without any attempt at concealment so that the respondents against whom time is running, ought, if to exercise due vigilance to be aware of what is happening. The possession of the appellants was adverse to the respondents inasmuch as the respondents (sic appellants) ever since the marriage of the first appellant and her sister Chinto continued to remain in possession and enjoyment of the property in derogation of the right, title and interest hitherto held by the respondents."

The test therefore is whether the person who is claiming through had he held land for himself and if he did so, the mere fact that there was acquiescence or consent at the inception on the part of the other party makes no difference.

12. Mr. S. Kar Bhowmik, learned counsel appearing for the appellant has continued to contend that it is the position of fact, as proved that the defendant-appellant came into possession on the suit land on 03.12.1993 and he was in continuous position of

the said land till the filing of the suit. Thus by prescription, the right to recover had extinguished.

13. Mr. S. M. Chakraborty, learned senior counsel appearing for the plaintiff-respondents has submitted that the defendant has entirely failed to prove the fact of adverse possession, on the contrary his pleas are the mutually destructive. According to him the defendant in para-7, has clearly admitted that as part-performance, the defendant entered in the possession of the suit land. There cannot be any hesitation to hold that for purpose of admitting a certified copy of private document, the procedure as laid down in Section 65 of the Evidence Act has to be ordinarily observed. Thus the finding of the trial court in this regard cannot be held to be irregular.

14. For accepting the secondary evidence no reason as such has been provided by the first appellate court. Now two pertinent questions that would follow is that whether in existence of the admission of part performance made by the defendant, can it be held that the defendant has proved the fact of adverse possession in terms of Article 65 of the Schedule to the Evidence Act and whether there is foundational evidence accepting the secondary evidence for in respect of title of the suit land.

15. The defendant has clearly stated that in part-performance of the agreement to sale, he was handed over the

possession, but the predecessor of the plaintiffs did not execute the sale deed but he continued in the possession of the suit land 'without any sort of disturbance' from any corners within the knowledge of Kumud Behari Paul and his family members and local people. When the plaintiff demanded vacation of possession, he denied to vacate the suit land and thus he contended that his possession had turned adverse to the true owners of the land. When a part-performance is admitted, can a party claim adverse possession against the true owner. In **Mohan Lal Kachru and Others vs. Mirza Abdul Gaffar and Another** reported in **(1996) 1 SCC 639**, it has been observed as under:

"As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., upto completing the period of his title by prescription 'nec vi nec clam nec precario'. Since the appellant's claims is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

16. The plea of the defendant is the part-performance unambiguously based a sale agreement [oral] and he has categorically and definitely admitted that in part-performance of the sale agreement he was handed over the possession. Except making a general statement, he could not show the nature of

possession whether it was ever changed its nature on demonstration of adversity. Hence, the plea of adverse possession as raised by the defendant is bound to fall through. The other question that surfaces for response is that whether the title has been proved by the plaintiff-respondents or not. The trial court by taking aid of the provisions of Section 65 of the Evidence Act has held that since the procedure has not been followed disclosing the custody and proving that the document falls within the categories of 'copies' as laid down in Section 65 of the Evidence Act those cannot be admitted in the evidence. For this reason, this court is to revisit the plaint where it has been stated that:

".....while the aforesaid brothers were in absolute owners in possession of the said land they separated their respective share by mutual partition among themselves and executed Deed of Partition to that effect and that has been registered being No.5044 for the year 1978 Book No.1 Volumn No.46 Page No.89 to 92 of the Office of the Sub-Registrar, Udaipur, South Tripura and both the original Registered Sale Deed No.5219 dated 24.09.1976 AD and the original Partition Deed are in custody of said Subodh Chandra Pal.

That Kumud Behari Pal had procured on 09-11-1992 AD one certified copy of the Deed of Partition being No.5044 for the year 1978, and the Plaintiff now apply for the certified copy of the Registered Sale Deed No.5219 dated 24-09-1976 AD and craves the leave of the Hon'ble Court to produce the same as and when get delivery of the same."

17. They have clearly stated that the custody of the documents was with Subodh Chandra Pal and as a result they had disclosed that those documents were not in their custody. Thereafter, they produced the sale deeds and the partition deeds

[Exbt.7, 8 and Exbt.3 respectively in the form of the certified copies]. The defendant had raised objection regarding the procedure. There cannot be any amount of dispute that the certified copies are duly authenticated by the issuing authority, and those have been admitted in the evidence. The partition deed [Exbt3] was executed on 24.11.1978 and the sale deeds were executed on 31.01.1966. Both the documents are thirty years old. That apart it has been also admitted by the defendant that predecessor of the plaintiffs namely Kumud Behari Pal is the true owner of the suit land. There was no objection against the record of right [Exbt.1] or their entries whereby the name of the predecessor of the plaintiffs namely Kumud Behari Pal has been recorded as holder of the title. In **M. Chandra Vs. M. Thangamuthu and Another** reported in **(2010) 9 SCC 712**, the apex court has held that:

"It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasized that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party."

18. What do we understand by the foundational evidence? So far the authentication is concerned it should be by the person who has authenticated the document by comparing with the original or an authenticated copy. In this case, the authentication has been made by a Competent Officer of the District Sub-Registry office, but the said Officer has not been examined in the trial of the suit and the defendant has raised objection regarding admissibility of the said certified copy. But what is more important is that when the defendant himself has admitted the ownership of the predecessor of the plaintiff namely Kumud Behari Pal and claimed to have entered into an agreement for sale whether can he raise any objection against any document demonstrating his title. Even though, he may legally raise some technical objection, but he is estopped to raise any objection relating to the ownership of the predecessor of the plaintiffs.

19. The foundational evidence, the entry in respect of the predecessor of the plaintiffs namely Kumud Behari Pal in the khatian [Exbt.1] if read with the admission made by the defendant in paragraph-7 would provide substantive reason to whittle down the objection raised by the defendant. Even though, there is irregularity in the process, but that irregularity in view of the said foundational evidence cannot stand in the way of admitting the Exbt-3, 7 and 8 for reading their content. Thus, there is no infirmity in the finding as returned by the first appellate court

inasmuch as the plea of adverse possession had fallen through. The defendant's status in the given circumstances, is not above that of a trespasser who according to the plaintiffs', entered into the possession on 16.12.2000.

20. The first appellate court did not commit any illegality, if viewed in this manner, in declaring the title of the suit land in favour of the plaintiffs as the legal heirs of their predecessor namely Kumud Behari Pal and issuing a decree for recovery of the khas possession of the suit land. The defendant is directed to hand over the vacant possession of the suit land within a period of 3(three) months from the date of decree and if the defendant does not hand over the vacant possession to the plaintiffs, the plaintiffs will be entitled to recover the suit land by the process of the court.

In the result, the appeal stands dismissed subject to the additional direction as made for substantive justice.

Draw the decree accordingly.

Send down the LCRs thereafter.

JUDGE

Meumita