At Residence **Reserved A.F.R.**

Case :- WRIT - B No. - 6690 of 1987

Petitioner :- Dwarika
Respondent :- D.D.C. And Others
Counsel for Petitioner :- A.N. Bhargava
Counsel for Respondent :- S.C.,Prakash Narayan Tirpathi,Triloki Nath

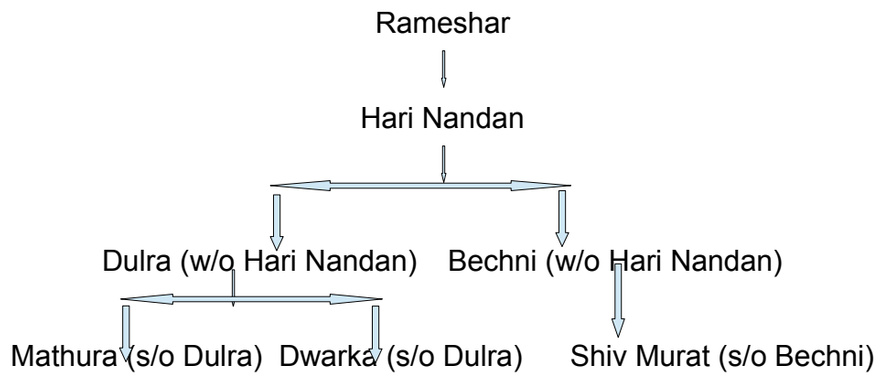
Hon'ble J.J. Munir,J.

1. Heard Sri A.N. Bhargava, learned Counsel for the petitioner and Sri Triveni Shankar, learned Counsel appearing on behalf of respondent nos.2/1 to 2/8.

2. This writ petition is directed against an order dated 30.03.1987 passed by the Deputy Director of Consolidation, Varanasi in Revision no.251/228/9225, arising from proceedings under Section 9-A (2) of the U.P. Consolidation of Holdings Act, 1953 (for short, the Act). The Deputy Director of Consolidation, Varanasi by his judgment and order aforesaid has reversed the two Authorities below and allowed the objections brought by respondent no.2, Mathura, now represented by his heirs and legal representatives.

3. The dispute between parties concerns title to *Khata* no.287 of Village Jathi, Pargana Kol Asla, Tehsil and District Varanasi. While the petitioner, Dwarka claims exclusive title to the said *Khata*, the second respondent, Mathura asserts a half share therein. It may be indicated here that the original parties to the *lis*, both Dwarka and Mathura, sons of Har Nandan are dead; they are represented before this Court, now by their heirs and legal representatives, petitioners nos.1 to 1/6 and respondent nos.2/1 to 2/8, respectively. It is not in issue between parties that Dwarka and Mathura were brothers. For

felicity of understanding about the rights of parties, their relationship is shown by the following pedigree:



4. It appears that Hari Nandan was a *Zamindar* who had two wives, Dulra and Bechni. Dwarka and Mathura are sons born to Hari Nandan of his wife, Dulra, whereas Shiv Murat is a son born of his other wife, Bechni. It is not in issue between parties that *Khata* no.287 was transferred to Dwarka and Bechni by Hari Nandan through a registered *Patta Istamrari*, dated 24.04.1923. It is also not in issue that on the basis of the aforesaid *Patta*, Dwarka and Smt. Bechni came to be recorded in the *Khatauni* for the *Fasli* Year 1334 (equivalent to the Calendar Year 1926) with a remark that the rights are three years old. The aforesaid *Patta* in original and a certified copy of the *Khatauni* of the year 1934 *Fasli* were filed by Dwarka. It is also not in issue between parties that Dwarka remained recorded from 1926 right upto the year 1974 when these consolidation operations commenced, to the exclusion of Mathura, his brother. Bechni, of course, was recorded along with him but there is no issue about her rights, or for that matter, her son and Dwarka's consanguine brother, Shiv Murat.

5. Dwarka's case is that *Khata* no.287 (hereinafter referred to as the property in dispute) after execution of the *Patta* dated 24.04.1923 in his favour, no longer remained property of his father, Hari Nandan or a joint family property of the *Zamindar*, but turned his exclusive property. Since he remained recorded

throughout from the year 1926 on that basis, right across *Fasli* 1359, when the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 came into force without objection from Mathura, upto the year 1974 when consolidation operations were notified, and these objections were filed, Mathura has no right to question his exclusive title to the land in dispute. The claim to a half share in the land in dispute by Mathura is without basis. The Consolidation Officer by his judgment and order dated 31.12.1974 rejected Mathura's objections. Mathura carried an Appeal to the Assistant Settlement Officer of Consolidation, Varanasi East, under Section 11 of the Act, who dismissed it by his judgment and order dated 12.05.1978, affirming the Consolidation Officer. On a further challenge laid by Mathura to both these orders before the Deputy Director of Consolidation, Varanasi, under Section 48 of the Act, the Deputy Director of Consolidation by his judgment and order dated 30.03.1987 allowed Mathura's Revision and reversed both the Authorities below, granting a half share to Mathura in the land in dispute. He, however, remitted the matter on a very limited part of Dwarka's claim to the Consolidation Officer, that is to say, that the land in dispute also included some properties self-acquired by Dwarka, that were not transferred to him through the *Patta Istamrari*, dated 24.04.1923. The Consolidation Officer, upon this limited point of remand was required to determine, if there was any such part comprising the land in dispute. Thus, for all intents and purposes, Mathura's claim to the land in dispute was accepted by the Deputy Director of Consolidation.

6. Aggrieved, the present writ petition has been filed.

7. The contention of the learned Counsel appearing for the petitioner is that the land in dispute did not remain a joint family

property in the hands of the *Zamindar*, Hari Nandan once it was leased out to Dwarka on 24.04.1923 through the registered *Patta Istamrari*. It was a property that was set apart from the joint holdings of the family and remained recorded in the name of Dwarka from 1926 to 1974 without demur from Mathura. It is also contended that the *Patta* under reference was executed in 1923, whereas Mathura was born in the year 1924, and, therefore, there was no basis to infer that the property remained joint, where Mathura could stake claim to a half share. Learned Counsel appearing for Dwarka has emphatically submitted that the Consolidation Officer and the Settlement Officer of Consolidation in Appeal have carefully scrutinized evidence to record firm findings of fact that it was Dwarka alone who was exclusive *bhumidhar* of the land in dispute, where there was no scope for Mathura to claim a share.

8. It is also argued by the learned Counsel appearing for the petitioner that the Revisional Authority has disturbed concurrent findings of fact recorded by the two Authorities below, without specifically reversing those findings, based on cogent evidence and good reasoning. The impugned judgment in his submission is, therefore, manifestly illegal.

9. Sri Triveni Shankar, learned Counsel appearing on behalf of respondents no.2/1 to 2/8 has, on the other hand, contended that the Revisional Court has relied upon a wealth of evidence and sound logic to reverse the two Authorities below. In particular, he has submitted that what has rightly weighed with the Revisional Authority are certain transactions post the admitted *Patta* in favour of Dwarka, that show that the land in dispute was considered to be a joint holding of the family always, the *Patta* notwithstanding. In particular, he has emphasized the fact that when the *Patta* dated 24.04.1923 was

executed by Hari Nandan in favour of Dwarka, Dwarka was a child of about 9 – 10 years. The *Patta*, therefore, was executed through his mother, Dulra acting for him as his guardian. The said fact, according to the learned Counsel, shows that there was indeed no acquisition of the land in dispute from the family by Dwarka, that would qualify it as his self-acquired property. The transfer was no more than an arrangement within the family from the funds of the joint family or the father himself, inasmuch as, there is no evidence to show that Dwarka as a child had funds of his own to pay consideration for the assignment made in his favour. Sri Triveni Shankar virtually says that the transfer is one in form but not in substance, so as to constitute the land in dispute, a separate and self-acquired property of Dwarka. It continues to be joint holding where both brothers, Dwarka and Mathura would have a half share each. In addition, it is submitted that the aforesaid submission of his finds support from distinctive facts about Dwarka and Mathura or the family, dealing with this property post assignment through the *Patta*, in favour of Dwarka.

10. To this end, Sri Triveni Shankar has referred to a family settlement of the year 1930 subscribed to by Shiv Murat, the consanguine brother of Dwarka and Mathura, besides Mathura and Dwarka acting through their guardian, Smt. Dulra where a family partition of the property was made, that includes the land in dispute, detailed in List-G to the said settlement. Likewise, there is a further reference to a registered partition deed, dated 20.01.1954 between parties. It is pointed out that this partition deed between parties finds reference in a subsequent sale deed dated 28.11.1962, executed jointly by Dwarka and Mathura in favour of a third party. This partition deed and the sale deed of 1962 read together, clearly acknowledge the joint rights of Dwarka and Mathura to the land in dispute.

11. A perusal of the impugned judgment shows that the Deputy Director of Consolidation has been much impressed by the fact that there are several instances, where Dwarka indeed, appears to have acknowledged rights of Mathura in the land in dispute. He has referred to a suit that the two of them filed together against a third party, under Section 229-B of the U.P. Z.A. & L.R. Act. He has taken into account the registered partition deed dated 20.01.1958, where rights of Mathura appear to have been acknowledged, as also the sale deed, dated 28.11.1962 that Dwarka and Mathura executed together, in favour of a third party. Rights of the third party have been noticed by the Deputy Director of Consolidation to be mutated in the revenue records, based on the sale deed dated 28.11.1962. Taking this acknowledgment by Dwarka into account, together with the circumstance that when the *Patta Istamrari* was executed in favour of Dwarka, he was but a child with no resources of his own to show that the land in dispute truly was a self-acquired property, may be from the family, the Deputy Director of Consolidation has held Mathura entitled to a half share.

12. This Court does not think that the Deputy Director of Consolidation is correct about his reasoning. A transfer of a particular *Khata* of the joint family property of the *Zamindar* made through a registered *Patta Istamrari* in favour of a minor son of the *Zamindar*, through the agency of his guardian, is a transfer of title of that part of the joint family property to the individual member. This transfer has been recorded in the *Khatauni* within three years, that is to say, in the year 1926. This record has continued to remain so in favour of Dwarka right through the date of vesting under the U.P. Z.A. & L.R. Act, until the year 1974 without challenge from any member of the joint family, including Mathura. Reliance placed on the evidence

of a family settlement of 1930 bringing about a partition of the land in dispute or that of the year 1954 which is a partition deed, coupled with an acknowledgment by Dwarka of Mathura's rights in the said property, permitting him to join conveyance of a part of that property in favour of some third party or a suit that Dwarka filed against a third party relating to the land in dispute, would not bring about an alteration to the title held and recorded. The title is held by Dwarka under a registered *Patta Istamrari* and recorded consistently in the revenue records, right upto the date of vesting under the U.P. Z.A. & L.R. Act and thereafter. Of course, after the date of vesting, Dwarka would have come to be recorded as a *bhumidhar*. There is no issue that the transfer was fraudulent or the rights of Dwarka recorded on its basis were forged or without right. It is difficult to read into this transaction of transfer by the *Zamindar* in favour of his son, while a minor through a *Patta Istamrari*, a principle that for lack of resources of his own in the hands of the minor son, the transfer though accepted for a fact is no transfer in the eye of law. The land in dispute once transferred cannot be regarded as a land of the *Zamindar*'s joint family. It has come through the conveyance, individually to Dwarka.

13. In this connection, reliance has been placed on behalf of Dwarka by Sri Bhargava on a decision in **Tribhuwan Nath and others vs. Deputy Direction of Consolidation, 1984 RD 137**, where it has been held that land recorded in the name of a son of a tenure holder during his lifetime brings about a fresh settlement, excluding the possibility of the land remaining inherited tenure, to be claimed by other co-sharers. In **Tribhuwan Nath and others** (*supra*), it has been held thus in paragraphs 10, 13 and 14 of the report:

> "10. If the land came to be recorded in name of Ram Prasad prior to death of Paltan, then he

could very well be taken to have ceased to be the tenure-holder of the land in dispute on his son being admitted as a tenant. It is well settled that no tenant can be superimposed on a sitting tenant. If Paltan was alive, then the name of Ram Prasad could not be recorded in the records unless Paltan ceased to be tenure-holder. Entry of the name of Ram Prasad during the life time of Paltan indicates that Paltan had ceased to be the tenure-holder of the land in dispute. It, therefore, cannot be said that Ram Prasad, whose name was recorded during the life time of Paltan held the land in dispute in the representative capacity in the life time of his father nor it can be said that the land in dispute continued to be ancestral land coming down from the time of Paltan.

13. Learned counsel for the opposite party in the end urged that there would be presumption regarding jointness of the Hindu family. He further urged that no evidence was led by the other side to indicate that there was severance in the family and as such even if the land would be deemed to have been settled afresh, it should be deemed to be joint property of all the members of the family. In support of his argument reliance was placed on decision reported in Bharat Singh v. Mst. Bhagirathi, AIR 1966 SC 405 wherein it has been laid down that even if mutation has been made in the name of a person of the family, it cannot be presumed that there was severance in the family. It was further held that the onus to prove it to be his exclusive property lies on the person, who asserts that the property was acquired after severance of the joint family. There is no dispute regarding the proposition of law laid down in the said decision. But in the present case the facts are altogether different.

14. As observed above it has been established from the evidence on record that the land in dispute was settled with Ram Prasad in the life time of Paltan and as such it cannot be said an acquisition by Ram Prasad in representative capacity. It is well settled that even a member of a joint family can acquire land in his own name. The land in dispute could certainly be taken to be a joint Hindu family property, if it was acquired by the joint family funds by the Karta of the family or any other member of the family. In the present case there is no such evidence; nor any such case was pleaded. In the present case Subedar admitted that partition took place some twenty-two years ago. But even during this period he could not produce any receipt regarding payment of rent in respect of the land

> in dispute; nor his name was ever recorded in possession over any portion of the land in dispute. In this view of the matter I do not find any error was committed by the Consolidation Officer as well the Settlement Officer (Consolidation) in recording a finding that Subedar is not co-tenure-holder in the land in dispute along with the petitioners and that the petitioners are the sole tenure-holders and are in exclusive possession. Thus, I find that the impugned order dated 27th March, 1980, cannot be sustained and deserves to be quashed."

14. The principle deducible is that a distinction has to be clearly made in case of land tenure or a land tenancy that is inherited from a father or for that matter acquired by survivorship as a member of a Joint Hindu Family on one hand, about which there may be a chance entry in the revenue record in the name of one member of the family, and a case where a son acquires an independent right in place of the joint family or the previous recorded tenure holder through a transaction *inter vivos* during the lifetime of the father/ earlier recorded tenure holder or the subsistence of the Joint Hindu Family. Here, is a case where there is a clear conveyance in favour of Dwarka, that has been promptly recorded and continued consistently in the revenue records over a long period of time, without objection from any member of the Joint Hindu Family or a co-sharer, including Mathura.

15. This Court is also of opinion that the Deputy Director of Consolidation has gone wrong about the law in inferring from admission an acknowledgment of title. An acknowledgment of title can be inferred from an admission provided there is basis to it. In this case, there is no basis to undo transfer of title to the land in dispute through the registered *Patta Istamrari* of 1923 in favour of Dwarka and its consistent reflection in the revenue entries, upto the date these objections were filed by Mathura. There is no challenge to that conveyance or a cancellation

thereof secured. A conveyed and acquired title cannot be undone by recording settlements, compromises, or even registered deeds of partition about a property that is not held jointly. To accept this, would be to permit a transfer that the law does not recognize.

16. The question whether title could be created by reason of acquiescence, waiver or estoppel arose for consideration of the Supreme Court in **Kamakshi Builders vs. Ambedkar Educational Society, (2007) 12 SCC 27**. The issue there arose in the context of a tenant claiming title on the basis of an oral gift by the landlord, who lateron entered into a development agreement with a third party in partnership. A partnership deed was executed between the landlord and the third party. A dispute having arisen between the landlord and the third party, it was referred to an Arbitrator. The Arbitrator made an award that was made rule of Court. Under the award, the landlord was directed to be paid a sum of Rs.4 lakhs by the third party, whereas the third party was declared to be the owner of the property. The tenant who had not paid rent for the past ten years was served with a notice to quit and payment of arrears of rent by the third party on the basis of acquisition of title to the demised premises. The tenant asked the third party to furnish particulars about acquisition of his claimed ownership to the property. The third party sued the tenant for recovery of possession and arrears of rent, besides damages for wrongful use and occupation of the suit property. In his written statement, the third party pleaded an oral gift said to be made in his favour by the landlord. In the alternative, a plea of adverse possession was raised. The aforesaid suit was filed by the third party in the year 1989. The facts showed that the tenant entered the suit property on a Eleven Months' Lease, dated 16.05.1973, granted by the landlord at a monthly rent of Rs.1200/-. The lease being

for a period of eleven months, expired in 1974. But, the tenant did not surrender his tenancy or vacate the premises. Rent was paid till December, 1976. Thereafter, no rent was paid. It was also not demanded by the landlord. Constructions were raised over the demised premises by the tenant after sanction of plans by the Development Authority, where it had established an educational institution. It was in the context of the aforesaid facts that their Lordships considered the question whether acquiescence on part of the landlord supported the plea of oral gift in favour of the tenant. It was held in **Kamakshi Builders** (*supra*) thus:

> "**23.** Acquiescence on the part of Respondent 3, as has been noticed by the High Court, did not confer any title on Respondent 1. Conduct may be a relevant fact, so as to apply the procedural law like estoppel, waiver or acquiescence, but thereby no title can be conferred.
>
> **24.** It is now well settled that time creates title.
>
> **25.** Acquisition of a title is an inference of law arising out of certain set of facts. If in law, a person does not acquire title, the same cannot be vested only by reason of acquiescence or estoppel on the part of other."

17. The principle that, therefore, emerges is that mere estoppel, waiver or acquiescence on part of one party cannot create title in favour of another, unless under the law there be some source of that right. In this case, drawing up of a settlement or inviting Mathura to join a suit brought by Dwarka against a third party relating to the land in dispute, or still more joining Mathura in a sale deed as a co-vendor, relating to a part of the land in dispute in favour of a third party, would be no more than acts that may lead to a plea of estoppel with no substantive right inhering in Mathura to support it.

18. Quite apart, a long continuing consistent revenue entry since much before the abolition of *Zamindari* and long thereafter, across the Basic Year (1359 *Fasli*) under the U.P. Z.A. & L.R. Act may not be conclusive evidence of title, but it certainly raises a presumption about it. Here, the entry has pre-dated the abolition of *Zamindari* by a good 23 years and continued thereafter for another 25 years, before it was objected to by Mathura, asserting his right as a co-sharer for the first time. It hardly works to dispel the presumption. This is so, because the long continuing entry in favour of Dwarka is founded on a registered conveyance (*Patta Istamrari*) executed in his favour by the then *Zamindar*, his father.

19. In view of the aforesaid clear position of law, the impugned judgment and order dated 30.03.1987 passed by the Deputy Director of Consolidation, Varanasi is manifestly illegal. It cannot be sustained.

20. In the result, the writ petition **succeeds** and is **allowed** with costs. The impugned order dated 30.03.1987 passed in Revision no.251/228/9225 is hereby **quashed** and the orders passed by the Settlement Officer of Consolidation and the Consolidation Officer are restored.

Order Date :- 30.03.2020
Anoop