
(2005) 12 GAU CK 0006
In the Gauhati High Court

Jagadish Shah and Others

APPELLANT

Vs

Smti. Kailashpatikalwar and Others

RESPONDENT

Date of Decision : 23-12-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 12, 100

Citation : (2006) 1 GLT 515

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Advocate : B.K. Goswami and T. Goswami, for the Appellant; D.K. Bhattacharjee, P.C. Borpujari, S. Chakraborty, P. Kataki and M. Khataniar, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Roy, J.

1. This appeal witnesses a challenge to the judgment Dated 12.4.1996 and decree dated 11.11.96 passed by the learned District Judge, Nagaon in Title Appeal No. I of 1995 affirming the judgment and decree dated 28.1.1994 passed by the learned Assistant District Judge, Nagaon Assam in Title Suit No. 85/78. The learned Courts below have dismissed the suit, the plaints Nos. 2 to 5 are in appeal.

2. I have heard Mr. B.K. Goswami, Senior Advocate assisted by Ms. T. Goswami, Advocate for the Appellants and Mr. D.K. Bhattacharyya, Senior Advocate assisted by Ms. S. Chakraborty, Advocate for the Respondents/principal Defendants.

3. The pleaded facts deserve to be noted at the outset. The pro forma Respondent/Plaintiff 1 instituted the aforementioned suit praying for a decree for declaration of his right, title and interest in the land described in Schedule "Ka" to the plaint, confirmation of possession in respect of land in schedule "Ka" thereof and for recovery of khas possession of the land in schedule "Ga" by

evicting the Defendants. At the time of institution of the suit, the proforma Respondent was a minor and therefore, it was filed by his mother Smti. Mira Devi as his next friend. The present Appellants during the pendency of the suit, having purchased a portion of the suit land were impleaded as Plaintiffs Nos. 2 to 5 in the suit. The predecessor in interest of the principal Respondents, Sita Ram Kalwar, was initially impleaded as the main Defendant. He having died during the pendency of the suit, his heirs (principal Respondents) were submitted in his place. On attaining majority, the proforma Respondent submitted an application under Order 32 Rule 12 CPC where after his mother and next friend Mira Devi was discharged from the suit and the proforma Respondent was permitted to proceed with it on his own. Though the Defendant Nos. 2 to 17 were impleaded as proforma Defendants, they did not contest the suit.

4. In short, the case of the proforma Respondent/Plaintiff No. 1 is that his father late Bhakat Ram Kalwar was the owner in possession of 4 Kathas of land covered by Dag No. 1529 of periodic patta No. 512 situated at Nagaon town having purchased the same some time in the year 1942-43. He thereafter sold 2 Katha 171/2 Lechas to Nandi Kalita, Himangsu Karmakar and Sontosh Singh and hence retained possession of the balance 1 katha 21/2 Lechas of land described in Schedule "Ka" to the plaint. He also constructed a two storeyed house over the suit land and used to reside there. On the death of his first wife, Bhakat Ram married Mira Devi some time in the year 1969 and out of the wedlock the proforma Respondent/Plaintiff No. 1 Tarun Kumar Kalwar was born. By a gift deed bearing No. 6293 executed on 8.6.1972 Bhakat Ram gifted the suit-land in favour of the proforma/Respondent/plaintiff No. 1 which was accepted on his behalf by his mother Miradevi Kalwar. The proforma Respondent/Plaintiff No. 1 thus came into possession of the entire suitland including the standing house thereon. The plaint contained the allegation that on the death of Bhakat Ram the original Defendant Sitaram Kalwar (predecessor in interest of the present Respondent Nos. 1 to 4) forcibly dispossessed the Plaintiff No. 1 from the house and land described in Schedule "Ga" to the plaint on 2.2.1978. On enquiry being made it transpired that in the meantime, Sitaram Kalwar had got his name mutated in respect of the "Ga" Schedule land. The reliefs in the suit were prayed for in the above backdrop.

5. In his written statement, the predecessor in interest of the contesting Respondents, apart from asserting that the suit was not maintainable in law contended that the proforma Respondent/Plaintiff had no subsisting right, title and interest in the suit land. According to him, his father late Ram Lakhnan Kalwar had come to Nagaon about 80 years back and started residing there. He had three sons namely Bhakat Ram (since deceased), Jotilal (since deceased) and Sita Ram (himself). Jotilal died as a bachelor and his parents also expired in or about 1940. It was a joint family and on the death of Ramlakhan, Bhakat Ram being the eldest member thereof became the karta. The suit land was purchased out of the joint family property earnings in the name of Bhakat Ram being the Karta of the family. A two storeyed building was also constructed on the land

where the members of the family used to reside jointly. On the death of his first wife, Bhakat Ram brought Mira Devi Kalwar as "Dhemoni" and the proforma Respondent/Plaintiff No. 1, Tarun Kr. Kalwar accompanied her. It was alleged that with the advent of Mira Devi and proforma Respondent/Plaintiff No. 1, the joint family started disintegrating and eventually an amicable partition was effected between the two brothers as a result whereof the land and houses described in schedule "Kha" fell in the share of Bhakat Ram and those in schedule "Ga" came to Sitaram Kalwar, the predecessor in interest of the principal Respondents. Accordingly Sitaram Kalwar got his name mutated in respect of schedule "Ga" land to which Bhakat Ram also extended his consent. A partition case was also filed by Sitaram and order as prayed for was passed. The predecessor in interest of the principal Respondents also denied the gift and transfer by sale by Mira Devi on behalf of the proforma Respondent. The allegation of forceful dispossession was also denied.

6. On the basis of the pleadings of the parties, the learned trial Court framed six issues of which issue Nos. 4 and 5 being of relevance for disposing of the instant appeal are extracted herein below:

Issue 4-Whether the suit property is a joint family property and whether the Defendants right is protected as per personal law?

Issue 5-Whether the Plaintiffs acquired any right, title interest etc. by sale deed executed by Mira Devi?

7. At the trial the Plaintiffs examined 9 witnesses including Mira Devi Kalwar R.W. 5 and proved and exhibited various documents including the gift deed and the sale deeds, the contesting Defendant Sri Sitaram Kalwar examined six witnesses including himself and also proved documents in support of his pleaded case.

8. The learned trial Court on a consideration of the pleadings of the parties and evidence on record decided issues No. 1 and 2 bearing on cause of action and partition in favour of the Plaintiffs. Issue No. 3 was left out as redundant. While deciding the issue No. 4, the learned trial Court proceeded on the assumption that a Hindu Family was to be presumed to be joint unless the contrary was proved. It took note of the evidence on record that Ram Lakhan Kalwar, the father of Bhakat Ram and Sitaram had come to Assam long back and that both the sons had grown up in a joint mess. The fact that Bhakat Ram had become the Karta of the Family was also taken to be a factor to support of the presumption of the jointness of the family. It held the view that in absence of any evidence by the Plaintiff that the suit land was purchased out of the self acquired funds of Bhakat Ram, the testimony of, D.W.-2 a retired District Judge, to the contrary tilted the balance against the Plaintiffs. Mutation in respect of the scheduled "Ga" land in favour of Sitaram Kalwar also weighed with the learned trial Court to conclude that the suit land was purchased out of the joint family fund in the name of the "Karta" of the family and that following an amicable partition Sitaram Kalwar had been in possession of his share of land described in

Schedule "Ga" to the plaint. The right, title and interest of the Plaintiff in respect of southern half of the scheduled "Ka" land was thus declared. On the aspect of the gift as well, the learned trial Court held against the Plaintiffs noticing that the gift deed in its original had not been proved and that no evidence had been led to establish that Sitaram Kalwar was not in possession of the suit property on the date of execution of the said document. It was also of the view that the Plaintiff could not establish the allegation of dispossession.

9. The learned lower appellate Court affirmed the verdict of the learned trial Court holding that Bhakat Ram, Jotilal and Sitaram were members of the Joint Hindu undivided family governed by Mitakshara law. It also proceeded on the premise that a Hindu family is presumed in law to be joint unless contrary is proved and that there was positive evidence, of jointness in the case in hand. After dealing with the evidence of the witnesses for the Plaintiffs more particularly of RW. 5, Mira Devi, P.W. 6 Jagadish Shah and P.W. 7 Bindeswari Shah the learned Court below concluded that the claim that Bhakat Ram had separated himself from the joint family was not established. It noticed the testimony of D.W. 1, Sitaram about the purchase of the suit land out of joint family funds in the name of Bhakat Ram who was the "Karta" thereof. The evidence of the said witness that the house was constructed on the suit land with the family funds and that the members of the family had a joint mess was also considered. The corroborative evidence of D.W. 2, Jogen Singh Chetri, received due weight from the learned Court below to conclude in favour of the stand of the principal Defendant. The application filed by Bhakat Ram before the sub-deputy Collector in Mutation Case instituted by Sitaram and proved as Ext. "Unga" was also taken note of to notice the admission of Bhakat Ram that four kathas of land including the suit land had been purchased out of family funds and that he (Bhakat Ram) had extended his consent for mutation of Schedule "Ga" land in favour of Sitaram. The learned lower appellate Court also took into consideration the order of mutation, Ext. "Kha". In the above factual premises, the learned Court below declined to grant primacy to the gift deed Ext. 10 over the above two documents observing that there was no evidence that Bhakat Ram had purchased the suit land out of his own funds or that the same was an ancestral property. The learned Court below held that as the property had been purchased by the Bhakat Ram in the capacity of "Karta", the principal Defendant, in the facts of the case was relieved of the burden to establish that the purchase was from the joint family funds. The learned lower appellate Court therefore concluded that the right of the principal Defendant over the land described in Schedule "Ga" was protected under the personal law and declared the right, title and interest of the proforma Respondent/ Plaintiff No. 1 in the southern half of "Ka" Schedule land. Decree for confirmation of his possession in respect of land under Schedule "Kha" was also granted. The appeal therefore was dismissed.

This Court while admitting the appeal formulated the following substantial questions of law:

1. Whether the learned Courts below committed the error of law in not applying the correct principles of law regarding Hindu joint family property?
 2. Whether the findings recorded by the learned Courts below that the suit property which was purchased by Bhagat Ram by sale deed executed in his name became a joint family property, are based on no evidence and if so whether the same are liable to be set aside?
 3. Whether the entries in revenue record could be based upon to declare the title of the Defendant No. 1 to the extent of half share?
 4. Whether the learned Courts below acted illegally in acting upon Ext. Unga, which is an unregistered document, purporting to extinguish title and create title?
10. Mr. Goswami has argued that there being no presumption in law that all purchases made by a member of a joint family in the capacity of a "Karta" are from joint family funds and that the properties acquired are of the joint family, the learned trial Court erred on a fundamental principle of law in holding that the suit land was so. According to him, jointness of the family in Hindu Law would not per se be demonstrative of jointness of any property purchaser by any member thereof. The determination of the learned lower Court that the suit land was purchased from joint family funds in absence of any evidence to the said effect is not only opposed to the elemental principle of law bearing on the issue but also is perverse, he urged. Referring to the decision of the Apex Court in D.S. Lakshmaiah and Anr. v. L. Balasubramanyam and Anr. (2003) 10 SCC 10 the learned Sr. Counsel contended that it being the burden of the person who asserts a property to be a joint family property, to prove the same, the learned trial Court misdirected itself in evaluating the evidence on record by placing a wrong onus on the Plaintiffs. There being no iota of evidence that at the time of purchase of the suit land there was either any joint family property or a nucleus of such property generating income, the learned Court below ought to have negated the Defendant's claim that the suit land was a joint family property. The factum of residence of Defendant Sitaram in the suit house being not decisive of the joint status of the family, the learned Court below erred in holding that the suit land had been purchased from joint family fund relying on the said fact by overlooking convincing evidence on record regarding independent business of Bhagat Ram and income therefrom. In absence of any evidence that the suit land had been purchased from joint family funds, Mr. Goswami urged that the finding to the contrary being not supported by any material on record is plainly perverse. He maintained that the application said to be written by Bhagat Ram (Ext. "Unga") being not admissible in law, it ought not to have been acted upon by the learned trial Court in upholding the plea of the Defendant. Moreover, as the contents of the said application and the mutation order Ext. "Ka" could not in any view of the matter, be construed to convey any title under the law, the learned Court below fell in error in upholding the plea of the Defendant, in this regard.

11. Mr. Goswami emphasized that mere purchase of the suit land in the name of Bhakat Ram as the "Karta" of the family did not shift the burden on the Plaintiffs to prove that it was not from joint family funds and in that view of the matter, the learned Court below laid a wrong burden on the Plaintiffs being oblivious of the settled position of law. According to the learned senior counsel, concurrent findings of the Court below notwithstanding, the learned Court below having failed to decide the core issue involved in the correct legal perspective, it is a fit case for interference in exercise of powers u/s 100 Code of Civil Procedure. In support of his submissions, Mr. Goswami placed reliance on Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, Jhumman Singh and others Vs. Central Board of Investigation and others, Jhumman Singh and Ors. v. Central Board of Investigation and Ors. and Achintya Kumar Saha Vs. Nanee Printers and Others,

12. As against this, Mr. Bhattachaijee has urged that the determination on the issue pertaining to purchase of the suit land being concluded by concurrent findings of fact on an exhaustive analysis of the evidence on record, no interference is called for with the impugned judgment and order. The Plaintiffs having failed to establish that the suit land was the self acquired property of Bhakat Ram, the learned Court below was perfectly justified in holding that the same was a joint family property purchased from the family funds decipherable from the evidence of the principal Defendant Sitaram Kalwar and D. W.2, Jogen Singh Chetri. Referring to the decision of the Apex Court in Mallesappa Bandeppa Desai and Others Vs. Desai Mallappa and Others, . the learned Sr. counsel argued that it was the exclusive burden of the Plaintiffs to prove that the suit land was not purchased from the joint family funds and they having failed to discharge the same the impugned judgment and order is unsailable. Moreover, in view of the admission of Bhakat Ram recorded in his application Ext. "Unga" supporting the assertion of the principal Defendant vis-a-vis the status of the suit land and the order of mutation ext. "Kha", the conclusions recorded in the impugned judgment and order cannot be said to be afflicted by any legal infirmity warranting interference of this Court. Without prejudice to the above, Mr. Bhattachaijee argued that as both the parties had adduced evidence, the burden of proof was only of academic relevance and in the teeth of evidence adduced by the principal Defendant in support of his plea of purchase of the suitland from joint family fund, adjudication of the issue as made by the learned Court below cannot be faulted with. The learned Sr. counsel contended that the decision in D.S. Lakshmaiah (supra) having been rendered without noticing the ratio of the decisions of the Apex Court in Mudi Gowda Gowdappa Sankh Vs. Ram Chandra Ravagowda Sankh, (Mudigowda Gowdappa Sankh and Ors. v. Ramchandra Revgowda Sankh (dead) by his representative and Anr. it is not decisive of the issues involved. The findings recorded in the impugned judgment and order being based on a detailed analysis of the evidence on record, the same cannot be termed to be perverse. Besides no substantial question of law to that effect having been framed any contention with regard thereto ought not to be

entertained. Mr. Bhattacharjee sought to draw sustenance from the following decisions: Mallesappa Bandeppa Desai and Others Vs. Desai Mallappa and Others, . Mudi Gowda Gowdappa Sankh Vs. Ram Chandra Ravagowda Sankh, by his legal representative and Anr. Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and Others, State of Haryana and Others Vs. Khalsa Motors Ltd. and Others, Bala Shankar Maha Shankar Bhattjee and others Vs. Charity Commissioner, Gujarat State, Chandra Bhan Vs. Pamma Bai and Another, Sarjas Rai and Others Vs. Bakshi Inderjit Singh,

13. I have extended my thoughtful consideration to the rival contentions. As the competing arguments have been built around the legal principle to be applied to determine the status of the suit land, it would be discreet at the threshold to take a stock of the judicial pronouncements on the issue cited at the bar.

14. In Mallesappa Bandeppa Desai (supra), the Respondent No. 1 there was the manager of the undivided Hindu family of which [he Appellants were also members. The Respondent No. 1 incidentally was also their uncle. Realising that the Respondent No. 1 was trying to deprive them of their legitimate share in the property and with that end in view had been refusing to accede to the request of partition, they filed a suit, "he claim was resisted on the ground that the grand father of the Appellant had effected partition of the joint family properties and that the claim for partition in the suit was untenable. While deciding on the controversy as to whether the litigation expenses was borne from the family fund, the Apex Court held that where a manager of a Hindu undivided family claims that any immovable property had been acquired by him with his own separate fund though in possession and charge of joint family funds, it is for him to prove by clear and satisfactory evidence his plea that the purchase (money had proceeded from his fund. The onus of proof in such a case would be on the manager and not on his co-owners, it was ruled.

15. While dwelling on the issue as to whether the land involved was a self acquired property of Goudappa, as claimed by the Appellant or a joint family property as asserted by the Respondents, the Apex Court in Mudigowda Gowdappa Sankh (Supra) relying on a decision of the Privy Council in Appalaswami v. Suryanarayanamurti AIR 1947 PC 189 reiterated the law as here under:

The law on this aspect of the case is well settled Of course there is no presumption that a Hindu family merely because it is joint, possess any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims

the property as self acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

16. A more recent decision of the Apex Court in this line has been rendered in *D.S. Lakhmaiah (supra)*. In the reported decision their Lordships were seized with question as to who was required to prove whether the property involved was a joint Hindu family property or a self acquired property of the first Appellant. On an exhaustive survey of the earlier decisions on the point, including those referred to above, as well as in *Baikuntha Nath v. Sasoiram (1972) 2 SCC 334*, *Surendra Kumar Vs. Phoolchand (dead) through and another*, and *Achuthan Nair v. Vhinnammu Amma and Ors. Achuthan Nair Vs. Chinnamu Amma and Others*, it was held that there is no presumption of property being a joint family property only on account of existence of joint Hindu family and that who asserts it to be so has to prove the same. If, however, the asserter proves that there was a nucleus with which joint family property could be acquired, there would be a presumption of the property being joint and the onus would shift on the person who claims it to be self acquired property to prove that he had purchased it with his own funds and not of joint family nucleus that was available. The Apex Court in coming to the said conclusion recounted in particular its observations in *Achuthan Nair (supra)* that the law as to presumption or shifting of onus would not be different even if the property is acquired in the name of "Karta".

17. The consistent judicial opinion on this facet of the law therefore, is against the presumption of jointness of property possessed by a member of Hindu family only because it (family) is joint. The burden of proof that such property is a joint family property is at the first instance on the person who claims it to be joint. However, if it is either established or admitted that the joint family is in possession of a property generating an income with the aid of which the property in question could have been acquired then the onus shifts on the person who claims the same to be a self acquired one to prove that it was so purchased without any aid from the family funds. To put it differently, if the person asserting in favour of joint family status of the property proves that there was a family nucleus yielding sufficient income to acquire the same, there would be a presumption of the property being joint consequently shifting the onus of the person claiming it to be self acquired property from his own funds to prove it to be so. The decision of the Apex Court in *Mallesappa Bandeppa Desai* does not essentially strike a different note as in that case as well the manager had been in possession and charge of joint family funds.

18. The precedential law on presumption and onus of proof vis-a-vis a property held by a member of Hindu undivided family notwithstanding, I am of the opinion that the parties in the instant case, having led evidence oral and documentary in support of their pleaded assertions, the same is not of a decisive significance but primarily of academic relevance. This view finds re-inforcement in the decision of the Apex Court in *Narayan Bhagwantrao Gosavi Balajiwale (supra)* was *Bala Shanker Maha Shanker Bhattjee and Ors. (supra)* to the effect that the burden of

proof is of importance only where by reason of not discharging the burden put upon it, a party must eventually fail but where the parties join the issue and lead evidence and the evidence get weighed to determine which way the issue can be decided, the question of burden of proof becomes academic.

19. Adverting to the contextual facts, in face of conflicting pleaded versions appertaining the status of the suit property and evidence in support thereof, the fine balance c)f legal presumption and burden of proof loses pertinence and the issue ought to be adjudicated upon an appraisal of the materials on record.

It having been emphatically contended on behalf of the Appellants that the learned trial Court had approached the evidence in the wrong legal perspective, I consider it expedient to have a birds eye view of evidence; oral and documentary on the issues involved.

20. P.W. 5 Mira Devi Kalwar, P.W. 6 Jagadish Shah, P.W. 7, Bindeswari Shah have testified on the aspect of status of the suit property. According to P.W. 5 her husband Bhakat Ram was the owner of the suit lane} on the strength of purchase thereof by his own funds. The two storied house on the suit land was also built by him at his own expenses. The suit property was gifted by Bhakat Ram to his son Tarun Kumar by a registered deed of gift at a point of time when the donee was a minor. She testified that her husband had business pf Oil Mill and cars. She denied that the suit property was a joint family property. She admitted that at the time of institution of the suit Sitaram was in occupation of a portion of the suit house by force. She conceded that the gift deed was misplaced and untraceable. She proved the Sale Deeds, Ext. 1, 2, 3 and 4 in favour of the Appellants. In cross-examination the witness Admitted that her marriage with Bhakat Ram had taken place in the year 1969. She could not recall the year in which the gift was made. She admitted that at the time of gift the principal Defendant Sitaram and his family were in occupation of a portion of the suit house.

21. RW.6 while proving the Sale Deeds whereby the suit land had been purchased from Mira Devi Kalwar on behalf of proforma Respondent deposed that the suit land and house belonged to Bhakat Ram and that though the principal Defendant Sitaram Kalwar was in occupation of suit house he did not construct the same. In cross-examination, the witness stated that Bhakat Ram and Sitaram did not have any joint business. RW. 7 also stated that suit land earlier belonged to Bhakat Ram and was purchased by the Appellant from Santosh Singh and Himangsu.

22. As against this, D.W. 1 Sitaram Kalwar deposed that his father had come to Nagaon about 80 years back. The witness stated that his father had three sons Bhakat Ram, Jotila and Sitaram (D.W. 1) and they used to reside as a joint family. After their father's death, the brothers continued in joint mess and being the eldest, Bhakat Ram was the "Karta" of the joint family. D.W. 1 deposed that the suit land was purchased from the joint family fund and that the suit house

was also constructed there from. According to him, the suitland was purchased in the name of Bhakat Ram as he was the "Karta" of the family. The witness stated that the peaceful atmosphere in the family got disturbed with the arrival of Mira Devi and thereafter two brothers separated. Jotilal in the meantime, expired as a bachelor. The witness stated that the northern half of the suitland fell in his share and southern half went to Bhakat Ram. The house was similarly partitioned. Thereafter he applied for and obtained mutation in respect of his share of 111/4 lechas. The witness stated that in the mutation case, on receiving notice, Bhakat Ram appeared but did not register any objection and on the contrary extended his approval thereto by an application. According to the witness, after the mutation his name was recorded in the chitta and jamabandi. The witness also referred to a copy of the application filed by Bhakat Ram and stated that though the record of the mutation case had been called for, it was reported officially that the same was not traceable. He proved the copy of the jamabandi and order of mutation as Ext. "Ka" and "Kha". He disputed the gift or execution of any deed to that effect or delivery of possession of the suit land pursuant thereto. In cross examination the witness mentioned that the suitland had been purchased in the year 1943 along with other lands totalling 4 Kathas. He admitted that Bhakat Ram had sold the remaining land to others.

23. D.W. 2 supporting the above plea deposed that Sitaram and Bhakat Ram constituted a joint family and that during 1940- 1941 they purchased the suitland, constructed a house thereon and started residing their with their families. The witness was categorical in stating that the suit land had been purchased by the joint family and that it was mutated in the name of Bhakat Ram as Sitaram then was a minor. The witness stated that the suit house was constructed with the joint family funds. In cross examination, he expressed his ignorance as to whether the suit property had been purchased by Sitaram and Bhakat Ram from inherited resources together with their own contribution.

24. As noticed herein above, the learned Court below rejected the case of the Plaintiffs by discarding the evidence of P.Ws.-5, 6 and 7 in support of the claim that the suit property had been acquired by Bhakat Ram from his own funds, amongst others, on the ground that it was unlikely that PW- 5 also had joined the family only in the year 1969, could be aware about the exact nature of acquisition of the suit land and the arrangement under which the house had been constructed thereon. Moreover, she admitted the residence of Sitaram Kalwar in the suit house on her arrival at Nagaon following her marriage. The evidence of P. Ws 6 and 7 was rejected being silent as regards the status of the family. The learned Court below on a consideration of evidence of D.W. 1 and D.W. 2 held it to be consistent to inspire confidence and accepted the pleaded version of the principal Defendant.

25. Noticeably except the testimony of P.Ws.-5, 6 and 7 there is no documentary evidence in respect of the purchase of the suit land by Bhakat Ram with his personal fund. The sale deed evidencing the above transaction has not been

proved to demonstrate any stipulation to that effect. P.Ws.- 5, 6 and 7 being the purchasers of the suit land from P.W. 5 are naturally interested witnesses to support the stand of the original Plaintiffs. The reasoning of the learned Court below to prefer the evidence of D.W. 1, D.W. 2 to that of P. Ws-5,6 and 7, in the facts and circumstances of the case, considering the quality of their testimony and applying the principle of preponderance of probability cannot be branded to be absurd or illogical. The testimony of D.W. 1 and D.W. 2 by no means can be brushed aside being of no positive value qua the plea of the principal Defendant. In other words, their evidence provide an acceptable & supportive basis of the conclusion that the suit property was a joint family property.

26. DW-4, Sarat Ch. Bora, then UDA of D.C. Office with reference to the official records, proved the certified copy of the application filed by Bhakat Ram, Ext. Unga acceding to the request of Sitaram Kalwar for mutation in respect of the land claimed to have fallen in his share after the amicable partition. He also proved Ext" gha" a letter in response to the requisition from the learned trial Court for the record of the mu- tation case, to the effect that the same was not available.

27. The certified copy of the application Ext." Unga" was also proved by DW- 5 Ramakanta Bora who was at the relevant time Sheistadar of D.C. office, Nagaon. He stated that the said application had been filed in mutation case No. 339/1180 of 73- 74 and that the certified copy thereof was made from the original records. The witness deposed to have certified Ext." Unga".

28. D.W.-6 Rohit Chandra Saikia who at the relevant time was copyist of the D.C. office, Nagaon stated that Ext." Unga" had been copied by him and was compared by Sri Bhadreswar Baruah, Mandal in his presence. He also proved the signature of the comparer.

29.1 have perused the certified copy of the application Ext. "Unga" where from it appears that Bhakat Ram Kalwar had admitted the purchase of the suit land with joint family funds and that he and his brother Sitaram had been residing there by constructing a house. Admitting that the two brothers had been living jointly, he accorded his approval for mutation of 111/ 4 lechas of land being 1/2 of the suit land in favour of Sitaram Kalwar on the basis of his possession. The mutation order dated 14.9.74 Ext. "kha" makes a clear reference of the said application and the Sub-Deputy Collector, Sadar Circle inter-alia taking note of the fact that the suit land had been jointly purchased by the Appellant and his brother and jointly by them, granted mutation as prayed for. Accordingly, the name of Sitaram Kalwar got recorded in the Janabandi, Ext. "ka".

30. The oral and documentary evidence as above, in my view is sufficient to prove Bhakat Rain"s consent to the mutation of the name of Sitaram in 1/2 of the suitland measuring 111/4 lechas, conceding that the land had been purchased from joint family fund. The evidence of D. Ws. 4,5 and 6 together with Ext. "Ka, kha and "Unga" adequately corroborates the testimony of D.W.-I and

D.W.2 in support of the pleaded case of Sitaram Kalwar. As Ext. Unga can permissibly be accepted to a piece of documentary evidence of the factum of joint family status of the suit land and the consent of Bhakat Ram to Sitaram's claim for mutation of his share thereof, the contention raised on behalf of the Appellant against the admissibility thereof does not commend for acceptance. Though this document perse cannot be considered to be an evidence of proof of title of Sitaram vis-a-vis 11 1/4 laches of land claimed by him, it can indubitably be acted upon as a testimony of the collateral fact of Bhakat Ram's concession to Sitaram's request for mutation thereof and the admission recorded therein. The decision of the Apex Court in Nagar Palika Jind (supra) to the effect that an order of mutation in the revenue record cannot be a source of title does not advance the case of the Appellant in the attending fact situation. The acceptance of this document Ext. Unga by the learned Court below to reinforce its conclusion in favour of the joint family status of the suit property is therefore unexceptionable.

31. Having held as above, the gift of the suit land said to have been made by Bhakat Ram in favour of the proforma Respondent-Tarun Kr. Kalwar fades into insignificance. The basic premise of the Plaintiffs case, having been rendered nonest by the above determination qua the status of the suit property, the gift evinced by Ext. 10 and the testimony of PW-8 Swapan Kr. Das and P.W.-9 Rabindra Nath Das in support thereof are of no avail to the Appellants. Moreso, no attesting witness of the conveyance by gift having been examined, the same remains unproved in law. The deduction of the learned lower Court vis-a-vis the gift thus cannot be faulted with.

32. In the wake of the above, the question Nos. 1, 2 and 4 formulated in the appeal are decided in negative. Ext. "Ka" "kha" and "Unga" and the oral testimony having been acted upon only for the co- lateral purpose of ascertaining Bhakat Ram's stand in the mutation proceeding and not for conferring title on Sita Ram Kalwar's on the basis thereof, question No. 3 stands answered accordingly.

33. From the above narrative, I am of the firm opinion that the impugned judgment and order does not suffer from any vitiating illegality warranting interference of this Court in exercise of its power u/s 100 C.P.C. All questions of law and facts have been adequately dealt with and answered by the learned Court below on the basis of the pleadings of the parties and evidence on record. No error apparent is discernible. The decisions of the Apex Court on the scope and ambit of interference under the above provision of the Code in these premises do not call for any detailed discussion.

34. The appeal being without any merit, therefore fails and is dismissed No costs.