

**(2001) 07 AHC CK 0057**

**In the Allahabad High Court**

**Case No :** Second Appeal No's. 1611, 1840, 2214 and 2830 of 1982

Krishna Mohan and another

APPELLANT

Vs

Balkrishna Chaturvedi (Dead) through L.Rs. and others

RESPONDENT

**Date of Decision :** 06-07-2001

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90  
Evidence Act, 1872 — Section 90A(2)  
Transfer of Property Act, 1882 — Section 2, 3, 5, 57, 8  
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90  
Evidence Act, 1872 — Section 90A(2)  
Transfer of Property Act, 1882 — Section 2, 3, 5, 57, 8  
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90  
Evidence Act, 1872 — Section 90A(2)  
Transfer of Property Act, 1882 — Section 2, 3, 5, 57, 8

**Citation :** AIR 2001 All 334 : (2001) 3 AWC 2080

**Hon'ble Judges :** U.S. Tripathi, J

**Bench :** Single Bench

**Advocate :** C.B. Mishra, Sri Kant and Sankatha Rai, for the Appellant; A.N. Bhargava, for the Respondent

## Judgement

U.S. Tripathi, J.—All the above four appeals have been filed against the judgment and decree dated 13.5.1982 passed by Sri K. C. Bhargava, the then learned 1st Additional District Judge, Allahabad in Civil Appeal No. 46 of 1979, 45 of 1979, 642 of 1979 and 571 of 1979 respectively which were decided by a common judgment.

2. Krishna Mohan and Ram Mohan, appellants in all four appeals (hereinafter called the appellants) filed Original Suit No. 91 of 1968 on 24.5.1967, through their next friend, against Bal Krishna Chaturvedi, the respondent No. 1 in all the four appeals, for permanent injunction, restraining the respondent No. 1 from interfering in their peaceful possession over the open land shown with green colour in the plaint map and house shown with letters Aa, Ba. Sa, Da and red colour in plaint map. The case of the appellants, briefly stated was that the

house shown with letters Aa, Ba. Sa. Da existing over plot No. 905 of mohatla Daraganj. Allahabad city, was constructed by their father Ram Avtar and he was in possession over it till his life time. The open land shown with green colour in the plaint map was appurtenant to the said house and was being used by their father for the purpose of "sehan" for tethering cattle, preparing cow dung cakes and for keeping other domestic articles. After death of their father, the appellants came in possession over the house and the land in suit as its owners. They further pleaded that their father Ram Avatar had perfected his title over the house and land in suit by way of adverse possession and the same was inherited by the appellants. Respondent Bal Krishna Chaturvedi had no concern or connection with the house and land in suit, but he threatened to take forcible possession over it. They further alleged that the mental condition of their mother was not sound and, therefore, she was not competent to become their next friend.

3. Respondent No. 1 Bal Krishna Chaturvedi contested the above suit by filing written statement contending therein. Inter alia, that he purchased the land in suit on 22.4.1961 in auction sale In E.C. No. 11 of 1960, Lola Munnt Lal and others v. Kullu Lal and others, relating to the Court of Additional Civil Judge, Allahabad, arising out of decree In O.S. No. 59 of 1957 and obtained possession through Amin of the Court on 19.7.1966. Since then he was in continuous possession over the land in suit. In the above execution case Smt. Ram Kali for herself and as guardian of the appellants filed objection under Order XXI, Rule 90. C.P.C. which was rejected on 4.3.1967. Thereafter the mother of the appellants did not file any declaratory suit, therefore, the suit filed by appellants was barred and not maintainable. The mother of the appellants previously claimed herself and her husband as tenant of the house in suit but subsequently the appellants asserted themselves as its owners. Therefore, the suit was barred by principle of estoppel and acquiescence. He further contended that the suit was barred by time, it was not properly valued and the court fee paid was insufficient.

4. Thereafter respondent Bal Krishna Chaturvedi filed Original Suit No. 164 of 1971 on 2.10.1971 against Smt. Ram Kali, the appellants, Smt. Malati and Smt. Shanti for recovery of possession over plot No. 905 with super-structures and fixtures standing thereon, numbering 587 and for damages amounting to Rs. 288 with pendente lite and future damages at the rate of Rs. 8 per month. The case of respondent Bal Krishna Chaturvedi was that plot No. 905 was parti land belonging to one Kunnu Lal. He purchased the above plot in auction sale for Rs. 2,050 on 22.4.1961. Kunnu Lal had put a temporary structure in the shape of kachcha jhopri over the said land. He got actual possession over the whole of the plot including fixtures standing thereon, in dakhil dihani through Court Amin on 19.7.1966 and continued in actual possession thereon. After delivery of possession to the respondent No. 1 Smt. Ram Kali filed objection on 20.7.1966 alleging that her husband Ram Avatar was tenant of the house existing over the above plot and prayed to take back the possession of the property sold in auction sale. She also represented herself as guardian of her minor children Krishna

Mohan and Ram Mohan, the appellants and her daughters Malti and Shanti. The above objection of Smt. Ram Kali was registered as M.C. No. 46 of 1966. Smt. Ram Kali v. Bal Krishna Chaturvedi, and was dismissed on 4.3.1967 by 1st Additional Civil Judge and the possession of Bal Krishna was upheld. Thereafter no declaratory suit was filed by Smt. Ram Kali or her sons and order dated 4.3.1967 became final. After filing written statement by Bal Krishna Chaturvedi in Suit No. 91 of 1968 filed by appellants Krishan Mohan and Ram Mohan. Smt. Ram Kali took unlawful possession of the property in the middle of June. 1968, which compelled him to file the suit.

5. The appellants Krishna Mohan and. Ram Mohan contested the above suit on the grounds which they had taken in their Suit No. 91 of 1968 and raising further pleas of nonjoinder and limitation etc.

6. The trial court [Additional Civil Judge) framed necessary issues in both the suits, separately but consolidated the above suits and decided the same by a common Judgment. On considering the evidence of the parties, the trial court held that Ram Mohan and Krishna Mohan had not been able to prove that they are owners of land in suit ; that according to sale certificate Bal Krishna Chaturvedi purchased plot No. 905 which was parti land and not structure over it and he did not become owner of the structure in suit. Only land was auctioned ; that according to Dakhalnama. Bal Krishna got possession over the parti plot No. 905 and he did not get possession over the house existing over it. The theory of dispossession of Bal Krishna by Smt. Ram Kali had not been proved and Krishna Mohan and Ram Mohan are still in possession till now. He further held that as parti land was auctioned and Bal Krishna got possession over parti land of plot No. 905 and as such he cannot be owner of house No. 587, because he would not get more than what he purchased in auction sale. That Suit No. 91 of 1968 and the suit filed by Sri Bal Krishna Chaturvedi were not barred by limitation. Bal Krishna Chaturvedi was not entitled for the possession over the house No. 587 and he was entitled for possession over plot No. 905 and that Krishna Mohan and others were entitled for possession over house No. 587. With these findings, the trial court partly decreed the Suit No. 91 of 1968 and 164 of 1971 restraining Bal Krishna Chaturvedi from interfering in peaceful possession of Krishna Mohan and others over house No. 587 and for possession over remaining parti land of Plot No. 905 except house No. 587 in favour of Bal Krishna Chaturvedi and partly dismissed above suits for remaining reliefs.

7. Aggrieved with the above judgment and decree, Bal Krishna Chaturvedi filed Civil Appeal No. 45 of 1979 (aggrieved with partly decree of Suit No. 91 of 1968) and Civil Appeal No. 46 of 1979 (aggrieved with partly dismissal of Suit No. 164 of 1971). while appellants Krishna Mohan and Ram Mohan filed Civil Appeal No. 571 of 1979 (aggrieved with partly decree of Suit No. 164 of 1971) and Civil Appeal No. 642 of 1971 (aggrieved with partly dismissal of Suit No. 91 of 1968).

8. All the four appeals were also decided by a consolidated common judgment. The lower appellate court on reappraisal of the evidence of the parties held that

disputed house was not constructed by Ram Avatar and Krishna Mohan and others have also not acquired title by adverse possession over the house and land in suit. The property in question (Plot No. 905) was purchased by Bal Krishna Chaturvedi in auction sale and by virtue of Section 8 of Transfer of Property Act. the house existing over it will also pass on to the transferee. That Bal Krishna Chaturvedi was owner of the land as well as house standing over it and Smt. Ram Kali took forcible possession over the same in June, 1968. The suits have been filed within time and Bal Krishna Chaturvedi was entitled to take possession of the land as well as the house standing over the same. With these finding, the lower appellate court concluded that Suit No. 91 of 1968 filed by Krishna Mohan and others against Bal Krishna Chaturvedi was liable to be dismissed in toto while Suit No. 164 of 1971 filed by Bal Krishna Chaturvedi against Ram Kali and others was to be decreed. It accordingly allowed Civil Appeal No. 45 of 1979 and 46 of 1979 filed by Bal Krishna Chaturvedi respondent No. 1 and dismissed Civil Appeal No. 571 of 1979 and 642 of 1979 filed by appellants Krishna Mohan and Ram Mohan and decreed the Suit No. 164 of 1971 in toto and dismissed Suit No. 91 of 1968 in toto.

9. The above judgment and decree of lower appellate court has been challenged by the appellants In these second appeals.

10. The above second appeals were admitted on the following substantial question of law :

Second Appeal No. 1611 of 1982

(A) Whether Sections 5 and 8 of Transfer of Property Act apply in respect of the property sold in auction?

(B) Whether auction purchaser can have right in the house which was in existence and was not mentioned in the auction sale and sale certificate?

(C) Whether Dakhalnama was the basis of claim of respondent No. 1?

(D) Whether Dakhalnama required proof u/s 90A(2) of Indian Evidence Act as amended in U. P.?

(E) Whether the admission made by witness of a party is binding on the party?

Second Appeal No. 1840 of 1982

(A) Whether Sections 5 and 8 of Transfer of Property Act apply in respect of the property sold in auction?

(B) Whether auction purchaser can have a right in the house which was in existence and was not mentioned in the auction sale and sale certificate?

(C) Whether Dakhalnama was the basis of claim of respondent No. 1?

(D) Whether Dakhalnama required proof u/s 90A(2) of Indian Evidence Act as amended in U. P.?

(E) Whether the admission made by witness of a party is binding on the party?

Second Appeal Wo. 2214 of 1982

(1) Whether the Dakhalnama was the basis of defence?

(2) Whether the Dakhalnama required proof?

(3) Whether the admission of the appellant No. 1 in his written statement was erroneously made and is not binding on him?

(4) Whether the plot purchased by the defendant/respondent Identical with the plot in dispute?

Second Appeal No. 2830 of 1982

(1) Whether the plaintiff/ respondent had not purchased plot No. 905, i.e., land in dispute and as such he cannot get a decree in respect of open land?

(2) Whether admission of the appellant in written statement that the plaintiff had purchased the land in dispute was erroneous and not binding on them?

(3) Whether the lower appellate court erred in holding that the sale certificate was not the basis of the suit?

(4) Whether the finding of the lower appellate court on the question of possession is wholly illegal and erroneous as it was against the admission made by the defence witnesses?

11. I have heard Sri Sankatha Rai, assisted by Sri Shree Kant learned counsel for the appellants and Sri A. N. Bhargava. learned counsel for the respondent No. 1 in all the four appeals and perused the record.

12. All the four appeals arose out of a common judgment and therefore, with the consent of the learned counsel for the parties, are being taken up together for decision.

## FINDINGS

13. Substantial Question Nos. A and B of Second Appeal No. 1611 of 1982 and Substantial Question Nos. A and B of Second Appeal No. 1840 of 1982.

The above questions are closely connected with each other and are taken up together for findings.

14. The appellants alleged in their plaint of Suit No. 91 of 1968 that the house in suit was constructed by their father Ram Avatar and the remaining open land was being used as sehan land. Admittedly, the land in suit is part of plot No. 905 and house existing thereon was numbered as 587 in Nagar Mahapalika records. The contention of the respondent No. 1 Bal Krishan Chaturvedi was that he purchased the entire Plot No. 905 with structure existing thereon in auction sale on 22.4.1961 in Execution Case No. 11 of 1960 arising out of Original Suit No. 59

of 1957.

15. The trial court on consideration of documentary as well as oral evidence of the parties held that Bal Krishna Chaturvedi purchased Plot No. 905 which was a parti land and not the structure existing over it. Bal Krishna Chaturvedi, therefore, cannot be said to have become owner of the structure in suit as only land was auctioned which he purchased in auction sale. The lower appellate court also recorded a finding that the property sold in auction has been described as parti land No. 905. From perusal of sale certificate, it is proved that plot No. 905 was sold in execution and the same was purchased by Bal Krishna Chaturvedi. He further held that no doubt It Is correct that the sale certificate does not speak that the house In dispute standing over this land has also been transferred but relying on provisions of Section 8 of Transfer of Property Act and the decision of Kerala High Court in George Vs. South Indian Bank Ltd. and Another, . held that the land over which house stands has been purchased by Bal Krishna Chaturvedi in auction sale, therefore, the house will also pass on to the transferee.

16. The contention of the learned counsel for the appellants was that plot No. 905 was allegedly acquired by Bal Krishna Chaturvedi, respondent No.1, through auction sale in execution of a decree and, therefore, the provisions of Section 8 of Transfer of Property Act would not apply to such sales and the above provision is confined to private sale only. In support of his above contention, he placed reliance on a Full Bench decision of this Court in Umrao Singh Vs. Kacheru Singh and Others, .

17. Section 8 of Transfer of Property Act, which is contained in Chapter II of Transfer of Property Act. which relates "of transfers of property by act of parties", reads as under :

"8. Operation of transfer.--Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing In the property, and in the legal incidents thereof.

Such incidents Include, where the property is land, the easements annexed thereto the rents and profits thereof accruing after the transfer and all things attached to the earth ;

And where the property is machinery attached to the earth, the moveable parts thereof ;

And where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys. bars, doors, windows, and all other things provided for permanent use therewith ;

And, where the property is a debt or other actionable claim, the securities therefore (except where they are also for other debts or claims not transferred to the transferee) but not arrears of interest accrued before the transfer ;

And where the property is money or other property yielding income, the Interest or income thereof accruing after the transfer taken effect."

18. The application and effect of above Section 8 was considered in the above noted Full Bench decision of this Court which consisted of five Hon"ble Judges of this Court. The question referred to the Full Bench was "whether the property in the house in suit passed to the plaintiff Khacheru Singh under the auction sale of 26th January, 1932 or not?"

The majority decision of Full Bench was as below :

"Section 8 of the Transfer of Property Act does not apply to a transfer which takes place by operation of law or by a Court sale. Section 2, Clause (d) of Transfer of Property Act provides :

But nothing herein contained shall be deemed to effect :

(d) save as provided by Section 57 and Chapter 4 of this Act, any transfer by operation of law or by, or in execution of decree or order of Court of competent Jurisdiction.....

Whether the question is what has been sold in a Court sale, it will have to be decided from what the Court intended to sell and will be judged from the sale certificate issued by the Court,"

It was further held by the majority decision in the said case that rights of the purchaser at a Court sale are different from those of a purchaser at a voluntary sale. It may be said that though the provisions of Section 8 of Transfer of Property Act do not apply to a sale by operation of law, the principle underlying these provisions may apply to a purchase made at a Court sale in execution of a mortgage decree as it would be anomalous if there were constructions of the transfer of the same property which has been mortgaged in the mortgage deed and sold in execution of the decree obtained thereon.....In a Court sale, it will always be a question to ascertain what the Court intended to sell and actually sold, and it will have to be judged from the sale certificate granted by the Court specifying the property sold. Section 8 of the Transfer of Property Act will not apply to the interpretation of the sale certificate, the sale certificate which is the title deed of the auction purchaser, will have to be interpreted independently of Section 8 of the Transfer of Property Act..... In the absence of anything in the sale proceedings and the sale certificate to show clearly that a land with the building thereon was sold, the sale of mere land will not pass building thereon to the purchaser. Accordingly, the question referred to the Full Bench was answered that the property and the houses in suit did not pass to the plaintiff Khacheru Singh etc. under the auction sale of the 26th January, 1932.

19. In the Instant case, admittedly a parti land of plot No. 905 was sold in auction sale to the respondent Bal Krishna Chaturvedi. The sale certificate does not indicate that anything else except the parti land was auctioned and. therefore, in view of the above Full Bench decision, the respondent Bal Krishna

Chaturvedi through auction sale acquired right and title only over the parti land and not over the structure or house existing thereon and the provisions of Section 8 of Transfer of Property Act will not apply to the present case.

20. Learned counsel for the respondent Bal Krishna Chaturvedi, however, contended that the provisions of Section 8 of Transfer of Property Act equally apply to the auction sale and if a particular land is sold in auction sale, everything attached with the said land passes to the transferee and structure of the house is a thing attached with the earth as detained in Section 3(b) of Transfer of Property Act. In support of his above contention, he placed reliance in the following decisions ; Commissioner of Income Tax Vs. Bhurangya Coal Co., ; Divisional Forest Officer. Sarahan Forest Division of Divisional Forest Officer, Himachal Pradesh and Another Vs. Shri Daut and Others, : Mrs. Christine Pais v. K. Ugappa Shelly AIR 1966 Mys 299 ; Boda Narayana Murthy and Sons Vs. Valluri Venkata Suguna and Others, ; Ram Dayal v. L. Mishri Lal. 1972 ALJ 333 and Bhoop Singh Vs. Sri Ram and Another, .

21. Having gone through the above decisions. I find that those decisions do not relate to the matter under controversy involved in these appeals.

22. The case of Commissioner of Income Tax v. Bhurangaya Coal Company (supra) was a case of private sale of immovable property and therefore, it was held that as to the sale of immovable under the sale deed dated 17.5.1946 the matter was governed by Section 8 of the Transfer of Property Act under which unless a different Intention was expressed or necessarily implied a transfer of property passed forthwith to the transferee all the interest which the transferor was then capable of passing in the property and in the legal incidents thereof, and those incidents included all things attached to the earth. Fixtures would pass under this Section to transferee, unless it was provided otherwise.

Undoubtedly, the provision of Section 8 of Transfer of Property Act applies to private sale but in the Instant case, it was not a case of private sale, but an auction sale. Therefore, facts of above case are distinguishable.

23. In the case of Divisional Forest Officer, Sarhan Forest Division of Simla (supra) the question related to compensation u/s 11 of the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1953. Certain land belonging to the Government were under the tenancy of one Moti Ram who was granted proprietary rights in the land by Compensation Officer. Moti Ram applied for compensation of land and trees existing thereon. The Forest Officer objected on the ground that trees belonged to Forest Department and tenant had no interest in the trees standing thereon. The Apex Court held that expression "right title and interest of the land owner in the land" in Section 11 is wide enough to include trees standing on the land. u/s 8 of Transfer of Property Act unless a different intention is expressed or implied, transfer of land would include trees standing on It. The facts of the above case are totally different with the facts of the present case and, therefore, the above decision does not apply to the present



case.

24. However, in the case of Mrs. Chritine Pais (supra), Hon''ble single Judge of the Mysore High Court held that contract of sale executed by the Court in pursuance of decree for specific performance is a transfer by Court on behalf of judgment debtor and has got all characteristics of transfer inter vivos. The question involved in the above decision was also different as the sale in pursuance of an agreement to sale or a contract by individual or through Court are on same footing. In such sales the extent of property is considered in the light of agreement or contract. Such type of sales through Courts in execution of a decree for specific performance cannot be equated with the auction sale of the property as sale in pursuance of a contract by Court is presumed to have been made on behalf of the party to the contract wherein in an auction sale the auction purchaser is not a party to the suit or the execution and under an auction sale he gets only that much what is sold and not more than it. Therefore, the above decision is also not applicable to the facts of present case. Moreover in view of the Full Bench decision of this Court, the decision of the Hon''ble single Judge of another High Court will not override the principle laid down by the Full Bench.

25. In M/s. Boda Narayan Murthy (supra), a Division Bench of the Andhra Pradesh High Court held that even though the title deed deposited relates to land only, if at the time the deposit was made, there were any structure on it, equitable mortgage would be created both with regard to the land as well as the structures thereon. The facts of the above case are also distinguishable from the facts of the present case and the above decision does not help the respondent No. 1.

26. In the case of Ram Dayal v. L. Mishri Lal (supra) the dispute related to Plot No. 148. Plaintiff claimed proprietorship of 11 biswas area while defendant was Zamindar of balance 10 biswas area. Defendant made construction on said plot. Plaintiff complained that the construction had been made on plaintiffs 11 biswas area and filed suit for demolition of the construction, injunction, possession and damages. Defence was that the construction had been made in the 10 biswas land belonging to defendant. The trial court and lower appellate court recorded finding that construction had been made by defendant in 11 biswas area of the plot of which the plaintiff was proprietor.

This Court while interpreting Section 3(d) and Section 8 of the Transfer of Property Act held that walls or building which are embedded in the earth are attached to the earth and it will be apparent that the owner of the land is owner of the walls and buildings embedded in the earth. The facts of the said case are also distinguishable from the facts of the present case.

27. In Bhoop Singh's case (supra), the Division Bench of this Court held that in the case of sole proprietor he cannot have inferior rights as a grove holder as well as full proprietor's right as a zamindar in the land in which he has planted a

grove. His right in the groves or trees planted by him merge completely in his zamindari rights. The trees pass to the purchaser with the auction sale of the zamindari. The facts of the above case are also distinguishable with the facts of the present case.

28. In this way, the decisions relied on by the learned counsel for the respondent No. 1 Bal Krishna Chaturvedi are of no avail and the principle laid down by the Full Bench of this Court referred to above, have to be applied as facts of the above case are fully applicable to the facts of the present case.

29. Thus, it is clear that the provisions of Section 8 of the Transfer of Property Act do not apply in respect of the property sold in auction.

30. So far as the provisions of Section 5 of Transfer of Property Act are concerned, it defines the transfer of property by a living person in favour of one or more other living persons. The above Section is also contained in Chapter II of the Transfer of Property Act, which relates to the transfer of property by act of the parties, i.e., private transfers. As such, the above provisions of Section 5 are also not applicable in respect of the property sold in auction sale.

31. In the result, the respondent Bal Krishna Chaturvedi can be held owner of parti land of plot No. 905, which alone he purchased in auction sale and since there was no mention of any structure or house in the auction sale or sale certificate or Dakhalnama, the respondent Bal Krishna Chaturvedi cannot be said to have acquired any right, title or interest over house No. 587 by virtue of provisions of Section 8 of Transfer of Property Act. The findings of the lower appellate court, contrary to it, therefore, cannot be sustained. The questions are answered accordingly.

Substantial Question No. C of Second Appeal No. 1611 of 1982, C of Second Appeal No. 1840 of 1982 and No. 1 of Second Appeal No. 2214 of 1982 :

These questions are identical and are taken up together.

32. As held by Full Bench decision in Umrao Singh v. Khacheru Singh (supra), the sale certificate is title deed of the auction purchaser. Dakhalnama is a document showing factum of delivery of possession. Dakhal or possession is delivered according to auction sale or sale certificate. Thus, the title of the auction purchaser is derived from the sale certificate and not from the Dakhalnama which is simply a document of delivery of possession. Therefore, the Dakhalnama cannot be said to be a title deed and it can also not be said the basis of claim or defence. The questions are answered accordingly.

Substantial Question No. D of Second Appeal No. 1611 of 1982, D of Second Appeal No. 1840 of 1982, 2 of Second Appeal No. 2214 of 1982 and 3 of Second Appeal No. 2830 of 1982.

33. The contention of the learned counsel for the appellants was that since the Dakhalnama was the basis of the suit of respondent Bal Krishna Chaturvedi, it

required proof. But it was not proved according to law and, therefore, the respondent Bal Krishna Chaturvedi could not establish his right, title and interest over the land which he allegedly purchased in the auction sale. As held in the findings on substantial Question No. C of Second Appeal No. 1611 of 1982, C of Second Appeal No. 1840 of 1982 and 1 of Second Appeal No. 2214 of 1982, Dakhalnama is not the basis of the suit, but the deed of title was the sale certificate. No doubt the trial court has held that witnesses of Dakhalnama. Ext. A-5 and A-6, namely, Shesh Narain and Deena Nath Pandey have not been examined and. therefore, the Dakhalnama has not been proved by Sri Bal Krishna Chaturvedi. The lower appellate court considered this question and held that Dakhalnama is merely a document of possession and not a document of title. That Bal Krishna Chaturvedi has come to the Court on the basis of title and not merely on the basis of possession. Dakhalnama was the certificate copy of a document which was part of record of the Court of justice and therefore, the presumption available u/s 90A of Indian Evidence Act as amended in U. P. can be safely drawn in this case. Since the Dakhalnama was not the basis of the suit or defence, the presumption u/s 90A of Indian Evidence Act was rightly drawn by the lower appellate court in respect of the Dakhalnama.

The questions are answered accordingly.

Substantial Question No. 3 of Second Appeal No. 2214 of 1982 and 2 of Second Appeal No. 2830 of 1982.

34. The claim of respondent Bal Krishna Chaturvedi in Original Suit No. 164 of 1971 was that he purchased the property in suit of Plot No. 905. The appellant Krishna Mohan and Ram Mohan filed written statement in the said suit and in para 12 of said written statement, they pleaded that they were owners in possession over the plot No. 905 from the time of their ancestors. Meaning thereby it was admitted to them that the land in suit was part of plot No. 905. Appellant No. 1 Krishna Mohan had also appeared in the witness box as P.W. 1 in leading Suit No. 91 of 1978. He had admitted in his cross-examination in clear and unequivocal terms that house No. 587 was constructed over plot No. 905. Now contention of the learned counsel for the appellants was that above admission of appellant No. 1 in the written statement was erroneously made and Is not binding on him. For proving any admission erroneous, the party concerned or a person claiming through him must explain and prove that the admission was erroneous. No such attempt was made by Krishna Mohan, appellant No. 1 either in his written statement or in his evidence. Therefore, the bare arguments without any basis is not tenable. The points are answered in the negative.

Substantial Question No. B of Second Appeal No. 1611 of 1982, E of Second Appeal No. 1840 of 1982 and 4 of Second Appeal No. 2830 of 1982.

35. Learned counsel for the appellants contended that Dev Narain, D.W. 2 witness of respondent No. 1 has admitted in his evidence that Ram Avtar, the father of appellant was residing in the house over land in suit and was tethering

cows and she-buffaloes over the open land for the last 20 years and after the death of Ram Avtar, Krishna Mohan and Ram Kali came in possession over the disputed house and land and were In possession till date. That the above admission of the witnesses is binding on respondent No. 1 to hold that the respondent No. 1 was not In possession and had not acquired any possession on the basis of the alleged sale certificate. This question was considered by the trial court as well as lower appellate court. The trial court clearly held that the appellants were not owners of open land of plot No. 905 as they had not pleaded source of their title and no evidence was led to prove their ownership over plot No. 905. However, the lower appellate court has held that the possession was taken by the respondent No. 1 over the entire land and house in suit and respondent no. 1 was subsequently dispossessed by Smt. Ram Kali and others in the month of June, 1968. Assuming that the father of the appellants and thereafter the appellants were tethering their cattle over the open land of plot No. 905, their above act will not confer any proprietary right on them. Stray and occasional act of tethering cattle is not proof of possession. The trial court as well as lower appellate court have recorded a concurrent finding of fact that the appellants could not prove their title over the land in suit by way of adverse possession. The admission of Smt. Ram Kali in her affidavit Ext. A/8 filed in Misc. Case No. 46 of 1966 arising out of Execution Case No. 11 of 1960 clearly shows that she claimed that her husband Ram Avtar was a tenant of Kunnoo Lal in the house and land in suit. In this way, tethering of cattle over the open land would have been with permission and implied consent of the owner of the land in suit. The above finding of trial court and lower appellate court are pure findings of fact and cannot be re-agitated in the second appeal.

36. Therefore, the admission of D.W. 2 Deo Narain does not mean that appellants became owner of open land of plot No. 905. The respondent had also sought relief of possession on the basis of his title and both the court below held that he is owner of open land and it is clear that appellants could not prove their title over suit land and, therefore, the trial court and lower appellate court rightly held that respondent Bal Krishna Chaturvedi was entitled to recover possession over open land of plot No. 905 of which he was owner.

37. Moreover, the admission is a best piece of evidence against the maker. The admission is binding on the person or the party making it. Admission of a witness is not binding on the party. The admission of a witness may be used for the purposes of contradiction or drawing an inference by the Court. In any way the admission of a witness cannot be treated an admission of a party and is not binding on the party.

The points are answered accordingly.

Substantial Question No. 4 of Second Appeal No. 2214 of 1982 and I of Second Appeal No. 2930 of 1982.

38. The contention of the learned counsel for the appellants was that the land in

suit was not purchased by respondent No. 1 through auction sale as the boundaries given in sale certificate do not tally with the boundaries of the land in the suit. It may be mentioned at the very outset that this question was not raised before the trial court or the lower appellate court. No plea was taken that the land in suit mentioned in the plaint of Suit No. 164 of 1971 was not identifiable on the spot. Moreover, a commission was issued by the trial court to prepare map of suit land. The Commissioner has shown the land in suit with boundaries in the map. The above boundaries tally with the boundaries of the land given in the sale certificate. There is nothing on record to show that the land purchased by the respondent No. 1 through sale certificate is not the land plot No. 905, which was claimed by the appellants themselves. As held above, the respondent No. 1 had purchased plot No. 905 through sale certificate. It has also been held by the trial court and lower appellate court that the appellants were not the owners of plot No. 905 and they had also failed to prove their title by way of adverse possession over the said plot. The possession of the appellants over the open land of plot No. 905, if any, was permissive and unauthorised and, therefore, the respondent No. 1 who acquired the title over plot No. 905 through the auction sale was entitled to decree of possession in respect of the said open land of plot No. 905.

39. It is clear from the findings on other questions that though the appellants could not prove their ownership or title by adverse possession over house No. 587 and yet their possession over said house is admitted. The respondent No. 1 had also failed to prove his title over said house as it was not purchased in auction sale or ouster of his possession. Therefore, a person in possession is entitled to the relief for permanent injunction against all except the true owner. Therefore, the appellants are entitled to the relief for permanent injunction in respect of house No. 587 against respondent No. 1 who is not its true owner.

The points are answered accordingly.

40. In view of my findings on the above substantial questions of law, the appellants were entitled to decree for permanent injunction against the respondent No. 1 in respect of house No, 587 and they were not entitled to decree of permanent injunction over the land of plot No. 905, respondent No. 1 was entitled to a decree for possession over the open land of plot No. 905 but he was not entitled for decree for possession over house No. 587.

41. In the result. Second Appeal Nos. 1611 of 1982 and 1840 of 1982 are allowed and Second Appeal Nos. 2214 of 1982 and 2830 of 1982 are dismissed, Accordingly the Judgment and decree of lower appellate court in Civil Appeal Nos. 45 of 1979 and 46 of 1979 are set aside and the judgment and decree of trial court partly decreeing Suit No. 91 of 1968, and partly dismissing Suit No. 164 of 1971 in respect of house No. 587 are restored and the Judgment and decree of lower appellate court in Civil Appeal Nos. 571 of 1979 and 642 of 1979 confirming the judgment and decree of trial court in respect of partly dismissal of Suit No. 91 of 1968 and partly decree of Suit No. 164 of 1971 in respect of open

land of plot No. 905 are confirmed.

42. In the circumstances of the case the parties shall bear their own costs throughout.