

Equivalent citations: AIR 1991 Pat 99

Bench: S Sinha

Lakshmi Narain Barnwal Alias Lakshmi Narayan vs Jagdish Singh And Anr. on 7/3/1990

JUDGMENT

S.B. Sinha, J.

1. This first appeal arises out of a judgment and decree dated 16-12-1983 passed by Sri B. Kandir, 1st Addl. Sub-Judge, Hazaribagh in T.S. No. 91 of 1980, whereby and whereunder the said learned Court had dismissed the plaintiff/ appellant's suit.

2. The plaintiff-appellant had filed the aforementioned suit for declaration of his title and recovery of possession as also for a decree for permanent injunction restraining the defendant from going upon any portion of the house in suit, situated in plot Nos. 804 and 822 appertaining to khata No. 83 measuring 0.09 dec. and 0.07 dec. respectively thus measuring a total area of 16 dec., the details whereof have been described in Schedule 1 of the plaint.

3. According to the plaintiff the property in question was recorded in the name of one Laddu Lal in the survey settlement record of rights. The relevant entry of khatian No. 23 was marked as Exhibit 7.

4. It appears that the said Laddu Lal had purported to transfer the properties in question by execution of a registered sale deed dated 18-2-1935 to one Ganesh Singh. However, according to the plaintiffs the aforementioned sale deed was not acted upon as the said Ganesh Singh did not pay the consideration amount in respect thereof and the possession of the said property was also not delivered to him and thus no right, title and interest passed in favour of Ganesh Singh in relation thereto.

5. The aforementioned Laddu Lal, thereafter, by reason of a registered deed of sale dated 3-5-1937 purported to sell the aforesaid properties to one Rai Saheb Nauratan Lal, who allegedly purchased the said property for and on behalf of the joint family of which he was the karta. The said registered sale deed dated 3-5-1937 was marked as Ext.

3. It is further the case of the plaintiff that the aforementioned Rai Saheb Nauratan Lal upon coming in possession of the properties in suit started a tobacco shop therein.

6. According to the plaintiff, the defendant No. 1, who was a servant in the plaintiffs firm, was deputed by the plaintiff for managing the said shop of tobacco. The plaintiff's family has been running an extensive business and dealing in tobacco under the name and style of M/s. Bundi Lal Bishun Ram having its headquarter in the town of Gaya and having branches at various places in the States of Bihar and West Bengal. It is further alleged that in course of its expansion the family of the plaintiff started also a shop in the town of Chouparan in the district of Hazaribagh.

7. According to the plaintiff, the aforementioned house was purchased by Rai Saheb Nauratan Lal for the purpose of running a business in tobacco in the town of Chouparan in the district of Hazaribagh. The said house was constructed on a "(rent free land)". The plaintiff has further asserted that the said business at Chaouparan was being looked after on behalf of the joint family through its servants and the defendant No. 1 was also one of the servants of the said firm. The plaintiff has further asserted that the defendant No. 1 was deputed for the first time in the year 1963-64 to look after the said shop and as the plaintiff had reposed confidence in him, he was also permitted to live in a portion of the said house,

8. According to the plaintiff the chauki-dari tax of the house in question was also being paid by him. The plaintiff has further asserted that Rai Saheb Nauratan Lal died issueless leaving the plaintiff as his only legal heir and successor and thus the plaintiff became owner of the entire joint family properties including the house-in question. The plaintiff's further case is that tobacco business became unprofitable and as such the extent of the business was shortended, but the shop at Chaouparan was retained and the same continued to be run by defendant No. 1 as sole in charge of the said shop. The plaintiff's further case is that in the year 1973 he came to know that even for the rent free lands rent was being assessed by the Anchal Adhi-kari and hence in order to avoid possible disputes he filed an application for assessment of rent before the Anchal Adhikari which was registered as case No. 3 of 1977-78. In course of enquiry in that case, the plaintiff came to know that the defendant No. 1 had already got rent assessed in his own name and had also managed to make the said tobacco shop started in his own name and further in order to create evidence, executed a collusive and farzi sale deed dated 14-2-1977 (Ext. 3 / a) with respect to half of the suit house in favour of his friend the defendant No. 2. The plaintiff's application for assessment of rent, which was filed before the Anchal Adhikari was rejected. He, thereafter, preferred an appeal against the said order, which was also dismissed.

9. In the aforementioned suit a joint written statement was filed by both the defendants. The defendant's case, inter alia, is that the defendant No. 1 was a servant of the aforementioned firm M/s. Bundilal Bishun Ram till 1946. According to defendant No. 1, the business of M/s. Bundilal Bishun Ram became unprofitable and as such the defendant No. 1 compelled to leave the services in the year 1946.

10. The defendant's main case appears from the statements made in paragraph No. 10 of the written statements, which reads as follows:--

"That the statements contained in para 3 of the plaint are false, baseless, save and except that defendant No. 1 was a servant of the said firm Bundi Lal Bishun Ram. It is false to allege that there was any shop of the aforesaid firm at Chouparan and that too in the suit house which was being managed by servants of the family from very beginning. It is false to allege that the defendant No. 1 was ever deputed by the plaintiff's family for managing and running their shop at Chouparan on behalf of the plaintiff family as a servant only in or about the year 1963-64 or at any point of time and that too in a portion of the house in suit. It is respectfully submitted here that the business of firm Bundi Lal Bishun Ram become unprofitable from the year 1944-45 as such defendant No. 1 was compelled to leave the service of the said firm in or about the year 1946. The defendant No. 1 to earn his livelihood came to Chouparan in or about the year 1946 and started selling Khaini etc. in the Maharajganj Market at big market at Chouparan. While the defendant No. 1 earning his livelihood at Maharaj Ganj market was in search of a suitable place to live and start business of his own at Chouparan. During his search defendant No. 1 found the area of suit house fit for his purposes. At that time the suit house was lying abandoned in dilapidated condition and nobody was there to look after and maintain the house. The defendant No. 1 finding the suit place fit for his habitation and business made two rooms of the said house fit for inhabitation and started his tobacco shop there and gradually he extended the house according to his choice. The defendant No. 1 is also holding licence for running his shop at Chouparan. It is false to say that the plaintiff used to pay Choukidari tax for the house through defendant No. 1, nor defendant No. 1 deposited some of choukidari receipt with the plaintiff. If there is any such receipt that must have been obtained by some other person as imposter for the purpose to create evidence.

11. The defendant further denied that Laddu Lal had any right, title and interest over the property in suit or the house. The defendant further denied that Rai Saheb Nauratan Lal or for that matter the plaintiff had any tobacco business in the, town of Chouparan. The defendant further denied the plaintiff's title in respect of the property in suit.

12. According to the defendants since the year 1946 the defendant No. 1 started a business in Khaini and having been in possession of the said premises openly, continuously and without any interruption whatsoever for a period of more than 12 years, acquired an indefeasible right, title and interest in the properties in question by adverse possession. The defendants have further asserted that after coming into force of the Bihar

Land Reforms Act, the defendant No. 1 filed an application for assessment of rent in the office of the Anchal Adhikari and the said authority having found the said defendant in possession of the suit premises started issuing rent receipts in his name.

13. Upon the aforementioned pleadings of the parties, the learned Court below framed the following issues :--

- (a) Has the plaintiff got any cause of action for the suit?
- (b) Is the suit as framed maintainable?
- (c) Is the suit barred by law of limitation and adverse possession?
- (d) Is the suit bad for non-joinder of necessary parties?
- (e) Is the plaintiff entitled to get a decree as prayed for?
- (f) To what any other relief or reliefs the plaintiff is entitled?

14. The learned trial Court took up for consideration issue Nos. 3 and 5 together and, inter alia, held as follows :--

(a) In view of the fact that Ladu Lal had already transferred his right, title and interest by virtue of the aforementioned sale deed dated 18-2-1935 in favour of one Ganesh Singh, he did not have any subsisting interest for executing the aforementioned sale deed dated 3-5-1937, and thus the plaintiff has not acquired any right, title or interest in respect of the properties in suit.

(b) The plaintiff has failed to prove that the defendant No. 1 was deputed to look after the business of the plaintiffs since the year 1963-64.

(c) The defendant No. 1, having been in possession of the properties in suit for more than 12 years, acquired title by adverse possession.

15. Mr. N. K. Prasad, learned counsel appearing on behalf of the plaintiff-appellant, firstly submitted that the learned Court below committed an error in not accepting the title of the plaintiff, which was acquired by Rai Saheb Nauratan Lal in terms of the aforementioned deed of sale dated 5-3-1937 (Ext. 3) by erroneously holding that the original owner of the properties in question, namely, Sri Laddu Lal had already transferred his right, title and interest in favour of one Ganesh Singh in terms of the aforementioned deed of sale dated 18-2-1935.

16. The learned counsel further submitted that in the aforementioned sale deed marked as Ext. 3, it was asserted by the vendor thereof that the aforementioned Ganesh Singh did not pay the consideration amount and as such neither possession of the properties in question was handed over to him nor he derived any right, title or interest in relation thereto.

17. According to the learned counsel the aforementioned assertion of Laddu Lal in the said registered sale deed dated 3-5-1937 is admissible in evidence under Sections 11(2) and Section 32(7) read with Section 13(a) of the Evidence Act.

18. In support of this contention, the learned counsel has placed reliance upon a decision of this Court in Khudi Ram Ojha v. Smt. Amodebala Debbar reported in AIR 1948 Pat 462 and also in Jaigobind Singh v. Brij Bihari Singh reported in AIR 1966 Pat 168.

19. The learned counsel further submitted that the learned Court below ought not to have rejected the aforementioned deed of sale dated 3-5-1937 merely on the ground that there had been inconsistencies in the khata No. and khewat No. mentioned in the deed of sale at the one hand and in the plaint on the other hand. According to the learned counsel as the plot Nos. have correctly been mentioned in the plaint as also in the aforesaid sale deed dated 3-5-1937, any mistake, which might have occurred in the sale deed in mentioning the correct khata No. and khewat No. would not affect the right, title or interest of Rai Saheb Nauratan Lal.

20. The learned counsel next submitted that the learned Court below applied a wrong test in holding that the defendant No. 1 acquired title by adverse possession in so far as it proceeded on the basis that the plaintiff failed to prove his possession within 12 years from the date of institution of the suit.

21. According to the learned counsel, the learned Court below appears to have relied upon Articles 142 and 144 of the old Limitation Act, without taking into consideration the change in law brought about by the Limitation Act, 1963, in terms whereof the onus of proof to prove that a person has acquired title by adverse possession is upon him, in the event, it is found that title in respect of the properties in question has been proved by the other side.

22. In this connection, the learned counsel has drawn by attention to Articles 64 and 65 of the Limitation Act, 1963 as also the effect of change in law as has been observed in *Bhagarthy Pillai v. Savrimuthu*, reported in AIR 1976 Madras 124 and in Ram Swaroop Singh v. Badri Narain Singh, reported in 1982 BBCJ 320 : (AIR 19H2 Pat 206).

23. Learned counsel further submitted that in view of the fact that the defendant No. 1 in paragraph No. 10 of his written statement admitted that he was a servant of the firm till the year 1946, the burden of proof to show that he ceased to be a servant was upon him, in as much as if a state of affairs is proved to exist at a particular time, a presumption arises that the said state of affairs continues unless the contrary is proved.

24. The learned counsel further submitted that the learned Court below committed a further illegality is not taking into consideration the letters written by the defendant No. 1 to the plaintiff, which were marked as Exts. 4 and 4/ A in their proper perspective as also the chaukidari tax receipts, which were marked as Exhibits 2 to 2/C,

25. The learned counsel also submitted that from the aforementioned documents, it would be absolutely clear that the defendant No. 3 has been looking after the property for and on behalf of the plaintiffs family. The learned counsel further submitted that the learned Court below ought not to have adopted the role of an expert by comparing the writing of the defendant No. 1 in the letter marked as Exts. 4 and 4/ A with his signature contained in written statement as also in the vakalatnama filed by him.

26. The learned counsel further drew my attention to the statements made by various witnesses and submitted that the learned Court below has not correctly appraised the evidence of the witnesses.

27. The learned counsel further submitted that defendant No. 1 had set up different title in himself at different point of time in as much as whereas in the written statement, he claimed title simply by adverse possession, it would appear from his deposition in the Court below in which he was examined as D.W. 13 as also his statements in the deed of sale dated 14-2-77 wherein he alleged that he took settlement in respect of the land in question.

28. Mr. U.S. Lal, learned counsel appearing on behalf of the defendant-plaintiff, on the other hand, submitted that the case of plaintiff himself must stand or fall on its own legs. According to the learned counsel, the plaintiff's definite case is that the property in question was acquired by Rai Saheb Nau-ratan Lal, but neither in the pleadings nor in his evidence, the plaintiff disclosed as to how and in what manner he became the sole owner in respect of the property in question. The learned counsel further submitted that from the documents

filed by plaintiff himself (Ext. 8/C), it would appear that the business, which was being carried on under the name and style of M/s. Bundi Lal Bishun Ram he described himself as the proprietor as well as the karta of the Hindu Undivided Family. According to the learned counsel if the Hindu Undivided Family Firm, known as the M/s. Bundi Lal and Bishun Ram, existed, the plaintiff could have filed the aforementioned suit only on behalf of the Hindu Undivided Family and not in his personal capacity. According to the learned counsel as the plaintiff has not filed the suit as the karta of the Hindu Undivided Family, the suit must fail on that ground alone.

29. The learned counsel next submitted that the plaintiff cannot take advantage of the statement made by the defendant in the written statement to the effect that the defendant No. 1 was serving the aforementioned firm till the year 1946, inasmuch as there is nothing to show that the defendant No. 1 had been managing the affairs of the alleged shop of said firm at Chouparan. According to the learned counsel, the plaintiff on his own showing allegedly deputed the defendant No. 1 to manage the said shop, which means the defendant No. 1 was sent to Chouparan for the first time in the year 1963-64, and further in view of the fact that the plaintiff stated that defendant No. 1 had been looking after the said business since the year 1964, it was for the plaintiff to prove that the defendant No. 1 was entrusted with the business of tobacco as a servant, which was carried on by the plaintiff under the name and style of the aforementioned firm for the first time in the year 1963 or 1964, as the case may be.

30. The learned counsel further submitted that the plaintiff has miserably failed to prove by producing any document on records that in the relevant years he had carried on any business whatsoever in tobacco at Chouparan. According to the learned counsel the defendant No. 1 had filed documentary evidence to prove besides the oral evidence, that the defendant No. 1 had been carrying on, the business in tobacco and also other business in his own name at that place and in that view of the matter the defendant No. 1 must be held to have acquired title by adverse possession.

31. In view of the rival contentions of the parties, in my opinion, the following questions arise for consideration in this appeal:--

- (a) Whether the plaintiff has been able to prove that he is the owner in respect of the premises in suit?
- (b) Whether the defendant No. 1 was a servant of the plaintiff and had been in possession of the suit premises in the capacity of a servant and he was entrusted to look after the plaintiffs business in tobacco and was permitted to occupy a portion of the suit premises for residential purposes?
- (c) Whether the defendant No. 1 has been able to prove that he acquired title by adverse possession?

Re:-- Question (a):--

According to the plaintiff himself, one Laddu Lal was the owner of the property in question. It is further admitted that by virtue of a deed of sale dated 18-2-1935 the said Laddu Lal sought to transfer his right, title and interest in relation to the properties in suit in favour of one Ganesh Singh.

It is true, as has been contended by Sri N. K. Prasad, that the learned Court below proceeded on the basis that by reason of the aforementioned deed of sale dated 18-2-1935, the right, title and interest in relation to the property in suit passed on to one Ganesh Singh without taking into consideration the recitals made in the deed of sale dated 3-5-1937 executed by the aforementioned Laddu Lal in favour of one Rai Saheb Nauratan Lal to the effect that by the reason of the aforementioned deed of sale dated 18-2-35, no title passed on to one Ganesh Singh, in view of the fact that he did not pay the consideration amount to him.

32. The question as to whether, upon execution of the deed of sale, title passes to the vendee or not, depends upon the intention of the parties. In terms of Section 54 read with Section 8 of the Transfer of Property Act,

ordinarily the title of the vendor passes to the vendee on registration of the deed of sale irrespective of the fact as to whether the consideration money either in whole or in part has been paid by the vendee to the vendor or not, subject of course a contrary intention of the parties to the said transaction.

Reference in this connection may be made to Harbansa Singh v. Smt. Tekamani Devi, reported in AIR 1990 Pat 26, in which this Court held as follows at page 31:--

"It is now well settled that the question as to whether a title passed to the vendee, even if the consideration amount or a part thereof has not been paid depends upon the intention of the parties. Such, an intention has to be gathered primarily from the recitals made in the deed of sale as also circumstances surrounding thereto. In terms of Section 54 of the Transfer of Property Act, a sale may become complete, although, the consideration amount or a part thereof has not been paid, but promised to be paid. In terms of Section 8 of the Transfer of Property Act, title passes forthwith upon the registration of the deed to the transferee with all the interest which the transferor had been capable of passing in the property and in the legal incidences thereof unless different intention as such is expressly or necessarily implied."

It is true, as has been contended by Sri N. K. Prasad, that the intention of the parties may have to be gathered from the evidences on record, which may in a given case include a subsequent statement made by the vendor. In Khudiram Ojha v. Smt. Amodibala Devi, reported in AIR 1948 Pat 426, a learned single Judge of this Court has held that the statements contained in a document is admissible in evidence under Section 32(7) of the Evidence Act. However, in that case the statement in a document was held admissible under Section 32(7) of the Evidence Act, as therein the transaction was between the parties, which comes within a purview of Section 13(a) of the Evidence Act.

However, in this case, the recitals in the deed of sale dated 3-5-1937 were self serving statements of Sri Laddu Lal.

33. In Khudiram Ojha's case, itself, a distinction has been made between the statement in relation to a transaction, by which a right or custom was created claimed or asserted etc., and the statement which amounts to admission on the part of a party, to the said transaction.

34. In Jaigobind Singh v. Brij Bihari Singh, reported in AIR 1966 Pat 168, the question arose as to whether a statement in a deed of mortgage to the effect that there had been a partition between the brothers was relevant under Section 11(2) of the Evidence Act as the fact involved in the said statement renders to a fact in issue in the said suit as alleged by the plaintiff became improbable.

However, as it is well known that even if, a statement of a dead person is admissible in evidence for certain purpose an admission or a self-serving statement should be accepted with great caution, even if, the same is admissible in evidence.

35. In a case where statement of a person, who is either dead or whose presence cannot be secured in Court and thus he is not available for cross-examination the probability of the statement of such person or its trustworthiness depends upon other safeguards, which are enumerated in the said provision itself.

36. Further in this case by reason of the purported recital made in the aforementioned deed of sale dated 3-5-1937, the intention of the parties in relation to the deed of sale dated 18-2-1935 can neither be said to be established as it was necessary for the parties to bring evidence on record to show that despite assertions having been made in the said deed of sale dated 18-2-35, the title in relation to the parties did not pass on to Sri Ganesh Singh in view of intention of the parties to the contrary.

37. A registered deed of sale carries with it a sanctity of a genuine transaction and in this view of the matter the burden of proof was heavy upon the plaintiff to show that despite the execution and registration of the said

deed of sale, no title passed on to Ganesh Singh as he did not pay the consideration amount to Sri Laddu Lal, in view of the intention of the parties that unless consideration amount is paid, no title will pass on to the vendee.

No evidence worth the name has been brought on record by the plaintiff to show that the aforementioned Ganesh Singh did not pay any consideration amount to Sri Laddu Lal at the time of execution and registration of the aforementioned deed of sale dated 18-2-1935.

38. The plaintiff examined two witnesses to prove the fact that no consideration amount was paid by Ganesh Singh to Sri Laddu Lal at the time of execution of the deed of sale dated 18-2-35, namely, P. W. 2 and P.W. 9.

However, P. W. 9 is not a competent witness to depose on the said issue as he was not present at the time of execution of deed of sale dated 18-2-1935.

39. So far as P. W. 2 is concerned, he of course asserted that he was present at the time of execution the said deed of sale but on the first date of his examination-in-chief, although, he stated that consideration amount in respect of the said deed of sale dated 18-2-35 did not pass, but on the next date in paragraph 21 of his cross-examination he resiled from the said statement and categorically stated that he had not stated on the previous date that Ganesh Singh did not pay the consideration amount to Sri Laddulal.

40. In this view of the matter the very basis upon which the plaintiff claims his right, title and interest in respect of the properties in suit falls to the ground. In such a situation, it must be held that in view of the fact that the witness, who was allegedly present at the time of execution of the deed of sale dated 18-2-35 did not support the case of the plaintiff relating to non-passing of the consideration amount from Sri Ganesh Singh to Sri Laddu Lal, it cannot be said that the plaintiff has been able to prove that despite execution and registration of the deed of sale dated 18-2-1935, the title in respect of the property question remained with Laddu Lal and he had a subsisting title on 3-5-1937, when he allegedly executed and registered the deed of sale in favour of Rai Saheb Nauratan Lal. Further no evidence has been brought on record to prove the intention of Ganesh Singh in this regard.

In this view of the matter, in my opinion, the learned Court below has rightly held that the plaintiff has not been able to prove his title in relation to the properties in suit.

41. Re : Questions (b) and (c) :--

Both the questions being inter-related, they are being considered together. As noticed hereinbefore, Mr. N. K. Prasad submitted that the defendant No. 1 admitted in paragraph 10 of his written statement that he was a servant of the plaintiff till 1946 and, as such according to the learned counsel, it was for the defendant No. 1 to prove that the said state of affairs did not continue after 1946.

42. It is now well settled that a purported admission made in a pleading must be culled out from reading of the entire pleadings as a whole. It is true that defendant No. 1 admitted in paragraph 10 of his written statement that he was servant of the firm M/s, Bundi Lal Bishun Ram but it was also asserted by him that as the business of the said firm became unprofitable in the year 1944-45, he was compelled to leave the service of the said firm in or about the year 1946. The defendant No. 1 in his written statement did not admit that he had ever been serving the said firm at Chouparan where allegedly the plaintiff had been carrying on a business in tobacco.

On the other hand, the specific case of the said defendant No. 1 had all along been that the plaintiff did not have any business far less any tobacco business at Chouparan.

43. The plaintiff in his plaint took a definite plea that the aforementioned firm M/s. Bundi Lal Bishun Ram had been carrying on a business in tobacco at Chouparan which used to be run through the servants and the defendant No. 1 was deputed to Chouparan to look after the said business of the plaintiff's firm in the year 1963-64. The plaintiff, therefore, on his own showing sent the defendant No. 1 to Chouparan in the year 1963-64. In such a situation, in my opinion, the plaintiff cannot take advantage of the fact that the defendant No. 1 admitted that he was servant of the firm M/s. Bundi Lal Bishun Ram till 1946. In order to prove the allegations, the plaintiff was required to prove that a tobacco business was being carried on at Chouparan in the name of the firm M/s. Bundi Lal Bishun Ram.

44. The plaintiff has filed various documents to show that M/s. Bundi Lal Bishun Ram used to carry business in tobacco but all documents filed by him in this regard were in relation to the business carried on by the firm at Gaya. The fact that the aforementioned firm was carrying on tobacco business at Gaya was not a subject-matter of dispute in the suit.

The plaintiff, on his own showing had been maintaining books of accounts in relation to his business. If it was a fact that a business was being carried on by the said firm at least from 1937 till 1980 when the suit was instituted, there was absolutely no reason as to why the plaintiff failed to bring on record even a single chit of paper showing that the said firm had been carrying on a business in tobacco at Chouparan.

It has not been disputed before me by the learned counsel appearing on behalf of the appellant that in order to carry on a business in tobacco a license from the Excise Authorities is required to be obtained.

Further sale of tobacco being sale of goods the same would entail payment of sales tax in respect whereof, the plaintiff's firm was bound to get itself registered with the sales tax authorities in relation to the aforementioned business. The plaintiff has evidently failed to establish the said fact.

45. The plaintiff could prove that the defendant No. 1 was in his permissive possession of the house in question provided he could prove the said allegation made in the plaint, namely, that the plaintiff had a tobacco business in the town of Chouparan and then only the question of the said business being run by the defendant No. 1 as his servant would have arisen.

The plaintiff has further failed to show that in the year 1963-64 or immediately prior thereto the defendant No. 1 was in his services or for that matter the defendant No. 1 was deputed to Chouparan from Gaya as asserted by the plaintiff. As the plaintiff made the said assertion in his plaint, it was for him to prove, that the said allegation is correct.

46. If the plaintiff had been maintaining a retinue of employees for the purpose of looking after the business of the firm at different places including Chouparan, it may be assumed that the plaintiff had been maintaining books of account for the purpose of production thereof before the taxing authorities including the Income-tax Authorities. In such a situation in normal course of business, the plaintiff would have shown the salary paid to the defendant No. 1 for looking after the said alleged business in his books of accounts; as payment of salary to the employees would have been deductible expenditure for the purpose of assessment of his income-tax. As noticed hereinbefore, the plaintiff did not produce any such document.

47. As the plaintiff had deliberately and/ or intentionally did not produce his books of account and other relevant documents to show that he had a business at Chouparan or the defendant No. 1 was his employee and in that capacity he had been looking after the business of the plaintiff and residing in a portion of the suit premises, in my opinion, an adverse inference must be drawn against the plaintiff for non-production of the said documents.

48. In this back-ground the question as to whether the defendant No. 1 had acquired title by adverse possession assumes importance.

It is true that the learned trial court proceeded on the basis that the plaintiff has failed to prove his possession within 12 years from the date of institution of the suit purported to be in terms of Arts. 142 and 144 of the Old Limitation Act, without taking into consideration the change in law brought about by Arts. 64 and 65 of the Limitation Act, 1963, but the question as to whether the onus of proof was upon the defendant to show that he had acquired title by adverse possession would have arisen only in the event the plaintiff had been able to prove his title over the properties in suit.

49. In a suit, where both, the defendants and the plaintiffs failed to establish their title, as admittedly the defendant No. 1 has been found to be in possession over the properties in suit and further in view of the fact that the plaintiff has not been able to show that the possession of the defendant was a permissive one under the plaintiff, the plaintiffs suit could not have been decreed.

In such a situation, the court will be entitled to draw a presumption of title in the defendant No. 1 relying on the doctrine 'possession follows title' as contemplated under Section 110 of the Indian Evidence Act.

50. However, assuming that the defendant was required to prove both 'animus possidendi's as well as 'corpus possidendi', it must be held that the defendant No. 1 has been able to prove his possession for a long time. The most important document filed by him is Ext. G, which was a licence to carry on a business in tobacco granted by the Competent authority to the defendant No. 1, The said licence has been renewed from time to time. The plaintiff has also proved money lenders licence for the year 1955 (Ext. 1/1) and for the year 1960 (Ext. 1). The defendant No. 1 had further proved Ext. D and Ext. E for the purpose of showing that he had been maintaining books of account since the year 1947-48. In these exhibits endorsements of the offices of the commercial taxes department have also been proved, which have been marked as Exts. F, F/1 and F/2.

The defendant No. 1 had also proved notice issued by the Sales Tax Department, which have marked as Exts. I and I/1 for the purpose of showing the name of defendant No. 1 had been registered therein.

From the aforementioned documents, it is clear that the defendant No. 1 had been in possession of the premises in suit since the year 1946, as alleged by him.

51. It is not the case of the plaintiff that apart from the suit premises, the defendant No. 1 had any other place house to reside.

It is true as has been submitted by Sri N. K. Prasad, that the defendant No. 1 in his written statement claimed title by prescription, whereas in the deed of sale dated 14-2-1977 (Ext. D) executed by him in favour of defendant No. 2, he claimed title in the suit premises by virtue of a settlement.

52. In my opinion, the alleged contradictory statements made by the defendant No. 1 can be explained. The defendant No. 1's name having been entered into the khatian as also rent having been assessed in his name by the State Government, he might have thought that he has been recognised by the State as its tenant and thus he has become a settlee under the State Government.

53. However, such different claims with regard to acquisition of title on the part of defendant No. 1 is wholly immaterial, inasmuch as, it was for the plaintiff to prove his own title.

54. There cannot be any doubt that in order to claim acquisition of title by adverse possession, the same must be hostile at its inception and possession, in order to be adverse must be continuous, hostile and open to the knowledge of the true owner.

55. But it is also well settled that the question as to whether certain admitted facts constitute an open assertion of title is a question of fact and the rule that adverse possession should be shown to have been brought to the knowledge of the person against whom it is claimed, is not applicable to a person, who is a complete stranger.

Further if it is shown from the evidence that the plaintiff and/or his predecessor by exercising due vigilance ought to have been aware of happening at Chouparan where defendant No. 1 had been continuing in possession and had been enjoying the usufruct adverse to their interest, the same would satisfy the requirement of his.

Reference in this connection may be made to *Haria v. Bhindru*, reported in AIR 1950 Himachal Pradesh page 8 at page 11.

56. It is true that possession in order to be adverse, has to be open and as of right but such possession can be said to be hostile or adverse to the true owner by reason of the fact that it is adverse or hostile to his interest and unless it is proved that the possession started with his permission or under a grant made by him, the possession cannot be said to be permissive.

57. So far as 'animus possidendi' is concerned, the same being an intention on the part of the person to possess adversely, such a fact can be proved, by evidence on records and by attending circumstances.

Reference in this connection may be made in *Abdur Rehaman Khan v. Ahamad Khan*, reported in AIR 1939 Oudh 427, *B. Budhram Rai v. Banarasi Rai*, reported in AIR 1948 All 31 (1947 ALJ 228). In *Machingal Potte Veettu alias Thakke Veettil Seetha Meithyar Amma v. Machingal Potte Veettu alias Patinhara Veettil Karnwan Kelu Menon*, reported in AIR 1939 Mad 564 and in *Kala Devi v. Khelu Rai*, reported in AIR 1949 Pat 124.

58. Further the question of knowledge on the part of the plaintiff also would arise as to whether he had sufficient means to know what is happening at Chouparan. The Court does not come to the aid of a person who has not been vigilant in respect of his property for a long period of time.

Reference in this connection may be made in *Secretary of State v. Devendra Lal Khan*, reported in AIR 1934 PC 23 : (1934 ALJ 153), wherein the Privy Council has clearly indicated as what would constitute the knowledge.

59. In the instant case, the defendant No. 1 had been carrying on a business in tobacco and in money lending in his own right.

60. Such carrying on of businesses is an assertion of his own right and in my opinion the same would amount to assertion of his hostile title against the true owner and his acts of possession must be held to be in his own right.

In such a situation it cannot be said that the defendant No. 1 had not been able to prove his 'animus possidendi'.

61. The defendant No. 1's claim to acquire title by adverse possession can be said to have been proved as he had been continuously and openly possessing the property in question in assertion of his own right and thus in hostile right of the plaintiff or any other person, who could have claimed title in relation thereto.

62. The documentary evidence filed on behalf of the plaintiff/ appellant is not very material. Exts. 2 to 2/c purported to have been the choukidari rent receipts. In some of the choukidari receipts tax have allegedly been paid by the defendant No. 1 but the defendant No. 1 denied the said fact and in this view of the matter, it was necessary for the plaintiff to prove by examining the person granting the receipts to show that the defendant No. 1 had in fact tendered the choukidari tax paid by him on behalf of the plaintiff.

63. The other exhibits which are relevant are Exts. 4 and 4/a which are letters allegedly written by defendant No. 1 to the plaintiff. The defendant No. 1 had denied that he was the author of those letters. Despite the same,

the plaintiff did not make any attempt to prove Exhibits 4 and 4/a to be in the handwriting of the defendant No. 1 by getting the said documents examined by an expert.

64. In such a situation, in ray opinion, the Court below cannot be said to have acted illegally in trying to satisfy his conscience by comparing handwritings appearing in the said letters with the signature of defendant No. 1 in the written statement and the Vakalatnama for the purpose of coming to the conclusion as to whether the said Exts. 4 and 4/ a were in the pen of defendant No. 1 or not. From a bare comparison of the said letters with the admitted signature of defendant No. 1 on the Vakalatnama and his written statement, it appears that the purported signature and the handwritings of the said letters do not tally with signature of defendant No. 1 on the Vakalatnama as also his signature in the written statement.

65. Further from a perusal of Ext. 4, it appears that the author of the said letter purported to have stated that original deeds are required to be sent as otherwise rent receipts would be issued in the name of the person in whose name the document of title stands,

66. The contents of the said letters, on the face thereof as also on the face of the submission made by Shri N. K. Prasad appears to be irrelevant. According to Sri N. K. Prasad the house and the land were recorded as Belgan and as such question of any assessment of rent in relation thereto in the year 1965 did not arise. If issuance of the receipt in the name of the person in whose name the document of title stands, refers to the choukidari tax, it is evident that even in the year 1965, allegedly choukidari receipts used to be issued in the name of the plaintiff and thus the question of apprehension on the part of the writer of the said letter that the receipt would be issued in the name of the person in whose name the document stands, goes against the contention of the plaintiff.

67. Further it is the case of the plaintiff that only in the year 1973 he came to learn that the rent is being assessed in receipt of Belagan land also. In this view of the matter, even the question of assessment of rent in respect of the lands in question in the year 1965 did not arise.

68. Thus, taking into consideration all the facts and circumstances of the case, I am of the view that the questions posed hereinbefore, must be answered against the plaintiff and in favour of the respondents.

69. In the result, there is no merit in this appeal, which is accordingly, dismissed, but in the facts and circumstances of the case, there will be no order as to costs.