

Equivalent citations: 2004 (3) JCR 521 Jhr

Bench: V Narayan

Saratul Fatima And Ors. vs Khodaiya Bibi And Ors. on 12/7/2004

JUDGMENT

Vishnudeo Narayan, J.

1. This appeal at the instance of the principal defendant-appellant Md. Sharif Mian has been preferred against the judgment and decree of affirmation dated 5.5.1990 and 21.5.1990 respectively passed in Title Appeal No. 47 of 1984 by Shri Stayendra Singh, 4th Additional District Judge, Palamau whereby and whereunder the appeal was dismissed and the judgment and decree of the trial Court passed in Title Suit No. 3 of 1983 by 4th Sub Judge. Palamau were affirmed.

2. The plaintiff-respondent has filed the said title suit for a declaration that they are the owners as of their own right of the suit land measuring 2-1/4 decimals of plot No. 688 appertaining to Khata No. 252 situate in village Hariharganj @ Satgawan, P.S. Hariharganj District Palamau shown in red and blue colour in the sketch map annexed with the plaint and more fully detailed in the schedule of the plaint and for confirmation of possession over 1- 1/2 decimals out of the suit land shown in red colour in the sketch map and for recovery of possession with respect of 3/4 decimals of the shown in blue colour in the sketch map after evicting the Principal defendant therefrom. A further relief of arrears of rent amounting to Rs. 200/- with interest pendent lite till realization has also been sought besides mesne profit.

3. The case of the plaintiffs-respondent (hereinafter referred to as the plaintiffs), in brief, is that plot No. 68 appertaining to Khata No. 252 having an area of 6 decimals is Gairmazarua Malik land recorded in the Cadastral Survey Records of Right having a house thereon in possession of Bachu Pasi and Deoki Pasi who had executed a sale deed dated 18.6.1930 in respect thereof in favour of Sk. Sukar Ali. Thereafter, Sk. Sukar Ali had executed two sale deeds dated 15.3.1943 one in favour of Sk. Tasduk Hussain in respect of 3 decimals southern portion of the said plot and the other sale deed of 3 decimals northern portion in favour of Sk. Abdul Latif, the father of the plaintiffs and they came in possession separately over the same in accordance with the sale deeds aforesaid. Sk. Abdul Latif executed a registered sale deed dated 2.11.1945 in respect of 12 cubic in length from east to west and 12 cubic in width from north to south i.e. 324 sq. ft. shown in yellow colour in the sketch map corresponding to 3/4 decimals of land out of his southern half 3 decimals of plot No. 688 in favour of principal defendant Md. Sharif Mian who came in possession over the same and started running a kirana shop thereon. The further case of the plaintiffs is that after the death of Sk. Abdul Latif the principal defendant approached plaintiff No. 1 Md. Syed Ansari in the month of May, 1978 to let out a portion of the old house lying adjoining west to his kirana shop shown in yellow colour in the sketch map in plot No. 688 to use the same for godown on rental on Rs. 10/- per month and plaintiff No. 1 accepted the proposal of the principal defendant and let out the said portion shown in blue colour in the sketch map to the principal defendant on a monthly rental of Rs. 10/-w.e.f. May, 1978 and the tenancy was according to the English calendar month and the principal defendant came in possession over 3/4 decimal of plot No. 688 shown in blue colour in the sketch map and he continued to pay rent to the plaintiff No. 1 up to the month of April, 1981 for which he was granted rent receipts.

4. Sk. Abdul Latif after the purchase by virtue of the sale deed dated 15.3.1945 was mutated in the Serista of the ex-landlord and he paid rent to the ex-landlord and got rent receipts and after the vesting of the estate demand was also opened in his name in the office of the Circle Officer and he paid rent to the State and got rent receipts. It is alleged that in the rent receipt granted by the State plot number or Khata number was not being mentioned. It is alleged that the plaintiffs had also their ancestral land in village Hariharganj and a separate demand was also running in respect thereof in the office of the Circle Officer, Hariharganj in the

name of Rahiman Mian, the ancestor of the plaintiffs. The plaintiffs, thereafter, filed a petition on 21.4.1981 before the Circle Officer, Hariharganj for mutation of their names in place of their father as well as for mentioning Khata number and area of land in suit for which the rent was paid and the said petition was registered as Miscellaneous Case No. 11/81-82. The principal defendant contested the said case in which he has falsely alleged that entire northern 3 decimals of plot No. 688 belonged to him which he has purchased from Sk, Abdul Latif and produced one un-registered sale deed dated 3.11.1951 purported to have been executed by Sk. Abdul Latif in his favour in respect of the land measuring 16 Haath from west to east and 13 Haath from north to south in plot No. 688 for a consideration of Rs. 48/-. It is alleged that at the spot no such area is available in the back of the shop of the principal defendant in plot No. 688 which the Principal defendants is said to have acquired by virtue of the unregistered sale deed aforesaid. It is alleged that the unregistered sale deed of the year 1951 is a forged and fabricated document brought into existence for wrongful gain which has never seen the light of the day prior to 1981-82. The said mutation case was allowed mutating the name of the plaintiffs for 1-1/2 decimals of land i.e. for the red portion of the plot shown in the sketch map only instead of 2-1/4 decimals and allowed the mutation in the name of defendant No. 1 also for remaining 1-1/2 decimals in the said plot. The Principal defendant filed an appeal before the D.C.L.R. Sadar, Daltonganj and plaintiffs also filed cross objection and the learned D.C.L.R., Sadar vide order dated 11.2.1982 set aside the order of the Circle Officer, Hariharganj and ordered that demand shall remain as it was before the order of the Circle Officer and directed the plaintiffs to get their right and title declared from the competent Civil Court with respect to the area of land of plot No. 688. It is also alleged that emboldened by the order aforesaid the principal defendant No. 1 has defaulted in payment of the rent since the month of May, 1981 and denied the title of the plaintiffs over the suit land shown in blue colour in the sketch map as well as the portion of the said plot shown in red colour. Hence the necessity of the suit.

5. The case of the principal defendant, inter alia, is that Sk. Abdul Latif, the father of the plaintiff had purchased 3 northern half of plot No. 688 and in the northern portion of the said 3 decimals there was vacant land and the entire area purchased by Sk. Abdul Latif did not have house standing thereon and soon, thereafter, the house standing on its western portion fell. It is alleged that this defendant had acquired 12 x 12 cubic of land with house thereon in plot No. 688 through registered sale deed dated 2.11.1945 executed by Sk. Abdul Latif and he came in possession thereon and after his purchase he made new construction of the house partly of Naria tiled roof and partly pucca terrace roof and the refuge water from the house of this defendant used to flow on the vacant land on the west and north in plot No. 688 and thus the land north and west shown in red and blue colour respectively in the sketch map annexed with the plaint were actually in possession of this defendant openly and within the knowledge and with acquiescence of Sk. Abdul Latif and since the vacant land was of no practical utility, Sk. Abdul Latif sold the remaining portion of plot No. 688 to this defendant for Rs. 48/- and executed a sale deed dated 3.11.1951 and handed over the same and this defendant became the owner in possession of the entire 3 decimals of plot No. 688 in his own right and, thereafter, he was mutated in respect thereof and he, thereafter, extended his house approximately on the entire southern half portion of the northern 3 decimals of plot No. 688 and the house of this defendant is also on the portion of the land shown in blue colour in the sketch map and this defendant is also in possession of the entire vacant land in front of his house which is shown in red colour in the sketch map. It is alleged that Sk. Abdul Latif was left with no land out of 3 decimals of plot No. 688 after the execution of the registered sale deed of the year 1945 and the unregistered sale deed of the year 1951 and the plaintiffs have no right, title, interest or possession over the suit land. It is also alleged that this defendant used the vacant land on the north of his house shown in red colour in the sketch map for flowing refuge water of his house as well as for passage for his egress and ingress. It is alleged that it is false to say that this defendant was inducted as a tenant on a monthly rent of Rs. 10/- in respect of a portion of the house lying adjoining west to his kirana shop to use the same for his godown. Lastly it has been alleged that Sk. Abdul Latif had ceased to have any title or interest, whatsoever, in the suit land after the execution of the sale deeds aforesaid and the plaintiffs have no right, title and interest therein and this defendant by virtue of its purchase by the sale deeds aforesaid has acquired indefeasible right, title and interest over the entire 3 decimals i.e. northern half of plot No. 688 by long lapse of time and adverse possession and he was also recognized as tenant by the ex-landlord as well as the State of Bihar and the suit of the plaintiff is barred by law of limitation as well as adverse possession.

6. In view of the pleadings of the parties the learned trial Court framed the following issues for adjudication in this case :

- (i) Is the suit as framed maintainable ?
- (ii) Whether the plaintiffs have got valid cause of action to sue the defendants ?
- (iii) Whether the suit is barred by the law of limitation and adverse possession ?
- (iv) Whether unregistered sale deed dated 3.11.1951 conferred valid right, title and interest to defendant No. 1 in respect of the suit land?
- (v) Whether defendant No. 1 was inducted as a tenant on a monthly rent of Rs. 10/- in the suit premises as alleged ?
- (vi) Whether plaintiffs have title and possession over the suit land as alleged ?
- (vii) Whether the plaintiffs are entitled to a decree as claimed by them ?
- (viii) To what other reliefs, if any, are the plaintiffs entitled ?

7. In view of the evidence oral and documentary on the record while deciding issue Nos. 3 and 5 the learned trial Court has held that the defendant No. 1 has failed to prove the plea of adverse possession in respect of the suit land and the suit is not barred by law of limitation and adverse possession. It has also been held that defendant No. 1 was inducted as a tenant in the suit premises shown in blue colour in the sketch map on a monthly rental basis and defendant No. 1 is a defaulter liable to be evicted of the suit premises. The learned trial Court has further held while deciding issue Nos. 4, 6 and 7 that unregistered sale deed dated 3.11.1951 did not confer any right, title or interest to the defendant No. 1 in respect of the suit land and the plaintiffs have valid right and title and possession over the suit land shown as red and blue colour in the sketch map annexed to the plaint and the plaintiffs are entitled to a decree as claimed. It has also been held that the submission of the learned counsel for the plaintiff that the unregistered sale deed is a forged and fabricated document and never executed by Sk. Abdul Latif is sound and convincing. In view of the findings aforesaid the learned trial Court has decreed the suit.

8. Being aggrieved by the judgment and decree of the trial Court the defendant-appellant preferred Title Appeal No. 47 of 1984. On re-appreciation and re-appraisal of the evidence on the record the learned appellate Court below has held that defendant-appellant did not derive any title and possession over the suit land either on the basis of unregistered sale deed dated 3.11.1951 or on the basis of the adverse possession and the said unregistered sale deed has not been proved to be a genuine, valid and legal document and it did not confer any title under Section 54 of the Transfer of Property Act and the defendant No. 1 was not in possession over the suit land shown in red and blue colour of the sketch map. It has also been held that portion of the suit plot shown in yellow colour in the sketch map was let out to the defendant No. 1 on rent and he is a defaulter due to the non-payment of the rent after November, 1979 and is liable to be evicted from the suit premises shown in blue colour in the sketch map on the ground of default. In view of the findings aforesaid the learned appellate Court below affirmed the findings of the trial Court and dismissed the appeal of the principal defendant.

9. The principal defendant preferred this appeal before this Court being aggrieved by the judgment and decree of the appellate Court below.

10. This Court while admitting the appeal for hearing has formulated the substantial question of law vide order dated 13.11.1990 which runs thus :

"whether the learned Court of appeal below committed an illegality in dismissing the appellant's appeal without taking into consideration that he would be deemed to be in possession adversely to the interest of the true owner on and from the date he purported to have purchased the property by virtue of an unregistered deed of sale dated 3.11.1951."

11. Assailing the impugned judgment it has been submitted by the learned counsel for the principal defendant that admittedly he has purchased 12 x 12 cubic of land with house standing thereon by virtue of the registered sale deed dated 2.11.1945 and came in possession thereof and has also made new construction of the house partly of Naria tiled roof and partly of pucca terrace roof and the refuse water from his house used to flow on the vacant land of west and north i.e. on the suit land shown in blue and red colour in the sketch map annexed with the plaint and the suit land was in his actual possession openly, uninterruptedly, to the knowledge of the plaintiffs and all including Sk. Abdul Latif and the house standing over the suit having been fallen and the suit land being of no practical use Sk. Abdul Latif sold the suit land to him for valuable consideration for Rs. 48/- and in proof of the sale he has handed over to him an executed sale deed dated 3.11.1951. It has also been contended that he was using the suit land for his egress and ingress to his house and by virtue of the said purchase of the year 1951 he became the owner of the entire 3 decimals of northern portion of plot No. 688 and he was in possession thereof as of his own right. It has also been submitted that he continued in possession over the suit land since 1951 i.e. from the date of the sale and thus the said unregistered sale deed of 1951 shall definitely be taken into consideration for collateral purposes of showing his possession over the suit land since 1951 and thereby this defendant has perfected his title by adverse possession and the finding of the learned Courts below that this defendant has not made out a case that the sale deed dated 3.11.1951 was effected by delivery of possession is clearly an erroneous finding as well as an error apparent from the record. It has also been contended that the unregistered sale deed of the year 1951 is a genuine and valid document and the learned Courts below has misconstrued the ratio of the case of Ram Sawari Devi and Ors. v. Maniraj Rai and Ors., 1969 BLJR 397. It has also been submitted that the learned Courts below has also wrongly referred AIR 1972 Pat 33, in their respective impugned judgments in support of their finding but in fact there is no such ratio therein at page 33. It has also been submitted that possession over the suit land of this defendant on the basis of the alleged invalid title deed is adverse from its very inception and if the purchaser continues in possession for 12 years or more he acquires a perfect and indefeasible title by adverse possession and this defendant is in possession of the entire suit land since 1951 when Sk. Abdul Latif had sold the same to the plaintiff and executed an unregistered sale deed dated 3.11.1951. Lastly it has been contended that the plaintiffs have purposely set up the case of tenancy of a portion of suit land shown in blue colour in the sketch map on a monthly rent of Rs. 10/- only to circumvent the continuous and uninterrupted possession of this defendant over the said suit land but in fact there is no relationship of landlord and tenant between them. Thus the impugned judgment is unsustainable. In support of his contention reliance has been placed upon the ratios of the case of Alakhdeo Singh v. The Gaya District Board, AIR 1957 Pat 321, Bageswari Charan Singh v. Jagarnath Kuari and Anr., AIR 1929 Pat 117, Raju Roy and Ors. v. Kasinath Roy and Ors., AIR 1956 Pat 308, Collector of Bombay v. Municipal Corporation of the City of Bombay and Ors., AIR (38) 1951 SC 469 and State of West Bengal v. The Dalhousie Institute Society, 1970 (3) SCC 802.

12. In contra, it has been submitted by the learned counsel for the plaintiffs that as per the mandates contained under Section 54 of the Transfer of Property Act a sale of property of the value of less than Rs. 100/- can be made only in one of the two following ways i.e. (a) by a registered document or (b) by delivery of property and the mere unregistered document without any delivery of property cannot, therefore, convey any title to the vendees in respect thereof. It has further been contended that the documents of which registration is necessary under the Transfer of Property Act but not under the Registration Act are within the scope of Section 49 of the Registration Act and if not registered are not admissible as evidence of any transaction affecting any immovable property comprised therein and do not affect any such property. In support of his contention reliance has been placed upon the ratio of the case of Ram Sawari Devi and others (supra) in which it has been observed by the Division Bench of the Patna High Court that "unregistered sale deed cannot be admitted into evidence in support of the case of the defendant. Section 54 of the Transfer of Property Act permits transfer of tangible immovable property of a value less than Rs. 100/- either by a registered instrument or by delivery of

the property. Thus according to this section, there are only two modes of transfer by sale, and these are (1) by registered instrument and (2) by delivery of property. The Registration Act does not distinguish between tangible and intangible immovable property and makes registration optional in the case of immovable property of value less than Rs. 100/-. If a sale deed purporting to transfer a tangible immovable property of value less than Rs. 100/- is not registered, the sale would be ineffective unless it is accompanied by delivery of possession of the property. The sale deed can be used only as an evidence of the character of possession." Adverting to the averments made in the written statement it has been contended that the Principal defendant claims to be in possession of the suit land prior to the date of the unregistered sale deed by virtue of the flow of refuse water of his house thereon but it is the settled proposition of law that flow of the refuse water of the house on the suit land does not amount the possession of the defendant over the suit land thereby perfecting his title by adverse possession. It has further been submitted that there is further averment in para 9 of the written stated that Sk. Abdul Latif sold the suit land for valuable consideration of Rs. 48/- and in proof of the sale he also handed over to this defendant a duly executed sale deed dated 3.11.1951 and after this purchase the defendant No. 1 became the owner in possession of the entire 3 decimals of land i.e. northern half portion of plot No. 688 but there is no specific averment therein that Sk. Abdul Latif had delivered possession to the principal defendant over the suit land. Relying upon the ratio of the case of Mst. Kirpal Kaur v. Bachan Singh and Ors., AIR 1958 SC 199, it has been submitted that the unregistered sale deed dated 3.11.1951 purported to have been executed by Sk. Abdul Latif cannot be admitted into evidence to show the nature of possession of the principal defendant subsequent to its date and to admit the said unregistered deed in evidence for the purpose sought would really amount to getting round the statutory power imposed by Section 49 of the Registration Act. Referring the ratio of the case of Raghunath and Ors. v. Kedarnath, AIR 1969 SC 1316, it has been submitted that Section 49 of the Registration Act mandates that the documents of which registration is necessary under the Transfer of Property Act (such as under Section 54 of the Transfer of Property Act) but not under Section 17 of the Registration Act fall within the scope of Section 49 of the Registration Act and the documents if not registered are not admissible as evidence of any transaction affecting any immovable property comprised therein and do not affect any such immovable property. It has also been submitted that in the absence of any case of the principal defendant of being put in possession over the suit land by virtue of the sale for Rs. 48/- followed by unregistered sale deed in the question of the defendant being in possession of the suit land by virtue of the said sale w.e.f. 3.11.1951 and perfecting his title by adverse possession is not at all tenable. It has also been submitted that both the Courts below have concurrently held that the unregistered sale deed aforesaid is not a genuine and valid document duly executed by Sk. Abdul Latif and from reading of both the sale deeds together it does not transpire that Sk. Abdul Latif has sold the entire suit land having an area of 2-1/4 decimals and both the Court below have concurrently held that the principal defendant is not in possession of the suit property as of their rights and there is a relationship of landlord and tenant between them in respect of the portion of the suit plot shown in blue colour in the sketch map annexed with the plaint and furthermore the question of possession is the pure and simple question of fact and both the Courts below have concurrently held that the principal defendant is not in possession of the suit property as of their rights by virtue of the said unregistered sale deed and in this view of the matter it is not within the domain of this Court to interfere with the concurrent finding of facts recorded by both the Courts below in respect thereof. In support of his contention reliance has been placed upon the ratio of the case of Kshitish Chandra Bose v. Commissioner of Ranchi, 1981 BLJ 201, Deo Krishna Singh and Ors. v. Harendra Prasad and Ors., 1981 BLJ 283, R.V.E. Venkatachala Go under v. Arulmigu Visweswaraswami and V.P. Temple and Anr., 2004 (2) JCR 34 SC, Thiagarajan and Ors. v. Sri Venugopalaswamy B. Koil and Ors., 2004 AIR SCW 1618. Thus there is no illegality in the impugned judgment requiring an interference therein.

13. It will admit of no doubt that Sk. Abdul Latif has acquired 3 decimals i.e. northern half of plot No. 688 by virtue of the sale deed dated 15.3.1943 executed by Sk. Sukar Ali who had earlier purchased the entire said plot by virtue of the sale deed dated 18.6.1930 from the recorded tenant Bachu Pasi and Deoki Pasi. Sk. Abdul Latif sold 12 x 12 cubic of land i.e. 3/4 decimals of land in the northern half of plot No. 688 to the principal defendant by virtue of the registered sale deed dated 2.11.1945 for Rs. 200/- and the area comprise in this sale deed has been shown in yellow colour in the sketch map annexed with the plaint in which the principal defendant runs his kirana shop. The sale deed dated 2.11.1945 executed by Sk. Abdul Latif in favour of the

principal defendant is Ext. D. The land sold under Ext. D to the principal defendant is bounded in the north by the house of Sk. Abdul Latif, south house of Umar Rasul, west house of Sk. Abdul Latif and east Bazar chowk. The principal defendant claims to have purchased the land out of plot No. 688 measuring an area of 16 Haath from west to east and 13 Haath from north to south for Rs. 48/- by virtue of the unregistered sale deed dated 3.11.1951 Ext. D/1. The land covered under Ext. D/1 is bounded in the north Sk. Abdul Latif, south Umar Rasul, east already purchased land of the principal defendant shown in the yellow colour in the sketch map and west Sujayat Mian. It therefore, appears that the subject matter of the registered sale deed is the land which is adjacent west of 3/4 decimals of land which the principal defendant has acquired by virtue of the registered sale deed of 1945 and it has been shown in blue colour in the sketch map attached with the plaint. It is, therefore, crystal clear that the portion of the land shown in red colour in the sketch map out of 3 decimals northern half of plot No. 688 is not comprised under the sale deed of the year 1951 and thus the northern portion of plot No. 688 as shown in red colour in the sketch map is the property of Sk. Abdul Latif and his descendants i.e. the plaintiffs. The principal defendant cannot be said to have come in possession over the suit land shown in red colour in the sketch map by virtue of any sale deed purported to have been executed by Sk. Abdul Latif in his favour. The flow of the refuge water of the house of the principal defendant on the suit land either shown in the red colour or in the blue colour or his passage for egress and ingress through the land shown in red colour in the sketch map do not tantamount to the possession of the principal defendant over the same. By flowing of the refuge water or using the passage through the land of the others do not constitute adverse possession. Therefore, the principal defendant in no stretch of imagination can be said to have perfected his title over the suit land shown in red colour and blue colour in the sketch map annexed with the plaint. Section 54 of the Transfer of Property Act defines "sale" which runs thus :

54. "Sale" defined--"Sale" is a transfer of ownership in exchange for a price paid or promised or part paid and part promised.

Sale how made.--Such transfer, in the case of tangible immovable property of the value of the one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

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It appears from the bare reading of Section 54 aforesaid that a sale of property of the value of less than one hundred rupees can be made only in one of the two following ways i.e. firstly by a registered document or secondly by delivery of the property. There is no third mode of a sale of the property of the value of less than one hundred rupees. Section 17(1)(b) of the Registration Act envisages, inter alia, that non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or immovable property requires to be registered. The sale deed of 1951 alleged to have been executed by Sk. Abdul Latif in favour of the principal defendant thus does not require to be registered as per the provisions of Section 17 of the Registration Act since the consideration of this sale deed is less than one hundred rupees but there are only two modes of the sale envisaged under Section 54 of the Transfer of Property Act, therefore, a deed of sale even for the value of less than one hundred rupees is required to be registered. In this connection Section 49 of the Registration Act is equally relevant which runs thus :

"49. No document required by Section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)] to be registered shall--

- (a) affect any immovable property comprised therein, or
 - (b) confer any power to adopt, or
 - (c) be received as evidence of any transaction affecting such property or conferring such power,
- unless it has been registered :--

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (1 of 1877), or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882 (4 of 1882), or as evidence of any collateral transaction not required to be affected by registered instrument."

The insertion of the words "or by any provisions of the Transfer of Property Act, 1882" has made it clear that the document of which registration is necessary under the Transfer of Property Act but not under Section 17 of the Registration Act fall within the scope of Section 49 of the Registration Act quoted above and if such document, if not registered, is not admissible as evidence of any transaction affecting any immovable property comprised therein and also does not effect any such movable property. In the case of *N. Varada Pillai and Anr. v. Jeevanathammal*, AIR 1919 Privy Council 44, it has been observed by the Privy Council that an unregistered document although not admissible for the purpose of proving the transaction purported to have been affected is admissible in evidence for collateral purposes such as for ascertaining nature of the possession of the property. It is the settled proposition of law by a catena of decisions some of which have been relied upon by the principal defendant that if a sale deed purporting to transfer a tangible immovable property of value less than one hundred rupees is not registered the sale would be ineffective and it does not confer title unless it is accompanied by the delivery of possession of the property and the unregistered sale deed can be used only as an evidence of the character of possession. In the case of *N. Varada Pillai and another* (supra) Privy Council has observed that where the donor did not effect a registered gift deed but allowed donee to enter into possession of the gifted property and the donee thus remained in possession for over 12 years, his title became perfected as against donor's heirs. In the case of *Bageswari Charan Singh* (supra) it has been held by the Division Bench of the Patna High Court that adverse possession denotes, possession under a claim or colour of title and where a defendant entered upon possession by virtue of a document and continued to be in possession on the strength of that document even if the title as based upon the document itself was void the possession, nevertheless, being under a claim or colour or title, must be regarded as adverse. In the case of *Collector of Bombay* (supra) the Apex Court has thus observed :

"....That the position of the Corporation and its predecessor in title was that of a person having no legal title but nevertheless holding possession of the land under colour of an invalid grant of the land in perpetuity and free from rent for the purpose of a market. Such possession not being referable to any legal title it was prima facie adverse to the legal title of the Government as owner of the land from the very moment the predecessor in title of the Corporation took possession of the land under the invalid grant. This possession had continued openly, as of right and uninterruptedly for over 70 years and the Corporation had acquired the limited title to it and its predecessor in title had been prescribing for during all this period, i.e. to say, the right to hold the land in perpetuity free from rent but only for the purpose of a market in terms of the Government resolution of 1865. The immunity from the liability to pay rent was just as much an integral part or an inseverable incident of the title so acquired as was the obligation to hold the land for the purposes of a market and for no other purposes. There was no question of acquisition by adverse possession of the Government's prerogative right to levy assessment. The right acquired include as part of it, an immunity from payment of rent which necessarily constituted a right in limitation of the Government's right to assess in excess of the specific limit established and preserved by the Government resolution within the meaning of Section 8 of the Bombay Act 11(2) of 1876."

The Apex Court following the ratio of the case of Collector of Bombay (supra) has thus observed in the case of State of West Bengal (supra) :

"There is no material placed before us to show that the grant has been made in the manner required by law though as a fact a grant of the site has been made in favour of the Institute. The evidence relied on by the Special Land Acquisition Judge and the High Court also clearly establishes that the respondent has been in open, continuous and uninterrupted possession and enjoyment of the site for over 60 years. In this respect the material documentary evidence clearly establishes that the respondent has been treated as owner of the site not only by the Corporation, but also by the Government. The possession of the respondent must have been on the basis of the grant made by the Government, which, no doubt, is invalid in law.

The institute was held to have acquired title by adverse possession."

In the case of Raju Roy and others (supra) it has been held by the Division Bench of the Patna High Court which runs thus :

"....Where a transferee under a lease or sale has been in possession for upwards of 12 years of a property under a lease or sale which is void under the law, an action against him by the rightful owner would be barred by limitation under the statute. But the possessor cannot acquire a right higher than what he was actually prescribing for. When the lease purported to create a permanent tenancy in the land, the party cannot claim an interest higher than or different from that which he would have got had the transfer of the lease been legally valid or operative."

Again in the case of Alakhdeo Singh (supra) the Division Bench of the Patna High Court has thus observed :

"....Where a person enters into possession of property by virtue of an instrument of lease which is void and inoperative, his possession, is adverse to the true owner from the very beginning, for the simple reason that the transfer conveyed to him no title. When his possession was adverse to the true owner from the very beginning the payment of rent will not make the possession lawful. It will only affect the nature of the interest that he was prescribing by virtue of his adverse possession. Whether or not a person is a licensee is a question of contract between the parties, and when initially he was inducted upon the land as a lessee, his possession will not be regarded, as that of a licensee on the instrument of lease being inoperative, payment of rent notwithstanding. When a person enters into possession of land under a void transaction and remains in possession for the full statutory period, the only question for determination is as to the nature of the interest that he has acquired by prescription. To hold that he was a licensee would be to substitute the contract for the parties which is not permissible.

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He cannot acquire by prescription a right higher than the right which the instrument of lease purported to convey to him. The transaction was admittedly a transaction of lease and, therefore, when he entered into possession under a void lease, he can acquire only the right of a lease by prescription."

On the touchstone of the settled position of law referred to above let us now consider the substantial question of law formulated in this appeal. For that we must first look into the case of the principal defendant as made out in his written statement. It has been averred in para 8 of the written statement that after the purchase in the year 1945 the principal defendant made new construction of house partly of Naria tiled roof and partly of pucca terrace roof on 3/4 decimals of land shown in yellow colour in the sketch map and the refuse water from the house of the principal defendant used, to flow on the vacant land on the west and north, and in this way the land on the north and west which are respectively coloured red and blue in the sketch map filed with the plaint were actually in possession of the defendant openly and within the knowledge and acquiescence of Sk. Abdul Latif. The pith and substance of the case of the principal defendant regarding his possession over

the suit land prior to the sale deed of 1951 is by virtue of the flow of the refuge water from his house. I have already negated the case of the possession of the defendant over the suit land by virtue of flow of the refuge water of his house. The reason for that is that for the purposes of acquiring title by adverse possession, the nature of animus possidenti is material, whether the animus is based on real, false or pretended title. Possession in order to be adverse must be adequate in continuity, in publicity and extent and in addition to animus possidenti the defendant must have definite physical control over the property i.e. the suit land. Dispossession denotes actual and complete ouster or expulsion of a person having right to the possession and his exclusion for all participations in the enjoyment of the property. The mere act of tethering cattle, throwing cow dung, flowing of the refuge water of the house, regularly cutting grasses, storing rubbish etc. on the land of another without the assertion of any adverse right does not by itself constitute adverse possession. Before a neighbour can filch a part of the land of his adjoining land owner he must show some act of an unequivocal character to put the latter on his guard. Acts of accommodation or of simple tolerance do not constitute possession in the person accommodated or tolerated so as to bring the rule of limitation as to play. The Apex Court in the case of Kshitish Chandra Bose (supra) has observed that :

"....All that the law requires is that the possession must be open and without any attempt at concealment. It is not necessary that the possession must be so effective so as to bring it to the specific knowledge of the owner. Such a requirement may be insisted on, where an ouster of title is pleaded but not in a case of adverse possession."

14. The unregistered sale deed of the year 1951 purported to have been executed by Sk. Abdul Latif though concurrently held not to be genuine and valid by the Courts below does not confer any title on the principal defendant in respect of the suit land Section 54 of the Transfer of Property Act mandates that delivery to tangible immovable property takes place when the seller places the buyer or such persons as he directs, in possession of the property. There is averment in para 9 of the written statement of the principal defendant that the suit land described in the red and blue colour in the map annexed with the plaint were actually in physical possession of this defendant openly and within knowledge of all including Sk. Abdul Latif and since the suit land was of no practical utility for Sk. Abdul Latif he sold the same for valuable consideration of Rs. 48/- and in proof of the sale he also handed over to this defendant a duly executed sale deed dated 3.11.1951. I have already stated above that flow of the refuge water of the house of the defendant on the suit land does not constitute dispossession of Sk. Abdul Latif. There is no specific averment that Sk. Abdul Latif when he has allegedly sold the suit land for Rs. 48/- has handed over the possession to the principal defendant over the same. It is relevant to mention here that the modes of acquisition of possession are two folds, namely, taking and delivery. Taking is the acquisition of possession without the consent of the previous possessor and this taking may be either rightful or wrongful. Delivery on the other hand is the acquisition of possession with the consent and co-operation of the previous possessor. Taking possession, therefore, consists of a corpus possessionis and an animus possidenti Here in the gives facts of this case the principal defendant has definitely not taken possession of the suit land rather he claims to be in possession of the suit land by virtue of the flow of the refuge water of his house situate on 3/4 decimals of land shown in yellow colour in sketch map aforesaid. There is no case of the principal defendant that after the sale of the land comprised in the unregistered sale deed of 1951 possession has ever been delivered to him by Sk. Abdul Latif. Therefore, the question of the principal defendant coming in possession of the suit land as alleged does not arise by either of the modes aforesaid in this case so as to perfect his title thereon by adverse possession. There is one other aspect in the matter. As per the boundary referred to above in both the sale deeds it is crystal clear that the suit land shown in red colour was not comprised in the alleged sale deed of the year 1951 and, therefore, 1-1/2 decimals of the suit land shown in red colour cannot be said to have been sold to the principal defendant. Both the Courts below have concurrently negated the case of possession of the principal defendant over any portion of the suit land. Both the Courts below have also concurrently held that the principal defendant is in occupation of the suit land shown in blue colour in the sketch map annexed with the plaint by virtue of the tenancy at the monthly rent of Rs. 10/-. The finding of the learned Courts below is based on the proper appreciation of the evidence on the record. The concurrent findings aforesaid of the Courts below are pure and simple question of facts which cannot be interfered within the ambit of Section 100 of the Code of Civil

Procedure. In the case of Kshitish Chandra Bose (supra) relying upon the ratio of Mst. Kharbuja Kuer v. Jangbahadur Rai, 1963 (1) SCR 456, the Apex Court has observed that it is the settled law that the High Court has no jurisdiction to entertain a Second Appeal on the ground of erroneous finding of fact. It has further been observed that as the two Courts approached the evidence from a correct prospective and gave a concurrent finding of facts the High Court has no jurisdiction to interfere with the said finding. The Apex Court has further observed which runs thus :

"....But the High Court cannot interfere with the conclusions of fact recorded by the lower appellate Court, however, erroneous the said conclusion may appear to be to the High Court, because, as the Privy Council observed, however, gross or inexcusable the error may seem to be there is no jurisdiction under Section 100 to correct that error."

The ratio of the case of R.V.E. Venkatachala Gounder (supra) and Thiagarajan and others (supra) relied upon by the plaintiff also support the said proposition of law. In the case of Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and Ors., AIR 1999 SC 2213, it has been observed by the Apex Court that :

"....the right of appeal is neither a natural nor an inherent, right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the Section must be strictly fulfilled before a Second Appeal can be maintained and no Court has the power to add to or enlarge those grounds. The Second Appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under the Section."

It has further been observed that it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at the last Court of fact being the 1st appellate Court... In a case wherefrom a given set of circumstances two inferences are possible one drawn by the lower appellate Court is binding on the High Court in the Second Appeal. Adopting in other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the 1st appellate Court unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provision of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence. Here in this case at hand both the Courts below have correctly approached and considered the evidence on the record in proper perspective for coming to the finding rejecting the case of adverse possession of the principal defendant over the suit land and there is no infirmity in the concurrent findings of the Courts below in respect thereof. Therefore, there is no substance in the contention of the learned counsel of the principal defendant. To sum up the impugned judgment does not suffer with any illegality requiring an interference therein.

15. There is no merit in the appeal and it fails. The appeal is hereby dismissed with costs. The impugned judgment is affirmed.