CASE NO.:
Appeal (civil) 4594 of 1995

PETITIONER:
Mahila Bajrangi (dead) through L.Rs. & Ors. Appellants

RESPONDENT:
Badribai w/o Jagannath & Anr. Respondents

DATE OF JUDGMENT: 19/12/2002

BENCH:
Doraiswamy Raju & Shivaraj V. Patil.

JUDGMENT:

J U D G M E N T

D. RAJU, J.

The unsuccessful plaintiff, who lost before the Trial Court but able to get relief before a learned Single Judge of the High Court, has originally filed the above appeal, having once again lost her claims before a Division Bench of the Madhya Pradesh High Court. The plaintiff-Bajrangi filed the suit case No. 1-A/77 Civil on the file of the District Court, Morena, for declaration of title and recovery of possession of the suit property which is a house situated at Shyopur Kala city, more fully described in the plaint. The suit originally was filed against three persons M/s Jagannath who claimed to be the adopted son and Shankarlal and Badruddin, the tenants. After the death of Jagannath his legal heirs have been brought on record. On the demise of Shankarlal also, his legal heirs have been brought on record. Though the suit filed as early as on 12.10.68 was disposed of on 22.12.78, on an appeal before the High Court, the matter was by an Order dated 21.1.83 remanded to the Trial Court. During the remit proceeding on the application of the plaintiff, the heirs of Shankarlal and Badruddin were deleted from the array of parties. The remand order was said to have been with a direction to consider all the materials on record, after hearing the parties afresh, with no right to produce any fresh material. The suit came to be dismissed by a judgment dated 19.3.83. Thereupon the plaintiff pursued the matter on appeal in first appeal No.25 of 1983 before the High Court and a learned Single Judge by a judgment dated 6.10.89, while allowing the appeal decreed the suit and directed the defendants to put the plaintiff in possession of the portion claimed. Aggrieved, the respondents filed LPA NO. 8 of 1990 and the Division Bench by a judgment dated 27.11.94 allowed the appeal and ordered the dismissal of the suit. Hence, this appeal.

The case of the plaintiff was that the suit property originally belonged to Gendilal and that he died on 8.1.1966, leaving behind Gopali, his wife said to have been married even before 1934 and the plaintiff Bajrangi was claimed to be the daughter born in the year 1934. Gopali, the mother was said to have executed a gift deed in favour of the plaintiff on 18.5.66 and that she came into possession thereon and continued to be so even after the death of Gopali, as full owner thereof. According to the plaintiff Jagannath forcibly dispossessed her on 17.8.66 though he had no right to the property and he is not the adopted son of Gendilal, as claimed, since there was no adoption in accordance with law. The defendant Jagannath claimed that he had been adopted by late Gendilal on whose death the house property in question divided on him. According to the defendant Gopali had been first married to one Chataru who was alive and the said marriage was subsisting when she married Gendilal and such a marriage was not recognized in law or under any custom recognized by the cast to which they belonged and consequently not only the entire property of Gendilal devolved upon him, but even the gift deed said to have been executed by Gopali in favour of the plaintiff is ineffective and will not convey any right in the property to the

plaintiff.

The learned Trial Judge, after remand by the High Court, considered the matter afresh and held that Gopali was not the married wife of Gendilal and Bajrangi came along with Gopali and therefore has not the daughter of Gendilal. The Trial Court also held that the plaintiff has not established that herself and Gopali were legal heirs of Gendilal and came into possession of the property. It was also specifically found that Jagannath and his heirs alone were in possession of the property. The deed of gift dated 18.5.66 though was held to have been executed by Gopali in favour of plaintiff, was found to be ineffective. The plaintiff also was held to have failed to substantiate that the tenants were paying rent to her or that in her absence the defendant Jagannath broke open the lock and entered into forcible possession. The claim regarding adoption was also found in favour of the defendants. The suit, therefore, came to be dismissed. The learned Single Judge in the High Court was of the view that Gopali was married to Gendilal on the basis of Ex.P-4 (certified copy of deposition of Gopali before Naib Tehsildar on 17.10.69) considered to be relevant under Section 33 of the Evidence Act. Based on the said version and Ex. P-7 certain statements, it was also held that Bajrangi was the daughter of Gendilal. The learned Single Judge also held that the claim of adoption of Jagannath by Gendilal was not sufficiently proved and established. In view of the above, on the death of Gendilal the suit property was held to have devolved upon Gopali and the plaintiff and that by virtue of the gift deed dated 18.5.66, the plaintiff was held entitled to the property. While allowing the appeal the suit was decreed as prayed and the defendants were directed to put the plaintiff into possession of the suit property. On further appeal before the Division Bench by the defendants, it was held that no presumption can be raised about the marriage of Gopali with Gendilal, on the evidence on record and that the plaintiff failed to prove that there was valid marriage of Gopali, the mother of the plaintiff with Gendilal. As to the parentage of the plaintiff it was held that plaintiff has not established that she was born to Gopali through Gendilal and per contra the other evidence including her own admission that when her mother Gopali went to Gendilal, she was a child, belied any such claim. So far as the parentage of the defendant Jagannath who claimed to be the adopted son of Gendilal was concerned the Division Bench, held that there was no evidence on record to prove the factum of actual adoption in accordance with law and that the 1st defendant at any rate could not have been validly given in adoption by his mother after her remarriage, the 1st defendant being her son through her first husband. Consequently, the suit came to be dismissed, while allowing the appeal and setting aside the judgment of the learned Single Judge.

The learned counsel for the appellants sought to raise for the first time the plea of resjudicata which was not taken at any time either in the pleading or before the Trial Court, the 1st Appellate Court or before the Division Bench in the High Court nor even before this Court till the matter was taken up for final hearing. The basis of the claim seem to be like this: Gendilal who died on 8.1.66 owned the house property as well as agricultural lands and in respect of agricultural lands Gopali and Bajrangi filed an application for mutation of their names on the death of Gendilal. Jagannath was also said to have filed an application for mutation claiming to be the adopted son of Gendilal. The Tehsildar was said to have conducted an enquiry under Section 110(4) of the M.P. Land Revenue Code, 1959, (hereinafter referred to as the 'Code'. He was said to have power to summon and examine witnesses while holding an enquiry into the claim for mutation. During September/October 1968, it appears Gopali was examined and cross-examined respectively and the statement of Gopali was filed as Ex.P-4 and statement of Jagannath was filed as Ex.P-7. The Tehsildar was said to have passed an order dated 18.3.69 in favour of Gopali and Bajrangi by allowing their claim for mutation on the ground that they were wife and daughter, respectively of the deceased Gendilal, rejecting at the same time the claim of Jagannath on the ground that he has not proved to be the adopted son of Gendilal. On an appeal filed under Section 44 of the Code, the Sub-Divisional Officer, appears to have, while partly allowing the same held that Jagannath was also the adopted son of Gendilal and that his name also may be mutated in equal share with that of Gopali and Bajrangi. A second appeal was said to have been unsuccessfully filed before the Additional Commissioner by Gopali and Bajrangi,

resulting in its dismissal on 21.8.71. On further Revision before the Board of Revenue, M.P. at Gwalior, the Revision was said to have been allowed holding that Jagannath has not legally proved his adoption and thereby the order of the Tehsildar was said to have been restored, while setting aside the Order of the Sub-Divisional Officer. This Order of the Board was marked as Ex.P-5. It was now, for the first time, claimed that the issues decided by the Tehsildar and Board of Revenue and findings recorded operated as resjudicata and being pure questions of law the same could be raised at any time on the basis of materials already on record. In pressing the said claim, reliance has been placed on Explanation (viii) to Section of the Code of Civil Procedure, 1908.

The learned senior counsel for the respondents strongly objected to the plea based on resjudicata being permitted to be raised at the belated stage, when the same was not raised either before the Trial Court or before the learned Single Judge and Division Bench in the High Court or even before this Court before the matter was taken up for final hearing. It was also urged that the on merits also, the said plea has no legs to stand and deserve to be rejected. The plea based on resjudicata is a mixed question of fact and law and ought to have been raised at the earliest, with the necessary pleadings and emphasis on the relevant materials to enable the defendants to effectively rebut the same. Such a plea in this case on merits also seems to be stale and now appear to have been resorted to, more out of desperateness rather than on account of any merit in it. Though, it ought to be rejected at this stage, since in the form and manner it is raised could not be effectively decided merely on the basis of the earlier orders made in the mutation proceedings alone without substantiating the essential ingredients necessary for its application, out of deference to the assumed seriousness with which it has been put forward, we propose to deal with it, on its merits also.

Explanation (viii) to Section 11 CPC on which strong reliance has been placed, in addition to certain judgments brought to our notice can be of no assistance whatsoever to the appellants in this regard. The said Explanation stipulate that an issue ‘heard and finally’ decided though by a court of limited jurisdiction, which the said ‘Court’ is competent to decide such an issue, shall operate as resjudicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit in which such issue has been subsequently raised. Merely because in exercising powers under Section 110 of the Code for mutation of acquisition of rights in the field books and other relevant land records, the Tehsildar was obligated to afford reasonable opportunity of being heard to the persons interested and hold further inquiry as may deem necessary into the claim, before making necessary entries or that some witnesses were examined by such authority, though not substantiated that he had any power to administer oath or compel and enforce attendance of witnesses, it cannot be elevated to the status of ’court’ and its orders credited with the force and efficacy of a decision of a Court of justice in a judicial proceeding. Such entries made in land records even as per the Code, shall be presumed to be correct only until the contrary is proved. Section 111 of the Code provides that the Civil Court shall have jurisdiction to decide any dispute to which the State Government is not a party relating to any right, which is recorded in the record of rights. Consequently, it could not legitimately be claimed that the Tehsildar or authorities exercising powers of mutation (original, appellate or revisional) have been accorded the status of Civil Courts or Courts of exclusive jurisdiction and for that matter, to use such orders as basis or source for asserting a claim of resjudicata before a competent Civil Court in a subsequent suit involving adjudication of title to the immovable property. That mutation proceedings before Revenue Authorities are not judicial proceedings in any Court of law and does not decide questions of title to immovable property is a trite position and principle of law vide- (Thakur) Nirman Singh & Ors vs Thakur Lal Rudra Partab Narain Singh and Ors. (AIR 1926 PC 100). The decision reported in Rajlakshmi Dasi & Others vs Banamali Sen & Otherrs (1953 SCR 154) rendered in the context of dealing with the efficacy of a decision relating to apportionment of compensation under the Land Acquisition Act among claimants can be of no assistance to the case on hand, viewed in the light of the very observations contained in the said decision of this Court itself, that the claim to compensation made by the respective parties was founded on the assertion of

their respective titles and that the Land Acquisition Court had thus jurisdiction to decide the question of title of the parties in the property acquired and that title could not be decided except by deciding the controversy between the parties about the ownership. Per contra, the Revenue Authority ordering mutation of revenue records cannot be Protanto held to be a Civil Court of concurrent and competent jurisdiction to adjudicate questions of title to immovable property. That apart, it is always the decision on an issue that has been directly and substantially in issue in the former suit between the same parties which has been heard and finally decided that is considered to operate as resjudicata and not merely any finding on every incident or collateral question to arrive at such a decision that would constitute resjudicata.

It was next contended for the appellant on the basis of the statement (Ext.P.4) of Gopali recorded in the Mutation Proceedings on 17.10.1968 by relying upon Section 33 of the Evidence Act that the same is admissible in evidence to prove that Gopali and Gendlilal both lived as husband and wife for a long time to create a presumption of valid marriage. Similarly, reliance was also placed on Exb.P5, the order passed by the Board of Revenue on revision in mutation proceedings. Yet another document was the Gift Deed (Exb.P7) the statement of Jagannath said to have been made on 13.9.68 in the mutation proceedings.

Sections 32 and 33 of the Evidence Act are considered to be exceptions to the general principle that the best evidence should be directly let in, during the course of trial to render it admissible in evidence. Section 32 renders statement of relevant facts made by a person, who is dead, or who cannot be found or who has become incapable of giving evidence, etc., admissible in evidence as to the relevant facts when it relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute raised. Section 33 provides the conditions necessary to be satisfied to admit as secondary evidence testimony given by a witness in a former judicial proceeding or before any person authorized by law to take it for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, etc. It was also contended that the admission of facts in those statements would be sufficient per se to prove the claims made in evidence, as an admission. The statement as to any fact in issue or relevant fact to be admissible as an admission must be such as are relevant and may be proved against the person, who makes them or his representative in interest and not on behalf of the person, who makes them, unless when it is of such a nature that if the persons making it were dead, it would be relevant as between third person under Section 32. So far as the case on hand is concerned, it cannot be said that the mutation proceedings before the Tehsildar under the code was a judicial proceeding or that it was shown to have been made before a person authorized by law to take evidence. Even that apart, the statements during the mutation proceedings were all after the disputes arose between parties when Gendilal died on 8.1.1966 and being self-serving claims and assertions in support of the very claims of the person making it which are seriously disputed, in the absence of any independent corroboration cannot be taken to be conclusive evidence sufficient in law to substantiate those facts sought to and necessitated, to be proved by the plaintiff to claim the relief. By the same standards, which the appellants seek to apply to the appreciation of their case if the materials produced on behalf of the first defendant are also adjudged the entries in the School Admission Register and School Leaving Certificate made long before even any dispute between parties arose, pertaining to Jagannath, describing late Gendilal as the father, cannot be brushed aside as of no significance. Dehors the admissibility or otherwise of a particular piece of evidence, the question of probative value of the material is as much relevant and necessary to be considered before the same being accepted as a legal piece of evidence sufficient in law to constitute proof of the fact sought to be established. The learned Trial Judge as well as the Division Bench, in our view, have properly kept into consideration these vital aspects in appreciating the materials on record and we could find no serious infirmity in the

manner of their appreciation or the reasonableness of the conclusions arrived at thereon. The learned Single Judge has, in our view, omitted to keep into account these vital aspects and committed a grave error in taking these statements to be conclusive evidence and sufficient in law by themselves to establish the factum of marriage of Gopali with Gendilal as well as the parentage of the original plaintiff. Apart from all these aspects, the evidence on record that Gopali was earlier married to another person and that even when she joined Gendilal, the original plaintiff Bajrangi was already a child, would militate against the normal presumption that would be available to be drawn on account of long cohabitation, as also the parentage of the original plaintiff. Consequently, we are of the view that the findings recorded by the Division Bench in this regard are not shown to suffer any serious infirmity or vitiated by perversity to call for our interference in this appeal.

The half-hearted plea on behalf of the appellants, last raised that in the light of the finding by the Division Bench that Jagannath has not proved his adoption, the relief of possession at least should have been granted in favour of the plaintiff need mention to be rejected, only. The learned Trial Judge on an appreciation of materials on record specifically found that Jagannath and his heirs alone were in possession of the property and had not dispossessed forcibly by breaking open the lock of the house property as claimed by the original plaintiff. The learned Single Judge, who reversed the judgment of the Trial Court, has not recorded any contra finding in regard to possession but only chose to set aside the judgment of the Trial Court on its findings regarding the status of Gopali as the wife and the original plaintiff as the daughter and in the absence of proper proof of adoption of Jagannath. The Division Bench, when it reversed those findings of the learned Single Judge and directed the dismissal of the suit, was not obliged in law, to grant any relief of possession alone when it was not proved by the plaintiff otherwise, dehors title that she had been in actual possession of the property and had wrongfully and forcibly been dispossessed by the first defendant Jagannath. Consequently, no exception could be taken to the dismissal of the suit in its entirety.

For all the reasons stated above, we see no merit whatsoever in the above appeal and the same fails and shall stand dismissed with no order as to costs.