2026:CGHC:430

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

SA No. 13 of 2019

Reserved on: 24.09.2025

Delivered on: 05.01.2026

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1. M.A. Rafi (Dead) Through Lrs.,

   1(A) (Deleted) Hajra Begum

   1(B) Mohd. Aatif S/o Late M. A. Rafi Aged About 52 Years R/o M I G 764, Padmanabhpur Durg, District - Durg Chhattisgarh.

   1(C) Mohd. Asif. S/o Late M.A. Rafi Aged About 49 Years R/o M I G 764, Padmanabhpur Durg, District - Durg Chhattisgarh.

   1(D) Mohd. Tausif S/o Late M.A. Rafi, Aged About 46 Years R/o M I G 764, Padmanabhpur Durg, District - Durg Chhattisgarh.

2. Jamilurrahman S/o Late Mohd. Fazlurrahman Aged About 80 Years R/o Opp. Chhoti Masjid, Byron Bazar, Raipur District - Raipur Chhattisgarh.

3. (Died) Ziyaurrahman, Through Legal Heirs.

   3(A) Nigahat Parveen Wd/o Late Ziyarrahman Aged About 66 Years R/o House No. 263, Opposite Chhoti Maszid, Byron Bazar, Raipur, Dist - Raipur, Chhattisgarh.

4. Zakeerurrahman S/o Late Mohd. Fazlurrahman Aged About 70 Years R/o Opp. Chhoti Masjid, Byron Bazar, Raipur District - Raipur Chhattisgarh.

5. Wasiurrahman S/o Late Mohd. Fazlurrahman Aged About 62 Years R/o Opp. Chhoti Masjid, Byron Bazar, Raipur District - Raipur Chhattisgarh.

6. Smt. Faheem Rahman Wd/o Late Safiurrahman Aged About 63 Years R/o Opp. Chhoti Masjid, Byron Bazar, Raipur District - Raipur Chhattisgarh.

7. Nausheen Afroz D/o Haji Samsuddin Aged About 32 Years R/o Near House Of Rahamatulla Advocate, Nayapara, Raipur District - Raipur Chhattisgarh.

8. Nasreen Afroz D/o Haji Samsuddin Aged About 31 Years R/o Near House Of Rahamatulla Advocate, Nayapara, Raipur District - Raipur Chhattisgarh.

9. Smt. Zubaida Khan Wd/o Late Sultan Khan Aged About 72 Years R/o Kadar Ka Jhanda, Kamthi, Nagpur Maharashtra.

10. Smt. Shahida Khan W/o Azizulhaw Khan Aged About 66 Years R/o Bharti Hote, Antagarh, Tahsil - Antagarh, District - Kanker Chhattisgarh.

11. Smt. Nahed Khan W/o Iliyas Khan Aged About 58 Years Through Power Of Attorney Shri Wasiurrahman, S/o Late Mohd. Fazlurrahman, Aged About 62 Years, R/o Opp. Chooti Masjid, Byron Bazar Raipur, District- Raipur, Chhattisgarh.
12. Smt. Shaheen Ali W/o Siddiq Ali Aged About 56 Years R/o Beside Post Office, Vaishalinagar, Bhilai, District- Durg, Chhattisgarh,

Petitioners No 1 To 12 All Through Power Of Attorney Shri Wasiurrahman, S/o Late Mohd. Fazlurrahman, Aged About 62 Years, R/o Opp. Chooti Masjid, Byron Bazar Raipur, District- Raipur, Chhattisgarh.

--- Appellants/Plaintiffs

versus

1. Ejazurrahman S/o Late Habiburrehman Aged About 70 Years R/o C-6, Shriramnagar, Phase - I, Opp. Golden Physiotherapy Shriram Nagar, Raipur, District Raipur Chhattisgarh.
2. Smt. Abeda Begum W/o Shri Kazi Basheer Ahmad Aged About 78 Years R/o Behind Akbad Manzil, Byron Bazar, Raipur, Disrtict- Raipur, Chhattisgarh.
3. Akhtar Sultana W/o Dr. Gafoor Mohammad Aged About 67 Years R/o Kalahandi, Odisha.
4. Smt. Nafisa Hashmi W/o Abdul Rasheed Hashmi Aged About 64 Years R/o Beside Vinsi Dress, Friends Colony, Mowa, Raipur, District- Raipur, Chhattisgarh..

---Respondents/ Defendants

For Appellants : Mr. Ravindra Sharma, Advocate

For Respondents : Mr. Kshitij Sharma, Advocate

Hon'ble Shri Justice Parth Prateem Sahu

C.A.V. Judgment

1. This appeal under Section 100 has been preferred by appellants- plaintiffs challenging the legality and sustainability of impugned judgment and decree dated 23.10.2018 passed by learned 8th Additional District Judge, Raipur District Raipur in Civil Appeal No. 50-A/2018, whereby learned First Appellate Court affirmed the judgment and decree passed by learned Trial Court, wherein the suit filed by plaintiffs was dismissed and the counter claim filed by defendants was allowed.

2. For the sake of convenience, parties shall be referred to in terms of their status shown in Civil Suit No. 285-A/2015 before the Trial Court.

3. Brief facts of the case necessary for disposal of this appeal are that the plaintiffs stating themselves to be legal heirs of Fazlurrahman has filed the suit for declaration of title and permanent injunction pleading therein that the land situated at Mohalla Baron Bazar, Bhagwati Charan Shukla Ward, Raipur bearing Block No. 110, Plot Nos. 106 (103 sq. ft.), 107 (3090 sq. ft.), 109/4 (32 sq. ft.), and 125 (165 sq. ft.), totaling 3390 sq. ft. of land was consisting of two houses, both houses were marked by Municipal Corporation as house No. 2/62 and 2/63, each measuring approximately 1695 sq. ft. Map of the houses is also enclosed along with plaint and the portion of houses possessed by plaintiffs is marked with red ink (one house). It is further pleaded that initially the property subject matter of the suit was purchased by one Mohd. Abdul Rahim son of Mohd. Abdul Aziz with two houses in the year 1924 from one Kutubuddin Musalman and had taken possession. When Mohd. Abdul Rahim became in need of money he sold out the entire property, subject matter of the suit, to his brother-in-law (husband of his sister) Abdul Gafur and his wife Smt. Ashiya in the year 1929 by registered sale deed and handed over ownership and possession of entire property. Since the date of execution of sale deed Abdul Gafur and his wife Ashiya Bee became owner of the property. When Abdul Gafur and his wife were enjoying the properties with two houses, Abdul Gafur gave one portion of the house to Fazlurrahman (his brother-in-law) for residence and one of the house was being used by himself. Abdul Gaffur went to Pakistan in the year 1948 and before going to Pakistan, one of the house in which Fazlurrahman was residing was given to him by oral Hibanama. The other house in which Abdul Gafur was residing was given to Mohd. Abdul Rahim. In both the houses Fazlurrahman and Mohd. Abudl Rahim lived till their life.

4. Fazlurrahman died on 25.02.1986 and thereafter his sons and daughters became owners and possessor of one of the house which was given to Fazlurrahman by oral Hiba. It is also pleaded that Mohd. Abdul Rahim after

residing for some time in one portion of the house received by him, he also went to Pakistan along with his family in the year 1958. In that portion of the house, Habiburrahman started residing without any authority of law and thereafter defendants came in possession of the said house. Defendants have demolished their portion of the house in the month of February 2015. Relationship between two families ie., of Fazlurrahman and Habiburrahman was cordial. There was no dispute and due to lack of knowledge father of plaintiffs could not apply to record his name in the revenue records (nazul records). In the year 2015, defendants have submitted an application before the Municipal Corporation for mutation of name in revenue record of both houses stating that the defendants are possessor of both the houses and proclamation was also issued in this regard in the newspaper. Mutation was objected by plaintiffs upon which it was informed that the entire property, subject matter of the suit (two houses) were given by Mohd. Abdul Rahim in favour of defendant (Habiburrahman) in Bakshishnama (gift). After death of Habiburrahman, his legal heirs have partitioned the property in their name. Plaintiffs have also pleaded that defendants in collision with the officials of nazul department have got their name also recorded for both the houses suppressing the fact that one of the houses is of father of plaintiffs as he was owner and possessed the said house during his lifetime and now the plaintiffs are in possession. Mutation was without following due process of law. It is also pleaded that when once the entire property was sold by Mohd. Abdul Rahim in favour of Abdul Gafur and Ashiya Bee by registered sale deed and also handed over possession, the purchasers became the owner and possessor of the house and Mohd. Abdul Rahim without any authority of law based on unregistered document got his name recorded in nazul record. No Bakshishnama was executed at any point of time by Mohd. Abdul Rahim in favour of Abdul Gafur. It is a forged and fabricated document. It is also contended that for a valid Bakshishnama under the Mohammadan Law there

must be proposal of donor, interest of beneficiaries of Bakshishnama and further there should be consequential transfer of possession of property and as the property was not transferred, the consequence of execution of so called Bakshishnama would not be a valid Bakshishnama as the important ingredient of valid Bakshishnama is missing. Mohd. Abdul Rahim was not the title holder of owner of the property and therefore the defendants would not get any right of title over the property based on Bakshishnama. Defendants are trying to forcefully evict them based on mutation entries and therefore the suit was filed.

5. Defendants have submitted written statement to the pleadings of the plaint and have also filed counter claim/ cross suit. The specifications of property as pleaded in the plaint and further that the property consists of two separate houses is denied. It is also denied that the two houses are on land measuring 1695 sq.ft. each. It is pleaded that the plaintiffs are residing in the house of defendants which is measuring about 1200 sq.ft. and the remaining area is vacant and no construction is made on it. It is further pleaded that they are owner of the entire property. Though in para-3, there is averment of denial of the fact that the property in dispute with two houses was purchased by Kutubuddin Musalman, however in the same paragraph it is admitted that the total area of the land ie., 3920 sqft (suit property) was purchased by Mohd. Abdul Rahim son of Mohd. Abdul Aziz from Kutubuddin Musalman in 1924. It is further pleaded that in the year 1929 Mohd. Abdul Rahim sold the property to Mohd. Abdul Gafur. After some time Mohd. Abdul Gafur went to Pakistan along with his entire family and thereafter name of Mohd. Abdul Rahim is recorded in nazul record and Mohd. Abdul Rahim became owner and possessor of the property. It is also pleaded that Mohd. Abdul Rahim by way of registered Bakshishnama dated 26.06.1958 came entire property in dispute to Habiburrahman and handed over the title and possession of the entire property. It is also pleaded that Fazlurrahman, ancestor of plaintiffs and

Habiburrahman, ancestor of defendants, were real brothers. They were having love and affection to each other and therefore Habiburrahman gave one portion of the house to Falurrahman. He was in permissive possession and not occupied the house as its owner. Legal heirs of Fazlurrahman were also not possessing that house and using it as owner. It is also pleaded that one house was not demolished by defendants but due to dilapidated condition being 100 years old, it fell on its own. Pleading of plaintiffs, that father of plaintiffs, 'Fazlurrahman' due to lack of knowledge could not get his his name recorded in revenue record after receiving the house in oral Hiba is not correct. Father of plaintiffs got his name recorded in several other properties situated in Mohalla Baron Bazar bearing Plot Nos. 2/2, 3/2 measuring 1514 sq.ft on which house is constructed. Other land is recorded in the name of plaintiff No. 1 and 3 bearing khasra No. 39/2 measuring 4757 sq.ft. Plaintiffs are well aware about the fact that the property of which they are claiming their rights is owned and possessed by Habiburrahman and defendants are his legal heirs. Plaintiffs were having knowledge about partition between the family members of the defendants.

6. It is also pleaded by defendants that name of Mohd. Abdul Rahim was recorded in nazul record in the year 1954 and the property recorded in his name ie., suit property was given to Habiburrahman by registered Bakshishnama. They have denied the claim of plaintiffs in its entirety that father of plaintiffs Fazlurrahman became owner of one house at any point of time.

7. In cross suit/ counterclaim, it is pleaded that at present in the part of land, subject matter of the suit, one house is standing in dilapidated condition on which defendants are having their title and the said accommodation is in possession of plaintiffs, ie., the disputed property measuring about 1200 sq.ft. and is marked in the map attached with the suit as A,B,C,D,E,F,G,H. It

is also pleaded that in the year 1924 Mohd. Abdul Rahim son of Mohd. Abdul Aziz purchased the property, subject mater of the suit from one Kutubuddin Musalman and taken possession of the same. Mohd. Abdul Rahim sold the suit land in favour of Abdul Gafur and his wife in the year 1929 is also pleaded. It is also pleaded that pursuant to sale deed executed in favour of Abdul Gafur and Ashiya Bee, they became recorded owner of the land/ property. The entire property was given in Bakshishnama (gift) dated 26.06.1958 to father of defendants (Habiburrahman) and based on which Habiburrahamn became owner of the property and in possession. After death of Habiburrahman name of legal heirs were mutated in nazul record. It is also pleaded that Habiburrahman, Fazlurrahman and Mohd. Abdul Rahim were real brothers and Habiburrahman permitted Fazlurrahman to use one of the houses for residence and based on the pleading it was prayed that defendants be evicted from the house marked with red ink as A,B,C,D, it be declare that plaintiffs are having no right and title to reside in it and further restrain them from interfering with possession of defendants.

8. Based on the pleadings made in the plaint, written statement and counterclaim, learned Trial Court formulated as many as 12 issues for consideration and proceed for trial. Trial Court upon conclusion of the trial dismissed the plaint and allowed the counter claim/ counter suit of defendants and further directed the plaintiffs to evict the portion of the house on which they are residing and hand it over to defendant and further restrained the plaintiffs from interfering in the property in dispute. The judgment and decree passed by learned Trial court dated 19.04.2018 was put to challenge by plaintiffs/ appellants by way of an appeal under Section 96 of CPC on the grounds raised therein. Learned First Appellate Court dismissed the appeal affirming the judgment and decree of trial Court. Against which this second appeal is filed.

9. This second appeal was admitted on following substantial question of law:-

> "Whether both the courts below were justified in dismissing the suit holding that defendants have acquired title by Bakshishnama dated 26.06.1958 (Ex. D-9) executed by Abdul Rahim in favour of their father Mohd. Habiburrahman ignoring the fact that Abdul Rahim has already sold the property to Abdul Gafur and Ashiya Bee vide sale deed dated 27.06.1929 (Ex. P-4) and they have executed Hibbanama in favour of Fazulur Rahman by recording finding, which is perverse to the record?"

10. Learned counsel for plaintiffs submits that the property in dispute is originally owned by Abdul Rahim. The suit property owned in the name of Abdul Rahim was sold to Abdul Gaffur and Ashiya Bee through registered sale deed dated 27.06.1929 (Annexure P-4) by Abdul Rahim and thereafter Abdul Gaffur and Ashiya Bee both left to Pakistan. He further contended that before Abdul Gaffur and Ashiya Bee left to Pakistan, part of the property was gifted by oral *Hibanama*, one portion to Abdul Rahim and other in the name of Fazlurrahman. Plaintiffs are the legal heirs of Fazlurrahman. Defendants are legal heirs of Habiburrahman. He contended that possession of Fazlurrahman and thereafter the plaintiffs in the suit property was not question just before filing of the suit and therefore plaintiffs have filed the suit. Defendants are trying to interfere in the possession of plaintiffs' portion of suit property on the basis of registered Bakshishnama dated 26.06.1958 in favour of Habiburrahman by Abdul Rahim. Referring to question of law framed by this Court, he would submit that considering the nature of dispute, facts of the case, pleadings and the evidence brought on record, this Court *vide* order dated 29.08.2019 has formulated question of law as quoted above. He submits that transferee cannot transfer better title than what he possess on the date of execution of the registered Bakshishnama on 26.06.1958. Abdul Rahim was not having any title or ownership over the property in dispute as it was already transferred by registered sale deed in favour of Abdul Gaffur and

Ashiya Bee. Referring to the evidence of DW-1, he submits that this witness has categorically stated about transfer of property in dispute by Abdul Rahim in favour of Abdul Gaffur and Ashiya Bee and further stated about possession of plaintiffs on the disputed portion of the house on the ground of oral *Hibanama*. Learned Courts below have misread the evidence and arrived at an erroneous finding. In support of his contention, he places his reliance upon the decisions in the case of **Prem Singh and others vs. Birbal and others** reported in **AIR 2006 SC 3608**; **D.N. Joshi (D) through Lrs. and others vs. D.C. Harris and another** reported in **AIR 2017 SC 3105**; **Nazir Mohamed v. J. Kamala,** reported in **(2020) 19 SCC 57; Jitendra Singh vs. State of M.P. and others** reported in **2021 (4) C.G.L.J. 283 (SC); Kaushik Premkumar Mishra and another vs. Kanji Ravaria @ Kanji and another** reported in **AIR 2024 SC 3766.**

11. Learned counsel for respondents would oppose the submission and would submit that in the written statement there is clear pleading with regard to the title that it will be governed by the entries made in the Nazul record. In evidence, defendants have produced copy of Nazul record wherein name of Abdul Rahim is recorded as owner on the date of execution of *Bakshishnama* and therefore pleadings made in the plaint that the defendants are not having any right or title over the property is misplaced. He also contended that upon appreciation of the evidence learned Trial Court has already recorded a finding that *Hibanama*, based upon which, plaintiffs are claiming their title is not found to be proved. Learned counsel for respondents further submits that merely based on possession, plaintiffs may not succeed for getting the injunction against the person who is having title over the property. As the defendants are having title over the property based on the registered document ie., registered *Bakshishnama* dated 26.06.1958, Ext. D-9, learned courts below have rightly dismissed the claim of plaintiffs

considering execution of registered document Ext. D-9 in favour of defendants. He places his reliance on the decisions of Hon'ble Supreme Court in the case of **Anathula Sudhakar vs. P. Buchi Reddy (dead) by LRS and others** reported in (**2008) 4 SCC 594; Abdul Rahim and others vs. Sk. Abdul Zabar and others** reported in **(2009) 6 SCC 160; Rajeev Gupta and others vs. Prashant Garg and others** reported in **2025 SCC OnLine SC 889** and decision of this Court in the case of **Madhu Shrivastava (dead) through Lrs and others vs. Rahul Sharma and others** reported in **2024 SCC OnLine Chh 2465.**

12. I have heard learned counsel for the parties, perused the record of trial court as also first appellate court.

13. From the pleadings and evidence brought on record by the respective parties, it is an undisputed fact that the property,subject matter of the suit, was initially purchased by Mohd. Abdul Rahim son of Mohd. Abdul Aziz from one Kutubuddin Musalman in the year 1924. Mohd. Abdul Rahim sold the same property by registered sale deed to Abdul Gafur, his brother-in-law (husband of his sister Smt. Ashiya) in the year 1929. Copy of registered sale deed is placed before the trial court as Ext. P-4 which is dated 27.08.1929. Plaintiffs to prove the pleadings made in the plaint have exhibited six documents ie., Ext. P-1, General power of attorney executed by M.A. Rafiq Rahman, Jamilulrrahman, Jiyaulrrahman, Jakirurrahman, Smt. Fahim Rahman, Smt. Jubeda Khan, Smt. Naseem Begum in favour of Wasiurrahman; Ext. P-2, General power of attorney executed by Smt. Nahed Khan and Smt. Shahin Ali in favour of Wasiurrahman. In both power of attorney it is mentioned that the executant of power of attorney and power of attorney holder are brothers and sisters. Ext. P-3 is also a general power of attorney in favour of Wasiurrahman. Ext. P-4, copy of registered sale deed executed by Mohd. Abdul Rahim (seller) to Abdul Gafur and Smt. Ashiya Bee

(wife of Abdul Gafur) dated 27.08.1929, it mentions that the subject matter of the sale deed is two houses. Ext. P-5 is an order dated 04.03.2017 passed in an appeal under Section 393(3) of the Chhattisgarh Municipal Corporation Act by which the appellate authority affirmed the order passed by Zone Commissioner dismissing an application for building permission and Ext. P-6 is photographs of spot.

14. Plaintiffs have examined, Jamilurrahman as PW-1, Nawal Kishor as PW-2, Wasiurrahman as PW-3, Syed Nasir Ali as PW-4 and Kanhaiyalal as PW-5.

15. Defendants in support of their pleadings in support of written statement and counter claim have produced Ext. D-1 objection for mutation submitted before Zone Revenue Officer, an affidavit of Syed Nasir Ali dated 05.10.2016 as Ext. D-2, affidavit of Kanhaiyalal Shandil dated 05.10.2016 as Ext. D-3. Receipt of Municipal Corporation, Raipur of house No. 62/63 of the year 1980 as Ext. D-4, receipt of house No. 62/63 of the year 1984 as Ext. D-5 and similarly receipts of the year 1985 and 1986 as Ext. D-6 and D-8 and Ext. D-7 of the year 1988. Ext. D-9 is copy of registered Bakshishnama, Ext. D-10 is a Najul Khasra of the year 1941-42 to 1944-45, Ext. D-11 is Najul Khasra of the year 1945-46 to 1948 to 49. Ext. D-12 is Najul Khasra of the year 1949-50 to 1952-53. Ext. D-13 is Najul Khasra of the year 1953-54 to 1956-57 (ei., in the name of Mohd. Abdul Rahim). Najul Khasra of the year 1957-58 to 1960-61 in the name of Mohd. Abdul Rahim. Copy of family partition deed Ext. D15-c, copy of order dated 16.08.2012, copy of order of court of Najul Officer, Raipur, Municipal Corporation receipts Ext. D-17 in the name of Mohd. Ezazurrahman, Ext. D-18 in the name of Nafisa Hashmi, Ext. D-19 Municipal receipt in the name of Abeda Begum, Ext. D-20 receipt in the name of Smt. Akhtar Sultana and Ext. D-21 Najul Sandharan Khasra in the name of Mohd. Jamilurrahman. Najul Khasra of the year 2006-07 in the name of Mohd. Shafiqurrahman as Ext. D-22, Najul Khasra in the name of A.A. Safi and

others of the year 2006-07 as Ext. D-23. Najul Khasra in the name of S.A. Safi of the year 2006-07 to 2009-10 as Ext. D-24. Defendants have examined Smt. Nafisha Hashmi as DW-1.

16. Claim of plaintiffs is that one of the house out of two, disputed house, stated to have been given to Fazilurrahman (father of plaintiffs) through oral hiba by Abdul Gafur, (registered owner of the property). There is no specific pleading in the plaint as to on which date the house which is possessed by plaintiffs were given in oral hiba to their father and further, before whom. Name of Fazilurrahman even is not recorded in najul revenue records. They were undisputedly in possession of the said portion of the house. Plaintiffs in their evidence have not produced any admissible evidence to accept their plea that the house which was possessed by them was given by Abdul Gafur, (purchaser of property), in favour of Fazlurrahman. Mere possession will not confer any title when it is a case that the owner of house went to Pakistan.

17. In evidence, PW-1 Jamilurrahman son of Fazlurrahman has stated that Mohd. Abdul Rahim sold disputed house to his brother-in-law, later on it was given to Fazlurrahman by oral hiba and also its possession as owner of the land and thereafter Abdul Gafur went to Pakistan. This witness has proved the document Ext. P-4 which is registered sale deed dated 27.07.1929 and the order of miscellaneous appeal dated 04.03.2017 Ext. P-5. In para-31 of his cross-examination, he admitted that the tax of the portion of the house shown in the map marked with red ink was paid by them, however, no document is enclosed in this regard. It is also stated that the property tax was deposited, however, receipts were misplaced. He also admitted that neither in his affidavit under Order 18 Rule 4 CPC nor in the plaint there is mention of name of persons who were present or in whose presence oral hiba was made. However, he made an attempt to state that, at that time Ramdas Naidu and Anna Swami were present, however, at the time of filing of the suit, they were not alive and therefore their names were not mentioned. He

also stated that the oral hiba was done in name of Fazlurrahman and Mohd. Abdul Rahim on same date and same time. He also admitted that it is also not pleaded in the plaint nor in the affidavit as to how he came to know about the oral hiba.

18. Nawal Kishore, PW-2, has stated that he is not aware that Abdul Gafur has made oral hiba in favour of Fazlurrahman, however, he got knowledge from the elders of his family. He also stated that he is not aware of the date of oral hiba.

19. Wasiburrahman, PW-3, has also stated according to the plaint in examination-in-chief. He admitted that he has also not produced any document with regard to payment of tax to Municipal Corporation. He shown his unawareness that the defendants are depositing property tax.

20. Syed Nasir Ali, PW-4, in his examination-in-chief stated that plaintiffs are children of Fazlurrahman and defendants are children of Habiburrahman. Two houses are situated adjoining to each other in which plaintiffs and defendant were residing. One house in which defendants were residing were demolished by them and house possessed by plaintiff is in good condition. He supported the pleading in the plaint with respect to purchase of the house by Abdul Gafur and his wife and they gave one house to Fazlurrahman for residence from earlier times and since then plaintiffs along with their father started residing. In the year 1948-49, Abdul Gafur went to Pakistan and at that time in presence of his father, Ramdas Naidu and Anna Swami by oral hiba given it to Fazlurrahman in which he was residing.

21. In the aforementioned facts as pleaded in the plaint, written statement, counterclaim as also the evidence of plaintiffs, the question arises for consideration is whether even if the oral hiba stated to be made/ announced by Abdul Gafur can be treated to be a valid hiba, more so when from the document Ext. P-4, registered sale deed executed by Mohd. Abdul Rahim in

name of Abdul Gafur and his wife Ashiya Bee, but according to pleadings and evidence which is produced on record is that, Abdul Gafur only made hiba. When the property is recorded in the name of two persons on the basis of its registered sale-deed in their favour, the oral hiba, if any, cannot be made by one co-owner of the property. Learned Trial Court upon appreciating the evidence, oral and documentary, has arrived at a conclusion that the plaintiffs could not able to prove their plea that the house possessed by them was given to Fazlurrahman by oral hiba. The said finding recorded by the Trial Court and affirmed by the first appellate court is on appreciation of oral and documentary evidence.

22. The concurrent finding of facts is recorded by both the courts below and hence in the second appeal the concurrent finding cannot be interfered unless and until it is shown to be perverse. Learned counsel for the appellants-plaintiffs could not able to make out a case before this Court that the finding recorded by the trial court that, they became owner of the land pursuant to the oral hiba to be perverse and therefore this Court in exercise of jurisdiction under Section 100 of CPC does not find any good ground to interfere the said finding. Accordingly,, the plea of plaintiffs that the finding recorded by the trial court that the plaintiffs became owner of the land pursuant to oral hiba of the house possessed by them is not sustainable, accordingly it is repelled and the finding recorded by the trial court as also the first appellate court in this regard is hereby affirmed.

23. So far as the second submission of learned counsel for plaintiffs that the finding of the trial court as also the appellate court on the cross suit filed by defendants declaring the defendants to be title holder of the entire suit property to be perverse or contrary to evidence is concerned, defendants, for claiming their right on the entire suit property based on the registered Bakshishnama Ext. D-9 which is stated to be executed on 26.06.1958 at

Raipur. The pleadings of the plaintiffs as also the defendants before the trial court with respect to ownership of the property in dispute is that originally Mohd. Abdul Rahim sold the property purchased by him in favour of Abdul Gafur and his wife Ashiya Bee in the year 1929 vide Ext. P-4 and handed over the possession to purchasers. In the sale deed, the property is mentioned to a house and the map forming part of the sale deed shows two houses of equal area adjoining to each other. The plea of plaintiffs in the plaint is that Abdul Gafur went to Pakistan along with his family members in the year 1948. Execution of Bakshishnama is denied by the plaintiffs. In the plaint it is pleaded that on the date of alleged execution of Bakshishnama, Mohd. Abdul Rahim was not title holder of the property and therefore Bakshishsnama is erroneous and no right or title is transfer in favour of Habiburrahman in whose favour Bakshishnama is stated to be executed. Mutation of name of Habiburrahman in najul record is based on alleged Bakshishnama is also erroneous. In written statement/ counterclaim, property purchased by Mohd. Abdul Rahim from Kutubuddin Musalman in the year 1924 is admitted. It is also admitted that Mohd. Abdul Rahim sold the property to Abdul Gafur and his wife Ashiya Bee in the year 1929. It is pleaded that after going of Abdul Gafur and Ashiya Bee to Pakistan name of Mohd. Abdul Rahim is recorded in Najul revenue record. In written statement, there is no specific mention as to how and on what basis name of Mohd. Abdul Rahim was recorded in revenue record after 1948. In written statement, there is mention that name of Mohd. Abdul Rahim son of Mohd. Abdul Aziz name is recorded in revenue record in the year 1954. in cross suit/ counterclaim also there is no specific mention as to how and on what basis name of Mohd. Abdul Rahim is recorded in revenue record.

24. When the defendants by way of counter claim is raising claim ie., entire suit property came in the name of Mohd. Abdul Rahim, the burden lies upon the defendants to prove the fact as pleaded in the written statement/ counter suit.

In absence of admissible evidence, defendants may not succeed in their counterclaim.

25. In the facts of the case, when once Mohd. Abdul Rahim had already transferred entire suit property by way of execution of registered sale deed in favour of Abdul Gafur and his wife Ashiya Bee then it is for the defendants to prove as to how and on what basis Mohd. Abdul Rahim got title over the suit property.

26. Perusal of documents ie. the mutation entries made in the najul revenue record placed by defendants in support of their claim would show that initially name of Abdul Gafur and Smt. Ashiya Bee, wife of Abdul Gafur is recorded as joint owner in joint Najul revenue record of the year 1942 to 1943, 1943-44, 1944-45 and 1945-46, 1948-49 and 1949-50, 1952-53. In Ext. P-12 which is Najul Sandharan of the year 1949-50 to 1952-53 there is an endorsement mentioning it to be of the year 1953-54 which is a written document and not a xerox copy issued in the year 2015 mentions the name of Mohd. Abdul Rahim son of Mohd. Abdul Aziz Musalman, Namantaran Adesh dated 15.02.1954, according to some endorsement made on back side of the sale deed dated 27.08.1929. Defendants have not produced copy of sale deed, however, it is available in record as Ext. P-4. It is certified copy issued from the office of Sub-Registrar on 14.08.2000, however in back side there is no such entry of endorsement mentioned in it. Ext. P-4 sale deed dated 27.08.1929 is a registered sale deed executed by Mohd. Abdul Rahim in favour of Abdul Gafur and his wife Ashiya Bee. The sale deed is in two pages from which it is not appearing that as to how and on what basis and circumstances the seller of that sale deed will again regain ownership of the same property which he has sold and got title on it again.

27. Mere mentioning of name in revenue records would not confer title upon any person. Hon'ble Supreme Court in the case of **Durga Das v. Collector,** reported in **(1996) 5 SCC 618** has observed thus:

> "**2.** ...The courts below held that since he purchased a specified share from Kewal Krishan he cannot be considered as a tenant in respect of other lands and, therefore, is not entitled to the compensation. We find that the view taken by the High Court is in conformity with law. Mutation entries do not confer any title to the property. It is only an entry for collection of the land revenue from the person in possession. The title to the property should be on the basis of the title they acquired to the land and not by mutation entries. Admittedly, the appellant has purchased some lands from Kewal Krishan one of the brothers of the family to the extent of his specified share. No lease deed was executed in respect of other lands. In these circumstances, the appellant cannot be treated to be a tenant of Vijay Kumar to claim compensation on the basis of his title as a tenant."

28. In the case of **Rajinder Singh v. State of J&K,** reported in **(2008) 9 SCC 368** Hon'ble Supreme Court has held as under:

> "**17.** It is well settled that revenue records confer no title on the party. It has been recently held by this Court in *Suraj Bhan* v. *Financial Commr.* [(2007) 6 SCC 186] that such entries are relevant only for "fiscal purpose" and substantive rights of title and of ownership of contesting claimants can be decided only by a competent civil court in appropriate proceedings.
>
> **18.** It is clear from the record that grievance of Respondent 2 daughter, related to mutation entry. If the authorities under the Tenancy Act felt that the action was in consonance with law, it could have retained the entry. The inquiry, however, was limited to the entry in the revenue records and nothing more. It had no bearing whatsoever as to the right of ownership, inheritance or title to the property. In our opinion, therefore, neither the authorities under the Tenancy Act nor the High Court could have entered into the question of ownership, title or inheritance in the *present proceedings* and they ought to have decided the controversy limited to mutation entry in the revenue records.
>
> **19.** The present appeal, therefore, deserves to be disposed of by leaving all the parties to take

appropriate proceedings in accordance with law in a competent civil court so far as substantive rights of ownership, title or inheritance are concerned. In view of the fact, however, that certain observations have been made and questions have been considered with regard to rights of sons and daughters in the property of father under the Hindu Succession Act as also under the Jammu and Kashmir Hindu Succession Act, we clarify that all those observations which were not relevant in view of the limited question before the Revenue Authorities, would have no effect in the proceedings before the civil court if such proceedings have been initiated in a competent court.

20. We, therefore, dispose of this appeal by granting liberty to the parties to take appropriate proceedings in a competent civil court by making it clear that the observations made in the orders of the Revenue Authorities as also by the High Court will not come in the way of the parties in a suit as and when proceedings have been initiated for the purpose of determination of substantive rights of ownership."

29. In **Jitendra Singh v. State of M.P.,** reported in **2021 SCC OnLine SC 802** Hon'ble Supreme Court has observed thus:

"**6.** … Be that as it may, as per the settled proposition of law, mutation entry does not confer any right, title or interest in favour of the person and the mutation entry in the revenue record is only for the fiscal purpose. As per the settled proposition of law, if there is any dispute with respect to the title and more particularly when the mutation entry is sought to be made on the basis of the will, the party who is claiming title/right on the basis of the will has to approach the appropriate civil court/court and get his rights crystalised and only thereafter on the basis of the decision before the civil court necessary mutation entry can be made.

7. Right from 1997, the law is very clear. In the case of *Balwant Singh* v. *Daulat Singh (D) By Lrs.*, reported in (1997) 7 SCC 137, this Court had an occasion to consider the effect of mutation and it is observed and held that mutation of property in revenue records neither creates nor extinguishes title to the property nor has it any presumptive value on title. Such entries are relevant only for the purpose of collecting land revenue. Similar view has been expressed in the series of decisions thereafter.

8. In the case of *Suraj Bhan* v. *Financial Commissioner*, (2007) 6 SCC 186, it is observed and held by this Court that an entry in revenue records does not confer title on a person whose

> name appears in record-of-rights. Entries in the revenue records or jamabandi have only "fiscal purpose", i.e., payment of land revenue, and no ownership is conferred on the basis of such entries. It is further observed that so far as the title of the property is concerned, it can only be decided by a competent civil court. Similar view has been expressed in the cases of *Suman Verma* v. *Union of India*, (2004) 12 SCC 58; *Faqruddin* v. *Tajuddin*, (2008) 8 SCC 12; *Rajinder Singh* v. *State of J&K*, (2008) 9 SCC 368; *Municipal Corporation, Aurangabad* v. *State of Maharashtra*, (2015) 16 SCC 689; *T. Ravi* v. *B. Chinna Narasimha*, (2017) 7 SCC 342; *Bhimabai Mahadeo Kambekar* v. *Arthur Import & Export Co.*, (2019) 3 SCC 191; *Prahlad Pradhan* v. *Sonu Kumhar*, (2019) 10 SCC 259; and *Ajit Kaur* v. *Darshan Singh*, (2019) 13 SCC 70."

30. From the aforementioned facts of the case, evidence available on record as also contents of Ext. D-12, it is apparent that mutation of name of in najul record is without any authority and valid document. No right or title was transferred in his favour prior to mutating his name in the property in dispute and therefore merely mentioning of name in revenue record had not conferred title and ownership right upon Habiburrahman of the suit property.

31. In the aforementioned facts of the case, now the question arises for consideration of this Court is whether Bakshishnama said to be executed by Mohd. Abdul Rahim in favour of Habiburrahman is a valid document and admissible in law. The law in this regard is very clear that no better title can be transferred by a person which he himself is having under law. Hon'ble Supreme Court in the case of **Ramlal v. Phagua,** reported in **(2006) 1 SCC 168** has held as under:

> **18 [Ed. : Para 18 corrected vide Official Corrigendum No. F.3/Ed.B.J./112/2005 dated 1-12-2005.].** In our opinion, agreement to reconvey the property will not *ipso facto* lead to the conclusion that the sale is nominal and in view of the stand of Defendant 8, as also of the fact that the property worth Rs. 700 has been purportedly sold for Rs 400, we are of the considered opinion that the sale deed dated 1-12-1965 did not convey any title to Defendant 8. It is well settled by a catena of decisions that the vendor cannot convey to the vendee better title than she herself has."

32. In case of **Thakar Singh v. Mula Singh,** reported in **(2015) 5 SCC 209**, Hon'ble Supreme Court has observed thus:

> "**9.** *39. ... In Mahabir Gope v. Harbans Narain Singh [1952 SCR 775 : AIR 1952 SC 205] which was a decision dealing with a lease created by a mortgagee with possession under the Bihar Tenancy Act, this Court reiterated that the general rule is that a person cannot by transfer or otherwise confer a better title on another than he himself has. A mortgagee cannot, therefore, create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. …"*

33. Defendants have examined Smt. Nafisha Hashmi as sole defendant witness who in her cross-examination has also stated that Abdul Gafur went to Pakistan and Mohd. Abdul Rahim became title holder and possessor of the suit property. Name of Mohd. Abdul Rahim was recorded in accordance with law in revenue records. She stated that she has not filed any document to show as to on what basis name of Mohd. Abdul Rahim came to be recorded as owner of the entire property in revenue records. She also admitted that name of Mohd. Abdul Rahim is not recorded based on any registered document.

34. Learned Trial court has considered that after the name of Abdul Gafur and Smt. Ashiya Bee, name of Mohd. Abdul Rahim came to be recorded which is specifically mentioned in Ext. D-12 in its back side and however, learned Trial Court has not taken into consideration as to how the name of Mohd. Abdul Rahim is mentioned and whether the reason assigned for mentioning of name of Mohd. Abdul Rahim gives any title. Defendants to prove the fact of mutation and its basis have not produced copy of order of mutation. When defendants could able to obtain the mutation entries of the year 1941-42 to 1944-45 onward, then, they could have also produced the order dated 15.02.1954 which is mentioned in Ext. P-12 on its back side. Documents of

the year 1941-42 is obtained in the year 2015 but the defendants failed to produce very important order of mutation.

35. It is not a case of defendants that the property was gifted by way of oral hiba in favour of Mohd. Abdul Rahim but in their pleadings and evidence it has only come that after Abdul Gafur and his wife went to Pakistan, Mohd. Abdul Rahim became owner of the property and further stated that after execution of so called Bakshishnama, Ext. D-9, Mohd. Abdul Rahim went to Pakistan along with his family.

36. Section 101 of the Evidence Act defines burden of prove which reads as under:

> "**101. Burden of proof.** Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
> Illustrations:
> (a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime.
> (b) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts and which B denies, to be true. A must prove the existence of those facts."

37. Hon'ble Supreme Court in the case of **Subhra Mukherjee v. Bharat Coking Coal Ltd. and others,** reported in **(2000) 3 SCC 312** while considering the issue of burden of prove in the contexts of allegation of sham and bogus transaction held that it is for the party/ plaintiffs relying on the transaction had to first prove its genuineness and only thereafter the defendants would be required to discharge the burden in order to dislodge such proofs and establish that the transaction was sham and fictitious.

38. In the case of **State of J&K v. Hindustan Forest Co.,** reported in **(2006) 12 SCC 198** Hon'ble Supreme Court has held that "onus is on the plaintiff to positively establish its case on the best material available and it cannot rely on the weakness or absence of defence to discharge such onus."

39. In the case at hand also, plea of execution of Bakshishnama by Mohd. Abdul Rahim is pleaded in counter claim by the defendants and therefore the burden lies upon the defendants to prove the fact that the executant Mohd. Abdul Rahim was having any right and title over the property, subject matter of Bakshishnama, to execute Bakshishnama. As the defendants could not able to produce any acceptable documentary evidence before the trial Court to show, as to how Mohd. Abdul Rahim got title over the property, in the opinion of this Court, merely by recording his name in the revenue record will not be sufficient to hold that Mohd. Abdul Rahim was having title over the property and authority to execute Bakshishnama. Learned Trial Court only considering that the revenue entries are made about more than 30 years old and therefore the burden to prove it to be forged and fabricated is upon the plaintiffs is contrary to law in the facts of the case.

40. Mutation of name of Mohd. Abdul Rahim in revenue record is not in dispute, the question for consideration is whether Mohd. Abdul Rahim acquired title on the land only because his name is recorded in revenue record. As discussed in preceding paragraph that only mutation does not confer title, as ruled by Hon'ble Supreme Court. Learned Courts below erred in confusing between documents by which any right is transferred and the values of entries made in revenue records. Learned trial court could have posed question as to whether only because mentioning of name in revenue record will confer any title or not upon such person in which it utterly failed. In above facts of the case, settled legal position, learned courts below erred in holding that Mohd. Abdul Rahim was having title because his name is recorded since last more than 30 years in revenue records. Section 90 of the Evidence Act

gives discretion to court to draw presumption under Section 90 of Evidence Act. Presumption of ownership cannot be raised under Section 90 of the Evidence Act based on certified copies of revenue entries when basis of entering of name in revenue record is not proved. Hon'ble Supreme Court in the case of **Om Prakash v. Shanti Devi,** reported in **(2015) 4 SCC 601** has observed thus:

> "**5.** The due execution and attestation of this gift deed is the sole point in issue before us. The appellant has rested his case on the favourable presumption contained in Section 90 of the Evidence Act i.e. that the gift deed being thirty-years old should be taken as having been duly executed and attested. The appellant seems to have made little or no endeavour to prove the gift deed without the advantage of this presumption. Under Section 90, before any question of presuming a document's valid execution can emerge, the document must purport and be proved to be thirty-years old. The law surrounding the date of computation of the elapse of thirty-years stands long-settled, since the verdict of the Privy Council in *Surendra Krishna Roy* v. *Mirza Mahammad Syed Ali Matwali* [*Surendra Krishna Roy* v. *Mirza Mahammad Syed Ali Matwali*, (1935-36) 63 IA 85 : (1936) 43 LW 107 : AIR 1936 PC 15] , which held that the period of thirty-years is to be reckoned, not from the date upon which the deed is filed in court but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the province of proof. Generally speaking, although the date on which the document has been tendered in evidence or subjected to being proved/exhibited is the relevant date from which its antiquity is to be computed, we think it necessary to underscore that it should be produced at the earliest so that it is not looked upon askance and with suspicion so far as its authenticity is concerned.
>
> **10.** ... The judgment [*Surendra Krishna Roy* v. *Mirza Mahammad Syed Ali Matwali*, (1935-36) 63 IA 85 : (1936) 43 LW 107 : AIR 1936 PC 15] of the High Court below has considered the issue of this document's eligibility under Section 90, and repudiated this submission, the document not even, echoing the words of Section 90, "purporting" to be thirty-years old at the time of tendering. We hasten to add that even if the document purported or is proved to be thirty-years old, the appellant would not axiomatically receive a favourable presumption, the Section 90 presumption being a discretionary one.

41. To prove a valid oral hiba (gift), the parties are required to prove that the donor on the date of making oral hiba is owner of the property which he is gifting. The thing to be gifted should be in existence at the time of hiba. There should be intention of donor of giving his property and title over the property to others by oral hiba. Transfer of possession of property is also one of the important ingredients of a valid oral hiba. Hon'ble Supreme Court in the case of **Abdul Rahim v. Sk. Abdul Zabar,** reported in **(2009) 6 SCC 160** while considering the issue or Hiba/ gift has observed thus:

> "**16.** Syed Ameer Ali in his *Commentary on Mohammedan Law* has amplified the definition of "hiba" in the following terms:
> "In other words the 'hiba' is a voluntary gift without consideration of a property or the substance of a thing by one person to another so as to constitute the donee, the proprietor of the subject-matter of the gift. It requires for its validity three conditions viz. (*a*) a manifestation of the wish to give on the part of the donor; (*b*) the acceptance of the donee either impliedly or constructively; and (*c*) taking possession of the subject-matter of gift by the donee either actually or constructively."
>
> **17.** In *Maqbool Alam Khan* v. *Khodaija* [AIR 1966 SC 1194 : (1966) 3 SCR 479] it was held : (AIR pp. 1196-97, paras 6-7)
>
> "*6*. The Prophet has said:'A gift is not valid without seisin.' The rule of law is:
> '*Gifts are rendered valid by tender, acceptance and seisin*. Tender and acceptance are necessary 'because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts; and seisin is necessary in order to establish a right of property in the gift, because a right of property, according to our doctors, is not established in the thing given merely by means of the contract, without seisin.' [See Hamilton's *Hedaya* (Grady's Edn.), p. 482.]
> *7*. Previously, the rule of law was thought to be so strict that it was said that land in the possession of a usurper (or wrongdoer) or of a lessee or a mortgagee cannot be given away, see Dorrul Mokhtar, *Book on Gift*, p. 635 cited in *Mullick Abdool Guffoor* v. *Muleka* [ILR (1884) 10 Cal

> 1112] . But the view now prevails that there can be a valid gift of property in the possession of a lessee or a mortgagee and a gift may be sufficiently made by delivering constructive possession of the property to the donee. Some authorities still take the view that a property in the possession of a usurper cannot be given away, but this view appears to us to be too rigid. The donor may lawfully make a gift of a property in the possession of a trespasser. Such a gift is valid, provided the donor either obtains and gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession."
>
> (emphasis supplied)
>
> (See also *Mullick Abdool Guffoor* v. *Muleka* [ILR (1884) 10 Cal 1112] .)
>
> **18.** Faiz Badruddin Tyabji in his *Muslim Law — The Personal Law of Muslims in India and Pakistan* states the law thus:
>
> "*395*.(*1*) The declaration and acceptance of a gift do not transfer the ownership of the subject of gift, until the donor transfers to the donee such seisin or possession as the subject of the gift permits viz. until the donor (*a*) puts it within the power of the donee to take possession of the subject of gift, if he so chooses, or (*b*) does everything that, according to the nature of the property forming the subject of the gift, is necessary to be done for transferring the ownership of the property, and rendering the gift complete and binding upon himself.
> (*2*) Imam Malik holds that the right to the subject of gift relates back to the time of the declaration."

42. Hon'ble Supreme Court in case of **Prem Singh v. Birbal,** reported in **(2006) 5 SCC 353** has observed in para-16 that "When a document is valid, no question arises of its cancellation. When a document is *void ab initio*, a decree for setting aside the same would not be necessary as the same is non est in the eye of the law, as it would be a nullity."

43. In view of the aforementioned discussion and the decisions, in this opinion of this court, learned Trial Court erred in accepting the claim of defendants allowing the counterclaim in declaring them to be title holder of the entire suit

property. Such finding is not sustainable. Learned first appellate court also erred in upholding such finding of the Trial Court. The finding of the trial court and the first appellate court that the defendants have got title of the property based on the Bakshishnama, in view of the aforementioned discussion, is not sustainable, accordingly it is set aside.

44. Consequently the appeal is **allowed in part**. The challenge to the judgment and decree passed by trial court dismissing the suit of plaintiff is affirmed and the judgment and decree by both the courts below on counter claim declaring the defendants to be owner of the entire suit property based on Bakshishnama being unsustainable, is set aside. Resultantly, the suit and the counterclaim both are dismissed.

45. No order as to cost.

46. Decree be drawn up accordingly.

Sd/-

(Parth Prateem Sahu)
Judge

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