



GAHC010003552009

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/2/2009

HEM KANTI MORAL and ORS
W/O LT. AMBICA MARAL

2: NIRABMARAL
S/O LT. AMBICA MARAL

3: GORIM MARAL

S/O LT. AMBICA MARAL

4: BIMAL MARAL
S/O LT. AMBICA MARAL

5: DIGANTA MARAL
S/O LT. AMBICA MARAL

6: ARNAB MARAL
S/O LT. AMBICA MARAL
ALL ARE RESIDENT OF SALIHA NAGAR
OPP. TO THE OFFICE OF THE TINSUKIA DEVELOPMENT AUTHORITY
PO. TINSUKIA
PIN-786125
DIST. TINSUKIA
ASSAM

7: NIRMAL MARAL
S/O LT. AMBICA MARAL
R/O SANKAR MANDIR ROAD
MOUZA-PUB BANSHAR
PS. SUALKUCHI
DIST. KAMRUP
ASSA

VERSUS



ON THE DEATH OF BHAGABAN MORAL HIS LEGAL HERIS ARE
NABAJYOTI MARAL and 5 ORS
DHRUBAJYOTI MARAN ASHIMJYOTI MARAL RUPJYOTI MARAL
PRANABJYOTI MARAL ANJALI MARAL

Advocate for the Petitioner : MR.H K DEKA

Advocate for the Respondent :

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellants :MR. B D Deka, Advocate

For the Respondents : Mr. Sheeladitya, Advocate

Date of Hearing : 04.05.2023, 13.06.2023

Date of Judgement :20.06.2023

JUDGEMENT & ORDER (CAV)

1. Heard Mr. BD Deka, learned counsel for the appellants. Also heard Mr. Sheeladitya, learned counsel for the respondents.
2. The present second appeal is preferred against the judgment and decree dated 30.06.2008 passed by the learned Civil Judge, Senior Division No. 1, Kamrup in TA 56/2002 upholding the judgment and decree dated 21.09.2002 passed in TS 93/1991 decreeing the suit. This court admitted the second appeal under its order dated 16.01.2009 by framing the following substantial question of law.

“1. Whether the learned lower courts below illegally came to a conclusion without framing and deciding the essential/important issue as to whether the suit property is a joint paternal property?”

2. Whether the lower courts below committed illegality in confirming the sale of the suit land to the plaintiff misconstruing and misreading the sale deeds i.e. Exhibit 4 and Exhibit 21 and the records of right i.e. Exhibit-16.”

3. Subsequently, two additional substantial questions of law were formulated by this court under its order dated 23.03.2023, which reads as follows:

“1. Whether the oral evidence of PW1 regarding the auction sale in favour of Gobinda Mahajan is inadmissible in view of Section 92 of the Evidence Act, 1872?”

2. Whether the Ext. 5 (gift deed dated 12.06.1990) can be held to be proved without examination of the attesting witnesses to the deed?”

4. Before determining the aforesaid substantial question of law, let this court first summarize in a nutshell the facts and pleadings of the parties.

5. The case of the plaintiff:

- I. The plaintiff filed the suit for declaration of right, title and interest and for confirmation of possession over the schedule B land appended to the plaint.

- II. It is the pleaded case of the plaintiff that one Lalit Gaonburah was the owner and possessor of a plot of land measuring 3 Kathas 19 Lechas i.e. schedule A land.
- III. According to the plaintiff on the death of said Lalit Nath, the Siddhi Nath inherited $13 \frac{1}{6}$ Lechas of land.
- IV. It is the pleaded case of the plaintiff that in a money suit a decree was passed against said Siddhi Nath and in execution of the said decree a land measuring $13 \frac{1}{6}$ Lechas belonging to the said Siddhi Nath was sold and same was purchased by one Gobinda Ram Mahajan in an auction purchase.
- V. The plaintiff also pleaded that the plaintiff purchased back the aforesaid land sold in auction from Gobinda Ram Mahajan, however, said purchase was made in the name of the mother of the plaintiff.
- VI. It was also pleaded that mother subsequently gifted the land to the plaintiff by a registered gift deed.
- VII. Thus, the plaintiff claims right, title and interest over the suit land on the basis of purchase and gift.
- VIII. It is also the case of the plaintiff that as the defendant who is son of Siddhi Nath and brother of the plaintiff tried to mutate the name over the suit land on the basis of inheritance the title of the plaintiff was clouded and accordingly a suit was filed.

6. The case of the defendant:

- I. The defendant by filing written statement took a stand that as the land belonged to the Late father of both the plaintiff and defendant, therefore, the defendant inherited $\frac{1}{2}$ portion of the said land from his father.
- II. The pleading and fact described by the plaintiff that land belonging to their father was sold in a auction purchase arising out of a decree of a civil court, was denied by the defendant.
- III. The factum of purchase of the land by the plaintiff and in his mother's name was also denied by the defendant.
- IV. The defendant further denied the execution of gift deed by the mother of the plaintiff and defendant in favour of the plaintiff.
- V. Though the other sons of Siddhi Nath were made parties, however, except the appellant defendant other brothers had not filed any written statement.

7. The Issues:

Considering the aforesaid pleading, the learned trial court framed the following five issues:

- “1. Whether there is cause of auction for the suit?*
- 2. Whether the suit is bad for non-joinder of necessary party?*
- 3. Whether the plaintiff has right, title, interest over the suit land?*
- 4. Whether the plaintiff is in possession of the suit land whether the plaintiff is entitled to decree of confirmation of*

possession or in the alternative recovery of possession?

5. To what relief the parties are entitled?"

8. The evidence:

- I. The plaintiff and the defendant in proof of their pleading examined two witnesses each. The plaintiff exhibited the sale deed as Ext 4 and the gift deed as Ext 5. Other three documents, namely, Chitha of the suit land, patta and jamabandi of the land were also exhibited as Ext 1,2 and 3.
- VI. Though the defendant adduced oral evidence and cross-examined the witnesses of the plaintiff however, had not exhibited any document.

9. The findings of the Trial Court:

After considering the pleading and material available on record, the learned trial court came to the following findings:

- I. The plaintiff through his evidence proved that the disputed land is part of 13 1/6 lechas of land, which was in the name of his father and father got the same from his grandfather.
- II. The plaintiff was able to prove through Ext 1 (chitha) and Ext 2 (patta) that the said land (13 1/6 Lechas) was sold in auction to one Gobinda Ram Mahajan and in the chitha it was mentioned that the land was sold in auction.
- III. Ext 3 (jamabandi) also reflects the name of the auction purchaser Gobinda Ram Mahajan was recorded in place of the name of the father of the plaintiff.

- IV. From the Ext 4 (sale deed), the learned court came to a conclusion that the said land was again sold to the mother of the plaintiff. The gift of 8 lechas of land to the plaintiff is evident from the registered gift deed dated 13.06.2019 (Ext. 5).
- V. Accordingly, on the basis of the aforesaid material, the learned court below came to a conclusion that the plaintiff has been able to prove the fact that he has right, title and interest over the suit land and the defendant has not been able to show any better title.
- VI. In view of the aforesaid finding and documents the learned court also concluded that the plaintiff is in possession of the suit land.

10. The findings of the Appellate Court:

- I. The learned Appellate Court also by the impugned judgment upheld such finding of the learned trial court and concluded the following:
- A. The Ext 1, the order dated 02.01.1961 shows that the name of Gobinda Mahajan (the auction purchaser) was recorded in place of the predecessor-in-interest of the plaintiff and it is also recorded that it was by way of sale in chitha of Dag No. 979.
- B. The Ext 2 periodic patta of the land shows the said auction purchaser as one of six pattadars since 1964-65.

- C. The Ext 3 is draft chitha of 1962 whereby the name of Gobinda Mahajan was inserted in place of Siddhi Nath i.e. predecessor-in-interest of the plaintiff and defendant.
- D. Ext 4, the sale deed discloses that the mother of the plaintiff and defendant bought the suit land from Gobinda Mahajan.
- E. The learned Appellate Court also relied on Ext 5 dated 14.06.1990 gift deed in favour of the plaintiff executed by his mother.

II. Though the defendant has taken a stand that his mother Jamuna Bala Moral had never executed the gift deed, however, the learned Appellate Court below rejected such contention on the ground that the defendant has not denied the signature of his mother in the gift deed and has not stated that his mother did not sign the gift deed or that her signature was forged. The learned Appellate Court also considered the admission of DW 1, defendant that he has not challenged the gift deed, when his mother gifted the land to his elder brother and has also not filed any objection during mutation of the plaintiff's name in the revenue record and on the basis of such evidence came to the finding that the gift deed was duly proved and therefore affirmed the decision of the learned trial court.

11. **Determination:**

- I. From the pleading of the parties it is clear that neither the plaintiff nor the defendant has raised any dispute as regards ownership of the land in question belong to their father. Therefore, it cannot be an issue that whether the suit property is a joint paternal property inasmuch as claim of the plaintiff is based on an alleged fact of sale of the suit property in an court auction during the days of their fathers, purchase of the suit property by the defendant from the auction purchaser in the name of his mother i.e. wife of the original owner and subsequent transfer of the mother by way of gift to the plaintiff. Therefore even if an issue whether the suit property is joint property, is not framed and decided, the same will have no bearing on the outcome of the suit. Accordingly in the considered opinion of this court the substantial question of law No. 1 is cannot be treated as substantial question of law.
- II. The Ext 4 and Ext 21 was properly dealt by both the courts below and came to a conclusion that by Ext 4 and Ext 21, the mother of the plaintiff and defendant bought the suit land from Gobinda Mahajan. The said sale deeds were registered sale deeds. Such sale deeds have remained unchallenged by the defendant inasmuch as it is also not a pleaded case of the defendant that the vendor of such sale deeds was having no title over the

suit land except a denial of sale of in auction.

- III. The burden of proof cast under Section 101 and 102 is onus probandi and is having persuasive burden. Such burden always lies upon the plaintiff and never shifts upon the defendant. However once the plaintiff succeeds in prima-facie establishing his pleaded case by leading evidence the onus will then shift upon the defendant side to disprove the case by leading evidence.
- IV. In the case in hand as is discernible from the judgment of the learned trial courts below the plaintiff has been able to establish the foundational fact through the Ext. 1,2 and 3 (chitha, patta and jamabandi), which discloses that land was purchased in auction sale, Ext. 4 and Ext. 21 (the sale deeds), which discloses that the mother of the plaintiff purchased the suit land from the auction purchaser and Ext. 5 which shows that the purchased land was gifted by the mother of the plaintiff and defendant to the plaintiff. Though it is seriously argued by Mr. BD Deka that the purchase in auction by the vendor of the mother ought to have been proved by exhibiting the certificate issued by the competent civil court this court is not impressed by such an argument inasmuch as both the courts below on the basis of revenue record which reflects that name of the Gobinda Mahajan was recorded by virtue of auction purchase concluded that the fact of transfer of the land in favour

of the auction purchaser. Such determination cannot be said to be made by ignoring material evidence or on the basis of no evidence. It cannot also be concluded that both the learned courts below have drawn wrong inferences by proved fact by applying the law erroneously. As discussed hereinabove, the plaintiff has rightly discharged his burden through the Ext. 1,2 and 3, the fact of transfer of the land through Ext. 1,2 and 3. Such evidence remained un-rebutted and nothing was brought on record to create a doubt on the veracity of such exhibits.

- V. Under Section 91 of the Indian Evidence Act, 1872 when the term of any transaction has been reduced to writing they must be proved by production of the document. It is correct to say that when a sale certificate issued to a auction purchaser, however, it is equally well settled that a person can establish his title independently of the sale certificate. Section 91 relates to evidence of term of contract grants and under disposition of properties reduced to form of document. This Section merely forbids proving the contents of writing otherwise than writing itself. Thus, it is covered by the ordinary rule of evidence, applicable not merely to writing. The law is also equally settled that Section 91 refers only to the method of proof of term of contract, grant or disposition of property and it does not exclude other proof of that

transaction itself.

VI. In the case in hand there are sufficient material on record to show that the land in question was transferred in a auction sale and accordingly, the name of such purchaser was recorded as owner by virtue of such auction purchase. Therefore, in the given fact of the present case more particularly in view of the nature and requirement of Section 91 of the Evidence Act as discussed hereinabove, the same cannot be made applicable stricto sensu. Accordingly, the first substantial question of law framed by this court on 23.03.2023 is held to be not a substantial question of law affecting the right of the parties.

VII. Coming to the proof of gift deed Ext. 7, it is clear from the evidence on record that the defendant has not specifically denied the execution of Ext 5 gift deed by his mother nor he has disputed the signature of his mother or made any allegation of forgery. Therefore, the finding of the, learned courts below that in absence of such denial and in view of the admission of the defendant in his cross-examination that he has not challenged the gift deed executed by his mother in favour of his elder brother and has also not objected to the mutation of this brother on the basis of such gift deed, the proviso to Section 68 shall not be applicable, cannot be faulted with at this second appellate stage by reversing such



concurrent finding of fact. Accordingly, it was held that the gift deed was duly proved and in absence of specific denial of the gift deed.

VIII. Accordingly, this second appeal stands dismissed. Prepare a decree accordingly. Parties to bear their own cost.

JUDGE

Comparing Assistant