



GAHC010123172012

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

Case No. : RSA/241/2012

RAMJAN ALI AND 4 ORS
S/O- LATE ABDUL MAJID, R/O-VILL-KODOMGURI, MOUZA-
RANGAGORAH, PS- SAMAGURI, DIST- NAGAON, ASSAM

2: MIRJA ALI

3: SURUJ ALI

4: OMAR ALI

5: MAHAMMAD ALI
ALL SONS OF LT. ABDUL MAJID
MUSLIM BY CASTE AND RELIGION
HOUSE-HOLDERS BY PROFESSION
RESIDENT OF VILLAGE - KODOMGURI
MOUZA - RANGAGORAH
PS.- SAMAGURI
DIST.- NAGAON
ASSAM

VERSUS

NUR ISLAM AND 18 ORS
S/O- LATE MAHARUDDIN, R/O-VILL-KODOMGURI, MOUZA-
RANGAGORAH, PS- SAMAGURI, DIST- NAGAON, ASSAM

2:ASOR UDDIN @ ASIRUDDIN

3:SAFARUDDIN @ SAFAR
ALL ARE SONS OF LATE MASIM SHEIKH



4:ABDUL SATTAR

5:ABDUL KALAM

BOTH ARE SONS OF LATE MAHARUDDIN AND GRANDSON OF LATE MASIM SHEIKH

ALL ARE MUSLIM BY CASTE AND RELIGION

HOUSE-HOLDER BY PROFESSION AND RESIDENT OF VILL.- KADOMGURI

MOUZA - RANGAGORAH

PS.- SAMAGURI

DIST.- NAGAON

ASSAM.

6:MUSST. FULBANU

WIFE OF LATE MASIM SHEIKH

7:MD. ABDUL HASSIM

SON OF NABI HAJI AND LATE MAHAR BANU

8:MD. MAHARUDDIN

9:MD. SAHAR UDDIN

BOTH ARE SONS OF LATE SAMAD

10:ABDUL HYE

11:MD. HASMAMUD

BOTH ARE SONS OF ISAB ALI

12:ABDUL KADIR

13:MD. OSMAN ALI

14:MD. MAMTAZ ALI

ALL ARE SONS OF LATE SAHAD ALI

15:MD. RAMJAN ALI

16:MD. RAJAB ALI



17:MD. AKBOR ALI

18:MD. SUKUR ALI

19:MD. SAMSUR ISLAM
ALL SONS OF LATE PACHANDA ALI
ALL ARE RESIDENTS OF VILL.- KODOMGURI
MOUZA - RANGAGORAH
PS.- SAMAGURI
DIST.- NAGAON
ASSAM

Advocate for the Petitioner : MR.S DUTTA

Advocate for the Respondent : MR.K K MAHANTAR-4,7,15,17,18and19

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

Date : 07-03-2024

JUDGMENT & ORDER

The instant appeal has been filed under Section 100 of the Code of the Civil Procedure, 1908 (for short, the Code), challenging the judgment and decree dated 21.12.2011 passed by the Court of the learned Additional District Judge, Nagaon (for short, the 1st appellate court). Vide the order dated 19.03.2013, the instant appeal was admitted by formulating the following substantial question of law:

Whether the learned court below committed perversity in interpreting the defendants Purchase Deed viz. exhibit gha to exhibit ta and overlooking

the evidence of DW-1, vis-à-vis, the mutation in the name of the plaintiff while declaring right, title and interest of the suit land in favour of the plaintiff?

2. For the purpose of deciding as to whether the said substantial question of law is involved in the instant appeal, this Court finds it relevant to take note of the facts in brief infra:

The plaintiffs are the successor-in-interest of one Masim Sheikh (since deceased). It is the specific case of the plaintiffs that they are the owners of land under dag No.235 of periodic patta No.147 which covers an area measuring 4 bighas 4 kathas 4 lessas situated at Kissam Kadomguri, Mouza-Hangagorah in the district of Nagaon, Assam. The said land for the sake of convenience is hereinafter referred to as the suit land.

3. It is the specific case of the plaintiffs in the plaint that they were absolute owners of the said suit land. However, the defendants had denied their title on various dates and trespassed into the said land on 22.03.2001. It is under such circumstances, that the suit was filed seeking right, title and interest of the plaintiffs over the suit land with a decree for recovery of khas possession against the defendants; a decree for demolition of any house/structure on the suit land erected by the defendants during the pendency of the suit, (if any); a decree for putting the plaintiffs into the vacant possession of the suit land by removing the house/structure etc. from the suit land with man and materials; for a decree for permanent injunction of the suit etc. On the basis of the suit being filed, it was registered and numbered as Title Suit No.05/2001.

4. The defendant Nos.1 to 5 filed their written statement claiming, *inter alia*, that 7 bighas 1 katha, 18 lessas of land is covered by dag Nos. 235, 236, 237 which is a part of the old dag No.97 of periodic patta No.42 of 1930/31 settlement. This very patta being periodic patta No.42 originally contained 9 dags and had land measuring 34 bighas 1 katha and 18 lessas. It was mentioned that on 29.03.1952, one Abdul Subhan sold 3 bighas 3 kathas 15 lessas of land covered by dag No.97 to one Abdul Mazid(since deceased) vide a registered sale deed. Further to that, on 21.01.1944, the said Abdul Subhan sold another 2 bighas 2 kathas 5 lessas of land to one Isab Ali, who subsequently on 02.03.1945 sold the said land to Abdul Mazid. In addition to that, the predecessor-in-interest of the plaintiffs Lt. Masim Sheikh by the deed of sale dated 22.01.1962 sold 1 bigha of the land which included a portion of the land of dag No.97. It was also stated that one of the sons of Lt. Masim Sheikh vide registered sale deed No.3076 dated 08.03.1972 sold 1 katha 5 lessas of land to Lt. Abdul Mazid from dag No.236 and 237. It was however mentioned that from a perusal of the said boundaries mentioned in the said deed of sale it would show that the delivery of possession was made in respect of dag No.235. It was, therefore, the specific case of the defendants in the written statement that Lt. Masim Sheikh had no land in dag No.235 of periodic patta No.147 and as such, the suit which was filed ought to be dismissed as it was false and vexatious.

5. On the basis of the said pleadings, the learned trial court framed as many as 8 issues, which included the issue as to whether the plaintiffs had right title and interest over the suit land and as to whether they were entitled to get khas

possession thereof, which was issue No.3.

6. The learned trial court after taking into account the evidence on record, came to a finding that the plaintiffs had right, title and interest over the suit land and the defendants dispossessed the plaintiffs and as such, the plaintiffs were entitled to recovery of khas possession. The other issues were also decided in favour of the plaintiffs. Resultantly, vide the judgment and decree dated 14.08.2006, the learned trial court decreed the suit of the plaintiffs with costs, declaring the right, title and interest of the plaintiffs over the suit land and further decreed for recovery of khas possession against the defendants by demolishing any house/structure in the suit land erected by the defendants during the pendency of the suit. Further to that, the learned trial court directed that the plaintiffs be put into vacant possession of the suit land by removing man, materials, structures and a permanent injunction was also granted against the defendants prohibiting them from erecting any house/structure over the suit land.

7. The defendants being aggrieved, preferred an appeal before the Court of the learned District Judge, Nagaon which was endorsed to the Court of the learned Additional District Judge Nagaon for disposal. The said appeal was registered and numbered as Title Appeal No.25(N)/2006. The learned 1st appellate court decided the said appeal issue-wise. In deciding the issue No.3, the learned 1st appellate court came to a finding that the plaintiff were entitled to a decree for right, title and interest over the suit land as well as for recovery of khas possession including the other reliefs which were given by the learned trial



court. Under such circumstances, the said judgment and decree was passed on 21.12.2011.

8. Being aggrieved, this second appeal has been filed.

9. This Court has duly heard Mr. BC Das, the learned senior counsel, assisted by Ms. I Das, learned counsel for the appellants and Mr. KK Mahanta, learned senior counsel assisted by Mr. KM Mahanta, learned counsel for the respondents.

10. The substantial question of law which has been framed, in effect, relates to as to whether there is any perversity in the findings arrived at on the interpretation of the exhibited documents of the defendants and the evidence adduced by the defendant No.1 *vis-à-vis*, the mutation of the plaintiff. This Court finds it very relevant to take note of that amongst the various exhibited documents by the defendants to show their title over the land. Exhibit *Cha* is a deed of sale dated 22.01.1962 whereby the predecessor-in-interest of the plaintiff have sold 1 bigha of land to the predecessor-in-interest of the defendant. The said land conveyed vide the said Deed of Sale was covered by dag No.106, 251, 252, 256, 101, 260, 253/97/103 which was a part of the total land measuring 34 bighas 1 kathas 18 lessas of patta No.42. From the materials on record, more particularly, the evidence which have been discussed by the learned 1st appellate court, it transpires that the old patta No.42 of the 1930/31 settlement contained a total land of 34 bighas 1 katha and 18 lessas in 9 dags. There is no denial to the fact that this patta No.42 belonged to the father of the

plaintiffs Lt. Masim Sheikh and his brothers. It is further seen from paragraph 11 of the judgment of the 1st appellate court which is based upon the evidence that out of patta No.42, a new patta was made that is patta No.147. Further to that, the new dag Nos. 235, 236, and 237 were the part of the old dag No.97. It is further seen from the judgment itself that dag No.235 contains 4 bighas 4 kathas and 4 lessas of land and the remaining 2 bighas 2 kathas and 14 lessas of land is covered by dag No.236 and 237. This Court further finds it relevant to take note of that the learned 1st appellate court while deciding the said appeal duly had taken note of exhibit *Cha* which revealed that Lt. Masim Sheikh sold 1 bigha of land to Lt. Abdul Mazid in various dags, which included dag No.97. The learned 1st appellate court, however, did not take into consideration as to whether the said land which was sold to Lt. Abdul Mazid vide deed of sale dated 22.01.1962 contained any portion of land, which fell under dag No.235.

11. This Court has also taken note of exhibit 4 which was a document exhibited by the plaintiff. This exhibit-4 is the chitha of patta No.147 showing the dag Nos.235, 236 and 237. From a perusal of the said exhibit- 4, it is seen that the name of Abdul Mazid is also seen in respect of dag No.235 of patta No.147. The question, therefore, arises as to whether the plaintiffs would be entitled to the declaration of right, title and interest in respect of the entire suit land which comprises of 4 bighas 4 kathas 4 lessas in dag No.235. More so, taking into consideration that the said exhibit-4 which is the document exhibited by the plaintiff also shows that not only the names of the plaintiffs are there, but also the names of various other persons are also mentioned in the said document.



12. This Court further finds it relevant to take note of that it is well settled that the burden of proof lies upon the person who is seeking for a judgment in his favour. The provisions of Section 101 of the Indian Evidence Act 1872 if applied would show that the burden lied upon the plaintiffs to show that the plaintiffs had exclusive and absolute right over dag No.235 of patta No.147 which, however, had not been taken into consideration either by the learned trial court or by the learned 1st appellate court. Both the courts below have decided the suit and Appeal on the basis that the defendants had failed to prove that they had any right over dag No.235, but did not take into consideration as to whether the plaintiffs had been able to prove as to whether the plaintiffs had absolute and exclusive right over dag No.235 of patta No.147. In this regard, this Court finds it relevant to take note of the judgment of the Supreme Court in case of *Union of India vs. Vasavi Cooperative Housing Society Limited & Ors reported in (2012) 2 SCC 269* wherein the Supreme Court lucidly explained on the question of burden of proof upon the plaintiff Paragraphs 15 to 19 of the said judgment is reproduced below:

“15. It is trite law that, in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

16. The High Court, we notice, has taken the view that once the evidence is let in by both the parties, the question of burden of proof pales into insignificance and the evidence let in by both the parties is required to be appreciated by the court in order to record its findings in respect of each of the issues that may ultimately determine the fate of the suit. The High Court has also proceeded on the basis that initial burden would always be upon the plaintiff to establish its case but if the evidence let in by the

defendants in support of their case probalilises the case set up by the plaintiff, such evidence cannot be ignored and kept out of consideration.

17. At the outset, let us examine the legal position with regard to whom the burden of proof lies in a suit for declaration of title and possession. This Court in Moran Mar Basselios Catholicos v. Thukalan Paulo Avira [AIR 1959 SC 31] observed that: (AIR p. 37, para 20)

“20. ... in a suit [for declaration] if the plaintiffs are to succeed they must do so on the strength of their own title.”

18. In Nagar Palika, Jind v. Jagat Singh [(1995) 3 SCC 426] this Court held as under: (SCC p. 427c)

“The onus to prove title to the property in question was on the plaintiff-respondent. ... In a suit for ejectment based on title it was incumbent on the part of the court of appeal first to record a finding on the claim of title to the suit land made on behalf of the plaintiff. The court is bound to enquire or investigate that question first before going into any other question that may arise in a suit.”

19. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against (sic them), in the absence of establishment of the plaintiff's own title, the plaintiff must be non-suited.”

13. Under such circumstances, this Court taking into account the evidence on record is of the opinion that this is a fit case for remand to the 1st appellate court taking into account that these vital aspects of the matter has been totally disregarded by the learned 1st Appellate court. This Court further in exercise of its powers under Order XLI Rule 25 of the Code is also of the opinion that an



additional issue is required to be framed in the instant proceedings. The additional issue read as under:

“Whether the plaintiffs have been able to show their exclusive and absolute rights over the suit land on the basis of the evidence on record?”

14. This Court while remanding the matter directs the learned 1st Appellate court to decide the said additional issue, which upon being decided would have an impact on all other issues and more so, the Issue No.3 and for which, the learned First Appellate Court shall decide all the issues afresh. The learned First Appellate Court in its discretion may permit the parties to adduce additional evidence.

15. With the above, the instant appeal, therefore, stands disposed of thereby directing the learned 1st appellate court to decide afresh the appeal in accordance with law in terms of the observations made hereinabove.

16. The Registry is directed to forthwith transmit the records back to the learned 1st appellate court so that the same is taken up for disposal at the earliest.

17. This Court, further, taking into account the above, sets aside the impugned judgment and decree dated 21.12.2011 passed by the learned 1st appellate court.



18. With the above, this appeal stands allowed to the extent indicated above. In the facts of the case, this Court would not like to impose costs.

JUDGE

Comparing Assistant