



GAHC010154732020

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

Case No. : WP(C)/4749/2020

DEBESWAR BURAGOHAIN AND 4 ORS
S/O- LT. KANAK CH. BURAGOHAIN, R/O- LICHUBARI, JORHAT, DIST.-
JORHAT, ASSAM, PIN- 785608

2: CHANDAN BURAGOHAIN
S/O- LT. SARBESWAR BURAGOHAIN
R/O- LICHUBARI
JORHAT
DIST.- JORHAT
ASSAM
PIN- 785608

3: BANDANA BURAGOHAIN
D/O- LT. SARBESWAR BURAGOHAIN
R/O- AMULAPATTY
T.L.B. ROAD
C/O- BISWAJIT KARMAKAR
SIVASAGAR
DIST.- SIVASAGAR
ASSAM
PIN- 785640

4: RUMI BURAGOHAIN
W/O- LT. NANDAN BURAGOHAIN
R/O- LICHUBARI
JORHAT
P.O.- CHINAMORA
DIST.- JORHAT
ASSAM
PIN- 785608

5: HIMAKSHI BURAGOHAIN
D/O- LT. NANDAN BURAGOHAIN
R/O- LICHUBARI



JORHAT
P.O.- CHINAMORA
DIST.- JORHAT
ASSAM
PIN- 78560

VERSUS

THE STATE OF ASSAM AND 3 ORS
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM, REVENUE
DEPTT., DISPUR, GHY-6

3:THE DY. COMMISSIONER (REVENUE)
JORHAT
DIST.- JORHAT
ASSAM
PIN- 785608

4:NITYANANDA GOGOI
S/O- LT. PUTU GOGOI
R/O- BORBHETA CHAPORI
JORHAT
P.O. AND P.S. JORHAT
DIST.- JORHAT
ASSAM
PIN- 785001

5:DEBESWAR GOGOI
S/O- LT. PUTU GOGOI
R/O- BORBHETA CHAPORI
JORHAT
P.O. AND P.S. JORHAT
DIST.- JORHAT
ASSAM
PIN- 78500

BEFORE

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

For the Petitioners : Shri D Das, Senior Advocate and
Shri TG Baruah, Advocate.

For the Respondents : Ms. M Barman, Govt. Advocate, Assam;

Ms. G Hazarika, SC, Revenue Deptt. and

Shri KR Bora, Advocate for R-4 & 5.

Date of Hearing : 25.04.2023.

23.06.2023.

Judgment & Order

The legality and validity of an order dated 28.06.2011 passed by the Addl. Deputy Commissioner (Revenue) Jorhat in an application filed by the respondent nos. 4 and 5 by which ownership rights have been declared as well as the order dated 19.09.2020 passed by the learned Assam Board of Revenue whereby, the appeal of the petitioners has been dismissed is required to be examined in this writ petition instituted by invoking Article 226 of the Constitution of India.

2. The facts projected in the petition are that the petitioners, who are five in numbers, are the legal heirs of Late Kanak Chandra Buragohain and Jagada Buragohain. According to the petitioners, their predecessors were the absolute owners of a plot of land measuring 17 bighas 4 kathas 1 lecha of KP Patta No. 5, 14 and 33. On the death of their predecessors, the petitioners inherited the aforesaid land and on the strength of such inheritance, their names were inserted in the *Jamabandi* in the month of January and February, 1981.

3. It has further been projected that on 28.10.2010, the respondent nos. 4 and 5 had filed an application before the Addl. Deputy Commissioner (Revenue) Jorhat for correction of the *Jamabandi*. On such application, the authority registered a case against the predecessors of the petitioners and issued notices to them. It is the case of the petitioners that much prior to the time of institution of the proceeding before

the revenue authority, the predecessors of the petitioners, who were the original owners of the land in question, had expired. However, it appears that notices were held to be issued to the aforesaid predecessors.

4. The petitioners contend that on coming to know about the proceeding before the Addl. Deputy Commissioner (Revenue) Jorhat, they filed a written objection stating that the names of the petitioners were inserted on correction of the *Jamabandi* in the year 1981. However, without considering the case in the proper perspective, an order dated 28.06.2011 has been passed in favour of the private respondents. The aforesaid order dated 28.06.2011 has also been upheld by the learned Assam Board of Revenue vide judgment and order dated 19.09.2020 in Revenue Appeal No. 13(J)/2018. As indicated above, the principal ground of challenge is that the proceeding was instituted against dead persons and in spite of knowing about the existence of the petitioners and their names being reflected in the *Jamabandi*, no steps, whatsoever were taken to implead/substitute the petitioners in the proceeding. The grounds of violation of the provisions of the Assam (Temporarily Settled Areas) Tenancy Act, 1971 (hereinafter referred to as the Act) as well as erroneous approach of the learned ABR in respect of proving the case have also been taken.

5. I have heard Shri D Das, learned Senior Counsel assisted by Shri TG Baruah, learned counsel for the petitioners whereas the contesting private respondent nos. 4 and 5 are represented by Shri KR Borah, learned counsel. Ms. M Barman, learned GA has represented the State of Assam whereas Ms. G Hazarika, learned counsel has represented the Revenue Department, Assam. The LCRs which have been transmitted to this Court, have also been carefully examined.

6. Shri Das, learned Senior Counsel for the petitioners has submitted that the petitioners' predecessors, including, Kanak Chandra Buragohain and Jagada

Buragohain were the original pattadars of the land in question. However, upon the death of the original pattadars, the petitioners duly applied for correction of the land records in the year 1981 itself. Accordingly, the land records were corrected and the names of the petitioners were substituted in place of their predecessors. In this regard, the learned Senior Counsel has referred to the order against remark (Ga) dated 31.10.1981 whereby, in place of the name of Jagada Gohain, the names of Sarbeswar and Debeswar were substituted. Reference is also made to the order dated 08.02.1981 and corrected *Jamabandi* where the names of the original pattadar, Kanak Chandra Buragohain were substituted by the names of Sarbeswar and Debeswar.

7. Shri Das, learned Senior Counsel has submitted that all along, the petitioners have been paying the land revenue, the receipts of which have been annexed to the writ petition. However, on 28.10.2010, an application was submitted by the respondent nos. 4 and 5 with a prayer for cancellation of the name of the pattadar and for issuance of patta in the name of the Rayati. Though a schedule was given in the said application, there was no mention under what provision of law, the application was made. The said application was registered as TSA No.5/2010.

8. It is strenuously argued on behalf of the petitioners that the aforesaid application was filed against the predecessors of the petitioners after about 30 years from the date of correction of the *Jamabandi* in the names of the petitioners and on that count itself, the application ought to have been dismissed. Shri Das, learned Senior Counsel further argues that the subsequent events and the procedure adopted were absolutely shocking. From a copy of the notice issued on the said application by the respondent nos. 3 and 4, it would appear that the name of the landlord was stated as Kanak Chandra Gohain, who had expired more than 30 years ago before institution of the proceeding. The authority had also passed an order on 12.01.2011 that the persons named in the notice had received the same. Nevertheless, the present petitioners on

coming to know about the proceeding had filed an objection wherein, it was stated that there was no tenant on the aforesaid land and further that the case was instituted against dead persons and therefore, not maintainable.

9. The learned Addl. Deputy Commissioner, Jorhat, however, vide order dated 28.06.2011 had rejected the objections and held that the private respondents were entitled to get ownership right and accordingly, directed the Circle Officer, Jorhat West Revenue Circle to make the necessary corrections. Accordingly, on 13.07.2011, the corrections were made by the Lat Mondal.

10. By referring to the order dated 06.12.2017 passed by this Court in WP(C)/2334/2012 which was initially instituted by the present petitioners against the aforesaid order of correction of land records, Shri Das, learned Senior Counsel has submitted that this Court had given liberty to the petitioners to approach the learned Assam Board of Revenue (ABR) as the order in question, was an appealable one. On such approach to the learned ABR, the impugned order dated 19.09.2020 has been passed whereby the appeal was dismissed and the order of the Addl. Deputy Commissioner, Jorhat was affirmed.

11. The learned Senior Counsel for the petitioners submits that such dismissal has been done by taking into consideration irrelevant factors and by overlooking the relevant and germane materials which were before the learned ABR. He submits that reference has been made to a title suit which was filed in the Court of the learned Civil Judge, Jorhat in TS No. 63/2011 and the Board recorded a finding that it was held in the suit that the private respondents had absolute right, title and possession. The learned ABR had also come to a finding that the notices in the proceeding before the Addl. District Judge were served on the legal heirs of the deceased pattadars who had appeared and therefore, the argument that the order was passed against dead



persons did not hold good.

12. Both the aforesaid findings by the learned ABR are severely criticized by the learned Senior Counsel for the petitioners. He submits that the reliance upon the order passed in the TS No. 63/2011 was absolutely incorrect and unreasonable inasmuch as, the suit was filed by a third party against the petitioners as well as the private respondents which was dismissed and the appeal preferred was also dismissed. Therefore, the observation of the learned ABR that the private respondents had got right, title and interest over the suit land by such dismissal is absolutely fallacious.

13. With regard to the issue of the validity of the proceedings which was admittedly instituted against the predecessors of the writ petitioners who had passed away long before such institution, Shri Das, learned Senior Counsel submits that such proceeding is *non est* in law as no case can be filed against a dead person. In support of his submission, the learned Senior Counsel has relied upon the following decisions:

- i) ***Hira Lal Patni Vs. Kali Nath*, AIR 1962 SC 199;**
- ii) ***C. Muttu Vs. Bharath Match Works*, AIR 1964 Mys 293;**
- iii) ***Ali Mohd. Khan Vs. Vijay Tulsj*, 1986 AIR (J&K) 26;**
- iv) ***Cuttack Municipality Vs. Shyamsundar Behera*, 1977 AIR (Ori) 137;**
- v) ***Pratap Chand Mehta Vs. Krishna Devi Mehta*, 1988 AIR (Del) 267;**
- vi) ***Ram Suresh Singh Vs. Prabhat Singh @ Chhotu Singh*, (2009) 6 SCC 681;**
- vii) ***Ram Pratap Singh Vs. Surendra Singh @ Radhika Singh*, 2017 (2) MPLJ.**

14. The Hon'ble Supreme Court in the case of ***Hira Lal Patni*** (*supra*) has laid down and explained the proposition that the validity of a decree can be challenged amongst

others, on the ground that the defendant was dead at the time the suit had been instituted or decree passed.

15. A division bench of the Hon'ble Mysore High Court in the case of **C. Muttu** (*supra*) after discussing the earlier case laws holding the field had approved the observations in the following manner:

“It does not appear to have ever been suggested that the issue of a right against a dead man, could not be anything, but a nullity, and we see no reasons for regarding the presentation of a plant, which, under our system corresponds to the issue of the writ, as anything more.”

16. The Hon'ble Madhya Pradesh High Court in the case of **Ram Pratap Singh** (*supra*) had also relied upon the aforesaid observation which was relied by the Hon'ble Mysore High Court in the case of **C. Muttu** (*supra*).

17. The Hon'ble Delhi High Court in the case of **Pratap Chand Mehta** (*supra*) had also reiterated the law laid down in **Hira Lal Patni** (*supra*). The Hon'ble Jammu and Kashmir High Court in the case of **Ali Mohd. Khan** (*supra*) had also followed the aforesaid proposition. Similarly, the Hon'ble Orissa High Court in the case of **Cuttack Municipality** (*supra*) had also relied upon the case of the Hon'ble Supreme Court in **Hira Lal Patni** (*supra*).

18. With regard to the finding of the ABR on the third argument made by the petitioners, as appellants, as to reliance upon the photo copies of the *Khatian* to ascertain ownership, the learned Senior Counsel has submitted that such findings are against the settled principles of law. In this regard, he relies upon the case of **Ram Suresh Singh** (*supra*). In the said case, the Hon'ble Supreme Court had explained that



a xerox copy of a document of which the original has not been produced is not admissible in evidence.

19. An order dated 11.08.2004 of this High Court in the case of Smt. ***Jonoswari Baruah & Ors. Vs. Shri Gajen Baruah & Ors.***, passed in **Second Appeal No. 103/1998** has been cited by the petitioner in support of the submission that mere dismissal of the plaintiff's case would not automatically result in a declaration of the defendant's claim to the suit land. Further, in the instant case, the suit was filed by a third party.

20. *Per contra*, Shri KR Bora, learned counsel for the respondent nos. 4 and 5 has opposed the writ petition and has also referred to the affidavit-in-opposition filed by the said respondents on 21.12.2021. He submits that the rights of the parties stood determined by the judgment of the learned Munsiff No. 1, Jorhat in TS No. 63/2011. He has also referred to the statement of PW 1 which has been referred in paragraph 13 of the said judgment wherein, it has been stated that the suit was instituted at the instigation of the predecessors of the present petitioners. The learned Munsiff had also referred to the proceeding TSA/5/2010 before the Addl. Deputy Commissioner (Revenue) Jorhat. He further submits that against the dismissal of the suit, a Title Appeal was preferred, being TA/09/2015 which, however, was also dismissed on 30.11.2015.

21. With regard to the submissions that the proceeding was against a dead person, Shri Bora, learned counsel for the private respondents has submitted that the petitioners were fully aware of the proceeding and had even contested. He has also referred to the provisions of Order I Rule 3 of the Code of Civil Procedure as regards who may be joined as defendants. Shri Bora, learned counsel has relied upon the following judgments:

- i) ***Ram Piyari Chauhan & Anr. Vs. Sankar Gowala & Ors., 2007 (3) GLT 489;***
- ii) ***Bikram Phukan Vs. State of Assam & Ors., order dated 16.06.2016 WP(C)/660/2010;***
- iii) ***Himatsingka Motor Works Ltd. Vs. State of Assam & Ors., 2014 (5) GLT 704.***

22. In the case of ***Ram Piyari Chauhan*** (*supra*), this Court has held that entry in a records of right would raise a legal presumption in support of the correctness of such entry. It has further been held that in case of any challenge to the same, the onus would lie on the contesting defendants to show that *Khatian* was not obtained in accordance with law and that the entries made therein were incorrect.

23. The case of ***Bikram Phukan*** (*supra*) has been cited by the respondents with regard to the issue of service of notice. In the said case, this Court had held that even if the notice is accepted by a person other than the defendant, such acceptance of service cannot be interfered with in absence of an argument that the person accepting the notice is not a family member.

24. Reliance has been placed upon the case of ***Himatsingka Motor Works Ltd.*** (*supra*) by the respondents with regard to the service of notice. In the said case, it reveals that notice was actually served. However, the said notice did not contain the case number. However, the Court had come to a finding that the party had appeared thereafter in the case and was therefore aware of the details of the case, and on such ground, it was held inconsequential whether the case number was given in the notice or not.

25. Shri Das, learned Senior Counsel for the petitioners, in his rejoinder has submitted that even on merits, the application of the private respondents could not have been entertained under the Act, 1971. By referring to Section 23 of the Act, 1971 and the Rules of 1972 framed under the said Act, the learned Senior Counsel submits that Rule 9 prescribes that the application should be in a particular format, being Form 5 which is required to be signed and verified. He submits that a bare look at the application said to have been filed on 28.10.2010 by the private respondents is not in the prescribed format and does not have any verification. He further submits that under Rule 13, publication is required which, admittedly has not been done.

26. The rival submissions of the learned counsel for the parties have been duly considered and the materials on records have also been carefully examined.

27. The issue which has arisen for determination in examining the correctness and validity of the judgment and order dated 19.09.2020 passed by the learned ABR whereby, the order passed by the Addl. Deputy Commissioner, Jorhat, declaring ownership in favour of the respondent nos. 4 and 5 has been upheld may be jotted down as follows:

- i) Whether the proceeding initiated before the learned Addl. Deputy Commissioner under the Act of 1971 was in accordance with law?
- ii) Whether the proceeding was a valid proceeding which was apparently instituted against dead persons?
- iii) Whether participation by the petitioners in the said proceeding would do away with the requirement of making necessary and

affected persons in the proceeding?

- iv) Whether the approach of the learned ABR while dismissing the appeal and deciding the various issues is in accordance with law?

28. The Tenancy Act, 1971 lays down the provision in Section 23 by which a tenant can seek the ownership of a plot of land on certain conditions. Rule 9 prescribes that the application should be in a particular format, being Form 5 which is required to be signed and verified. However, it is seen that the application dated 28.10.2010 by the respondent nos. 4 and 5 is neither in the prescribed format nor does it contain any verification. That apart, even if this issue of format is overlooked, the same does not have any verification which is a substantive requirement. It is also seen that publication, as required under Rule 13 has not been done. Under such circumstances, it is difficult to give an endorsement of legal sanctity to such procedure.

29. As regards the issue of filing of the case against dead persons, to examine the same, some relevant as well as contemporaneous materials are required to be considered. The predecessors of the petitioners had passed away before 1981 when the *Jamabandi* was corrected and the names of the petitioners were recorded. It is after about 30 years, when the respondent nos. 4 and 5 had filed the application on 28.10.2010, purportedly under the Act, 1971. The respondents had claimed that they were tenants in possession and yet, the application was filed against the predecessors of the petitioners who had expired about 30 years ago. The notice issued by the Addl. Deputy Commissioner, as would appear from the annexure to the writ petition, is admittedly against the aforesaid dead predecessors. At no point of time, any attempts were even made to substitute the respondents by their legal heirs even after the authority as well as the respondent nos. 4 and 5 was informed about the death of the opposite parties. This Court is also unable to accept the finding that notices were

deemed to be served as, even the endorsement showing receipt of such notice states that the concerned opposite party was already dead as the prefix "late" was used before his name.

30. It is a settled position of law that notices can neither be issued to a dead person nor can be accepted by any one on his behalf, more particularly, when such notices are of legal proceedings. The landmark case of the Hon'ble Supreme Court of **Hira Lal Patni** (*supra*) which has been cited lays down as follows:

"4. ...The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seizin of the case because subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit in over the parties to it. ..."

31. The said proposition has been uniformly followed in all later decisions which have been referred to above.

32. From the order dated 28.06.2011, it appears that the Addl. Deputy Commissioner, Jorhat, though observed that the original pattadars were deceased, notices were issued to the legal heirs of the original pattadars. This Court is of the opinion that unless, the writ petitioners, who were the present pattadars, were substituted in place of the original pattadars and were made parties, question of issuing notice to the writ petitioners cannot arise and therefore, the entire proceeding against the dead persons is a nullity and *non est* in law.

33. With regard to the issue of reliance upon the photo copies of the documents relating to *Khatian*, the learned ABR had made the following observations:

“I have also perused the arguments put forward regarding the photo copy of Khatian submitted etc. and find that this argument do not hold as there is clear indication that these documents in original were perused and found as acceptable in a title suit No. 63/2011 in the Court of Munsiff 1 of Jorhat.”

34. The aforesaid observation is not in consonance with the law of evidence. Though photo copy of documents can, under certain circumstances, be exhibited as secondary evidence, there is a procedure prescribed in law for such a course of action. In the instant case, there is not even a semblance that any procedure was followed in this regard and therefore, reliance upon a photo copy of a document with the aforesaid observation that the same was filed in a Civil Court, that too, in a suit instituted by a third party, is a wholly erroneous approach and not sustainable in law.

35. The case laws relied upon by Shri Bora are clearly distinguishable from the case in hand. In the case of ***Himatsingka Motor Works Ltd.*** (*supra*) which has been cited with regard to the issue of notice, the facts in the said case was in connection with the date which was not given in the notice even whereafter, the opposite party had appeared and therefore, the issue was rendered redundant. In the case of ***Bikram Phukan*** (*supra*), the notices were received by family member of the respondent who was still alive.

36. Under the aforesaid facts and circumstances, this Court is of the considered opinion that the entire proceeding initiated before the Addl. Deputy Commissioner,



Jorhat in TSA/5/2010 which had culminated in the order 28.06.2011 and the consequential order for correction of *Jamabandi* dated 11.07.2011 are unsustainable in law and therefore, the appeal preferred by the present petitioners could not have been dismissed by the learned ABR vide the impugned judgment and order dated 19.09.2020 and accordingly, the same is also set aside. Consequently, the names of the present writ petitioners are directed to be restored in the *Jamabandi* pertaining to the land involved.

37. The writ petition is, accordingly disposed of. No costs.

JUDGE

Comparing Assistant