

GAHC010002412008



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

Case No. : RSA/57/2008

NAGEN DAS
S/O LT. MANIK DAS, R/O VILL. BAR AZARA, MAUZA-BAHJANI, PO/DIST.
NALBARI, ASSAM.

VERSUS

NARAN DAS
S/O LT. JANIK DAS.

2:SMT. KAMINI DAS

W/O NAREN DAS
BOTH ARE RESIDENT OF VILL. BAR AZARA
MAUZA-BAHJANI
PO/DIST. NALBARI.

3:MADHAB CH. SARMA @ MADHAB CH. MEDHI GISWAMI

S/O LT. HANGSA
R/O VILL. DEHARKUCHI
MAUZA-GHOGRAPAR
DIST. NALBARI
ASSAM

Advocate for the Petitioner : MR.P DAS

Advocate for the Respondent : MR. B KALITA

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER(ORAL)

Date : 13.06.2023

Heard Mr. D. Choudhury, the learned counsel appearing on behalf of the Appellant.

2. The instant second appeal was admitted by formulating the following substantial question of law vide an order dated 30/6/2008 :-

“Whether on the proved facts the plaintiff discharged his burden as occupancy tenant under the Defendant No. 3, the original owner of the land from whom the defendant No. 1 purchased the land ?”

3. For adjudicating the substantial question of law so formulated in the instant appeal, it would be relevant to take note of the brief facts leading to the filing of the instant appeal.

4. For the purpose of convenience, the parties herein are referred to in the same status as they stood before the Trial Court.

5. The records reveal that the Appellant herein as Plaintiff had instituted a suit which was registered and numbered as Title Suit No. 15/2002, seeking a decree of khas possession in favour of the plaintiff, declaring his right as a ‘rayat’ over the land described in the Schedule to the plaint; for a decree of permanent injunction restraining the Defendants from disturbing the peaceful

possession of the Plaintiff on the land described in the Schedule to the plaint; for a precept to be sent to the Revenue Authority to grant the 'rayati' khatian in favour of the Plaintiff in respect to the land described in the Schedule to the plaint and for other reliefs to which the Plaintiff would have been entitled to in law and in equity.

6. The case of the Plaintiff as could be seen from a perusal of the plaint is that the Plaintiff claims to be a 'rayat' over the land described in the plaint on the ground that he had been enjoying the possession over the said land by doing cultivation as a 'rayat' under the Defendant No. 3 and his brothers. It was mentioned in the plaint that along with the suit land which has been described in the Schedule to the plaint, there were some other lands also which were under the possession of the predecessors-in-interest of the plaintiff i.e. his maternal grandfather as 'rayat' and after him the same devolved upon his two sons, namely Dhuti and Lakshi. The Plaintiff used to reside with his mother in the house of his maternal uncle from his childhood and his maternal uncle had handed over the possession of some plots of land along with the suit land to the Plaintiff. The mother of the Plaintiff expired in the year 1970 and since then the Plaintiff has been enjoying the possession of the suit land as 'rayat' by paying Rs. 100/- per annum as the rent. It is further the case of the Plaintiff that the khatian was required to be prepared in the name of the Plaintiff in respect to

the suit land in the settlement operation. But during the last settlement operation, by mistake, the Dag No. and Patta No. of the suit land were wrongly recorded in the khatian against the name of the Plaintiff. It was the further case of the Plaintiff that the Defendant No. 3 had also disclosed to the Plaintiff that all the lands in the Suit Dag had fallen to his share and as such the Defendant No. 3 started collecting the annual rent from the Plaintiff. It was alleged that the Defendant No. 3 for wrongful gain sold the entire land belonging to the Suit Dag possessed by the Plaintiff by executing a Deed of Sale bearing Deed No. 883/1986 dated 25/2/1986 in favour of the Defendant No. 1 and tried to disturb the peaceful possession of the Plaintiff. Under such circumstances, the Plaintiff was compelled to file a case being Case No. 80^M/86 under Section 145 of the CrPC against the Defendant No. 1 when he tried to evict the Plaintiff forcefully from the suit land by virtue of the Sale Deed. The said proceedings was decided against the Plaintiff for which the Plaintiff preferred a revision petition before the Court of the Sessions Judge, Nalbari. The Court of the Sessions Judge, Nalbari had set aside the order and declared the khas possession of the suit land in favour of the Plaintiff. It was further alleged that the Defendant No. 1 filed one more case through his wife, (the Defendant No. 2) being Case No. 10^M/1991 under Sections 145 and 146 of the CrPC. In the said proceedings, the Defendant

No. 3 admitted the right of the Plaintiff as a 'rayat' and his Predecessors-in-interest, Late Dhutiram in the said suit land. It was alleged that the Defendant No. 3 admitted that upon selling the suit land to the Defendant No. 1, the possession of the land could not be handed over. However, the Court of the Executive Magistrate decided the case i.e. the Case No. 10^M/1991 wrongly and declared the possession of the suit land in favour of the Defendant No. 2. The Plaintiff thereupon being aggrieved filed a revision petition before the Court of the Sessions Judge, Nalbari. However, the said proceedings was also decided against the Plaintiff. It is under such circumstances, the suit was filed seeking the reliefs as abovementioned.

7. It further appears from the records that a written statement was filed by the Defendant Nos. 1 and 2. In the said written statement, it was stated that there was no tenancy between the Plaintiff and the Defendant No. 3 in respect to the suit land and further, no khatian was issued by the Revenue Authority either in the name of the Plaintiff or predecessors of the Plaintiff in respect to the suit land. It was denied that there was any amicable settlement amongst the brothers of the Defendant No. 3 and the Defendant No. 3 never realized any rent from the Plaintiff @ Rs. 100 per year, stating that the suit land had fallen in the share of the Defendant No. 3. It was also denied that the Defendant No. 1

tried to dispossess the Plaintiff from the suit land forcefully. It was the categorical stand of the Defendant No. 1 that the Plaintiff was never in possession of the suit land after the land was vacated from attachment as alleged in paragraph No. 4 of the plaint. It was further stated in the written statement that the Defendant No. 1 purchased the entire land area of Dag No. 438 and a part of Dag No. 439, totaling to 2 Bighas 3 Kathas 13 lechas and both the Dags being contiguous, the Defendants have been possessing the suit land by making a compact block. It was further mentioned that the land had been under the possession of the Defendant No. 1 as his homestead prior to possession of the suit land under the Defendant No. 3 as tenant. There was a dwelling house on one part of the said land and various 'jirats'; and on the other part Rabi crops were cultivated years after years. It was further stated that the Plaintiff had no manner of right, title and interest over the suit land. It was further stated that the Plaintiff had misrepresented the facts of proceeding of Case No. 80^M/86, inasmuch as, there was no mention of any Patta number and Dag number in respect of the land of the said proceeding apart from the fact that the boundaries given in the Schedule of the said proceeding are not the boundaries of the present suit land. It was mentioned that the present Dag No.438 contains a total area of land measuring 1B 2Ks 13Ls but in that proceeding, the area of the land was mentioned as 1B 3Ks 13Ls. It was further

mentioned that on 10/1/1991, the Plaintiff in absence of the Defendant No. 1 cut away some 'jirats' from the land of the Defendants. The Defendant No. 2 though resisted, the Plaintiff threatened her with dire consequences. Hence, the Defendant No. 2 preferred a proceeding under Section 145 of the Code of Criminal Procedure, 1973 being Case No. 10^M/86. It was mentioned that in the said proceeding the Plaintiff took different pleas. In the said proceeding there was a local inspection carried out and the learned Executive Magistrate declared the possession over the land of Dag No. 438 and 439 in favour of the Defendant No. 2. The Plaintiff thereupon preferred a proceeding being C.M. No. 32/2000 before the District and Sessions Judge and vide the order dated 22/3/2002, the revision petition of the Plaintiff was dismissed. It was further mentioned that the Defendants have been possessing the suit land prior to 1985 as their homestead land and paid Government revenue regularly.

8. On the basis of the above pleadings, as many as 6 issues were framed. The issue No. 5 is of vital importance, inasmuch as, the said issue relates as to whether the Plaintiff had occupancy right over the suit land and whether he is entitled to the reliefs claimed in the said suit. The Plaintiff adduced the evidence of four witnesses and likewise the defendants also adduced the evidence of four witnesses and exhibited various documents. It is relevant at this stage to take

note of Exhibit-4 which was the evidence of the Defendant No. 3 in the proceedings i.e. Case No. 10^M/1991. The said evidence was put under objection. The Trial court vide the judgment and decree dated 5/3/2005 dismissed the suit against the plaintiff. It appears from the judgment of the Trial Court that the Issue No. 5 was decided against the Plaintiff thereby holding that the Plaintiff did not acquire any right as a 'rayat' over the suit land and as such the Plaintiff was not entitled to the reliefs sought for in the suit.

9. The plaintiff being aggrieved preferred an appeal before the Court of the District Judge, Nalbari which was registered and numbered as Title Appeal No. 4/2005. The First Appellate Court vide the judgment and decree dated 18/9/2007 dismissed the appeal. The First Appellate Court also decided the Appeal by taking into account each of the Issues. The Issue No. 5 was decided against the Plaintiff. In deciding so, the First Appellate Court held that the Exhibit-1 was not related to the case of the present suit land. It was held that the Plaintiff had failed to establish that he had possessed the suit land as a 'rayat' under the Defendant No. 3 for more than 3 years by paying 1/5th share of the paddy. It was further observed that in terms with Section 37 of the Assam (Temporarily Settled Areas) Tenancy Act, 1971, the tenant is entitled to a written receipt for payment of the rent to be given to the landlord showing

therein a description of the land, the total rent due, the amount of cash rent or crop rent paid, the area to which it relates. It was further observed by the First Appellate Court that no such documents were placed on record. The First Appellate Court further taking note of Exhibit "Gha" and Exhibit "Unga" as exhibited by the Defendants which were proved through the defendant Witness No. 4, came to a finding that the defendant No. 1 had purchased the suit land from the defendant No. 3 by executing a registered Deed of Sale and the land was also mutated in favour of the defendant No. 1. The evidence of PW-1, PW-2 and PW-4 were also discussed and on the basis of that, the First Appellate Court came to finding that as the Plaintiff had failed to produce any document evidencing that he tendered any rent to the defendant No. 3 as such, the Plaintiff failed to establish landlord-tenant relationship with the Defendant No. 3 that the Plaintiff had not acquired any right over the suit land as a "riyat" and hence he is not entitled to any relief as claimed. It is on the basis thereof that the appeal was also dismissed.

10. In the backdrop of the above and taking into account the substantial question so formulated by the order dated 30/6/2008 as quoted herein above, this Court therefore is called upon to decide as to whether the substantial questions of law so formulated arises in the instant appeal.

11. Mr. D. Choudhury, the learned counsel appearing on behalf of the Appellant submits that both the Trial Court and the Appellate Court did not take into account Exhibit 4 which was kept under objection. He submitted that from a perusal of the evidence of the Defendant No. 3 before the Executive Magistrate in the proceeding being 10^M/1991, there was a clear and categorical observation that the Plaintiff as well as his predecessors-in-interest were in possession of the suit land which was not taken into account by the Trial Court as well as the First Appellate Court.

12. Now therefore, the question arises as to whether the non-consideration of Exhibit -4 which was kept under objection by both the Trial Court and the First Appellate Court amounts to perversity. The answer to the same can be found from a reading of Section 33 of the Indian Evidence Act, 1872, which stipulates as to when evidence given by a witness in judicial proceedings or before any person authorized by law to take it relevant for the purpose of proving in a subsequent judicial proceeding or in a later stage of the said judicial proceeding. A perusal of Section 33 of the Indian Evidence Act, 1872 stated that evidence given by a witness in judicial proceedings or before any person authorized by law to take, it can only be taken into consideration, provided it meets the various conditions as mentioned therein to the effect that the witness was dead,

or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if its presence cannot be obtained without any amount of delay or expense which under the facts and circumstances of the case, the Court considers unreasonable.

13. I have perused the records and from the records it does not show in any manner that any application was filed by the Plaintiff explaining before the Trial Court or giving any evidence to that effect that those circumstances exist for the purpose of taking on record the evidence tendered by the Defendant No. 3 before the proceeding i.e. 10^M/1991. Further to that, it is also relevant to mention that the recourse to Section 33 of the Indian Evidence Act, 1872 can only be made, provided the proceedings were between the same parties or their representatives in interest; the adverse party in the first proceeding has the right and opportunity to examine; the question in issue was substantially the same in the first as well as in the second proceeding.

14. A perusal of the proceeding in Case No. 10^M/1991 would show that the said proceeding was initiated by the Defendant No. 2, who was the wife of the Defendant No.1 against the Plaintiff. It is also to be seen that the Defendant No. 1 did not have an opportunity to cross-examine the Defendant No. 3 in the said proceeding. It further appears from the pleadings itself that the proceeding

being 10^M/1991 was initiated on the basis of the allegations that the Plaintiff tried to take away certain 'jirats' from the occupation of the defendant No. 2. However, the issue involved in the instant proceeding pertains to as to whether the plaintiff would be entitled to a declaration that the plaintiff is a 'rayat' under the Defendant No. 3 and for recovery of possession. Therefore the requirements as stipulated in the proviso to Section 33 of the Indian Evidence Act, 1872 is not met for the purpose of taking into account Exhibit-4. Under such circumstances, this Court is of the opinion that non-consideration of Exhibit-4 by the Trial Court as well as the First Appellate Court would not amount to perversity in the findings arrived at by the Courts below.

15. In that view of the matter, the substantial question of law so formulated, in the opinion of this Court, is not involved in the instant appeal, for which the instant appeal stands dismissed.

16. The Registry is directed to prepare the decree.

17. Return the LCR forthwith.

18. In the facts of the instant case, this Court is not inclined to impose any costs.

JUDGE

Comparing Assistant