

GAHC010003282016



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

Case No. : RSA/113/2023

SRI MANU DARJEE @ BAL BAHADAR DARJEE
S/O SRI LASMAN DARJEE, R/O JAKHALABANDHA (BAGHJAN) MOUZA
CHATIAL, KALIABAR SU-DIVISION, DIST. NAGAON, ASSAM, PIN 782136

VERSUS

SRI SHIU MANGAL SAHU and 2 ORS
S/O LATE HARDEU SAHU, RELIGION HINDU, OCCUPATION FAMILY MAN,
R/O RANGALU, MOUZA DWARBAGARI, KALIABOR SUB DIVISION, DIST.
NAGAON, ASSAM, PIN 782136

2:SRI SHIBAPRASAD GOSWAMI
SONS OF LATE JOGENDRANATH GOSWAMI
R/O NA-SATRA
MOUZA CHATIAL
DIST. NAGAON
ASSAM
PIN 782136

3:SRI JATIN GOSWAMI
SONS OF LATE JOGENDRANATH GOSWAMI
R/O NA-SATRA
MOUZA CHATIAL
DIST. NAGAON
ASSAM
PIN 78213

Advocate for the Petitioner : MR. S K GHOSH

Advocate for the Respondent :

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 18.10.2023

Heard Mr. S.K. Ghosh, learned counsel for the appellant.

2. This appeal under Section 100 CPC has been filed to assail the appellate judgment and decree dated 09.09.2015, passed by the learned Civil Judge, Nagaon in Title Appeal No. 12/2013, thereby dismissing the appeal and affirming the judgment and decree dated 19.01.2013, passed by the learned Munsiff, Kaliabor in T.S. No. 16(K)/2017, by which the suit of the respondent no.1 was decreed.

3. The learned counsel for the appellant has referred to the draft substantial questions of law contained in the memo of appeal and has submitted that he has prepared a re-casted substantial question of law and prayed for admission of appeal on the said substantial questions of law. The draft substantial questions of law are as follows:

1) Whether the Learned Courts below erred in Law in decreeing the suit of the plaintiff without considering the provision of section 48 of the T.P. Act?

2) Whether the Learned Courts below erred in Law in decreeing the suit of the plaintiff without applying the provisions of section 101 of the Indian Evidence Act?

3) Whether the Learned Courts below erred in Law in not deciding the point of Law as regard when there was dispute between Dag No./Patta No. And boundary of the suit land the boundary shall prevail?

4. The respondent no.1 is the plaintiff in T.S. No. 16(K)/2017 wherein the appellant is the respondent no.1. The vendors in respect of the sale deed executed in favour the respondent no.1 were arrayed as proforma defendant

nos.1 and 2. The plaint does not contain any statement as regards to the proforma respondent no.2.

5. The case of the respondent no.1 is that he had purchased 1 bigha- 3 katha land from the proforma respondent nos.1 and 2 out of their total land measuring 2 bigha- 1 katha, covered by dag no. 307 of periodic patta no.47 at Rangalu Kissamat under Dwarbaguri Mouza in the district of Nagaon at an agreed consideration of Rs.12,000/-, by registered sale deed no. 86/97. It is claimed that he was put into possession of the suit land and his name was also mutated in respect of the purchased land. It was claimed that the respondent no.1 tried to forcibly occupy the suit land and accordingly, a proceeding under Section 145 Cr.P.C. was drawn up at the instance of the respondent no.1 against the son of the appellant. It is claimed that the appellant had forcibly occupied 1 bigha- 1 katha out of the suit land on 20.10.2005. Accordingly, a suit was filed for declaring the title of the respondent-plaintiff in respect of the *ka* schedule land; the respondent no.1 also prayed for confirmation of his possession over the land described in schedule *kha* within schedule '*ka*' land; for evicting of the respondent no.1 from the land described in schedule *ka* and *kha* and claimed khas possession of the land described in schedule *ga*. It may be mentioned that schedule '*ga*' of the plaint relates to 1 katha land within schedule '*ka*' excluding land of schedule '*kha*'. The respondent no.1 had also prayed for permanent injunction. The schedule '*ka*' land is as follows:

"SCHEDULE 'KA'

Land measuring 1B 1K out of the total land measuring 2B 3K in Dag 307 of Periodic Patta No. 47 in Rangalu Kissamat, Mouza Dwarbarguri, District Nagaon. The boundaries of the land are:

North: Naba Kumar Barkakati,

South: Bidyabati Chamua,
East: Dipankar Goswami,
West: Subidya Mahanta and Muchari Kurmi."

6. The schedule 'ga' from which eviction was sought for against the appellant is as follows:

"SCHEDULE 'GA'

Land measuring 1K within the land of Schedule 'Ka' excluding the land of Schedule 'Kha'. The boundaries of the land are –

North: Naba Kumar Barkakati;
South: Land of Schedule 'Kha' which is under the plaintiff's possession;
East: Dipankar Goswami;
West: Plaintiff's land in Schedule 'Kha'."

7. The appellant, as defendant no.1, had filed the written statement and along with usual plea, it was the stand of the appellant that the suit was barred under Section 64 and 65 of the Limitation Act as well as Section 27 and 28 of the Limitation Act. While denying the claim of the respondent no.1-plaintiff, it was also claimed that the land mentioned in paragraph-1 of the plaint and that in schedule-'ka' and 'kha' are all different and that the respondent no.1 had prayed for decree in respect of the land which is less than the land in respect of which he had prayed for relief. It was also stated that out of the total land measuring 2 bigha- 1 katha covered by dag no. 307 of period patta no. 47, the appellant was enjoying possession of 1 bigha- 3 katha land by including the same in a plot of land measuring 2 bigha- 1 katha, which he had purchased in the year 1977 from Jogendra Goswami. It is claimed that the father of the appellant had purchased land in the name of his son Bal Bahadar and that Manu Darjee is also known as Bal Bahadar and the purchase was made in the year

1977 vide deed no. 46, wherein the land that was sold was stated to be 2 bigha- 2 katha- 11 lecha, covered by dag no. 97 of K.P. patta no. 67 at Rangalu Kissamat under Chatial Mouza, which was a fraud committed on his father and that the appellant was given possession of 2 bigha- 1 katha land, covered by dag no. 307 of patta no. 47, which the appellant has been enjoying since 1977. It was further claimed that Jogendra Nath Goswami and another, who are the son of Brajanath Goswami were the owners of 2 bigha- 2 katha- 11 lecha land in dag no.97 of patta no.67 and that the appellant had not purchased any land under patta no.67 from Jogendra Nath Goswami and that the appellant's sale deed, the name of the father of the vendor Jogendra Nath Goswami has been mentioned as Purnadeb Goswami. Accordingly, it is claimed that the owner of the land of patta no.57 was Jogendra Nath Goswami, son of Purnadeb Goswami, whose successor in interest are proforma defendant nos.1, 2 and 3. Accordingly, it is claimed that the appellant's vendor i.e. Jogendra Nath Goswami, son of Purnadeb Goswami has sold land to the appellant under patta no.47, but another dag and patta were fraudulently mentioned in the sale deed. Nonetheless, the appellant has been enjoying possession of the said land uninterruptedly since 1977. Accordingly, the case of the appellant is that as the land was sold to him in the year 1977, there was no right to sale the same land to the respondent no.1 and therefore, it is claimed that the suit was liable to be dismissed.

8. In course of trial, the following issues were framed:

- 1) *Whether there is cause of action for the suit?*
- 2) *Whether the suit is maintainable?*
- 3) *Whether the suit is barred by limitation?*
- 4) *Whether the suit is barred by adverse possession?*
- 5) *Whether the suit is barred by the principle of waiver, estoppels, and*

acquiescence?

6) *To what relief/reliefs the parties are entitled to?*

9. In support of his case, the respondent no.1-plaintiff had examined 3 (three) witnesses, i.e. Sew Mangal Sahu (PW-1), Siba Prasad Goswami (PW-2), and Anowar Hussain (PW-3) and had exhibited 3 (three) documents, i.e. Certified copy of Jamabandi of P.P no.47 dag no. 307 (Ext.1), sale deed (Ext.2), and Revenue Receipt (Ext.3). The appellant-defendant no.1 had examined 3 (three) witnesses, i.e. Manu Darjee @ Dalbahadur Darjee (DW-1), Penju Kharia (DW-2), and Dew Bahadur Siba (DW-3) and had exhibited 4 (four) documents, i.e. Sale Deed no. 46/77 (Ext.Ka), Certified copy of jamabandi of P.P no. 47 (Ext.Kha), Certified copy of Jamabandi of P.P no. 67 (Ext.Ga), and Revenue paying receipts (Ext.Gha).

10. In respect of issue no.1, the learned trial Court had found that there was a cause of action for the suit. In respect of issue no.2, it was held that the suit was maintainable. However, it appears that the learned trial Court had committed an error in respect of its decision on issue no.2 as it has been mentioned in respect of the said decision that the issue is decided in the negative. In respect of the issue no.3 and 4, which was taken up together, but incorrectly mentioned in the heading as issue nos.2 and 3, the learned trial Court had examined the evidence on record and referred to the evidence of the appellant that although he was sold land covered by periodic patta no.47 dag no. 307, it was inadvertently referred to as periodic patta no.67 and dag no.97 in the sale deed and accordingly, the sale deed of the appellant (Ext.Ka) being sale deed no.46/77 was not found acceptable. It was also held that the appellants plea that the vendor of Ext.Ka had practiced fraud upon his father, could not be established. It was further held that the appellant had expressed

his ignorance about the dag number and patta number of the land sold by proforma respondent nos.2 and 3 to the respondent no.1. The evidence of the DW-2 and 3 were not found reliable and in this regard, it was held that the DW-1 and 2 failed to withstand the cross-examination and could not state the facts which they had asserted in their evidence-on-affidavit. In respect of DW-2, it was held that the said witness admitted his cross-examination that he did not know as to what was written in his evidence-on-affidavit and that he also did not know who had sold the land and he had only heard that the same was purchased by the appellant and could not say the dag number and patta number of the suit land. The DW-3 was also not a witness to the execution of the sale deed and did not know the dag number and patta number of the disputed land. The evidence of the appellant was not found reliable because his failure to examining the two attesting witnesses in the sale deed and it was held that the evidence of the appellant was not convincing to establish his pleaded case that the vendor had fraudulently mentioned another dag in the sale deed. It was further held that even after the discrepancy in the sale deed came to his notice, the appellant could not demonstrate that he continued to remain in hostile possession of the suit land for a period of more than 12 years to extinguish the title of the vendors, i.e. proforma respondent no.2 to the effect that the vendor did not have subsisting right and title over the suit land so as to transfer the same to the respondent no.1. It was held that he respondent no.1 had proved his title over the suit land vide sale deed (Ext.2), jamabandi (Ext.1) showing that the name of the respondent no.1 was entered as a *pattadar* and moreso, because there was no dispute that the original owner of the suit land was the father of respondent nos.1 and 2. Accordingly, the issue no.3 and 4 was decided against the appellant by holding that the suit was not barred by adverse

possession or under the principles of waiver, estoppel, and acquiescence. Resultantly, in view of the finding recorded in the other issues, in respect of the issue no.5, the respondent no.1 was found entitled to declaration and decree for eviction of the appellant from the schedule-*'ka'* land.

11. Appeal was preferred against the judgment and decree passed by the learned trial Court. Upon hearing the learned counsel for the appellant, the learned first appellate Court had formulated a point of determination as to "whether the impugned judgment and decree appealed against is sustainable in law?"

12. The learned first appellate Court had revisited all the issues and the finding of the learned trial Court on issue no.1 was affirmed. The objection as to the maintainability of the suit was examined by referring to the provisions of Order XXXII Rule 15 CPC and in the said connection, it was held that the learned trial Court by order dated 07.01.2012 allowed the proforma respondent no.3 to be represented by his elder brother, the proforma respondent no.2 and moreover, no relief was claimed against the proforma respondent and therefore, the issue was decided in affirmative and in favour of the respondent no.1-plaintiff. In respect of issue no.3, it was held that the appellant had failed to prove the claim of adverse possession, and therefore, the said issue was also decided in the negative. In respect of issue no.4, the learned first appellate Court had held that the appellant could not prove that his father's vendor had committed fraud on his father and it was held that the appellant had not approached the vendor for correction of the dag number and patta number in the sale deed and no deed of rectification was executed by the vendors. Accordingly, on the basis of Ext.2, it was held that the respondent had been able to prove the tile and that having regard to the sale deed of the appellant

(Ext.*Ga*), the plea that fraud was played on his father by entering incorrect dag and patta number of the land in the sale deed, it was held that the appellant had failed to prove that the suit land purchased by the Ext.*ka* were within the same boundary, and accordingly, it was held that the said issue was rightly decided by the learned first appellate Court. The issues nos.5 and 6 were also decided against the appellant and the appeal was dismissed on contest.

13. In respect of the draft substantial questions of law no.1, which is urged by the learned counsel for the appellant, it was submitted that the sale deed of the appellant was of the year 1977, whereas the respondent no.1 claimed to have purchased the suit land in the year 1997. Accordingly, it is submitted that the prior rights which was created in respect of the land sold to the father of the appellant, those rights would have a priority over the rights, if any, flowing from the subsequent sale deed. It is also submitted that all along it was the case of the appellant that notwithstanding the description of land contained in the sale deed, the father of the appellant was put into possession of 2 bigha- 1 katha land covered by dag no. 307 of patta no. 47. In the said context, it is submitted that in the event there was a discrepancy with regard to the dag number and patta number of the land, it would be the boundary which would prevail. Accordingly, it is submitted that both the Courts below had erred on facts and in law while decreeing the suit and discarding Ext.*ka*, the sale deed of the appellant. In the said context, it was submitted that in view of the plea taken by the appellant in the written statement, the burden of proof was on the respondent no.1 to prove that he had got a lawful title. In the said context, it was also submitted that it was the finding by the learned first appellate Court that the proforma respondent no.2, who is the vendor of the respondent no.1 was of unsound mind. Accordingly, it is submitted that a valid title could not

have passed on to the respondent no.1. It is also submitted that as it had admittedly come out in the evidence of the appellant that there an error was committed in executing the sale deed (Ext.*ka*), wherein the incorrect dag number have been referred, it was submitted that that it was a pious obligation of vendor to rectify the sale deed.

14. At the outset, it may be mentioned that the parties had contested the suit on the basis of issues that was framed before the learned trial Court. In course of trial, no attempt was made to introduce any fresh issues for adjudication. When the matter was taken up in the first appeal, again there was no attempt to draw the attention of the learned first appellate Court to formulate any fresh point of determination and to hear the parties on the same. On a perusal of the memo of appeal before the learned first appellate Court, it does not appear that with clarity it was pointed out as a ground of appeal that the right of the prior transferor would prevail over the subsequent sale deed. Therefore, in the considered opinion of the Court, no substantial question of law would arise without the plea being raised before the learned trial Court and/or the learned first appellate Court on the point. Nonetheless, on examining the issues which have already been decided, specifically with regard to issue no.4, the Court finds that it is not in dispute that the admitted case of the appellant is that an incorrect dag number was inserted fraudulently in Ext.*Ka*. The learned first appellate Court had rightly held that the appellant did not exercise the right to have the said sale deed rectified.

15. Although plea has been taken that when there is dispute with regard to dag number and the boundary, it will be the boundary which prevails, but the fact remains that in terms of the provisions of Rule 3 of Order VII CPC, the requirement of the said provision is that where the subject matter of the suit is

immovable property, the plaint shall contain a description of property sufficient to identify it and in case such property can be identified by boundaries or numbers in the record of settlement of survey, the plaint shall specify such boundaries or numbers. The respondent-plaintiff had given schedule-*ka* of the plaint, where the dag number, patta number and the boundary of the suit land was given. At that point of time, it was required of the appellant to approach the competent Court having jurisdiction for the rectification of the sale deed. From the discussions of the evidence of the witnesses made by the learned trial Court as well as the learned first appellate Court, it could not be found that a specific evidence was led on the point that the boundaries shall prevail when there was error in the sale deed with regard to the dag number and patta number. In the considered opinion of the Court, if the survey number, i.e. dag number and patta number are different in the sale deed and the purchaser occupies a different plot of land, his right, title and interest cannot be fructified on a land which is being occupied if it is not within the concerned dag number and patta number mentioned in the sale deed. Therefore, the Court does not find that the plea taken for the first time at the second appellate stage regarding priority of rights as provided under section 48 of the Transfer of Property Act could be taken up for adjudication as a substantial question of law.

16. The second point urged by the learned counsel for the appellant is the application of Section 101 of the Evidence Act. In this connection, the learned trial Court as well as the learned first appellate Court had returned a definite finding on issue no.4 that the respondent no.1 could prove his right, title and interest over the suit land. In this regard, the learned trial Court as well as the learned first appellate Court relied on the evidence of P.W.-2, who was one of the vendors of the sale deed (Ext.2), who had admitted execution of the sale

deed in favour of the respondent no.1. Although the appellant is taking a plea that the proforma respondent no.3 was a person of unsound mind, the Court is of the view that it could not be proved that the respondent no.3 was a person of unsound mind. In this regard, we may refer to the observations made by the learned trial Court in the impugned judgment, wherein it has been recorded as follows:

“On his appearance, proforma defendant no.2 was found to be a person who could not speak and the Court found him to be physically disabled on that count and vide order dt. 7.1.12, allowed proforma defendant no.1 to continue representing proforma defendant no.2.”

17. Therefore, the learned trial Court on examining the proforma defendant no.2, found him to be a person who could not speak and he was found to be physically disabled on that count. Therefore, merely because a plea is taken that the proforma respondent no.2 was of unsound mind, the same is not found acceptable as the appropriate steps which are required to be taken for determination of a person to be of unsound mind was not followed by the appellant and not pressed by the appellant. As the P.W.2 had admitted that the sale deed was signed by him as well as by proforma respondent no.3, the Court is of the considered opinion that the respondent no.1 was able to discharge his burden to prove his title deed, which is Ext.2 and therefore, there is no substantial question of law involved on the said point raised by the learned counsel for the appellant.

18. As regards the third point raised by the learned counsel for the appellant that it should be the boundary of the said land which will prevail, the Court has already expressed its opinion on the point while discussing point no.1 and therefore, the dispute with regard to the identity of the land is pure

question of fact and not a question of law and cannot be determined without examining the facts. Hence, the Court is of the considered opinion that no substantial question of law is made out for adjudication on the third point raised by the learned counsel for the appellant.

19. Accordingly, the Court does not find this to be a fit case for admission of the appeal as no substantial question of law arises for determination in the case and accordingly, this appeal is dismissed at the "admission" stage without issuance of notice at the respondents.

20. Let a decree be drawn up and transmitted to the learned trial Court for making it a part of record.

JUDGE

Comparing Assistant