

GAHC010005152009



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

Case No. : RSA/96/2009

RADHA RANI MAHANTA
W/O LATE SATISH CHANDRA MAHANTA, R/O VILL- KHURIABARI, P.S.-
GOSSAIGAON, DIST- KOKRAJHAR, ASSAM.

VERSUS

ATUL CH. BARMAN and ORS,
S/O LATE HAR KISHORE BARMAN,

2:PARIMAL SARKAR

S/O LATE SOMBHU NATH SARKAR.

3:PARIMAL SARKAR

S/O SRI KAMALA KANTA SARKAR.

4:SMT MAKHANBALA SARKAR

W/O SRI KAMALA KANTA SARKAR.

5:PARESH CH. BARMAN

S/O LATE ASWINI CHANDRA BARMAN
ALL ARE THE R/O THE VILL- PATHIMARI
UNDER P.O.- KORTIMARI
DIST- KOKRAJHAR
ASSAM

Advocate for the Petitioner : MR.P K R CHOUDHURY

Advocate for the Respondent : MR.R ISLAM

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

ORDER

Date : 09-10-2023

Heard Mr. PK Roychoudhury, learned counsel for the appellant as well as Mr. R. Islam, learned counsel for the respondent.

2. This appeal under section 100 CPC is preferred against the appellant judgment and decree dated 27.06.2008 passed by the learned Civil Judge, Kokrajhar in TA no.4/2007 thereby affirming the judgment and decree dated 27.02.2007 passed by the learned Munsif, Kokrajhar in TS no.3/2003 thereby dismissing the suit. The appellant is the plaintiff.

3. This appeal has been admitted for hearing by order dated 01.07.2009 on the following substantial question of law:

- (1) *Though the Exhibit-2 is a valid document, has not been considered by the learned Court below by passing the impugned judgment and decree, thereby resulting to miscarriage of justice to the appellant;*
- (2) *The learned Court below had caused material irregularities and erred in law in passing the impugned judgment and decree and also the issues formulated have not been decided by the Court below and as a result, the impugned judgment and decree is not sustainable;*
- (3) *The learned Court below failed to appreciate the statement of the PWs and exhibited the documents in their true perspective, thereby violating the*

provisions under Section 114 of the Indian Evidence Act; and

- (4) *Any other substantial questions of law which would be pertinent for deciding the present appeal.*

4. The case of the petitioner is that at the relevant point of time she was a muster roll worker in the Prosecuting Inspector's Office, Kokrajhar. She had claimed that the respondent no.1 was the owner of the suit land and had received an advance of Rs.3000/- in the year 1990 for selling 3 bighas of land out of his total land holding at a total consideration of Rs.15,000/- and deliver possession of the said part of the land to the appellant. It is claimed that at the said time, she could not pay the entire amount and therefore in three installments of Rs.5000/-, Rs.4000/- and Rs.3000/- respectively, a sum of Rs.12,000/- was paid to the respondent no.1 during the lifetime of his mother. It was agreed that the name of appellant could be recorded in the *Chitha* in respect of the said land maintained by the Revenue authorities at Gossaigaon Revenue Circle. It is claimed that the entry of the appellant was not made in the Revenue records and she has been cultivating the said land as a *riyot* with the respondent no.1 and her name was reflected in the record of *riyots* and it is also claimed that the appellant has been paying the land revenue in respect of the said land. As the name of the appellant was not recorded in the *Chitha* as an owner and as the respondents were trying to forcibly disposes the appellant from the suit land on 14.12.2002, as such the appellant had lodged an FIR with Tulshibil Outpost which was registered as Gossaigaon PS case no.210/2002. It is also projected that on 20.12.2002, the respondent no.1 had executed a general power of attorney in respect of the entire land measuring 9B-0K-15L covered by Dag no.47/49 of PP No.26/1 in favour of respondent no.3, who is the son of

respondent no.2. The appellant had obtained a certified copy of the said power of Attorney on 07.01.2003. By alleging that the appellant was in possession of the suit land and may be disposed therefrom, the appellant had filed the suit for declaring her right, title and interest over the suit land described in the schedule of the plaint, for declaration to hold and possess the suit land as a *riyot* and is entitled to get *riyoti patta*, for declaring the Power of Attorney dated 20.12.2002 as null and void and not effective, for permanent injunction and cost.

5. The said suit was registered as TS. 3/2003. It appears that all the defendant have filed the suit by filing a joint written statement which was verified only by the respondent no.1. The contention of the appellant/plaintiff was denied and was stated that the appellant did not have possession of the suit land and that the name of the appellant was entered in the Revenue records as *riyot* illegally which did not confer any right on her. And accordingly, it was stated that the appellant had no right to deny the right, title and interest of the respondent no.1 or in respect of the other respondents and it was further stated that the appellant was not entitled to any relief in the suit.

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

- (i) *Whether the suit is maintainable in its present form?*
- (ii) *Whether the plaintiff has purchased the suit land from the defendant?*
- (iii) *Whether the plaintiff has right, title and interest over the suit land?*
- (iv) *Whether the General Power of Attorney executed by defendant no.1 in favour of defendant no.3 dtd. 20.12.02 is illegal, null and void?*
- (v) *Whether the plaintiff has possession over the suit land?*
- (vi) *Whether the plaintiff is entitled to the reliefs as prayed for?*
- (vii) *Whether there is cause of action for this suit?*

7. The appellant had examined 3 witnesses viz., Sri Arjun Chouhan (PW-1), Sri Deepak Ch. Bhatt (PW-2) and Smti Radha Rani Mahanta (PW-3) and had exhibited the following documents, viz., Land holding certificate as "*Raiyot*", Ext.2, Certified copy of FIR of GR case no.753/02, Ext.3, Certified copy of order dtd. 3.5.03 in case no.99^c/2003, Ext.5, Ext.1 and 4 rejected as they are photostat copy with no Court seal or sign. The respondent had not examined any witnesses and had exhibited the following document, viz., deposition of Radha Rani Mahanta in GR case no.74/01, Ext.Kha.

8. In respect of issue no.1, the learned trial Court held that the suit was maintainable in its own form and appropriate Court fees was paid. In respect of issue no.2, the learned trial Court on examining the evidence of 3 PWs, had put reliance on the evidence of PW-3 and held that the stand of the appellant (PW-3) was opposite to that made in the plaint. It was held that in the plaint and evidence-on-affidavit the appellant had stated that the respondent no.1 had refused to give consent in writing in *Chitha* and other documents, but in her cross-examination he stated that the respondent no.1 had signed the *Chitha* and other documents in front of the SDC and the land had been mutated in the appellant's name. Considering both the stand, it was held that the appellant could not prove the sale and purchase as she could not produce any document or copy of *Chitha* to show that the respondent no.1 had given his consent. On the ground that the transfer of an immovable property having value of one hundred rupees or more is required to be compulsorily registered, it was held that the appellant could not prove that she had purchased the suit land from the respondent no.1 and accordingly the issue was decided in the negative and

against the appellant.

9. In respect of issue no.3, as the appellant had claimed the status of '*riyot*' the Court found it unacceptable that the ownership right could be claimed by the appellant as a *riyot* or through adverse possession and accordingly, the issue no.3 was also decided in the negative and against the appellant.

10. In respect of issue no.4, the Court had expressed its opinion that the appellant could not cite any reasons as to why the General Power of Attorney executed in favour of the respondent no.3 was null, void and illegal and accordingly, the said issue was decided in the negative and against the appellant.

11. In respect of issue no.5, the learned trial Court had relied in the cross-examination of PW-1, namely, Arjun Chauhan, wherein he had stated that the appellant gave him *adhi* for the land in 2001 and that for the period earlier he did not know and had also stated that the appellant had never cultivated the suit land herself as she was a lady. Although, the appellant had stated that she was in possession of the land since 1990 by cultivating it through her adhiar Sri Arjun Chauhan, but as per the evidence of PW-1, Arjun Chouhan, it was revealed that the appellant had given the land to him in 2001 and accordingly, notwithstanding that in the certificate produced from the office of the Assistant Settlement Officer (Ext.2), the name of the appellant was there in the draft *Chitha* as a "*riyot*" of defendant no.1, the said certificate was disbelieved as the said certificate was not proved through any official of the office of the Assistant Settlement Officer and accordingly, it was held that the appellant could not

prove that she was in possession of the suit land.

12. In respect of issue no.7, as the appellant could not prove issue nos.2, 3 and 5, accordingly it was held that there was no cause of action for the suit title and the said issue was decided in the negative. Resultantly, in respect of issue no.6, as the issue nos.2, 3, 4 and 5 were decided in the negative and against the appellant. As a result, the suit was dismissed on contest with cost.

13. Aggrieved by the judgment and decree dated 27.02.2007 passed in TS 3/2003, the appellant preferred an appeal under section 90 CPC before the Court of learned Civil Judge, Kokrajhar which was registered as TA No.4/2007. The learned first appellate Court, formulated the question as to whether there is any illegality or irregularity of the learned Court below in passing the judgment and decree as the only point of determination.

14. The issue nos.2, 3, 4 and 5 as framed by the learned trial Court was visited. In respect of issue no.2, having referred to the evidence of PW-3, it was held that on a scrutiny of the entire evidence, it was found that the appellant had failed to prove the sale and purchase of the suit land and as no title deed was submitted by the appellant for transfer of the immovable property valued more than Rs.100/-, where registration is compulsory, and on considering that there is no consent of the respondent no.1 for entry of the name of the appellant in the *Chitha* book in respect of the sale of the land, it was held that the learned trial Court had correctly decided the said issue against the appellant.

15. In respect of issue no.3, the learned first appellate Court took note of the admission made by the appellant that she never herself cultivated on the land as she was a government employee and that she also claimed the right, title over the suit land by purchase and thereafter by adverse possession and as a *riyot*, the learned first appellate Court also found the pleadings and evidence to be inconsistent and contradictory and it was held that there was no illegality and irregularity in the decision of the learned trial Court in issue nos.2 and 3. Resultantly, the decision of the trial Court on issue no.4 was also affirmed.

16. In respect of issue no.5, the claim of the appellant for *riyoti patta* under the Assam Temporarily Settled Area Tenancy Act, 1971 was disbelieved as there was no evidence in respect of the occupation of the land by herself and it was held that under the said 1971 Act, a tenant cannot take a sub-tenant. On the ground that the Ext.2 was not proved by calling witnesses from the Revenue Department, the same was disbelieved and the decision of the learned trial Court on issue no.5 was affirmed. Similarly, in respect of issue no.7, it was held that there was no cause of action in the suit and resultantly issue no.6 was also decided against the appellant by holding that the learned trial Court did not commit any illegality in the decision on the said issue and accordingly the said appeal was dismissed.

17. The learned counsel for the appellant has submitted that it was an unimpeached evidence of PW-3 that she was in possession of the suit land since 1990 exclusively and peacefully and accordingly, it is submitted that without the respondents being in possession of the suit land, the decision of the learned

Court below was not sustainable and the concurrent findings of fact was liable to be interfered with. It is also submitted that the Ext.2 being the land holding certificate having been admitted without objection could not have been discarded as the said document proved the possession of the appellant whereas the appellant was in possession of the suit land, the general Power of Attorney executed on 20.12.2002 was a void document.

18. In respect of substantial question of law no.1 as framed by this Court, having perused the pleadings and evidence on record of all the three PWs, it is seen that Ext.2 is the certificate issued by the Assistant Settlement Officer, Gossaigaon, Revenue Circle bearing no.GGC (S) L, R 3/2003/5 dated 03.01.2003 certifying that the name of the appellant and two others were entered into the no.2 Khatian in respect of Dag no.47(old)/ 79(new) of KP Patta no.1(old)/1(new) of Pathimari village under Gossaigaon circle.

19. In respect of the appellant, it was mentioned that her share as *riyat* was 3 bigha. In this regard, it is observed from the entries made in Ext.2 that the said certificate was prepared on the basis of draft Chitta as well as entries made in 2 No. Khatian. The said original records being available, there is no explanation by the PWs, specifically by the appellant (PW3) as to why the original record could not be called for. A certified copy of a record or a certificate would always be secondary evidence. In the absence of the original record being proved, the rejection of the said evidence in concurrent finding by both the learned Courts below cannot be altered with. Nonetheless, a certificate being obtained from the office of the ASO, Gossaigaon Circle, the said certificate is required to be proved by the author of the document. As the author of the

document was not called for, the rejection of the said evidence by the learned Courts below and the concurrent finding of fact is not found to be perverse and therefore the said finding is not liable to be interfered with.

20. Accordingly, the learned first substantial question of law is decided in the negative by holding that the Ext.2 is not a valid document to prove entries made in the Khatian or in the draft *Chitha*. There is another reason for rejecting the same, which is the draft *Chitha* is merely a draft and cannot be held to be a primary evidence of the entries made in the revenue records. Therefore, a certificate placed reliance on the draft *Chitha* would be a secondary evidence. The name of the draft *chitha* itself suggests that it is merely a draft and it has not been approved to be a final revenue record, which otherwise finds entry in the jamabandi. Therefore, ownership by way of entry in the draft *Chitha* is inadmissible in view of the provision of section 17 read with section 49 of the Registration Act, 1908.

21. From the discussion on the issues nos.1 to 7, made by the learned trial Court and the learned first appellate Court, it could not be demonstrated by the appellant that there was any material irregularity or perversity in appreciation of pleadings of evidence by both the learned Courts below. Therefore the second substantial question of law is also decided in the negative and against the appellant by holding that there was no material irregularity in appreciation of the evidence of both the learned Courts below.

22. In view of the finding recorded in respect of substantial question of law

no.1, in respect of substantial question of law no.3, the Court is inclined to hold that this is not a case where the learned trial Court had failed to appreciate the statement of the PWs and the exhibited documents in its correct perspective. The learned counsel for appellant has placed reliance on section 114 of the Evidence Act. There is no doubt that under illustration (e) of section 114 of the Evidence Act, there is a presumption that judicial and official acts are regularly performed. Nonetheless, the original revenue record was not called for. The Ext.2 being secondary evidence, was rightly discarded by a concurrent finding of fact by both the learned Courts below. Hence, it cannot be said that the appreciation of the pleadings and evidence by both the learned Courts below was not in accordance with law, in its true perspective.

23. Therefore, as perversity could not be shown in respect of appreciation of the pleadings and evidence, the substantial question of law no.3 is also decided in the negative and against the appellant.

24. No other substantial question of law arose for determination in course of the hearing.

25. Accordingly, the appeal fails as the Court does not find any ground to interfere with the concurrent finding of facts as recorded by both the learned Courts below. Thus, the appeal stands dismissed and the first appellate judgment and decree dated 27.06.2008 passed by the learned Civil Judge, Kokrajhar in TA 4/2007, thereby dismissing the appeal and affirming the dismissal of TS no.3/2003 by the Court of learned Munsif, Kokrajhar vide

judgment and decree dated 27.02.2007 stands affirmed.

26. The Registry shall prepare a decree.

27. Let the LCR be send back.

28. The parties are left to bear their own cost.

JUDGE

Comparing Assistant