

GAHC010009512011



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

Case No. : RSA/197/2011

SOMED ALI
S/O LATE ABDUL HAI, VILL. GUNIALGURI, MOUZA-RUPSHI, DIST.
BARPETA, ASSAM, PIN-781319

VERSUS

ON THE DEATH OF AJAHAR UDDIN HIS LEGAL HEIR SMTI. NURJAHAN
(WIFE) AND ORS
S/O LT. SIRAJUDDIN AHMED.

2:NUR JAHAN BEGUM

W/O ATOWAR RAHMAN

3:ATOWAR RAHMAN

S/O LATE ABUL HUSSAIN MONDAL

4:NASIUR RAHMAN

S/O ATOWAR RAHMAN
NO. 1
R/O VILL. KALGACHIA
NO. 2
3 and 4 ARE R/O VILL. DEPKURA
ALL ARE MOUZA-RUPSHI
P.S.SORBHOG
DIST. BARPETA
ASSAM
PIN-78131

Advocate for the Petitioner : MS.R CHOUDHURY

Advocate for the Respondent : MS. S B CHOUDHURY

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 01.06.2023

Date of Judgment & Order : 26.06.2023

JUDGMENT & ORDER (CAV)

Heard Ms. R. Choudhury, learned counsel for the appellant. Also heard Mr. F. H. Laskar, learned counsel for the respondents.

2. The present second appeal, under Section 100 of the Code of Civil Procedure, is preferred against the judgment and decree dated 02.06.2011, passed by the learned Civil Judge, Barpeta, in Title Appeal No. 26/2010, dismissing the appeal and upholding the judgment and decree, dated 21.04.2010, passed by the learned Munsiff No. 1, Barpeta, in Title Suit No. 244/2008.

3. The brief facts of the case is that the present appellant, as plaintiff, instituted a suit, being Title Suit No. 244/2008, before the Court of learned Munsiff No. 1, Barpeta, for declaration of right, title, interest and khas possession along with partition. The plaintiff's case was that the Schedule 'A' land of the plaint originally stands in the name of plaintiff, defendant No. 2 and pro-forma defendants. Out of the said Schedule 'A' land, the plaintiff purchased

2K 10L of land, which is specifically described in Schedule 'C' of the plaint from the pattadar- Ramjan Ali by a registered sale deed, dated 20.05.2006, and took the possession by demarcating the boundaries through the revenue officials. However, on 19.03.2008, the defendants, who were having their lands in eastern and southern boundaries of the Schedule 'C' land, forcibly trespassed into the Schedule 'C' land of the plaintiff and occupied the same by constructing permanent boundary wall without having their right, title and interest over the suit land.

4. The defendant Nos. 1 to 4 contested the suit by filing written statements. The defendant Nos. 2, 3 & 4 also filed counter claim stating that there is no cause of action and the suit is barred by limitation and the same is not maintainable and liable to be rejected. It was further stated that out of the land in Schedule 'B' of the plaint, one Yakub Ali mutated his name over 2 Bighas of land on 06.06.1969 on the strength of purchase from the original pattadars, namely, Kalu Muchi, Ram Raj Muchi and Afjal Muchi. In the year 1982 and 1984, defendant No. 2 purchased 3K 15L of land from Yakub Ali by executing 2 (two) registered sale deeds, vide registered sale deed Nos. 1021/81 and 921/84, respectively, which is specifically described in Schedule 'X' of the counter-claim. Accordingly, it is contended that the defendant No. 2 is the earlier purchaser than the plaintiff and also from his transferor Ramjan Ali. There is no existence of land measuring 2K 10L as per the boundaries mentioned in Schedule 'C' of the plaint and one Matiur Rahman Bhuyan and others are the northern boundary persons of the land of defendant No. 2, as described in Schedule 'X' of the counter-claim. Moreover, the plaintiff or his vendor- Ramjan Ali never took over possession of any part of the Schedule 'C' land of the plaint and the

plaintiff might have purchased the alleged land in papers only. And, accordingly, the defendants denied the allegation of forcible dispossession and hence, by filing the counter-claim, the defendants prayed for declaration of right, title and interest, confirmation of possession and partition.

5. The defendant No. 1, in his written statement, had also reiterated the same facts as narrated by defendant Nos. 2, 3 & 4 in their written statement cum counter-claim and denied the allegation of dispossession or construction of pucca wall.

6. The plaintiff, thereafter, submitted written statement against the counter-claim of the defendants and pleaded that there is no cause of action for the counter-claim and the same is not maintainable at all. The plaintiff further denied the allegation of the defendants and reiterated the facts narrated in the plaint and accordingly, prayed for dismissal of the counter-claim of the defendants with cost.

7. On the pleadings of both the parties, following issues were framed by the learned Munsiff No. 1, Barpeta:

1. Whether there is cause of action for the suit as well as for the counter-claim?
2. Whether the suit is barred by law of limitation?
3. Whether the plaintiff has right, title and interest over the Schedule 'C' land of the plaint? If so, whether the plaintiff is entitled for the

decree of khas possession of the Schedule 'C' land by evicting the defendants therefrom?

4. Whether the plaintiff is entitled for the decree as prayed for in the suit?
5. Whether the defendant No. 2 has right, title, interest and possession of the Schedule 'X' land of the counter-claim, which is out of the schedule 'B' land of the plaint?
6. Whether the defendant Nos. 2, 3 & 4 are entitled for the decree as prayed for in their counter claim?
7. To what other relief or reliefs the parties are entitled for?

8. During the trial, the plaintiff examined as many as 4 (four) numbers of witnesses in favour of his case and also exhibited some documents. The defendants' side, on the other hand, examined 3 (three) witnesses in support of their case and also exhibited some documents.

9. The learned Munsiff No. 1, Barpeta, after framing the above mentioned issues, made a detail discussion and accordingly, decided the issues. However, the learned Munsiff No. 1, Barpeta, came to a conclusion that the plaintiff is not entitled for the relief as prayed for and accordingly, while dismissing the suit of the plaintiff, allowed the relief sought for by the defendants through their counter-claim.

10. Accordingly, the learned Munsiff No. 1, Barpeta, after making detail discussion in regards to all issues, on conclusion of trial as well as after hearing

the arguments of both sides, was pleased to dismiss the suit filed by the plaintiff and allowed the counter-claim of the defendant Nos. 2, 3 & 4 declaring that the defendant No. 2 has right, title, interest and possession of the Schedule 'X' land of the counter-claim, which is out of the Schedule 'B' land of the plaint.

11. On being dissatisfied and aggrieved by the judgment and decree passed by the learned Munsiff No. 1, Barpeta, the plaintiff preferred an appeal before the learned Civil Judge, Barpeta. The learned First Appellate Court, however, dismissed the appeal and concurred with the findings of the learned Trial Court and affirmed the judgment and decree in favour of the defendant Nos. 2, 3 & 4. Hence, the present second appeal has been preferred by the appellant.

12. This Court while admitting the appeal vide order dated 17.12.2011 had formulated the following substantial question of law –

“Whether the learned Court below was justified in refusing to appoint the Amin Commission to find out as to whether any land was available in Dag No. 316 of Period Patta No. 381 for sale by Yakub in favour of Ramjan, the vendor of the plaintiff, after Yakub transferred the land by various sale deeds including to the defendant No. 2 vide Exhibits- Ka and Kha?”

13. From the judgment passed by the learned Munsiff No. 1, Barpeta, it is seen that the issue No. 1, i.e. the cause of action, and the issue No. 2, i.e. the law of limitation, are decided in favour of the plaintiff/appellant with an observation that there is a cause of action for the suit filed by the plaintiff as well as the counter-claim filed by the defendants. It is also held by the learned Munsiff No. 1, Barpeta, that the suit is not barred under the law of limitation

and except the statement made in the written statement, there is no any mention as to how the suit is barred by limitation and the learned Munsiff No. 1, Barpeta, rightly held that the suit is not barred by limitation and accordingly, these issues were decided in favour of the plaintiff/appellant.

14. So, the issue Nos. 3 & 5 are the most vital issue of the entire case and the learned Munsiff No. 1, Barpeta, as well as the learned Civil Judge, Barpeta, made a detail discussion in regards to these issues.

15. It is a fact that the plaintiff purchased the land from Ramjan Ali vide registered Sale Deed No. 231/2006 and it is also stated that the said Ramjan Ali purchased the land from the original owner- Yakub Ali. On the other hand, it is the plea of the defendants that the defendant No. 2 purchased the land measuring 3K 15L in a compact boundary vide registered sale deed which were executed in the year 1981 and 1984 vide registered Sale Deed Nos. 1021/81 & 921/84, which they have specifically described as schedule 'X' in their counter-claim. It is also claimed by the defendants that they have their exclusive possession over the purchased land and they have purchased the land from the original owner- Yakub Ali much prior to the purchase of the land by the plaintiff from the vendor- Ramjan Ali. Further, there is no existence of land as mentioned in the Schedule 'C' of the plaint and neither the plaintiff nor his vendor- Ramjan Ali had any possession over the said plot of land. Further, it is the claim of the plaintiff that out of Schedule 'A' land, he has purchased 2K 10L of land, which is specifically described in Schedule 'C' of the plaint, from the pattadar- Ramjan Ali and he also took possession by demarcating through the revenue officials. But, the defendants, having their land in the eastern and southern boundaries of the Schedule 'C' land, have forcibly trespassed into the Schedule 'C' land of the

plaint and occupied the same by constructing permanent boundary wall in the year 2008. But, it is admitted by P.W.-1 that the defendants are in possession of their purchased land measuring 3K 15L and at present, he is in occupation of only 8-10L of land out of his total purchased land and rest of the land is already under the possession of the defendants. But, it is also not disputed that the defendants purchased 3K 15L of land from the original pattadar- Yakub Ali within a compact boundary, though the land was purchased by 2 (two) sale deeds.

16. Further, it reveals from the evidence of D.W.-1 that the land which is under their possession comprises different Dag and Patta numbers and he also stated in his cross-evidence that the revenue authority visited the place for demarcation of the suit land of the plaintiff, but the suit land could not traced out and there was no demarcation of the land. More so, from the evidence of D.W.-3- Ramjan Ali, i.e. the vendor of the plaintiff, it is seen that though he claimed that he purchased the land from the original pattadar- Yakub Ali, but he never had any possession over the suit land nor he could deliver the possession of the suit land to the plaintiff. When he could not take possession on his purchased land, Yakub Ali somehow managed the land and accordingly, the said Ramjan Ali sold the plot of land to the plaintiff, though he never delivered possession to the plaintiff.

17. P.W-4 claimed in his cross-examination that he was present at the time of execution of sale deed, but he could not say as to what portion of the land was delivered to the plaintiff. The learned Munsiff No. 1, Barpeta, as well as the learned Civil Judge, Barpeta, also made a detail discussion wherefrom it is seen

that that defendants cannot be the boundary man of the Schedule 'C' land when the learned Courts below made a comparative study of the boundaries of the Schedule 'C' land as well as the boundary of the land purchased by the defendant Nos. 2 & 3. Accordingly, the learned Civil Judge also came to a findings that there is no existence of any land of the plaintiff within the boundary as mentioned in the Schedule 'C' of the plaint and in Ext.-1, i.e. the Sale Deed. It is not disputed that the plaintiff purchased a plot of land by a registered sale deed from Ramjan Ali, but from the evidence of the P.Ws. and D.Ws. as well as from the Schedule of the sale deeds etc., it is seen that there is no existence of land which is claimed to have been purchased by the plaintiff and neither the vendor of the plaintiff, Ramjan Ali, nor the plaintiff had any possession over the Schedule 'C' land at any point of time. Rather, it is admitted by the vendor of the plaintiff- Ramjan Ali that he never had any possession over the land nor he could deliver the possession to the plaintiff, though he claim that he purchased the land from the original pattadar- Yakub Ali.

18. The learned Civil Judge, Barpeta, while passing the order, had also made a discussion about the appointment of Amin Commission to survey the disputed land and considering the fact that there is no existence of land as per the boundary of the Schedule 'C' land and comparing with the boundary of the sale deeds executed in favour of the plaintiff as well as Defendant Nos. 2 & 3, the learned Civil Judge held that there is no necessity of appointment of any Amin Commission to survey the suit land.

19. So the substantial question was formulated and the main issue as to whether the refusing of the appointment of Amin Commission by the learned

Court below was justified or not.

20. In this context, the learned counsel for the appellant submitted that there cannot be any bar in appointment of a Amin Commission if it becomes necessary to trace out the disputed land and at the appellate stage also, the Court has the authority to appoint Amin Commission for ascertaining the land in question and to arrive at a correct conclusion for proper adjudication of the matter.

21. In support of his submission, the learned counsel for the appellant relied on a decision of this Court reported in **2009 Legal Eagle (GAU) 474 [Atul Sarma (Dr.) Vs. Ethaben Chandra Pegu]** and further emphasized on paragraph Nos. 13, 14 & 15 of the judgment, which reads as under:-

"13. Record shows that the defendant filed a petition under order 26, rule 9 of the Civil Procedure Code, 1908 praying for appointment of Amin Commission to find out on which side of the pipeline, the land under Dag No. 292 (Part-Dag No. 885) 4 under K. Patta No. 144 of Village- Hengrabari Beltola Mauza purchased by the defendant is located or existed. The said petition No. 901 of 2000 was rejected by the learned Civil Judge (Junior Division) No. 2, Kamrup vide order dated 13.11.2000 on the ground that it was filed at the fag end of the trial when the case was posted for argument and it was found to be a deliberate tactic to delay the disposal of the suit. The defendant also filed Misc. Application No. 21 of 2005 on 19.1.2005, under section 75 read with order 26, rule 9 of the Code of Civil Procedure before the learned Civil Judge (Junior Division) No. 2, Kamrup, Guwahati for issuance of Commission for local investigation of the suit land and to ascertain the proper identification of the suit land and/or to call for a report of the Settlement Officer, Kamrup, Beltola Mauza (resettlement operation), Guwahati for ascertainment of the respective plots of land of the plaintiff and defendant for effective disposal of the suit. The said application was also rejected by the learned Civil Judge (Junior Division) No. 2, Kamrup vide order dated 22.3.2005 mainly on the ground that both the parties have already adduced ample evidence and exhibited documents, which would help in adjudicating the case and there was no such need for local inspection.

14. *Considering the peculiar facts and circumstances of the case, it is, in my considered view, necessary to enquire into the matter through Amin Commission for ascertainment of the location and existence of the suit land purchased/possessed by the plaintiff and the defendant. In my considered view, without ascertaining the said position, it would not be possible to come to a correct conclusion and adjudicate the matter.*

For this purpose, the following additional issue is framed:-

Whether suit land measuring 2 Kathas 11 lechas situates on the north of pipeline as described in the schedule of the plaint or in the south of the pipeline as shown in the revenue record?

Although, it is too late for such investigation/enquiry after such a long period of time and at the stage of second appeal, such enquiry, it has become essential for arriving at a right decision and in the interest of justice to remand the matter to the learned trial court, who shall appoint Amin Commission for local investigation and ascertainment of proper identification/location of the suit land and also call for the report of the Settlement Office, Kamrup Beltola Mauza (re-settlement operation) and adjudicate the matter taking into consideration the pleadings of the parties and the oral and documentary evidence already adduced by them. The impugned judgment and decree dated 28.7.2006 passed by the learned Civil Judge (Senior Division) No. 2, Kamrup, Guwahati affirming the judgment and decree dated 30.9.2005 passed by the learned Civil Judge (Junior Division) No. 2, Kamrup in Title Suit No. 272 of 1996 are liable to be set aside.

15. *In view of the above, the impugned judgment and decree dated 28.7.2006 passed by the learned Civil Judge (Senior Division) No. 2, Kamrup, Guwahati in T.A. No. 92/2005 as well as the judgment and decree dated 30.9.2005 passed by the learned Civil Judge (Junior Division) No. 2, Kamrup in Title Suit No. 272 of 1996 are set aside. The learned trial court shall notify the parties concerned and fix a date for their appearance and thereafter pass necessary order for appointment of Amin Commission as stated above and also call for report from the Revenue Officer concerned and thereafter, upon hearing the parties, shall decide the additional issue and dispose of the matter preferably within a period of 6(six) months from the date of receipt of the LCR. The parties shall not be allowed to lead/adduce fresh or additional evidence."*

22. On the other hand, the learned counsel appearing on behalf of the respondent has submitted that the learned Civil Judge as well as the learned

Munsiff No. 1 rightly came to a findings that the plaintiff could not prove the case and considering the discussions made by the learned Munsiff No. 1, the learned Civil Judge rightly held that the defendants have the right, title and interest over the Schedule 'X' land. From the judgment passed by the learned Court below, it is seen that the plaintiff never had any possession over the Schedule 'C' land, which he claimed to have been purchased from one Ramjan Ali. More so, from the evidence as well as from the discussion made by the learned Civil Judge, Barpeta, and the learned Munsiff No. 1, Barpeta, in the judgments, it is seen that the vendor of the plaintiff, i.e. Ramjan Ali, also never had any possession over the Schedule 'C' land. Rather, it is admitted by the said Ramjan Ali that though he purchased the land from the original pattadar- Yakub Ali, but he never had any possession over the land nor he could deliver the possession of the land to the plaintiff, which he claimed to have been purchased from his vendor vide registered sale deed. Further it is submitted that the land, which is described in the Schedule 'C' of the plaint is not in existence and the learned Courts below also made a detail discussion that on comparative study, it is seen that the defendant Nos. 2 & 3 are not the boundary man as per the Schedule 'C' of the plaint or the boundary of the respective sale deeds. Thus, the plaintiff also failed to prove that the Schedule 'C' land exists as he claimed to have purchased the same from his vendor- Ramjan Ali. It is a fact that initially when the dispute arose regarding the existence of the land or the verification of the land, as per the Schedule 'C' of the plaint, prayer was made by the defendants/respondents side for appointment of Amin Commission in their written statement. But, subsequently, at the time of evidence, it has come out from the evidence of P.Ws. and D.Ws. that no such land exists as per Schedule 'C' of the plaint and in the same time, it is also seen that the

defendant Nos. 2 & 3 are not the boundary man as claim by the plaintiff/appellant with the allegation of encroachment on the land of the plaintiff. Accordingly, it is submitted that at this stage, there is no necessity of appointment of any Amin Commission for survey of the land as the issues are well discussed by the learned Courts below that no land exists as per Schedule 'C' of the plaint nor it is proved that the respondents/defendants encroached on the land of the plaintiff/appellant. Accordingly, it is submitted that there is no need of any interference on the judgment and decree passed by the learned Civil Judge, Barpeta, as well as the learned Munsiff No. 1, Barpeta, in Title Appeal No. 26/2010 and Title Suit No. 244/2008, respectively, nor there is any necessity of appointment of Amin Commission.

23. The only substantial question law arose in this appeal as to whether the refusal of prayer for appointment of Amin Commission by the learned Courts below is justified or reasonable. From the discussion made by the learned Munsiff No. 1 as well as from the learned Civil Judge, Barpeta, while passing the judgments, it is seen that the learned Courts below made a detail discussion while deciding the issue Nos. 3 & 5 and from the evidence as well as from the exhibited documents, it is seen that the land of the plaintiff could not be identified even by the revenue officer when they visited the land as per description of the plaintiff for demarcation of the land. From the boundary of the Schedule 'C' land and the boundary of the sale deed of the defendants as well as the plaintiff, it is seen that there is no land exists which the plaintiff/appellant claimed to have purchased from vendor- Ramjan Ali. In the same time, it is also a fact that neither the vendor of the appellant- Ramjan Ali had any possession of the land which he sold to the plaintiff/appellant nor the

vendor of the plaintiff could deliver the possession of the land which the plaintiff claimed to have purchased from his vendor- Ramjan Ali. The learned Munsiff No. 1 as well as the learned Civil Judge made a detail discussion in their judgments while discussing these issues, wherefrom it is evident that the plaintiff could not prove that the defendants are the boundary man nor there is any prove of encroachment over his land which he claimed to have been purchased from Ramjan Ali. Rather, it is seen that no land could be identified by the revenue officer as per the Schedule of the sale deeds of plaintiff as well as the defendants. No land exists on which the appellant has claimed his right, title and interest. As the sale deed is not challenged by the defendants in their counter claim, plaintiff may have purchased from said Ramjan Ali, but the possession of land could not be delivered by him as no land exists as per Schedule of the sale deed which was sold to the plaintiff/appellant.

24. In the above referred judgment of this Court in **Atul Sarma (supra)**, it is seen that there can be appointment of Amin Commission even at the appellate stage. But, here in the instant case, it is seen that the learned Munsiff No. 1 as well as the learned Civil Judge committed no error or mistake while refusing the prayer for appointment of Amin Commission to survey the land as it is evident from the testimony of P.Ws. and D.Ws. as well as from the annexed documents that the land could not be identified as per boundary of the Schedule 'C' and in the same time, it is also evident that the revenue officer could not demarcate any land as per the boundary of the sale deed or Schedule 'C' land.

25. Accordingly, in view of the aforesaid facts and circumstances and discussion, the substantial questions of law have been answered in the above

manner and the same is decided against the present appellants/defendants.

26. Thus, in view of the discussion made above, it is seen that the learned First Appellate Court rightly upheld the judgment and decree passed by the learned Munsiff No. 1, Barpeta, and therefore, I am of the opinion that the present second appeal has no merit and accordingly, the same stands dismissed without any cost affirming the judgment and decree, dated 21.04.2010, passed by the learned Munsiff No. 1, Barpeta, in Title Suit No. 244/2008 as well as the judgment and decree dated 02.06.2011, passed by the learned Civil Judge, Barpeta, in Title Appeal No. 26/2010.

27. Registry to transmit back the records of the case to the learned Courts below forthwith.

JUDGE

Comparing Assistant