

GAHC010092352009



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

Case No. : RSA/173/2009

LEGAL HEIRS OF LATE ABDUS SATTAR and 10 ORS,
A WIFE-MUST. PIARJAN NESSA, B DAUGHTER-MUST. RAMELA KHATUN,
C DAUGHTER-MUST. HASINA KHATUN, D SON-MOZIBUR RAHMAN, E
SON-MOHIDUL ISLAM.

2: ABDUR RAHIM

S/O ABDUS SATTAR.

3: AZIMUDDIN

S/O DO

4: ABDUL SAMAD

S/O LATE LAKHAN SHEIKH

5: HAZARAT ALI

S/O DO

6: SAHIDUR ISLAM

S/O HAZRAT ALI

7: ANOWAR HUSSAIN

S/O DO

8: MAINUL HAQUE

S/O DO

9: SAKUMUDDIN

S/O DO

10: SAJAHAN ALI

S/O DO

11: AZGAR ALI

S/O DO

APPELLANT NO. 1

2

3 RESIDENT OF VILL. JARABARI

NO. 4

5 RESIDENT OF VILL. KAMLPUR NO. 6

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10 AND 11 RESIDENT OF VILL. BARBALA ALL ARE WITHIN MOUZA
BETBARI

DIST. BARPETA

ASSAM

VERSUS

AKBAR ALI,

S/O LATE SAMAD ALI, R/O VILL. KAMALPUR, MOUZA-BETBARI, DIST.
BRPETA, ASSAM.

Advocate for the Petitioner : MRM H AHMED

Advocate for the Respondent : MRS.P B HAZARIKA

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Date : 15-06-2023

Heard Mr. M. H. Ahmed, the learned counsel appearing on behalf of the Appellants and Mr. S. Ali, the learned counsel appearing on behalf of the Respondent.

2. The instant Second Appeal was admitted by this Court vide an order dated 28.05.2010 by formulating two substantial questions of law which are reproduced hereinunder:

“(i) Whether the learned lower appellate court is justified in reversing the judgment and decree passed by the learned trial court without adhering the provision of section 54 read with Order 20 Rule 18 of the Code of Civil Procedure when the decree is sought for right, title and interest over the suit land and partition of “B” schedule land and for khas possession over “B” schedule land, more so, when, there is counter claim over “B” schedule land?

(ii) Whether the reversal of the decree passed by the trial court on the basis of the finding under issue No.6 to be perverse as held by the lower appellate court is valid and correct?”

3. For ascertaining as to whether the two substantial questions of law as formulated by this Court arises in the instant appeal, this Court finds it relevant to take note of the brief facts of the instant case. For the purpose of convenience, the parties herein are referred to in the same status as they stood before the Trial Court.

4. The respondent herein as Plaintiff had instituted the suit being Title Suit

No.226/2006 before the Court of the Munsiff No.1, Barpeta. A perusal of the plaint reveals that the Schedule-A land originally belonged to (i) Lakhan Sheikh, (ii) Kader Ali and (iii) Jalil Ali. It has also been averred that Kader Ali and Jalil Ali had purchased 1 Bigha of land out of the Schedule-A land vide a registered Deed of Sale on 29.05.1967 and thereupon their names were duly included in the Jamabandi of Dag No.92 covered by K.P. Patta No.108 of village Jarabari Gaon, Mouza Betbari, District Barpeta. It further reveals from the plaint that vide a registered Deed of Sale bearing Deed No.444/06 dated 17.04.2006, the said Kader Ali and Abdul Jalil transferred 1 Bigha of land which has been most specifically described in Schedule-B to the plaint to the Plaintiff and the Plaintiff was also handed over the possession of the Schedule-B land. However, it is alleged in the plaint that on 12.05.2006, the Defendants trespassed upon the Schedule-B land and dispossessed the Plaintiff. It is under such circumstances, the suit was filed for declaring the Plaintiff's right, title and interest over the suit land which is the Schedule-B land; for recovery of khas possession of the Schedule-B land and further that the land in Schedule-B partitioned under separate Dag and separate Patta in the exclusive possession of the Plaintiff by evicting the Defendants from the Schedule-B land falling under the exclusive title and possession of the Plaintiff on partition. At this stage, it is relevant to take note of that the relief of partition so sought for is only for the purpose of allotment of a separate Dag and Patta thereby curving out the Schedule-B land from the Schedule-A land. The said partition is not in respect to proceedings under Section 54 or a decree in terms with Order XX Rule 18 of the Code.

5. Be that as it may, all the Defendants submitted a joint written statement along with a counter claim. In the said written statement more particularly at paragraph No.10, it was an admitted fact that Lakhan Sheikh had transferred 1

Bigha of land to Abdul Kader and Abdul Jalil and the said purchasers i.e. Abdul Kader and Abdul Jalil mutated the names and were possessing that 1 Bigha of land peacefully. It was further averred in the written statement that after the death of Lakhan Sheikh, his son Samed Ali inherited 1 Bigha 6 Lechas of land situated at the Northern side of the plot of 1 Bigha of land and was possessing, cultivating peacefully. It was further mentioned that late Abdul Kader and Abdul Jalil had on the basis of family partition handed over the plot of land measuring 1 Bigha to their brother Abdul Sattar i.e. the Defendant No.1 in lieu of his ancestral property and the said Abdul Sattar was possessing that 1 Bigha of land by constructing house, digging ponds and making shop houses. It was further mentioned that the boundary mentioned in the Deed of Sale bearing Deed No.444/06 dated 17.04.2006 was not the correct boundary and the Plaintiff never possessed the suit land even for a single hour and the entire suit so filed was false. It is relevant herein to take note of that though a counter claim was filed and various reliefs have been sought for, but the said counter claim which as per Order VIII Rule 6(A)(4) requires the counter claim to be treated as a claim and governed by the Rules applicable to the plaint was not in terms with Order VII Rule 1 inasmuch as there was no statement of value of the subject matter of the claim. It further reveals that to the said counter claim, there was a written statement filed by the Plaintiff. On the basis of the said pleadings as many as 6 issues were framed which are as under:

- “1. Whether there is cause of action for the suit?*
- 2. Whether the suit is lead for non-joinder of necessary parties?*
- 3. Whether the plaintiff has right, title and interest over the suit land?*

4. *Whether the plaintiff is entitled for the decree of partition and khas possession thereof?*

5. *Whether the defendant No.4 has right, title and interest and possession over the suit land?*

6. *Whether the parties are entitled for the decree as prayed for in the suit as well in the counter claim?"*

6. During the course of the trial as many as 7 (seven) witnesses were adduced by the Plaintiff and various documents were exhibited. The Defendants on the other hand examined as many as 4 (four) witnesses in favour of their case.

7. At this stage, this Court finds it relevant to take note of that Exhibit-1 was the Deed of Sale bearing Deed No.444/06 dated 17.04.2006. Exhibit-2 is the Jamabandi of Dag No.92 covered by K.P. Patta No.108. A perusal of Exhibit-2 shows that the total land in Dag No.92 of K.P. Patta No.108 consisted of 2 Bighas 0 Katha 6 Lechas. It further transpires that the name of Kader Ali and Jalil Ali were also included therein along with Lakhan Sheikh. The learned Trial Court vide a judgment and decree dated 03.09.2008 dismissed the suit of the Plaintiff and decreed the counter claim on contest thereby declaring that the Sale Deed No.444/06 dated 17.04.2006 as invalid, illegal, inoperative in law and the Defendant No.4 Samed Ali had right, title and interest over the possession over the Schedule-B land which is specifically described in the plaint.

8. Being aggrieved, the Plaintiff preferred an appeal before the Court of the Civil Judge, Barpeta which was registered and numbered as Title Appeal No.43/08. In the said appeal, the judgment and decree passed by the Trial Court was set aside by holding that the findings arrived at Issue Nos. 3, 4 and 5

were contrary to the well settled principles of law and were based upon perverse findings. Further to that, the Issue No.6 whereby the learned Trial Court dismissed the suit and decreed the counter claim was also set aside. At this stage, it may be relevant to take note of that the Issue No.3 relates as to whether the Plaintiff had right, title and interest over the Schedule-B land and Issue No.5 relates as to whether the Defendant No. 4 had right, title and interest and possession over the Schedule-B land. The learned First Appellate Court taking into account Exhibit-1 and Exhibit-2, had come to a finding that the Plaintiff had right, title and interest over the Schedule-B land. As the entire edifice of the case of the Defendant was on the basis that Kader Ali and Jalil Ali had given the Schedule-B land to Abdul Sattar i.e. the Defendant No.1 in exchange of some other land and the said aspect of the matter having not been proved, the First Appellate Court therefore held the Issue No.3 and Issue No.5 against the Defendants. It is against this judgment and decree dated 05.09.2009 that the present appeal has been filed and this Court vide the order dated 28.05.2010 had admitted the instant appeal by formulating the two substantial question of law as above quoted.

9. I have heard the learned counsels for the parties and perused the materials on record. The first substantial question which has been framed is whether there was a necessity of adhering to the provisions of Section 54 read with Order XX Rule 18 of the Code while passing the judgment by the First Appellate Court when the decree sought for was for right, title and interest over the suit land and partition of the Schedule-B land and for recovery of the Khas possession of the Schedule-B land. A perusal of the plaint as well as the relief sought for would show that the Plaintiff had sought for right, title and interest over the Schedule-B land and for recovery and possession of the Schedule-B

land. Further to that, the Plaintiff sought for a precept that the Schedule-B land which is a part of the Schedule-A land be curved out and be allotted a separate Patta and Dag Number. In the opinion of this Court, the said relief does not come within the ambit of Section 54 of the Code as well as under provisions of Order XX Rule 18 of the Code inasmuch as the said provisions would have been applicable if there was a partition sought for in respect of Schedule-B land. In that view of the matter, the first substantial question of law so framed in the opinion of this Court is not a substantial question of law arising in the instant appeal.

10. The second substantial question of law relates as to whether the reversal of the decree passed by the learned Trial Court on the basis of the findings under Issue No.6 to be perverse as held by the Lower Appellate Court is valid and correct, in the opinion of this Court cannot be regarded as a substantial question of law as the same is a question of fact which the First Appellate Court having the authority empowered to exercise the power of re-appreciation the evidence had done so. The learned counsel appearing on behalf of the appellant though submitted that the First Appellate Court did not take into consideration that the southern boundary stated in the plaint as well as also in the Sale Deed included the Defendant No.1 which could not have been possible in view of the fact that the land which was sold to Kader Ali and Jalil Ali was transferred to the Defendant No.1 and as such the Defendant No.1 could not have been on the southern boundary of the land sold by Kader Ali and Jalil Ali. In the opinion of this Court, the said submission is misconceived more particularly in a proceeding under Section 100 of the Code when the First Appellate Court on due appreciation of the evidence had come to a finding that the land in Schedule-B was transferred by Kader Ali and Jalil Ali to the Plaintiff vide the Deed of Sale

and more particularly when the First Appellate Court had rightly negated the stand of the Defendants to the effect that there was a transfer by Kader Ali and Jalil Ali in favour of the Defendant No.1 which the Defendants have failed to prove.

11. In view of the above, this Court is of the opinion that the substantial questions of law which have been formulated by this Court on 28.05.2010 do not arise in the instant appeal. Consequently, the instant appeal stands dismissed. However, in the facts of the present case, this Court is not inclined to impose costs.

12. The Registry is directed to prepare the decree and thereupon forthwith transfer the records.

JUDGE

Comparing Assistant