

GAHC010101752007



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

Case No. : RSA/47/2007

MD. FAKRUL ISLAM BEG
S/O LT. MAHAMMAD ALI BEG, R/O VILL. NAM DABAKAGAON, MOUZA-
JOGIJAN, CIRCLE-HOJAI, DIST. NAGAON, ASSAM., PRESENT ADD
LECTURER, LANKA COLLEGE, PO/PS. LANKA, DIST. NAGAON, ASSAM.

VERSUS

ABDUL GAFUR BORBHUIYAN
S/O LT. IDRISH ALI BARBHUIYA, VILL. NAM DABOKA GAON, PO/MOUZA-
JOGIJAN, SUB REGISTRY, HOJAI, DIST. NAGAON, ASSAM.

Advocate for the Petitioner : MR.D PATHAK

Advocate for the Respondent : MR. B GOGOI

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

JUDGMENT

Date : 11.12.2023

Heard Mr. S. Dasgupta, learned counsel for the appellant. Also heard Mr. K.A. Mazumdar, learned counsel for the respondent no.1.

2. The first appellate judgment and decree dated 19.09.2006, passed by the learned Civil Judge, Nagaon, in Title Appeal No. 16/2004 is under

challenge in the present appeal filed under Section 100 CPC.

3. The respondent no.1 is the plaintiff in T.S. No. 22/1999. The appellant herein, who was the principal defendant no.1 in the said suit, had also filed a counter-claim against the respondent no.1/plaintiff. Out of 26 (twenty-six) proforma defendants, only the proforma defendant nos.2 and 3 had contested the suit by filing their joint written statement.

4. The learned Trial Court had dismissed the suit and decreed the counter-claim of the appellant by declaring the sale deed no. 1201/1999 dated 23.03.1999 as forged, fraudulent, void and inoperative in law.

5. By the impugned appellate judgment and decree, the learned first appellate Court had reversed the judgment and decree dated 09.02.2004 passed by the learned Civil Judge (Junior Division), Hojai, Sankardev Nagar in T.S. No. 22/1999 by decreeing the suit, declaring tight, title, interest of the respondent- plaintiff over the suit land, confirmation of possession and decree for permanent possession and moreover, the counter-claim of the appellant was dismissed.

6. In brief, the case of the respondent/plaintiff in the plaint was that the appellant and the proforma defendant nos.2 to 7 were the sons and daughters of Late Mohammed Ali Beg, who was the original *pattadar* and the proforma defendant no.8 was his wife. On death of the original pattadar, the proforma defendant nos. 2 to 8 became the owners and possessors of the suit land by way of right of inheritance. By executing registered sale deed no. 1201/1999 dated 23.03.1999, registered at the Sub-Registry at Hojai, a plot of land measuring 1 bigha was sold by the proforma defendant nos.2 and 3 to the respondent no.1 and purportedly delivered possession thereof and accordingly,

the respondent had claimed that he possessed the suit land as title holder. On the allegation that the appellant, without any right, title and interest or possession over the suit land made an attempt on 20.07.1999 to forcibly take possession and to plough the same. Accordingly, claiming that cause of action for the suit was arose on 20.07.1999, Abdul Gafur Barbhuiya, the respondent, had filed a suit for declaring his right, title and interest over the suit land, for a decree of confirmation of possession over the suit land, for a permanent injunction against the appellant to restrain him from disturbing the possession of the respondent-plaintiff over the suit land, cost, etc. The suit land is described in Schedule-A of the plaint, which is 1 bigha out of 7 bigha- 4 katha- 2 lessa land, covered by dag no. 61, Periodic Patta No. 79, under Nam Daboka Village Kisam, Mouza- Jogijan, Circle- Hojai with definite four boundaries as described in the plaint.

7. The appellant-defendant no.1 had contested the suit by filing his written statement and had denied the statements made in the plaint. It was denied that the appellant had no right, title and interest or possession over the suit land and he had justified his entrance into the suit on 20.07.1999 on the basis of his right, title and interest and possession over the suit land and ploughing it. The appellant had claimed that the suit land originally belonged to Mohammed Ali Beg (since deceased), who had left behind the proforma defendant nos. 2 to 8 as his sons, daughters and wife respectively. It was further claimed that after the death of Mohammed Ali Beg, the suit land devolved only on the proforma defendant nos. 2 to 8 as per the Mohammedan law of inheritance. It was submitted by the learned counsel for the appellant that the suit land was not partitioned and therefore, the suit land was enjoyed by all the heirs jointly. It was claimed that the respondent no.1 made an

attempt to enter into the suit land, for which the appellant had filed a proceedings under Section 144 Cr.P.C., which was registered as M.R. Case No. 77/99 in the Court of Executive Magistrate, Hojai, and the respondent no.1 was restrained by order dated 25.05.1999 to enter into the suit land, which was executed, and that the land was also attached on 21.07.1999. Accordingly, it is claimed that the sale deed referred above was illegal, void and inoperative and no lawful title could pass on to the respondent. Therefore, in the counter-claim, the appellants had prayed, amongst others, that the said sale deed no. 1201/99 was forged, fraudulent, void and inoperative and liable to be cancelled.

8. On the basis of pleadings, the following issues were framed for trial:

- “1. Is there any cause of action for the suit?*
- 2. Whether the sale deed bearing no. 1201/99 is executed duly and validly by the proforma defendant no.2 and 3 in favor of the plaintiff?*
- 3. Whether the plaintiff has been in possession of the suit land since the purchase of the same?*
- 4. Whether the sale deed bearing no. 1201/99 is void, illegal and liable to be set aside?*
- 5. Whether the plaintiff has right, title, interest over the suit land?*
- 6. Whether the plaintiff is entitled to get a decree as prayed for?*
- 7. Whether the defendant is entitled to get a decree as prayed for?*
- 8. To what reliefs are to parties entitled to?”*

9. In support of the suit, the respondent-plaintiff had examined 7 (seven) witnesses and sale deed no. 1201/ 1999 dated 23.03.1999 (Ext.1) was exhibited including the signatures of the vendors. The appellant had examined 3 (three) witnesses and exhibited the following documents, viz. jamabandi for the year 1968-69 (Ext. Ka), revenue receipt (Ext. Kha), forwarding letter of case records of M.R. No. 77/99 (Ext. Ga), petition before the Circle Officer, Hojai, bearing no. 423/99 dated 04.08.1999 (Ext. Gha).

10. The issue nos. 2, 4 and 5 were taken up together. The learned trial Court had examined the signatures of the vendors in Ext.1 and by comparing it with the signatures of the PWD on Ext. Kha(1) arrived at a conclusion that the said signature did not tally with signatures marked as Ext.1(4). It was held that the stamp papers were procured on 23.03.1999. It may be mentioned that the learned trial Court had held that the sale deed was procured on 18.06.1999, which is found to be incorrect because the original exhibit available in the record shows that the stamp paper was purchased on 23.03.1999 and the sale deed was registered on the same date. It appears that the learned trial Court took an exception of the writings made in Ext.1, which disclosed signs of being partly erased by applying whitener and therefore, the lack of explanation regarding the note, the writing, and then erasure had created doubt in the mind of the learned trial Court. It was held that the PW-1 was not aware of the extent of the property because in his examination-in-chief, the said witness had stated that the suit land was measuring 6 bigha- 4 katha- 2 lessa, but in his cross-examination, PW-1 had submitted that the land held was 7 bigha- 4 katha- 2 lessa. The learned trial Court had arrived at a conclusion that as per the evidence of PW-3, the proforma defendant nos.2 and 3 had sold his land. Accordingly, it was held that the Court could not find out what was the share of PW-1 in respect of the land. It was also held that the proforma defendant nos.2 and 3 could not show that they had inherited the suit patta and dag exclusive to themselves. Thus, as there was no evidence on any partition, the Court had opined that the foundational facts must be pleaded and was not open to the parties to make out a new case while giving evidence. Accordingly, as there was no averment with regard to partition by the proforma defendant nos.2 and 3 or about existence of any family arrangement, the

learned trial Court had decided the issues in favour of the appellant and against the respondent-plaintiff. The learned trial Court, had referred to the decision of the Allahabad High Court in the case of *Bansi Lal v. Smti. Shafiqur & Ors., 1986 (1) Civil LJ 250*, and had relied on the finding that under Mohammedan Law neither a partial partition is permissible nor mere allotment of shares can serve the purpose and accordingly, agreed that there was no division by the *metes and bounds*. Reliance was also placed on the observation made to the effect that under Muslim law, a partial partition is not permissible. The learned trial Court also relied on the case of *S.A. Halima Bibi Ammal v. S.A. Fatima Bibi & Ors., AIR 1987 Mad 129*, wherein it was observed that in case the property was in joint possession and ownership of parties, the purchaser of property from one of the parties, having not approached the other party though they know that other party had got common shares in property held, it was held that purchasers were not *bona fide* purchasers for value and were not entitled to any equity. Reliance was also placed by the learned Trial Court on the case of *Champalal & Anr. V. Roopa & Ors., AIR 1963 Raj 38 : 1962 RajLW 429 ILR (1962) 12 Raj 744 : ILR (1962) 12 Raj 744* wherein it was observed to the effect that the seller's failure to disclose material defects in property sold had the affect of the transaction being fraudulent and the buyer would be deprived of possession of the property and suit for return of the purchase money without registration of sale deed would be maintainable. Accordingly, the learned trial Court held that the legal heirs of Late Mohammed Ali Beg had enjoyed the property jointly, which can be inferred from the evidence of DW nos. 1, 2, and 3 and accordingly, it was held that the sale deed no. 1201/1999 was not executed validly and the same was held to be void, illegal and inoperative. Accordingly, the issue nos.2 and 5 were decided in the negative and the issue no.4 was

decided in the positive and against the respondent- plaintiff.

11. In respect of issue no.3, in view of the initiation of proceedings under Section 144 Cr.P.C. and taking note of the attachment of the suit land by order dated 21.07.1999, it was held that the allegation of the respondent-plaintiff of attempt being made on 20.07.1999 to enter into the suit land was found doubtful and accordingly, the issue no.4 was decided in the negative and in favour of the appellant.

12. In respect of issue no.1, it was held that there was cause of action for the suit and in respect of issue no.6, it was held that the respondent-plaintiff was not entitled to any relief. In respect of issue nos.7 and 8, it was held that the sale deed no. 1201/1999 was not duly executed, void, illegal and inoperative and that the appellant was held to be entitled to relief as prayed for. Accordingly, as a result of the decision of the issues, the suit was dismissed and the counter-claim was allowed.

13. Perused the materials available in the LCR as well as in the memo of appeal. Considered the submissions made from both sides.

14. The learned first appellate Court appears to have committed an irregularity for not framing any points for determination as required under the provisions of Order XLI Rule 31(a) CPC. Nonetheless, as this second appeal was filed on 19.12.2006 and the defect of non-framing of points of determination was not brought to the notice of the learned First Appellate Court or before this Court, and as no substantial question of law was framed thereon, the Court is of the considered opinion that without this order being treated as a precedent, the irregularity in not framing of the points of determination would not be fatal

under the unique facts and circumstances of the present case.

15. In respect of issue nos.2, 4 and 5, which were revisited by the learned first appellate Court, the learned first appellate Court had held in respect of over writing in the sale deed to be an official act, which had not changed any portion of the deed. Accordingly, it was held that such over-writing had not affected the contents of the sale deed. Hence, the learned first appellate Court had disagreed with the finding of the learned trial Court on the discrepancy in the signature of the vendors in the sale deed by holding that the learned trial Court, without any reason had compared the signature of PW-6 in the deed, in the *hazira* (Court attendance-sheet or memo of appearance) and in the deposition, which was not necessary as the PW-6 had admitted his signature on the sale deed to be his own. It was further held that the law did not recognize Mohammedan joint family as a legal entity and accordingly, relied on the submission made by the learned counsel for the respondent that Section 125 of the Islamic Law, written by Sri B.R. Verma was very specific that if the land was not partitioned amongst the heirs of Late Mohammed Ali Beg, even that the respondent-plaintiff would acquire a good title in respect of land he had purchased. It was held that the respondent-plaintiff had produced the original sale deed and examined the vendors, scribe and the attesting witnesses and that the mother of appellant/defendant no.1 and proforma defendant no.8 had clearly stated in their evidence that the suit land was sold by her two sons from their share to the respondent and delivered possession of the same. Accordingly, it was held that the sale deed was a genuine one, which was duly executed by the vendors in presence of the witnesses in the Sub-Registrar's office and that the proforma defendant nos.2 and 3, who were the vendors had admitted the sale deed. Thus, it was held that good title devolved on the

appellant and it was held that the learned trial Court had decided issue nos.2, 4 and 5 erroneously and the said finding was reversed. Accordingly, in respect of issue no.1 it was held that there was cause of action for the suit and the said issue was decided in favour of the respondent. In respect of issue no.3, it was held that the respondent was in possession of the suit land and accordingly, the said issue was decided in favour of the respondent. In respect of issue nos.6 and 7, the said issues were decided in favour of the respondent by holding that the respondent was entitled to reliefs as prayed for. Resultantly, the appeal was allowed by decreeing the suit and dismissing the counter-claim.

16. This appeal was admitted for hearing by framing the following 2 (two) substantial questions of law by order dated 29.06.2007:

1. *Whether the learned first appellate Court was justified in arriving at a finding that the sale deed No. 1201/89 (sic.) dated 23.12.1999 was a valid document by reversing the findings of the learned trial Court?*
2. *Whether the defendant/respondent nos.2 and 3 had legal right to transfer the suit land by a sale deed when admittedly the suit land was part of the joint family property which was not partitioned?*

17. In respect of substantial question of law no.1, on a perusal of the evidence of record, the Court finds that the learned first appellate Court had correctly appreciated the execution of the sale deed no. 1201/1999 on 23.03.1999. It was held by the learned first appellate Court that it was not in dispute that the land sale permission was obtained subsequently, but nothing was brought on record to show that the appellant had sought for cancellation of the said sale deed by the Sub-Registry on account of sale deed being executed without the requisite land sale permission. The learned trial Court had rightly held that the vendors, who are proforma defendant nos.2 and 3 had duly executed the sale deed. It is seen that it could not be demonstrated by the

appellant by tendering cogent and admissible evidence before the learned trial Court that any fraud was intended to be committed by the vendors by registering the sale deed without obtaining prior permission. Be that as it may, it has been brought on record that subsequently sale permission was obtained on 18.06.1999. In this case, the proforma defendant nos.2 and 3, who are the vendors had not disputed their signatures. Rather, the proforma defendant nos.2 and 3 along with their mother admitted execution of the sale deed by appearing as witnesses before the learned trial Court. Therefore, the Court is inclined to hold that the vendors did not dispute execution of sale deed and subsequent obtaining of the land sale permission and that the said sale had since been validated, there is no material before this Court to interfere with the finding of the learned first appellate Court, wherein it had been held the sale deed no. 1201/1999 dated 23.03.1999 was a valid document. Resultantly, the finding of the learned trial Court on the validity of sale deed no. 1201/1999 is affirmed by holding that the reversal of the finding of the learned trial Court is found to be in accordance with law. Hence, the first substantial question of law is answered in the affirmative and against the appellant by holding that the registered sale deed no. 1201/1999 dated 23.03.1999 was valid.

18. In respect of substantial question of law no.2, it appears from the provision of Section 49 of the Principles of Mohammedan Law, written by Sir Dinshaw Fardunji Mulla (20th Edition), that on death of a Mohammedan, his all estate devolves on his heirs at the moment of his death and the heirs succeed to the estate as tenants-in-common in specific shares. Therefore, the Court does not find that there is any bar in claiming partition in respect of the properties held in common without seeking partition of all the properties. Be that as it may, it appears that the proforma defendant nos.2 and 3 and their

mother, who were examined as PW nos. 1, 3 and 2 respectively, could show from their evidence to the effect that the plea that suit land was partitioned amongst them could be discarded. It also appears that Sufia Begum, the mother of the proforma defendant nos.2 and 3, who was examined as PW-2, had admitted the sale of the suit land to the respondent no. 1 and delivery of the possession of the suit land to the respondent no.1. Accordingly, the Court is inclined to hold that the learned first appellate Court had not committed any error in appreciating the issue nos. 6 and 7 by holding that a co-owner can sell his/her property to the extent of his share. Moreover, as discussed above, there is no material to hold that the sale deed (Ext.1) in question was fraudulent or illegal in any manner whatsoever. Resultantly, the substantial question of law no.2 is decided in favour of the respondent and against the appellant by holding that a legal heir of a deceased Mohammedan has a right to transfer the land to the extent of his share by executing a sale deed. The evidence of PW nos. 1, 2 and 3 cannot be discarded by holding that there was no partition of the specific shares of the proforma defendant nos.2 and 3, moreso, when the sale deed (Ext.1) contained specific boundaries in the schedule appended thereto.

19. Accordingly, the finding returned by the learned first appellate Court on all the issue nos.1 to 8 stands affirmed and accordingly, this appeal stands dismissed.

20. The learned counsel for the respondent no.1 has brought to the notice of the Court that the defendant nos.2 and 3, who are the vendors of the suit land, had contested the suit by filing their joint written statement and moreover, they had also deposed as witnesses against the appellants. However, vide order dated 29.01.2018 of this Court in this appeal, the name of

respondent nos. 2 to 8 had been struck-off. Thus, notwithstanding that this appeal has been dismissed on merit, the Court is also of the considered opinion that the issue of the validity of the sale deed cannot be decided in the absence of the said vendors, who were arrayed as respondent nos.2 and 3, because they were the vendors of sale deed no. 1201/1999 dated 23.03.1999. Hence, this appeal is found to be not maintainable for non-joinder of proforma defendant nos.2 and 3, who otherwise are proper and necessary parties in this appeal. Therefore, non-joinder of respondent nos.2 and 3, who were the vendors of the sale deed referred above makes this appeal bad and not maintainable for non-joinder of necessary parties and accordingly, on this additional ground, this appeal also stands dismissed.

21. Let the LCR be returned back.
22. There shall be no cost in respect of this appeal.

JUDGE

Comparing Assistant