

GAHC010105862022



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

Case No. : RSA/92/2022

SARFIA KHATUN AND ANR.
W/O MD. FARJUL HAQUE @ FAZLUL HAQUE,
RESIDENT OF VILLAGE DATIALBORI, PO DATIALBORI, PS LAHARIGHAT,
DIST MORIGAON, ASSAM, 782126

2: MD. FARJUL HAQUE @ FAZLUL HAQUE
S/O LATE ABIR HUSSAIN
RESIDENT OF VILLAGE DATIALBORI
PO DATIALBORI
PS LAHARIGHAT
DIST MORIGAON
ASSAM
78212

VERSUS

JABED ALI AND ORS.
S/O LATE JOYNAL UDDIN @ JOYNAL ABEDIN
RESIDENT OF VILLAGE DATIALBORI, PO DATIALBORI, PS LAHARIGHAT,
DIST MORIGAON, ASSAM 782126

2:MD. SAMED ALI
S/O LATE JOYNAL UDDIN @ JOYNAL ABEDIN
RESIDENT OF VILLAGE DATIALBORI
PO DATIALBORI
PS LAHARIGHAT
DIST MORIGAON
ASSAM 782126

3:MUSSTT. JAHERA KHATUN
D/O LATE JOYNAL UDDIN @ JOYNAL ABEDIN
RESIDENT OF VILLAGE DATIALBORI
PO DATIALBORI
PS LAHARIGHAT

DIST MORIGAON
ASSAM 782126

4:MD. RAHUL AMIN
S/O LATE SABDUL ALI
RESIDENT OF VILLAGE DATIALBORI
PO DATIALBORI
PS LAHARIGHAT
DIST MORIGAON
ASSAM 782126

5:MD. AINUL HAQUE
S/O LATE SABDUL ALI
RESIDENT OF VILLAGE DATIALBORI
PO DATIALBORI
PS LAHARIGHAT
DIST MORIGAON
ASSAM 782126

6:MUSSTT. ANJURA BEGUM
D/O LATE SABDUL ALI
RESIDENT OF VILLAGE DATIALBORI
PO DATIALBORI
PS LAHARIGHAT
DIST MORIGAON
ASSAM 782126

7:MUSSTT. SWAGIARA BEGUM
D/O LATE SABDUL ALI
RESIDENT OF VILLAGE DATIALBORI
PO DATIALBORI
PS LAHARIGHAT
DIST MORIGAON
ASSAM 782126

8:MD. ALAM SHEIKH
S/O MD. FAZLUL HAQUE
RESIDENT OF VILLAGE DATIALBORI
PO DATIALBORI
PS LAHARIGHAT
DIST MORIGAON
ASSAM 782126

9:MD. ZINNATUL
S/O MD. FAZLUL HAQUE
RESIDENT OF VILLAGE DATIALBORI
PO DATIALBORI
PS LAHARIGHAT

DIST MORIGAON
ASSAM 782126

10:MUSST. NUR JAHAN
W/O LATE SABDUL ALI
RESIDENT OF VILLAGE DATIALBORI
PO DATIALBORI
PS LAHARIGHAT
DIST MORIGAON
ASSAM 78212

Advocate for the Petitioner : MR. A K PURKAYASTHA

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 09-10-2023

Heard Mr. AK Purkayastha, learned counsel for the appellants.

2. This is a regular second appeal filed under section 100 CPC.
3. The appellants are the defendant nos.5 and 1 respectively in the suit. The suit was decreed in favour of the plaintiff nos.1, 2 and 3 and the said plaintiffs are respondent nos.1, 2 and 3 in this appeal. Vide impugned judgment and decree dated 29.05.2019, passed by the learned Munsif No.1, Morigaon in TS 3/2015, right, title and interest of the respondent nos.1, 2 and 3 over the suit land described in Schedule A (II) of the plaint was declared, and decree was passed for the recovery of *khas* possession of the suit land by demolishing the structures standing thereon, and a decree of permanent injunction was also passed in favour of respondent nos.1, 2 and 3. The counter-claim filed by the defendant nos.2(i) to 2(v) against the plaintiffs was dismissed. The said

defendant nos.2(i) to 2(v) are arrayed in this appeal as proforma respondent nos.7, 2, 1, 3 and 4 respectively.

4. The appellants had preferred the first appeal before the learned Civil Judge, Morigaon against the decree passed by the learned trial Court. However, by rejecting the application for condonation of delay in Misc. (J) case no.26/2020, the unregistered first appeal is deemed to have been also dismissed.

5. The case of the respondent nos.1, 2 and 3 in the plaint is that the land of their predecessor-in-interest, namely, Late Abdul Kalim @ Kalimuddin was divided between his two sons, namely, Abdur Rahman and Joynal Uddin @ Joynal Abedin by virtue of a family settlement. The share of Late Joynal Uddin is described in Schedule A(II) of the plaint. It is projected that while alive Abdur Rahman was alive, he sold the land described in Schedule A(I) to the defendant nos.1 and 6. And that in the month of October 2014, an attempt was made by the defendant nos.1 to 15 to occupy the Schedule A(II) land. Accordingly, the suit was filed with a prayer for a decree of declaration of right of the plaintiffs over the schedule A(II) and Schedule B land, for recovery of *khas* possession of Schedule A(II) land and for confirmation of possession of Schedule B land with a prayer for injunction and cost of the suit.

6. The defendant nos.1 to 6 had contested the suit by filing a common/ joint written statement. A counter-claim was filed by the substituted defendant no.2 being defendant nos.2(i) to 2(v). It was claimed that the predecessor Abdur Rahman had no son or daughter for which Abdur Rahman and his brother

Joynal Uddin, while alive, partitioned the entire suit patta land between them. It is claimed that Joynal Uddin, when alive, sold 4 bighas of land to one Md. Sabdul and Md. Farijul Haque @ Fazlul Haque and further sold 3 kathas of land out of remaining 1 bigha 1 katha of land vide sale deed no.4754 dated 04.05.1976 and 4 kathas of land was sold by Abdul Rahman to the principal defendant no.1, Md. Farijul Haque @ Fazlul Haque and defendant no.6 Md. Nazrul Hoque vide sale deed no.3176 dated 20.02.1982 and further land measuring 1B-2K was sold by Joynal Uddin to the defendant no.1 Md. Farijul Haque @ Fazlul Haque vide sale deed no.1084 dated 04.09.2001 and a further land measuring 2K-5L was sold by Joynal Uddin to Md. Fozlul Hoque on 15.01.2002. It is claimed that the land purchased by the defendant nos.1, 2 and 6 were mutated in their respective names. It is claimed that the suit land described in Schedule A(ii) and Schedule B was purchased by the principal defendant nos.1, 2 and 6 vide sale deed no.4754 dated 04.05.1976 as well as sale deed no.3176 dated 20.03.1982 and that Joynal sold his remaining land of Dag no.126 to the principal defendant no.1. There appears to be reference to few other transactions for the said land, which does not appear to be relevant at this stage.

7. It is claimed that the plaintiffs were permissive possessors of the suit land described in Schedule B and did not vacate the suit land on demand and the present suit was filed. In the counter claim filed by proforma respondent nos.7, 2, 1, 3 and 4, it was prayed that the right, title and interest over the Schedule A and B land of the counter-claim of the contesting defendants as well as the first son of the deceased Sabdul Ali, namely Md. Nurul Amin be declared, and a decree be passed for confirmation of possession of the land described in

Schedule A(i) and A(ii) of the counter-claim and for decree for recovery of *khas* possession of the suit land described in Schedule B by evicting the plaintiffs from the suit land, for the costs of the suit and mutating the suit land described in Schedule A and B in the name of contesting defendants as well as in the name of Md. Nurul Amin and any other reliefs as legally entitled to.

8. It transpires from the record that the plaintiffs had filed their written statement against the counter claim and denied the statements made in the counter-claim.

9. In course of trial, the plaintiff had examined three witnesses, namely, Javed Ali (PW-1), Abu Samed (PW-2) which was not considered as they did not come to face cross-examination. Md. Afaaz Uddin (PW-3) was examined, who had exhibited the following documents viz., Draft Chitha No.1957/58 of dag no.130/121/527, Patta no.58/62 (original) of Datialbori Kissam (Ext.1), Draft Chitha No.1968/69 of dag No. 578/129, Patta No. 97/62 (original) of Datialbori Kissam (Ext.2), Certified copy of the jamabandi of dag No. 124/125, patta No.97 (original) of Datialbori Kissam (Ext.3), Revenue Receipt of patta No.97(original) of Datialbori Kissam (Ext.4), Certified copy of the trace-map (Ext.5). The defendants did not examine any witnesses and no exhibits were proved.

10. The learned trial Court had framed the following issues for trial:

1. *Whether there is cause of action?*
2. *Whether the plaintiff is entitled to a decree declaring right, title & interest over A (II) & B schedule suit land as mentioned in the plaint?*

3. *Whether the plaintiff is entitled to a decree for recovery of khas possession over schedule suit A (II) land as mentioned the plaint?*
4. *Whether the plaintiff is entitled to obtain the decree as prayed for?*
5. *To what other relief/reliefs are the plaintiff is entitled to?*
6. *Whether there is a cause of action for the counter claim?*
7. *Whether the counter claimants acquired right, title and interest over the Schedule A and B land of the counter claim on strength of the various registered sale deeds mentioned to have been executed by their predecessors?*
8. *Whether the counter claimants are entitled to the reliefs prayed for?*
9. *If so, to what relief/reliefs the counter claimants are entitled?*

11. In respect of issue nos.1 and 6, it was held that there was a cause of action for the suit as well as in the counter-claim. In respect of issue no.2, by taking note of the evidence of the plaintiffs on records as well as their pleadings, on the basis of Ext. 1 and 2, it was held that Abdul Kalim was the original *pattadar* of the suit land described in Schedule A and B and as per note *Ka* of Ext.3 it was held that the mutation was made in the name of Abdul Rahman and Jainal Uddin and as per note *Kha* of Ext.3, the name of Jaynal Abedin was mutated in place of Abdul Rahman by way of inheritance and as per note *Ga* in Ext.3, in place of Dag nos.124, the Dag nos.37, 38, 39 were mutated and as per the Ext.3, the names of Abdul Samed and Javed Ali were mutated against the name of their father and in view of law of inheritance it was opined that though the name of Jahera Khatun does not appear in Ext.3, but it does not extinguish her right over the suit land. Therefore, as no evidence was tendered by the defendants, issue no.2 was decided in the affirmative and resultantly in respect of issue no.2, the plaintiffs were found entitled to the decree for recovery of *khas* possession over Schedule A(ii) and confirmation of possession of land over Schedule B land and it was held that the defendants

had dispossessed the plaintiff from the Schedule A(ii) land and also threatened them for eviction and dispossession from the Schedule B land. Accordingly, the issue no.3 was decided in favour of the plaintiffs and the plaintiffs were found entitled to the decree as prayed for and in the absence of any evidence, the counter-claim was dismissed by deciding the issue nos.7, 8 and 9 against the counter-claimants. Accordingly the suit was decreed, declaring the right, title and interest of the plaintiffs over the Schedule A(ii) land and Schedule B land, the plaintiffs were found entitled to the recovery of *khas* possession of Schedule A(ii) land by evicting the defendants and by demolishing their structures in respect of the said land, the plaintiffs were also entitled for permanent injunction restraining the defendants from entering into the said Schedule A(ii) and B land in future or from dispossessing of the plaintiffs from the said land.

12. As already indicated above, the appeal was filed by the appellants for condonation of delay in an application filed under section 5 of the Limitation Act read with section 151 CPC which was registered as Misc. case no.26/2020 for condoning the delay of 532 days in filing the appeal.

13. It appears that in the said appeal, defendant nos.1 and 6 had heavily relied on the medical certificate and prescription of treatment of appellant no.1, Musstt. Sarifa Khatun dated 07.03.2020 given by a particular doctor (Annexure-2) and another prescription given by another doctor (Annexure-3). The said two prescriptions were discarded by the learned First Appellate Court by its order dated 11.02.2022, passed in Misc.(J) case no.26/2020 on the ground that out of the three prescriptions, two prescriptions were issued in the year 2016 and another prescriptions were issued in the name of said Musstt. Sarifa Khatun, but

it does not bear the signature of the doctor who had issued it.

14. The said medical certificate disclosed that the said Sarifa Khatun, i.e. appellant no.1 herein was given medical treatment from time to time since 28.05.2019 till 17.03.2020 and accordingly, the learned Court had opined that the medical certificate showed that Musstt. Sarifa Khatun, the appellant no.1 was not ill during the entire period. The learned Court was also of the considered opinion that the appeal was preferred by two appellants namely, Musstt. Sarifa Khatun and Fazlul Hoque, but no ground has been shown as to why the second appellant could not file the appeal within time. Accordingly, the explanation of delay was not found good enough to condone the delay that had occurred in filing of the appeal and accordingly the application for condonation of delay was rejected and resultantly the appeal was dismissed.

15. In course of consideration of the appeal, the Court vide order dated 07.11.2022 in RSA 92/2022 granted leave to the learned counsel for the appellant to obtain instructions and to file documents by way of an affidavit. Accordingly, by filing an additional affidavit on 21.09.2023, the appellants have filed a copy of the medical certificate dated 07.09.2020 by the Deputy Superintendent, Laharighat, Model Hospital, District Morigaon certifying that Musstt. Sarifa Khatun, aged 40 years, wife of Fajlul Hoque of village Dalialbari, Laharighat, Morigaon, is a case of Nuro LS and hepatitis and under treatment since 28.05.2019 from time to time and that she needs further treatment and investigation. No prescription is found in support of the said certificate to show that the appellant was under treatment from the concerned doctor. The name of the doctors is not disclosed in this order to mask their identity.

16. In the second medical certificate produced, which is a certificate from the concerned doctor who is a neuro psychiatrist at Nagaon, it was certified that the appellant no.1 has been suffering from "generalized anxiety disorder" along with "migraine" and was under his treatment from 28.05.2019 and 17.03.2020. From the said certificate also it cannot be said that the appellant no.1 was under constant medical treatment. One prescription is enclosed at page-28 of the additional affidavit which is by a third doctor and from there it can be seen that it is a medicine purchased invoice of the appellant no.1, which is prescribed by the third doctor. In the invoice dated 15.03.2022, out of the 5(five) medicines prescribed, Bipaz D capsule is for treating gastrointestinal reflux disease, the 2nd drug namely, Hyocimax MF tablet is generally used for menstrual pain. The 3rd drug Ivoral forte tablet is used for treatment of parasitic infestations of skin, hair, scabies, inflammatory disease, pediculosis. The 4th drug is Oflomac-Oz tablet is used for treatment of bacterial and parasitic infections. The uses of Rifamim syrup, the 5th medicine could not be found out. Therefore, none of the drugs which are prescribed by the third doctor (page-28 of the additional affidavit) is used for curing generalized anxiety disorder with migraine problem, which is contained in the certificate issued by the second doctor (at page 27 of the additional affidavit).

17. Therefore, this Court is of the considered opinion that the learned first appellate Court was justified in rejecting the application for condonation of delay on the ground that the prescriptions of the appellant no.1 do not indicate that she was under constant medical treatment because the certificate itself

demonstrate that the appellant no.1 was availing treatment from time to time.

18. Moreover, as the appellants could not adduce any evidence before the learned trial Court, it cannot be said that there was any perversity on the part of the learned trial Court to appreciate the evidence on record or that there was misreading of any documentary exhibits. Therefore, from the discussions as indicated above, the Court does not find any substantial question of law to be present in this appeal for admitting this appeal.

19. Accordingly, this appeal stands dismissed at the "admission stage" without issuance of notice on the respondents.

20. Let a formal decree of dismissal of this appeal be prepared.

21. Let a copy of this order of the Court be transmitted by the Registry before the learned Courts below to be retained on record of the concerned cases.

JUDGE

Comparing Assistant