

GAHC010191962013



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

**Case No. : RSA/25/2013**

Md. Abdul Salam alias Abdus Salam and Anr.

.....**Appellants/Defendants**

**-VERSUS-**

Julhash Ali and 4 Ors.

.....**Respondents/Plaintiffs**

**BEFORE**  
**HON'BLE MR. JUSTICE AJIT BORTHAKUR**

Advocate for the appellants : Mr. N. Dhar

Advocate for the respondents : Ms. R. Choudhury  
Mr. A. Roshid

Date of hearing : 06.12.2022

Date of Judgment/ Order : 24.02.2023

**JUDGMENT & ORDER**

Heard Mr. N. Dhar, learned counsel for the defendant/appellants and Ms. R. Choudhury assisted by Mr. A. Roshid, learned counsel appearing for the plaintiff/respondents.

2. This second appeal has been preferred against the impugned Judgment and Order, dated 25.04.2012 and Decree, dated 07.05.2012, passed by the learned Civil Judge, Barpeta in Title Appeal No. 2/2001 whereby allowed the appeal setting aside the Judgment, Order and Decree, dated 20.12.2000, passed by the learned Civil Judge (Jr. Divn.) No. 1, Barpeta in Title Suit No. 83/1997 partly decreeing the suit by reversal.

3. The plaintiff/respondents instituted a suit being T.S. No. 83/1997 before the Court of learned Civil Judge (Jr. Divn.) No.1 at Barpeta seeking reliefs of decree for their right, title, interest and possession over the suit land described in the schedule and for delivery of khas possession by evicting the defendant/appellants herein by removing the houses from the suit land as well as declaration for setting aside the purported fraudulent chitha mutations, dated 06.01.1977, 08.11.1977 and 18.09.1991 to restore the plaintiffs' patta. It was further prayed to send precept to the concerning revenue authority and to decree for partition of plaintiffs' share of the suit land etc.

4. The principal defendant/appellants contested the suit by filing a written statement stating, *inter-alia*, that there is no cause of action for the suit; that the suit is not maintainable in the present form as there is no Dag Nos. such as 513, 514 and 515 under Periodic Patta No. 226; that the suit is bad for non-joinder of necessary parties as the recorded pattadars have not been impleaded in the suit; that the suit land is undervalued and under stamped and that the suit is barred by law of limitation. The defendant/appellants herein denied the pleaded contentions of the plaintiff/respondents herein terming the same as false, fabricated and concocted. The defendant/appellants pleaded that originally the land measuring 5B 2K 15Ls, covered by Dag No. 373(4B 1K 10Ls)

and Dag No. 380 (1B 1K 5Ls) under Period Patta No. 226 of village Agmandia was originally belonged to the plaintiff/respondents and out of the said plot of land the defendant No. 1/appellant No.1 herein got mutation over 3 K 3½ Ls of land from Dag No. 380 of Village Agmandia in place of the plaintiff No. 1 (Julmat Ali) which was passed by the SDC on 08.11.1977 by right of purchase. The defendant/appellants shifted their basti to the said land in the year 1977 and since then, the defendant/appellants have been residing without any interruption from any corner. The defendant/appellants purchased a number of adjoining plots of basti land. The defendant/appellants have stated that as the suit has been filed on 11.08.1997, that is, after more than a period of 12 years the suit is barred by law of limitation,.

5. The Court of learned Civil Judge (Jr. Divn.) No.1 at Barpeta formulated the following issues to arrive at a just decision in the suit-

- “1. Whether there is cause of action for this suit?*
- 2. Whether the suit is not maintainable in the present form?*
- 3. Whether the suit is bad for non-joinder of necessary parties?*
- 4. Whether the suit is undervalued?*
- 5. Whether the suit is barred by law of limitation?*
- 6. Whether the plaintiffs have right, title and interest over the suit land?*
- 7. Whether the plaintiffs were dispossessed from the suit land on 7-6-97 by the defendant?*
- 8. Whether the plaintiffs are entitled to get khas possession as prayed for?*
- 9. Whether the mutation order dated 6-1-77 and 8-11-77 in favour of defendants are*

*illegal and void and liable to be cancelled?*

*10. Whether the plaintiffs are entitled to a decree as prayed for?*

*11. To what relief or reliefs if any the plaintiffs are entitled to?*

*Additional Issue No.1-*

*1. Whether the plaintiffs are entitled to get partition as prayed for and to issue precept to the revenue authority accordingly?"*

6. During trial the plaintiff/respondents examined 4 witnesses whereas the defendant/appellants examined 5 witnesses. Both sides exhibited some documents. Thereafter, on appreciation of the evidence, oral and documentary, the learned trial Court of Civil Judge (Jr. Divn.) No. 1, Barpeta delivered the Judgment and Decree, dated 20.12.2000, dismissing the suit. Being aggrieved by the aforesaid judgment and decree, the plaintiff/ respondents preferred the first appeal being Title Appeal No.2/2001 in the Court of learned Civil Judge, Barpeta on the following grounds-

*a) That learned Trial Court has erred in law while dismissing the suit of the plaintiff/appellants;*

*b) That, learned Trial Court should have held that the defendants did not acquire any title upon the suit land on the strength of their mutation;*

*c) That learned Trial Court was wrong to hold that the plaintiffs have relinquished their right over the annual patta land;*

*d) That learned Trial Court did not consider the evidence in proper perspective;*

*e) That learned Trial Court has wrongly placed the burden of proof upon the plaintiff regarding non-transfer of any land in favour of the defendants;*

*f) That learned Trial Court has failed to consider that granting mutation on putting T.I. Marks on citha books is a not recognized mode of Transfer of immovable property*

*and by such mutation, defendants could not acquire any title;*

*g) That the learned Trial Court failed to appreciate the documents proved by both the sides."*

7. The First Appellate Court of learned Civil Judge, Barpeta by the impugned Judgment and Order, dated 25.04.2012 and Decree, dated 07.05.2012 partly decreed the appeal with the following reliefs-

*"A) Plaintiffs have right, title and interest over the plot of land measuring 1B-0K-15L in Dag No. 513 of P.P. No. 234 and also over Dag No.514 measuring 0B-1K-5L of annual patta of village Ag-Mondia Gaon under Mouza Mondia.*

*B) Plaintiffs are also entitled for recovery of khas possession of the aforesaid land by evicting the defendants or any other persons claiming through them and if required by removing any structures standing on the suit land.*

*C) Plaintiffs are entitled for partition of the aforesaid land as per the provisions of AIRR through Collector, Barpeta or his authorised agent.*

*D) A permanent injunction is also granted against the defendants restraining them from creating any disturbance in possession of the plaintiffs after partition and recovery of khas possession of the aforesaid land of Dag No.513 and 514 in due process of law.*

*E) Plaintiffs are entitled for correction of the records of rights by getting their names mutated and by deleting the name of the defendants for the decreetal land as above.*

*F) Plaintiffs are also entitled for cost of the suit from the defendants."*

8. Being aggrieved, the defendant/appellants have preferred the instant second appeal on 08.08.2012 on the following substantial questions of law-

*" 1) Whether the impugned Judgment and Order, dated 25.04.2012, was passed by the learned lower appellate Court without jurisdiction in defiance to the judgment and order, dated 22.07.2011, passed by this Court in RSA No. 81/2003 directing the*

*learned District Judge, Barpeta to decide the appeal and without formulating the point for determination in the appeal in accordance with Order 41 Rule 31 of the Code of Civil Procedure are sustainable in law?*

*2) Whether the impugned judgment, dated 25.04.2012 and decree, dated 07.05.2012, passed by the learned lower appellate Court without formulating or discussing the issue relating to adverse possession in pursuance to the judgment and order, dated 22.07.2011, passed by this Court in RSA No. 81/2003 are sustainable in law?*

*3) Whether the impugned judgment and decree, dated 25.04.2012, passed by the lower appellate Court in deciding issue No. 5 relating to limitation in filing the suit without taking consideration of Article 58 and 65 vis-a-vis the judgment and order, dated 25.04.2012, passed by this Court in Second Appeal No. 81/2003 are perverse and accordingly, unsustainable in law?*

*4) Whether the impugned judgment and decree, dated 25.04.2012, 07.05.2012, passed by the learned appellate Court below holding that the title of the plaintiff side for 1 Katha 5 Lecha in Dag No. 514 and for 1 Bigha 15 Lechas in Dag No. 513 remained with them without any evidence in the case record by travelling beyond the scope of pleading made in the plaint and ignoring the evidence of P.W. 1 are perverse and accordingly, unsustainable in law?*

*5) Whether the impugned judgment, dated 25.04.2012 and decree, dated 07.05.2012, passed by the lower appellate Court ignoring Exhibit- 'Ka', Exhibit- 'Ga' and Exhibit- 'Gha' in the case record and the statutory provision of law u/s 53A of the Transfer of Property Act, Section 49 of the Registration Act and Section 41 of the Assam Land and Revenue Regulation, 1886 are perverse and accordingly, unsustainable in law? and*

*6) Whether the impugned judgment, dated 25.04.2012 and decree, dated 07.05.2012, passed by the learned lower appellate Court in deciding issue Nos. 7 and 8 without any evidence in the case record and ignoring the statutory provisions of law under Sections 101 and 102 of the Evidence Act are perverse and accordingly, unsustainable in law?"*

9. However, upon hearing the learned counsel of both the sides, this Court

by order, dated 08.01.2014, passed in RSA No. 25/2013 admitted the appeal for hearing on the following questions of law-

*“(1) Whether the appellate court committed error by holding that the plaintiffs did not transfer the suit land in favour of the defendants by executing the sale deed and allowing the defendants to have mutation in respect of the same.*

*(2) Any other questions of law that may be raised at the time of hearing.”*

10. In course of hearing, no new issue has come up and the arguments of both sides confined to the above substantial question No. 1.

11. I have given due consideration to the submissions made by the learned counsel of both sides based primarily on the original pleadings. Perused the records including the impugned judgment and decree.

12. On perusal of the pleadings, it appears that the plaintiff/respondents herein claimed to be the sole and exclusive owner of the suit land measuring total 2B 5Ls and claimed to have never alienated the suit land which is an annual patta land described in the schedule to the plaint with clear metes and bounds by constructing three thatched houses, one house with CI sheets on the roof and one fishery. The plaintiff/respondents also disputed the signature/thumb impression upon the chitha for causing mutation on 06.01.1977 and 08.11.1977. Their further case is that the defendant/appellants forcibly dispossessed them from the suit land as well as from the fishery. The defendant/appellants have, however, denied pleading that although originally the suit land was belonged to the plaintiff/respondents, the defendant/appellant No. 1 got mutation over 3K 3½ Ls of land from Dag No. 380 of village Agmandia in place of the plaintiff No.1, namely, Late Julmat Ali (father of the

respondent Nos.1 to 4) on 08.11.1977 by right of purchase. The defendant/appellants accordingly shifted their 'basti' to the said plot of land in the year 1977 and since then they have been residing there openly without any interruption from any corner. Thereafter, the defendant/appellants also purchased some adjoining plots of land which according to them fall outside the suit land. Also, the defendant No.1/appellant No. 1 herein purchased 4K 10Ls of land from Dag No. 513 by executing a registered sale deed on 27.10.1984 and since then the defendant/appellants are in possession with specific boundary thereof. Thus, they have claimed to have been in possession for more than 12 years as on the date of institution of the suit on 11.08.1997.

13. P.W.1, Md. Bisha Seikh, the plaintiff No. 2/respondent No. 5 herein, in his evidence in chief, has supported the above facts narrated in the plaint and recognized Exts.- 1 to 10, the certified copies of chitha. According to him, the suit land covers myadi and annual patta land and their ancestral landed property was partitioned about 30 years ago with 6½ Bigha of land in his share. He sold 4K 10Ls of land located at other place, about 15-16 years ago, by executing sale deeds, where the said defendant/appellants now have possession, but the suit land was never sold out. So, also, the plaintiff No.1, Late Julmat Ali (the father of respondents No. 1, 2, 3 and 4) sold 3Kathas of basti land to the defendant/appellants where the name of the defendant was mutated about 22-23 years ago. He has not exhibited any revenue payment receipts.

14. P.W. 2, Munser Ali, stated that the suit land was never sold by the plaintiff/respondents to the defendant/appellants.

15. P.W.3, Abdul Khalek stated that the defendant/appellants encroached

upon the fishery of the plaintiff/respondents located in the suit land from the year 1997-1998. In cross-examination, he stated that the plaintiffs have been residing at Guwahati for 15-16 years.

16. P.W. 4, Md. Unus Ali Sikdar, the Lat Mandal of Lat No. 1 under Bagbar Revenue Circle, has testified to the mutation of the names of the defendant/appellants in the land records as stated in the evidence of P.W. 1. P.W. 4 stated, *inter-alia*, that the mutations were made after due service of notice and that the pattadar was Md. Bisha Seikh, the plaintiff No. 2/respondent No. 5 herein. He further stated that the Ext.-7, the copy of handwritten chitha does not fully tally with the land records.

17. D.W. 1, Abdus Salam @Abdul Salam, the defendant No.1/appellant No. 1 herein, in his examination-in-chief, has corroborated the facts averred in the written statement and recognized Ext.-'Ka', the sale deed, dated 22.07.1977, executed by Late Julmat Ali in favour of Abdus Salam/appellant No. 1 herein; Ext.- 'Kha', the certified copy of Jamabandi; Ext.-'Ga', the sale deed, dated 27.10.1984 executed by Bisha (plaintiff No. 2/respondent No. 5) in favour of Abdus Salam (defendant No.1/appellant No.1 herein); Ext.-'Gha', the sale deed, dated 02.01.1985 executed by Bisha (plaintiff No. 2/respondent No. 5 herein) in favour of Abdus Salam (defendant No.1/appellant No.1); Ext.-'Unga', certified copy of Jamabandi. He has stated the four boundaries of the purchased land.

18. D.W. 2, Akram Ali, a resident adjacent to the suit land, whose evidence was recorded on 15.11.2000, stated that the defendant/appellants have been in physical possession of the suit land by raising dwelling house for about 20-22 years by purchase. He denied the suggestion of the plaintiff/respondents that

after encroachment the defendant/appellants had erected three thatched houses and another house with CI sheets on the roof. In cross-examination he reiterated that the defendant No.2/appellant No.2 herein constructed house on the plot of land purchased from Julmat Ali, the plaintiff No. 1 (father of respondent Nos. 1 to 4) and Bisha Sheikh, the plaintiff No.2/respondent No. 5 herein and that the tank has been in the share of the defendant No.1/appellant No.1 herein.

19. D.W. 4, Md. Tarak Ali, aged about 70 years, was the scribe, who wrote the sale deeds, Exts.-'Ka' and 'Gha' and proved the contents more specifically, the names of the vendor and vendee.

20. D.W.5, Khalilur Rahman, aged about 55 was the scribe of Ext. 'Ga', who proved its contents including the names of the vendor and vendee.

21. The pleadings and evidence on record show that there are rival contentions in regard to the signatures of the plaintiff/respondents on the sale deeds and mutations and the various dag numbers of the suit land, but none of the parties found it expedient for local investigation under Order 26 Rule 9 of the Code of Civil Procedure nor resorted to proving and disproving the disputed signatures/handwritings as required under Section 67 of the Evidence Act. Mere plea of denial does not amount to evidence.

22. The above evidence shows that the plaintiff/respondents had transferred the ownership of the suit land or their title over the suit land by executing sale deeds and then effecting mutations for consideration. The execution of the aforesaid sale deeds were followed by delivery of possession vide copy of

jamabandi and mutations. The execution of the exhibited sale deeds testify the signing, sealing and delivery of them in the presence of the attesting witnesses. The evidence shows that the vendor intended to give effect and operation to the aforesaid instruments of sale deeds signed. On careful appreciation of the evidence, oral and documentary, of both sides, it transpires that the defendant/appellants have only created a high degree of probability of transfer of title to them by the plaintiff/respondents followed by delivery of possession animus to the claim of original title of the plaintiff/respondents herein. There is no evidence of any attesting witnesses in testimony of execution of the exhibited documents of title except chitha mutations. There is preponderance of probability that the defendant appellants had been openly in physical possession of the suit land since 08.11.1977 without any interruption by raising houses by right of purchase and the plaintiff/respondents have brought the action by instituting the instant suit on 11.08.1997, that is, after elapse of 19 years 9 months 3 days based on purported title and continuous possession until they were allegedly dispossessed on 03.06.1997. There is no credible evidence to show ouster of the plaintiff/respondents from the suit land by the appellant/defendants as alleged. It is, thus, noticed that the appellant/defendants, in fact, legally entered into possession of the suit land by right of purchase and continued their possession uninterrupted for a long period and as such, they cannot be termed as trespassers. The totality of evidence available on record, therefore, reveals that the learned First Appellate Court has arrived at an erroneous inference by holding that the plaintiff/respondents did not transfer the suit land in favour of the defendant/appellants by executing the sale deeds and allowed the defendant/appellants to have mutation in respect of the suit land.

23. In the premises, in order to settle the basic issues effectively between the parties, it is hereby ordered that the matter be **remanded back** to the learned Trial Court with direction to pass an order issuing commission under Order 26 Rule 9 of the CPC for physical inspection, measurement and for ascertaining the existing possessions etc. of the parties concerned with specific metes and bounds on the suit land. Thereafter, the learned Trial Court shall give an opportunity of hearing on the report of the commission and then, deliver a fresh judgment on all the issues within a period of 06(six) months from the date of receipt of copy of this judgment and order. Accordingly, **the appeal stands partly allowed** setting aside the impugned judgment and decree passed by the learned First Appellate Court. Both the parties shall appear before the learned trial Court either personally or through counsel on **3<sup>rd</sup> of April, 2023** to receive instructions.

Be it mentioned that no observation made in the judgment and order shall have any bearing in the independent discretion of the learned trial Court while writing the fresh judgment.

The appeal stands disposed of.

Send back the LCRs.

**JUDGE**

**Comparing Assistant**