

GAHC010233662013



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

Case No. : RSA/58/2013

TAPAN BHATTACHARYYA and 9 ORS

2: TARUN BHATTACHARYYA

3: SMTI ILA SHARMA
ALL ARE THE SONS AND DAUGHTER OF LATE SIBANATH
BHATTACHARYYA
R/O NEW VIEL ROAD
JORHAT TOWN
JORHAT 785001
P.O. JORHAT
P.S.JORHAT
IN THE DIST. OF JORHAT
ASSAM.

4: MUNINDRA NARAYAN BHATTACHARYYA

5: GUNINDRA NARAYAN BHATTACHARYYA

6: SMTI MRINALINI GOSWAMI

7: SMTI NIRMALI SARMA

8: SMTI SEWALI BHATTACHARYYA

ALL ARE THE SONS AND DAUGHTERS OF LATE HARINATH
BHATTACHARYYA
R/O NEW VIEL ROAD JORHAT TOWN
JORHAT 785001
P.O. JORHAT
P.S. JORHAT
IN THE DIST. OF JORHAT

ASSAM.

9: NIRENDRA NARAYAN BHATTACHARYYA
SONS OF LATE MAHESWAR BHATTACHARYYA
R/O RAJAHOWLI
HAZARI MOUZA JORHAT
ASSAM.

10: JAY CHARAN SHAH

S/O SRI SURAN SHAH
R/O NOLOMONI PHUKAN ROAD
JORHAT TOWN
JORHAT
ASSAM

VERSUS

UMESH PRASAD HALWAI
S/O LATE RAGHUBIR HALWAI, NILLMONI PHUKAN ROAD, JORHAT-1, P.O.
and P.S. JORHAT, DIST. JORHAT, ASSAM.

Advocate for the Petitioner : MR.R P SARMAH

Advocate for the Respondent : MRS.S S BAWARI

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT & ORDER (ORAL)

Date : 19-01-2023

Heard Mr. R.P. Sarmah, the learned senior counsel assisted by Mr. H.K. Baishya, the learned counsel appearing on behalf of the appellants and Mr.G.N. Sahewalla, the learned senior counsel assisted by Ms. S. Todi, the learned counsel appearing on behalf of the respondent.

2. This Court vide an order dated 3/5/2013 have admitted the instant appeal by formulating two substantial questions of law which are reproduced herein under :-

1) Whether in view of cancellation of the mutation made in favour of the plaintiff by the Assam Board of Revenue and the said cancellation not being challenged before any other appropriate authority, the plaintiff, who is the grand-son of the actual owner, was entitled to claim his right over the suit property during the lifetime of the sons of the actual owner ?

2) Whether the first appellate Court committed error by reversing the judgment and decree passed by the learned trial court in Title Suit No.81/2001 despite the fact that the plaintiff admitted that the legal heirs of the original owner were alive and that they were not made party in the suit ?

3. For appreciating as to whether the said substantial questions of law so formulated by this Court vide the order dated 3/5/2013 are the substantial questions of law involved in the instant appeal, this Court briefly would like to take note of the relevant facts which led to the filing of the instant appeal. 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 a suit being Title Suit No. 11/1988 before the Court of the Munsiff at Jorhat seeking declaration of his right, title and interest over the suit land and confirmation of possession and in case of dispossession during the pendency of the suit, khas possession thereof; for a decree for compensation of Rs. 200/-; for a cost of the suit etc.

5. The factual matrix on the basis of which the suit was filed is that land measuring 4½ lechas pertaining to New Dag No.1859 corresponding to partitioned Dag No.2255 of P.P Patta No. 33 corresponding to New Partitioned Patta No.33(kha) situated at Block C of Jorhat town which has been specifically described in schedule A to the plaint originally belonged to the proforma defendant No. 5, Sri Hemendra

Prasad Baruah and his deceased brother Ramendra Prasad Baruah, his mother Late Kamal Kumari Baruah, who sold out 2 kathas of the land to the defendant Nos. 1, 2 and 3 vide registered Deed of Sale No. 1738 dated 3/5/1962 and delivered possession thereof. The defendant No. 1 thereafter sold out 9 lechas of land out of the said 2 kathas of land which was purchased jointly with the defendant No. 2 and 3 to the plaintiff's grandfather Late Mushafir Halwai vide a registered sale deed No. 1779 dated 07/05/1962 for a consideration of Rs. 3,000/-. The said 9 lechas of land includes the suit land and another 4½ lechas of land covered by Dag No. 1501. It was clarified in the said plaint that due to typographical mistake while preparing the said Sale deed, the Dag No. 1501 was wrongly written as Dag No. 1051. The said typographical error did not make much of a difference as the land was properly described within the four boundaries in the Deed of Sale. It was further mentioned that at the time of purchase by the defendant Nos. 1, 2 and 3 the entire land was under the occupation of the plaintiff's grandfather Late Mushafir Halwai and in order to get possession of the purchased land and to satisfy occupier Late Mushafir Halwai, the defendant No. 1 sold out 9 lechas of land out of 2 kathas to Late Mushafir Halwai, who in turn allowed the defendant Nos. 1, 2 and 3 to take possession rest of the purchased land measuring 9 lechas in occupation of Mushafir Halwai. It was further mentioned that after the said purchase, Late Mushafir Halwai and the plaintiff have been occupying and enjoying the said land of 9 lechas having right, title and interest over the same. It was further mentioned that the plaintiff being the only legal heir of Late Mushafir Halwai living

with him till his death and exercised complete control over the said land. Further it was mentioned that Late Mushafir Halwai had some other legal heirs who had settled down in Bihar and never came back to Assam claiming the property left by Late Mushafir Halwai since 1962. It was also mentioned that the plaintiff got his name mutated in the record of rights as legal heir of Mushafir Halwai in exclusion of other legal heirs and used to pay land revenue, municipal taxes, urban area immovable property tax and other tax. The plaintiff also got partition of the land with other land and obtained partitioned patta in his name. Upon the said land there is a standing house consisting of four rooms. The frontal three rooms are used as shop-cum-residence and the fourth room is situated on the north kept reserved for storing ordinary goods. The western wall from the first room to the last is half brick with upper portion covered by bamboo fencing and tin sheet. It has been mentioned that while the plaintiff was away from Jorhat for his business purpose the defendant Nos. 1, 2 and 3 with the assistance of the defendant No. 4 broke down a portion of the western bamboo and brick wall of the last northern most room on 29/9/1987 with a view to grab the suit land and took away some woods and bamboo stored inside the room and threw down some useless articles thereto. It has been alleged that the defendant Nos. 1 to 4 have also threatened to invade the land for which the plaintiff had filed the suit claiming for the reliefs as above mentioned.

6. The defendant Nos. 1 to 4 contested the suit by filing a joint written statement. Besides rebutting the averments of the plaintiff, the defendants contended that the

dag and the patta number of the suit land mentioned in the plaint are not correct. The suit is bad for non-joinder of the legal representatives of the deceased Kamal Kumari Baruah and Ramendra Prasad Baruah. The defendants denied the fact that the defendant No. 1 sold out 9 lechas of land to Late Mushafir Halwai and Late Mushafir Halwai was ever in occupation of the land purchased by the defendant No. 1, 2, and 3. It was also denied that out of the 2 kathas of land purchased by the defendant No. 1, 2, and 3, 9(nine) lechas of land was sold out to Late Mushafir Halwai in order to get appropriate possession of the purchased land. The defendants further denied the fact that the plaintiff is the only legal heir of Late Mushafir Halwai who used to stay at Jorhat. It was mentioned that the plaintiff has got his name recorded in the record of rights after the death of Late Mushafir Halwai to the exclusion of the other legal heirs. Further to that, it was mentioned that the plaintiff with an ulterior motive to make illegal gain at the cost of the defendants instituted Title Suit No. 57/78 in the Court of the learned Munsiff No.2, Jorhat in respect to 4½ lechas of land and the said suit being Title Suit No. 57/78 is pending before this Court by way of Appeal No.48/86. It was further mentioned that the previous suit the issues involved were directly and substantially the same issue involved in the said suit between the parties and before final disposal of the said suit, the present suit cannot be proceeded with.

7. On the basis of the rival pleadings, as many as six issues were framed which are reproduced hereunder :-

- (1) Is there any cause of action for the suit ?

- (2) Is the suit is bad for non-joinder of legal representative of the deceased Kamal Kumari Barooah and Ramendra Prasad Barooah ?
- (3) Is there any right, title and interest of plaintiff over the suit land ?
- (4) To what relief or reliefs the plaintiff is entitled ?
- (5) Whether the plaintiff is entitled for a decree for confirmation of possession over the suit land ?
- (6) Whether the suit is bad for non-joinder of necessary parties ?

8. The plaintiff examined himself and exhibited 35 documents in support of his claim whereas the defendants examined two witnesses and exhibited five documents to prove their stand. The Trial Court vide the judgment and decree dated 11th of October, 2010 dismissed the suit of the plaintiff.

9. Being aggrieved, the plaintiff as appellant has preferred an appeal before the Court of the Civil Judge, Jorhat, which was registered and numbered as Title Appeal No.22/2010. The First Appellate Court vide the judgment and decree dated 15/12/2012 decreed the suit in favour of the plaintiff thereby setting aside the judgment and decree dated 11/10/2010 passed in Title Suit No. 18/2001(earlier numbered as Title Suit No.11/88). The First Appellate Court further declared that the plaintiff's right, title and interest over the suit land as well as confirmation of possession and recovery of khas possession in case of dispossession during the pendency of the suit. Being aggrieved, the present appeal has been preferred which had been admitted by formulating the substantial questions of law which have been already reproduced hereinabove.

10. In the backdrop of the above facts, let this Court therefore take into consideration as to whether the said substantial questions of law at all are involved in

the instant appeal. The first substantial question of law relates to is as to whether in view of the cancellation of the mutation made in favour of the plaintiff by the Assam Board of Revenue and the said cancellation having not been challenged before any other appropriate authority, the plaintiff, who was the grand-son of the actual owner was entitled to claim his right over the suit property during the life time of the sons of the actual owner. To answer as to whether the said substantial question of law is involved in the instant appeal, it is relevant to take note of that the Deed of Sale executed in favour of the grandfather of the plaintiff, Late Mushafir Halwai i.e. exhibited as Ext.31 bearing Deed No. 1779 dated 7/5/1962 have not been put to challenge by the defendants/the appellants herein in any proceedings. It is also relevant to take note of that vide the Deed of Sale bearing Deed No.1738 dated 3/5/1962 exhibited as Exhibit –'Ga', the defendant Nos. 1, 2 and 3 had purchased a plot of land measuring 2 kathas collectively.

11. In terms with Section 44 of the Transfer of Property Act, 1882, when one of two or more co-owners of a immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession and/or common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred. In view of the Deed of Sale(Ext.-'Ga') the defendant No.1 was legally competent to

transfer his portion of the share. Accordingly vide the registered Deed of Sale exhibited as Ext.31, Deed of Sale bearing Deed No. 1779 dated 7/5/1962 the defendant No. 1 had transferred a part of the portion of his share to Late Mushafir Halwai. This Deed of Sale as already stated hereinabove has not been put to challenge in any of the proceedings and by virtue of Section 90 of the Indian Evidence Act, 1872 the Court may draw presumption in favour of a document which is proved to be 30 years old. Under such circumstances, the plaintiff, who is one of the legal heirs of Late Mushafir Halwai, has the right over the suit land on the basis of the said title document i.e. Exhibit-31. The substantial question of law so formulated pertains to a question as regards cancellation of mutation made by the Assam Board Revenue. As it is well settled that mutation neither confers a title nor extinguishes the title, therefore, the question of cancellation of the mutation made in favour of the plaintiff by the Assam Board of Revenue would have no relevance inasmuch as the Revenue Courts cannot decide the right, title and interest of the parties and it is only the Civil Court which can decide. Under such circumstances, the first substantial question of law so formulated in the opinion of this Court is not a substantial question of law involved in the instant appeal.

12. It is also relevant to take note of that the later part of the first substantial question of law so formulated and a reading of a second substantial question of law, it would show that both the substantial questions of law are intertwined to the effect as to whether the plaintiff could maintain the suit without the legal heirs of the original

owners who were alive being made parties to the suit. It is accepted at the bar that the law of succession as applicable to the plaintiff will be governed by the Mitakshara school of law whereby all the heirs of Late Mushafir Halwai would have a co-ownership right upon the suit land. It is well settled that a co-owner can very well maintain a suit seeking declaration of his right, title and interest as well as to protect the said property against a bystander or a third party. Under such circumstances, the second substantial question of law in the opinion of this Court is not a substantial question of law involved in the instant appeal inasmuch as the plaintiff being a co-owner can very well maintain a suit seeking right, title and interest along with confirmation of possession as well as for recovery of possession, if so necessary. It is however made clear that the said declaration of the right, title and interest of the plaintiff as well as confirmation of possession would be subject to such claims of the other legal heirs of Late Mushafir Halwai.

13. In that view of the matter, this Court finds that the two substantial questions of law so formulated vide the order dated 3/5/2013 are not the substantial questions of law involved in the instant appeal, for which the instant appeal stands dismissed.

14. Return the LCR.

JUDGE

Comparing Assistant