

GAHC010080142002



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

Case No. : RSA/5/2002

MD SABED ALI
S/O LATE KASEM ALI AND KASOM
VILLAGE BORCHALAGAON
P.O AND P.S. AND MOUZA LAHORIGHAT
DIST MORIGAON, ASSAM

VERSUS

ASWINI KUMAR NATH and ORS
S/O LATE CHOTIRAM NATH
R/O SIMALUGURI HATIBAT
P.O AND P.S. MIKIRBHETA
DIST MORIGAON ASSAM

2:SHRI PHANI DHAR NATH
S/O LATE CHOTIRAM NATH
R/O SIMALUGURI HATIBAT
P.O AND P.S. MIKIRBHETA
DIST MORIGAON ASSAM

3:ON THE DEATH OF RESPONDENT NO. 3 HIS LEGAL HEIRS
REPRESENTED BY

3.1:BULUMONI BARUAH
S/O MOLENDRA NATH

3.2:MOUSUMI DEVI
D/O LATE MOLENDRA NATH
W/O NIRANJAN NATH
R/O VILLAGE AND PO ALIKUCHI
DIST MORIGAON
PIN 782105

4:STRUCK OFF
STRUCK OFF

5:SMTI HARIMALA DEVI
W/O SHADRESWAR NATH
VILL. SIMALGURI HATIBAT
P.O. and P.S. MIKIRBHETA
DIST. MORIGAON
ASSAM
PIN 782106

6:SMTI ARUNA DEVI
D/O LATE CHOTIRAM NATH
VILL. SIMALGURI HATIBAT
P.O. and P.S. MIKIRBHETA
DIST. MORIGAON
ASSAM
PIN 782106

7:STRUCK OFF
STRUCK OFF

8:STRUCK OFF
STRUCK OF

For the Petitioner(s) : Mr. F. U. Barbhuiya, Advocate

For the Respondent(s) : None appears.

Date of Hearing : **30.05.2024**

Date of Judgment : **30.05.2024**

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Heard Mr. F. U. Barbhuiya, the learned counsel appearing on behalf of the Appellant. None appears for the Respondents.

2. This is an appeal under Section 100 of the Code of Civil Procedure, 1908 challenging the judgment and decree dated 18.07.2001 passed by the

Court of the learned Civil Judge (Senior Division) Morigaon in Title Appeal No.14/2000 whereby the judgment and decree passed by the learned Trial Court i.e. the Court of the learned Civil Judge (Junior Division) No.1, Morigaon dated 14.11.2000 in Title Suit No.29/96 was reversed.

3. This Court vide an order dated 29.01.2007 admitted the instant appeal by formulating the following substantial question law:

“Whether the learned first appellate court erred in law in reversing the judgment of the learned trial court holding Exb – 4, i.e. Sale Deed No.2932 dated 04.04.1985 as an illegal document as it was sold by one of the co-sharers only?”

4. The question arises in the instant appeal as to whether the said substantial question of law which has been formulated is involved in the instant appeal. For the purpose of deciding the same, this Court finds it relevant to take note of the brief facts leading to the filing of the instant appeal.

5. A plot of land measuring 12 Bighas 4 Kathas 9 Lechas covered by Dag No.54 of Periodic Patta No.53 of village Hatibat Simaluguri Kissam under Mouza Mikirbheta, Morigaon originally belonged to one Puturam Nath (since deceased) and Chotiram Nath (since deceased). It is an admitted fact that the Plaintiff, the Principal Defendant No.2 as well as the proforma Defendant Nos. 4 to 7 were the legal heirs of Chotiram Nath (since deceased). It is an admitted case of both the parties that Late Puturam Nath transferred his share in favour of Late Chotiram Nath and therefore, during the lifetime of Late Chotiram Nath, he became the owner of 12 Bighas 4 Kathas 9 lechas of

land which have been specifically described in Schedule-A to the plaint.

6. Pursuant to the death of Late Chotiram Nath, the names of the Plaintiff, the Principal Defendant No.2 as well as the Proforma Defendant Nos. 4 to 7 were duly mutated. Out of the Schedule-A land, the Defendant No.2 transferred 2 Bighas of land vide a registered Deed of Sale bearing Deed No.2932 dated 04.04.1985 which have been specifically described in Schedule-C to the plaint in favour of the Defendant No.1 who is the appellant in the instant proceedings. In pursuance to the said Deed of Sale, the Defendant No.1 have been alleged to have forcefully taken over the possession of the Schedule-C land and under such circumstances, the suit was filed seeking a declaration that the Sale Deed No.2932 dated 04.04.1985 described in Schedule-D is void, illegal and has no force in the eyes of law; plaintiff had right, title and interest over the suit land described in Schedule-C land and those over Schedule A and B; the khas possession of Schedule-C land and costs etc.

7. Both the Defendant Nos. 1 and 2 filed their written statement stating inter alia that the Defendant No.1 duly had the right to transfer his share of the Schedule-A land to the Defendant No.2 and as such the said transfer made in favour of the Defendant No.2 vide the Deed of Sale bearing Deed No.2932 dated 04.04.1985 of the Schedule-C land was in accordance with law.

8. On the basis of the said pleadings, as many as 9 (nine) issues were framed of which Issue No.6 was as to whether the Defendant No.2 had right to sale the Schedule-C land to the Defendant No.1 and whether the Sale

Deed No.2932 dated 04.04.1985 is liable to be declared void and illegal. The Issue No.8 was as to whether the plaintiff had right title and interest over the suit land. Both sides adduced evidence.

9. The learned Trial Court on the basis of the pleadings as well as the evidence decided that there was no materials on record to show that the Defendant No.2 was disentitled by his father Late Chotiram Nath to inherit the properties. The learned Trial Court also came to a categorical finding that the Defendant No.2 had right to sale his own share and under such circumstances, the question of declaring the Sale Deed No.2932 dated 04.04.1985 as void and illegal did not arise. Under such circumstances, the learned Trial Court dismissed the suit vide a judgment and decree dated 14.11.2000.

10. Being aggrieved, the plaintiff preferred an appeal before the Court of the learned Civil Judge (Senior Division), Morigaon which was registered and numbered as Title Appeal No.14/2000. The learned First Appellate Court however reversed the judgment and decree passed by the learned Trial Court vide a judgment and decree dated 18.07.2001 holding inter alia that without the consent of the remaining pattadars, the transfer could not have been made by Defendant No.2 in favour of the Defendant No.1. It is under such circumstances, the instant appeal has been preferred.

11. I have heard Mr. F. U. Barbhuiya, the learned counsel appearing on behalf of the Appellant who submits that the substantial question of law which has been formulated on 29.01.2007 is duly involved in the instant appeal taking into account that the learned First Appellate Court did not

consider the provisions of Section 44 of Transfer of Property Act, 1882 which permits transfer of the share by one of the co-owners and the devolution of the right upon the transferee on the basis of the said transfer. He further submitted that this aspect of the matter having not been taken into consideration, the learned First Appellate Court was not justified in reversing the judgment and decree passed by the learned Trial court.

12. This Court upon perusal of the materials on record, finds it relevant to take note of Section 44 of the Transfer of Property Act, 1882 which is reproduced herein under.

“44. Transfer by one co-owner:- Where one of two or more co-owners of 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 or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions of liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.”

13. A perusal of the above quoted provision shows that where one of two or more co-owners of 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 or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions of liabilities affecting at the date of the transfer, the share or interest so transferred.

14. Taking into account that it is nobody's case and there is a dwelling house, the second paragraph of Section 44 of the Transfer of Property Act, 1882 has no relevance. In the instant case, the finding of facts which have been arrived at by both the Courts below clearly shows that the Plaintiff, Defendant No.1 as well as the proforma Defendant Nos. 4 to 7 had rights over the Schedule-A property. Under such circumstances, the Defendant No.2 was competent to transfer his share to the Defendant No.1. The Defendant No.2 therefore was well within his rights to transfer his share of Schedule-A land to the Defendant No.1.

15. Under such circumstances, this Court is of the opinion that the learned Trial Court was justified in dismissing the suit and the decision in respect to Issue Nos. 5 and 6 have been rightly decided by the learned Trial Court. The learned First Appellate Court having not taken into account the provision of Section 44 of the Act of 1882 renders the impugned judgment and decree passed by the learned First Appellate Court bad in law and accordingly, taking into account that the substantial question of law which have been formulated is involved in the instant appeal, this Court therefore sets aside the impugned judgment and decree passed by the learned First Appellate Court dated 18.07.2001 passed in Title Appeal No.14/2000 and this Court further restores the judgment and decree dated 14.11.2000 passed by the

learned Trial Court in Title Suit No.29/1996.

16. Accordingly, the instant appeal stands disposed of.

17. The Registry is directed to forthwith return the LCR to the Court below.

JUDGE

Comparing Assistant