

GAHC010181292019



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

Case No. : RSA/223/2019

SRI KAMALESHWAR THAKURIA AND ANR
S/O- LATE NABIN THAKURIA, R/O- VILL.- DAULGURI, P.O. AND P.S.
KHETRI, DIST.- KAMRUP(M), ASSAM.

2: SRI MOHAN THAKURIA
S/O- LATE NABIN THAKURIA
R/O- VILL.- DAULGURI
P.O. AND P.S. KHETRI
DIST.- KAMRUP(M)
ASSAM

VERSUS

SMTI. SUBHADRA THAKURIA AND ORS.
W/O- LATE SHANTA RAM THAKURIA, R/O- VILL.- DAULGURI, P.O. AND P.S.
KHETRI, DIST.- KAMRUP(M), ASSAM, PIN- 782403.

2:SMT. ANAMIKA THAKURIA
D/O- LATE SHANTA RAM THAKURIA
R/O- VILL.- DAULGURI
P.O. AND P.S. KHETRI
DIST.- KAMRUP(M)
ASSAM
PIN- 782403.

3:RAJU THAKURIA
D/O- LATE SHANTA RAM THAKURIA
R/O- VILL.- DAULGURI
P.O. AND P.S. KHETRI
DIST.- KAMRUP(M)
ASSAM
PIN- 782403.

4:SMT. BARNALI THAKURIA

D/O- LATE SHANTA RAM THAKURIA
R/O- VILL.- DAULGURI
P.O. AND P.S. KHETRI
DIST.- KAMRUP(M)
ASSAM
PIN- 782403.

5:ON THE DEATH OF RESPONDENT NO 5
(PURNA CHANDA THAKURIA) HIS LEGAL HEIRS
REPRESENTED BY-

5.1:ARUP THAKURIA
S/O- LATE PURNA CHANDRA THAKURIA
R/O- VILL.- DAULGURI
P.O. AND P.S. KHETRI
DIST.- KAMRUP(M)
ASSAM

5.2:SMTI ANJU THAKURIA
R/O- VILL.- DAULGURI
P.O. AND P.S. KHETRI
DIST.- KAMRUP(M)
ASSAM

5.3:SMTI KUSUM THAKURIA
D/O OF LATE PURNA CHANDRA THAKURIA
R/O- VILL.- DAULGURI
P.O. AND P.S. KHETRI
DIST.- KAMRUP(M)
ASSAM

5.4:SMTI JAMINI THAKURIA
D/O OF LATE PURNA CHANDRA THAKURIA
R/O- VILL.- DAULGURI
P.O. AND P.S. KHETRI
DIST.- KAMRUP(M)
ASSAM

5.5:SMTI SABITA THAKURIA
D/O OF LATE PURNA CHANDRA THAKURIA
R/O- VILL.- DAULGURI
P.O. AND P.S. KHETRI
DIST.- KAMRUP(M)
ASSAM

6:STRUCK OFF
VIDE ORDER DATED 30.07.2022

7:STRUCK OFF
VIDE ORDER DATED 30.07.2022

8:STRUCK OFF
VIDE ORDER DATED 30.07.2022

9:STRUCK OFF
VIDE ORDER DATED 30.07.2022

10:STRUCK OFF
VIDE ORDER DATED 30.07.2022

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VIDE ORDER DATED 30.07.2022

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VIDE ORDER DATED 30.07.2022

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VIDE ORDER DATED 30.07.2022

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VIDE ORDER DATED 30.07.2022

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VIDE ORDER DATED 30.07.2022

17:STRUCK OFF
VIDE ORDER DATED 30.07.2022

18:STRUCK OFF
VIDE ORDER DATED 30.07.2022

19:STRUCK OFF
VIDE ORDER DATED 30.07.202

Advocate for the Petitioner : MR H K SARMA

Advocate for the Respondent : MR S HUSSAIN (r

:: PRESENT ::

THE HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

For the Appellants : Mr. H.K. Sarma,
Advocate.

For the Respondents : Mr. B. Islam,
Advocate.

Date of Hearing : 21.05.2024.

Date of Judgment : 14.06.2024.

JUDGMENT AND ORDER (CAV)

Heard Mr. H.K. Sarma, learned counsel appearing for the appellants as well as Mr. B. Islam, learned counsel representing the respondents.

2. This is a Regular Second Appeal under Section 100 of the Civil Procedure Code (CPC) where the judgment dated 03.05.2019 passed by the learned Civil Judge (Sr. Div.) No.3, Kamrup (M), Guwahati in Title Appeal No.27/2017, is under challenge.

3. Late Kahiram Thakuria was the predecessor of the appellants as well as the respondents. He had four sons, namely- Narayan Thakuria, Ram Charan Thakuria, Dharmeshwar Thakuria and Nabin Thakuria.

4. Late Kahiram Thakuria used to purchase plots of lands by the money of the joint income of the family. Sometimes, he also used to sell some of his lands.

5. After the death of Kahiram Thakuria, his sons jointly occupied the lands left behind by him. The sons also, used to purchase lands and sometimes they used to sell their lands.

6. The son Nabin Thakuria (since deceased) had two sons, namely- Kamaleshwar Thakuria and Mohan Thakuria.

7. Late Nabin Thakuria had occupied a plot of land measuring 2 Bighas 2 Kathas

and 19 Lechas covered by Dag No.103 of K.P. Patta No.110 situated in Dimoria Mouza in the district of Kamrup.

8. Late Kahiram Thakuria had purchased a plot of land measuring 7 Bighas 9 Lechas in the name of his son Ram Charan Thakuria. The said purchase was made on the basis of a registered sale deed. At that time, it was agreed that the aforesaid land measuring 7 Bighas 9 Lechas shall be transferred and mutated in favour of late Nabin Thakuria.

9. After the death of Nabin Thakuria, his legal heirs continued to reside over the said plot of land by constructing dwelling houses.

10. After the death of Kahiram Thakuria, his four sons started to live separately but the properties left behind by late Kahiram Thakuria, remained unpartitioned.

11. The sons of late Nabin Thakuria used to occupy the aforesaid 2 Bighas 2 Kathas 19 Lechas of land. On the eastern side of this plot of land, the land of one Rabindra Ram Dutta is situated.

12. In the month of March, 1959, Rabindra Ram Dutta wanted to sell his plot of land measuring 4 Bighas 10 Lechas covered by Dag No.102 of KP Patta No.109. Late Nabin Thakuria wanted to purchase the said land. Accordingly, the sale deed was executed on 10.03.1959.

13. After the purchase of 4 Bighas 10 Lechas land covered by Dag No.102 of KP Patta No.109, the total land occupied by late Nabin Thakuria became 7 Bighas 9 Lechas. Late Nabin Thakuria also got himself mutated in the land records.

14. In the year 1974, Ram Charan Thakuria died and in the year 1987, Nabin Thakuria expired.

15. Ram Charan Thakuria had left behind his two sons, namely- Purna Chandra Thakuria and Santaram Thakuria.

16. In the year 1990, Santaram Thakuria died.

17. Santaram Thakuria during his lifetime and Purna Chandra Thakuria had

mutated their names in the land records in respect of the joint family property.

18. Since the land, measuring 7 Bighas 9 Lechas was purchased by late Kahiram Thakuria in the name of late Ram Charan Thakuria, during his lifetime Ram Charan Thakuria never staked his claim over the property that was occupied by late Nabin Thakuria.

19. Late Purna Chandra Thakuria, the son of Ram Charan Thakuria, never filed an application for mutation of his land in respect of the land occupied and purchased by late Nabin Thakuria.

20. Although Purna Chandra Thakuria being the son of late Ram Charan Thakuria is entitled to inherit his father's properties, he did not stake his claim over the properties of late Nabin Thakuria because of a promise made by his father.

21. After the death of Santaram Thakuria, his wife and daughters got their names mutated in respect of the land occupied by Nabin Thakuria and also got the name of Purna Chandra Thakuria deleted from land records. It is alleged that the aforesaid mutation was done without issuing notice to other legal heirs.

22. In the meantime, some portion of the land occupied by late Nabin Thakuria was acquired by the Government for widening of the National Highway.

23. Thereafter, for the remaining lands, the sons of late Nabin Thakuria filed application for mutating their names in respect of the land that was occupied by late Nabin Thakuria. Mutation was done accordingly.

24. The said matter ultimately reached the Revenue Board because the said mutation was cancelled by the Addl. Deputy Commissioner, Kamrup. The Revenue Board dismissed the appeal filed by the sons of late Nabin Thakuria.

25. Therefore, the sons of late Nabin Thakuria filed the suit before the trial court seeking declaration of their right, title and interest over the suit land.

26. The defendants, i.e. the wife and their daughters of late Santaram Thakuria as well as Purna Chandra Thakuria had contested the case by filing a written statement.

27. They denied all the averments of the plaint and prayed for dismissal of the suit.

28. On the basis of the pleadings of the parties, the trial court framed the following issues:

1. Whether the plaintiffs had paid adequate court fee or not?
2. Whether there is any cause of action for the suit?
3. Whether the plaintiffs had right, title, interest over the suit land?
4. Whether the suit is barred by limitation?
5. Whether the plaintiffs are in possession of the suit land?
6. Whether the plaintiffs are entitled to the decree as prayed for?
7. To what other reliefs if any, the parties are entitled to?

29. The plaintiffs and the defendants examined some witnesses. On the basis of the evidence on record, the trial court dismissed the suit.

30. The plaintiffs filed the Regular First Appeal in the court of the Civil Judge No.3 (Sr. Div.), Kamrup (M), Guwahati.

31. The first appellate court framed two points for determination as under:

1. Whether the suit is maintainable in the eye of law?
2. Whether the suit land was purchased by late Kahiram Thakuria during his lifetime?

32. The learned first appellate court answered these two points for determination against the plaintiffs/appellants and dismissed the appeal.

33. The second appeal was admitted for hearing upon two substantial questions of law, which are as under:

1. Whether the appellants/plaintiffs who are the legitimate successors of late Nabin Thakuria can be deprived of their share of inherited paternal property/suit property inspite of having verbal family settlement of inherited properties/purchased properties amongst the four sons namely- late Narayan Thakuria, late Ramcharan Thakuria (the father-in-law)/(grandfather of defendants/respondent nos.1, 2, 3 and 4), late Dharmeswar Thakuria and Nabin Thakuria (the father of plaintiffs/appellants) of late Kahiram Thakuria (since deceased) which (family settlement) in fact, took place before the death of Ram Charan Thakuria (father-in-law)/(grandfather of defendants /respondent nos.1, 2, 3 and 4) in the year 1974 and also before the death of Nabin Thakuria (the father of the plaintiffs/appellants) in the year 1987?

2. Whether the appellant court's judgment failed to comply with the provision of law as laid down in Order 41 Rule 31 of the Code of Civil Procedure?

34. I have considered the submissions made by the learned counsel of both sides.

35. The Supreme court in *Malluru Mallappa v. Kuruvathappa*, (2020) 4 SCC 313 has held as under—

“16. In *VinodKumar v. Gangadhar* [*Vinod Kumar v. Gangadhar*, (2015) 1 SCC 391: (2015) 1 SCC (Civ) 521] this Court has reiterated the principles to be borne in mind while disposing of a first appeal, as under: (SCC p. 395, para 15)

“15. Again in *B.V. Nagesh v. H.V. Sreenivasa Murthy* [*B.V. Nagesh v. H.V. Sreenivasa Murthy*, (2010) 13 SCC 530 : (2010) 4 SCC (Civ) 808] , this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words : (SCC pp. 530-31, paras 3-4)

‘3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court [*H.V. Sreenivasa Murthy v. B.V. Nagesha*, 2008 SCC OnLine Kar 837] to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide *Santosh Hazari v. Purushottam Tiwari* [*Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179] , SCC p. 188, para 15 and *Madhukar v. Sangram* [*Madhukar v. Sangram*, (2001) 4 SCC 756] , SCC p. 758, para 5.)”

36. In *Shasidhar v. Ashwini Uma Mathad* [*Shasidhar v. Ashwini Uma Mathad*, (2015) 11 SCC 269] , it was held as under :

“21. Being the first appellate court, it was, therefore, the duty of the High Court [*Shasidhar v. Ashwini Uma Mathad*, 2012 SCC OnLine Kar 8774] to decide the first appeal keeping in view the scope and powers conferred on it under Section 96 read

with Order 41 Rule 31 of the Code mentioned above. It was unfortunately not done, thereby, causing prejudice to the appellants whose valuable right to prosecute the first appeal on facts and law was adversely affected which, in turn, deprived them of a hearing in the appeal in accordance with law."

37. Reverting to the case in hand, I have found that the learned appellate court, in the name of drawing up point for determination, has actually framed two new issues and answered those two issues. It is not allowed by law.

38. An appeal is a remedial concept determined as an individual's right to seek justice against an unjust decree/order by referring it to a Superior Court. Sections 96 to 99A; 107 to 108 & [Order 41](#) of the [Code of Civil Procedure, 1908](#) deal with appeals from original decrees known as First appeals. An appeal under CPC is a legal process in which a higher forum reviews the decision of a lower forum on both legal and factual grounds. The word appeal has nowhere defined in the Code of Civil Procedure. The term appeal means the judicial examination by a higher court of the decision of an inferior court. Appeal in other word means the removal of a cause from an inferior court to superior court for purpose of testing the soundness of the decision of inferior court. An appeal in legal parlance is held to mean the removal of a cause from an inferior subordinate to superior tribunal or forum in order to test and scrutinize the corrections of impugned decisions.

39. The appellate court is bound to determine whether the judgment passed by the lower court is correct or not. In the case in hand, I have found that in the name of drawing up points for determination, the appellate court has actually framed two new issues which are factual issues and are to be proved by adducing evidence. The appellate court has answered these two issues against the appellants though no evidence was adduced by the parties to that effect. This is not allowed by law.

40. The appellate court has failed to analyze and to express its opinion as to whether the trial court had rightly or erroneously decided the issues framed by it. Rather, the appellate court has passed a new trial court judgment. This is also not allowed by law.

41. Therefore, the impugned judgment is bad in law for non-compliance of

provisions of law as laid down in Order 41 Rule 31 of the Code of Civil Procedure.

42. The appeal is allowed. The impugned judgment dated 03.05.2019 passed by the learned Civil Judge No.3, Kamrup (M), Guwahati in Title Appeal No.27/2017, is set aside.

43. The case is remanded to the first appellate court for passing a fresh judgment after hearing oral arguments of both sides.

Send back the LCR.

JUDGE

Comparing Assistant