

GAHC010181462004



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

Case No. : RSA/132/2004

PYARA SINGH AND ORS

VERSUS

SIBA PRASAD DUTTA AND ORS
INDIA

Linked Case : RSA/133/2004

PYARA SINGH AND ORS

VERSUS

SIBA PRASAD DUTTA AND ORS
ASSAM

Advocate for the Appellants : Mr. G. N. Sahewalla, Sr. Advocate
Ms. K. Bhattacharjee, Advocate

Advocate for the Respondents : Mr. B. D. Deka, Advocate

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 21.05.2024

Date of Judgment : 21.05.2024

JUDGMENT AND ORDER (ORAL)

Heard Mr. G. N. Sahewalla, the learned senior counsel assisted by Ms. K. Bhattacharjee, the learned counsel for the Appellants in both the Appeals and Mr. B. D. Dekka, the learned counsel appearing on behalf of the respondent.

2. Both the Appeals are taken up together taking into account that the RSA No.133/2004 arises out of the Title Suit No.32/1978 and RSA No.132/2004 arises out of the Title Suit No.42/1981. From a perusal of the materials on record, it reveals that the Title Suit No.42/1981 is a cross suit to Title Suit No.32/1978. It is in view of the similarities of the facts and the issues involved, both the learned Trial Court as well as the learned First Appellate Court had taken up both the suits as well as the Appeals filed together and this Court therefore takes up the two Second Appeals together for disposal by this common judgment.

3. From a perusal of the order dated 13.08.2004 passed in both the Second Appeals, it transpires that in both the Second Appeals, the same substantial questions of law have been formulated which are as under:-

(i) Whether the learned Appellate Court committed error of law in not taking into consideration Exhibits-21, 22, 23 and 24 on the ground that these were not tendered in evidence by any witness?

(ii) Whether the provisions of Section 44 of the Transfer of Property Act, 1882 and Section 3 and 4 of the Partition Act, 1893 are applicable in the instant case and whether the learned First Appellate Court erred in law in not considering the appellant's case in the light of the above provisions?

4. For deciding as to whether the two substantial questions of law so formulated in the present two Appeals are involved, this Court finds it relevant to take note of the brief facts which have led to filing of both the Appeals.

5. **Title Suit No.32/1978** was filed by one Sulakshan Singh, (since deceased) the

predecessor-in-interest of the present Appellants. In the said suit, it was the case of the plaintiff therein that the said plaintiff along with defendant No.1, Tara Singh (since deceased) had purchased a plot of land measuring 4 kathas in Dag No.458 covered by PP No.250/274 of South Amolapatty, Dibrugarh which was specifically described in Schedule-I of Title Suit No.32/1978. In the said suit, it was also mentioned that in the said Dag there was an additional area of 5 lechas which belonged to one Hari Prasanna Das. It was further alleged that the plaintiff and the defendant No.1 in the said suit carried on a business together and out of their joint income, the remaining 5 lechas of land which originally belonged to Hari Prasanna Das was purchased from his son after his death. It was alleged that both the plaintiff and the defendant No.1 jointly constructed a house over the said land which was described in Schedule-I to the plaint and both the plaintiff as well as the defendant No.1 used to reside. Sometime in the year 1975, the defendant No.2 who is the respondent herein in the present Appeals tried to take over the possession of the Schedule-I land forcibly. Thereafter, a proceedings under 107 of the Cr.P.C. was initiated by the defendant No.2 which was however dismissed. It was also mentioned that prior thereto, the defendant No.1 had filed the Revenue Partition Case No.22 of 1971-72 before the Additional Deputy Commissioner, Dibrugarh seeking perfect partition of his land claiming his share to be 2 kathas 5 lechas out of 4 kathas 5 lechas covered by Dag No.458/21 of PP No.15 corresponding to new Dag No.134 and new Patta No.21 situated at Amolapatty Ward, Dibrugarh Town, Mouza-Dibrugarh. It was alleged that the plaintiff did not get any notice in respect to the said Revenue Partition Case. It was further mentioned that the defendant No.1 on 15.05.1973 managed to obtain an ex-parte order for partition of the said land which the plaintiff came to learn from one Pyara Singh (since deceased) who was served with the notice dated 31.10.1974 from the Sub-Deputy Collector, Dibrugarh, East Circle informing that the land would be demarcated by the Town Lot Mandal on 02.11.1974. A challenge was made before the learned Additional Deputy Commissioner, Dibrugarh to the said Revenue Partition order and on the basis of the said challenge, the Revenue Partition Order was set aside vide an order dated 19.03.1975. Subsequently, when the defendant No.1 moved an application before the same Additional Deputy

Commissioner, Dibrugarh, an order dated 05.08.1975 was passed thereby setting aside the order dated 19.03.1975. An Appeal thereagainst was filed before the Assam Board of Revenue by the plaintiff. However, the same was rejected vide an order dated 19.07.1976.

6. At this stage, it may be apposite herein to mention that there was no further challenge to the Revenue Partition Order after the rejection of the Appeal of the plaintiff vide the order dated 19.07.1976 by the learned Assam Board of Revenue and accordingly, the order dated 15.05.1973 had attained finality.

7. Be that as it may, the plaintiff further alleged that the sale Deed which was executed by the defendant No.1 in favour of the defendant No.2 being Registered Sale Deed dated 08.08.1975 bearing Deed No.3124 of 1975 whereby 2 kathas 5 lechas of land was sold under Dag No.134/143 of PP No.21/68 of Amolapatty Ward, Dibrugarh Town, Mouza-Dibrugarh included a dwelling house and a saw mill. It was therefore contended in the plaint that upon the land as there was a dwelling house of the joint family property, the transfer could not be made by the defendant No.1 in favour of the defendant No.2. Under such circumstances, the plaintiff therefore challenged the Registered Deed of Sale which was executed by the defendant No.1 in favour of the defendant No.2; sought for a declaration that the plaintiff and the defendant No.1 were the joint owners of the 5 lechas of land which was specifically described in Schedule-II of the plaint and further also sought for declaration that on the basis of the Revenue Partition Case, the defendant No.1 did not acquire any right to a specific property for any transfer to be made in favour of the defendant No.2. In addition to that, a declaration was sought that the defendant No.1 had no right, title and interest in any part of the property described in Schedule-I and Schedule-II as he had absolutely made over the same to the plaintiff.

8. The defendant No.1 filed a written statement in the said suit stating inter-alia that the Schedule-I land was purchased by the defendant No.1 alone out of his earnings. However, the plaintiff's name was included as he was then living with the defendant No.1 and also out of filial affection and to respect the sentiments of the defendant's elder brother Bhagat Singh who lived in Punjab. It was categorically mentioned that the plaintiff never paid any

amount for the said purchase. In respect to the 5 lechas of land which is Schedule-II land, it was categorically stated that it was the defendant No.1 who purchased the said land. Further to that, it was mentioned that the plaintiff was only allowed to reside in a part of the house out of filial affection and he carried on his works independently. It was mentioned that there was no business carried on jointly at any point of time by the defendant No.1 with the plaintiff. It was further stated in the written statement that as there was some disputes between the plaintiff and the defendant No.1, a Revenue Partition Proceedings was initiated and on the basis thereof, a final partition order was passed on 15.03.1973 and the original Patta was split up and a separate Patta being Patta No.21/68 of Dag No.134/143 in respect of 2 kathas 5 lechas of land was issued in favour of the defendant No.1. It was further stated that the land which was transferred to the defendant No.2 solely belonged to the defendant No.1 after the revenue partition was carried out, and as such, the plaintiff had no right whatsoever in the land which was sold to the defendant No.2.

9. The defendant No.2 also filed a separate written statement wherein the statements made are similar in contents to the written statements filed by the defendant No.1. It was however mentioned that 107 Cr.P.C. Proceedings was initiated at the behest of the plaintiff and not the defendant No.2. It was also denied that the defendant No.2 had initiated the 145 Cr.P.C. proceedings as was stated in the plaint.

10. On the basis of the said statements and allegations made in the respective pleadings of the parties, the learned Trial Court framed as many as 7 Issues. Relevant herein to take note of is the Issue No.4 which was as to whether the defendant No.1 alone purchased the land measuring 5 lechas from the defendant No.3 and if so whether the sale of the defendant No.1 in favour of the defendant No.2 is valid and operative in law. The Issue No.5 stipulated as to whether the plaintiff had right, title and interest over the suit land and the house.

11. Now coming to the second suit, i.e **Title Suit No.42/81**, it is seen that the defendant No. 2 in the earlier suit as plaintiff instituted the second suit wherein the plaintiff of the earlier suit was the defendant No. 1 and the defendant No.1 (Tara Singh)

in the earlier suit was the defendant No.4 in the subsequent suit. In addition to that, the sons of the Defendant No.1 of Title Suit No.42/81 were arrayed as defendant Nos.2 & 3. In order to avoid prolixity, this Court is not repeating the said averments. However, it is relevant to observe that the case which was set out by the defendant No.2 in the written statement in Title Suit No.32/78 was the case of the plaintiff in the present suit. In this present suit the plaintiff sought for declaration of his right, title and interest over the land which was described in Schedule-A to the plaint of the subsequent suit which was parimateria in content with the Schedule-3 of the earlier suit except further more details being given as regards the houses standing thereon as well as the saw mill. The plaintiff further sought for declaration of his right, title and interest over the suit premises described in Schedule-A; for recovery of possession of the Schedule-A. Further to that, the plaintiff also claimed for mense profit by way of compensation, the details of which were given in Schedule-B to the plaint of the subsequent suit.

12. The defendant Nos.1, 2 & 3 of the subsequent suit filed a joint written statement. The stand being similar with the stand of the plaintiff in Title Suit No.32/1978 in the earlier suit for which this Court is not repeating the contents thereof again.

13. On the basis of the said pleadings, the Trial Court framed 8 Issues in the subsequent suit and the Issue No.4 was as to whether the defendant No. 1 was the absolute owner in possession of the suit premises by way of family settlement and the Issue No. 5 was whether the plaintiff had acquired any right, title interest over the suit premises. Both the suits were consolidated by the learned Trial Court. The parties to both the suits adduced their respective evidence, both oral and documentary. The learned Trial Court vide common judgment and decree dated 12/10/2001 decreed Title Suit No.32/1978. The Title Suit No.42/81 was dismissed.

14. Being aggrieved, two Appeals were preferred by the Respondent herein which were registered and numbered as Title Appeal No. 1/2001 as well as Title Appeal No.2/2001 before the Court of the District Judge, Dibrugarh. Later on, the said appeals

were endorsed to the Court of the Additional District Judge, Dibrugarh for disposal. The learned First Appellate Court set aside the judgment and decree dated 12/10/2001 passed by the learned Trial Court by a common judgment and decree dated 21/05/2004. The learned First Appellate Court dismissed Title Suit No. 32/1978. However Title Suit No. 42/81 was decreed declaring the right, title and interest of the Plaintiff / Respondent herein over the suit premises described in Schedule-A to the plaint of Title Suit No. 42/81; for eviction of the Defendants/the Appellants herein as well as for payment of future compensation @ Rs.150/- per month from the date of the judgment till recovery of possession. Being aggrieved, the present Appeals have been filed.

15. In the above perspective let this Court therefore consider as to whether the two substantial questions of law so formulated by this Court vide the 13.08.2004 are at all involved in the present Appeals.

16. This Court has heard Mr. G. N. Sahewalla, the learned senior counsel appearing on behalf of the appellant in both the Appeals and Mr. B. D. Deka, the learned counsel appearing on behalf of the respondent in both the Appeals and duly considered their respective submissions.

17. The first substantial question of law, so formulated is whether the first Appellate Court committed error in law in not taking into consideration Ext.21, 22, 23 & 24 on the ground that these were not tendered in evidence by any witness. This Court has duly taken note of the judgment of the learned First Appellate Court where at internal page No. 15, the learned First Appellate Court duly deals with this Ext. 21,22, 23 & 24. The learned First Appellate Court while dealing with these Exhibits had also taken note of the provisions of Section 67 of the Indian Evidence Act 1872, which mandate as to how a document is required to be proved. The learned First Appellate Court had categorically held that the Exhibits which were exhibited as Ext. 21, 22, 23 & 24 were not proved by examining the witnesses. Further to that, the learned First Appellate Court had taken note of that in respect to these Exhibits when the Plaintiff witness was cross-

examination, he also categorically stated that they had no personal knowledge about the running of the furniture shop at Digboi and that the engine was purchased in 1952 from Sardar Sarani Singh and Dilip Singh. The witness only stated that they had heard about the joint business and the joint family. This Court further is of the opinion that this substantial question of law so formulated cannot be a substantial question of law involved in the instant Appeal for the simple reason that to be a substantial question of law involved in the Appeal, the decision made as regards the question of law so formulated would necessarily have to change the course of the litigation. Under such circumstances, in the opinion of this Court the first substantial question of law is not involved in the instant Appeal.

18. The second substantial question of law pertains to as to whether the provisions of Section 44 of the Transfer of Property Act, 1882 (for short, 'the Act of 1882') and Sections 3 & 4 of the Partition Act, 1893 (for short, 'the Act of 1893') are applicable in the instant case and whether the learned First Appellate Court erred in law in not considering the Appellants' case in the light of the above provisions. For the purpose of deciding the same, this Court finds it relevant to take note of Section 44 of the Act of 1882. The said Section is quoted 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 and 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.”

19. From a perusal of the said Section, it reveals that where one of two or more co-owners of immoveable property who are legally competent on their behalf to transfers his or her share of such property or any interest therein, the transferee acquires the rights 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 and liabilities affecting at the date of the transfer, the share or interest so transferred. Therefore, a simple reading of the said provision clearly shows that a co-owner is competent/empowered if he/she/they is/are legally competent to transfer his/her/their share of such property or interest therein and the transferee(s) would acquire the right of the transferor co-owner to joint possession or other common or part enjoyment of the property. However, the second paragraph to Section 44 of the Act of 1882 creates an exception whereby a transferee of the share of a dwelling house belonging to a undivided family being not a member of the family, would not entitled to a joint possession or other common or part enjoyment of the house. Be that as it may, a conjoint reading of both the parts of Section 44 of the Act of 1882 do not in any manner bar a co-owner who is otherwise legally competent to transfer his/her/their right or interest in respect to a joint property wherein there is a dwelling house, but if such transfer is made, the transferee would not be entitled to the joint possession or other common or part enjoyment of the dwelling house of an undivided family which is otherwise permissible in respect to other properties.

20. The Supreme Court in the case of *Dorab Cawasji Warden vs. Coomi Sorab Warden and Others*, reported in (1990) 2 SCC 117 had the occasion of dealing with Section 44 of the Act of 1882 and more particularly to the second paragraph of the said Section. It was observed that in order to attract the second paragraph of Section 44 of the Act of 1882, the subject matter of the transfer has to be a dwelling house belonging to a undivided family and the transfer is a share in the same to a person who is not a member of the

family. It was further observed that in order to satisfy the first ingredient of clear existence of the right and its infringement, the plaintiff will have to show a probable cause that the suit property is a dwelling house and it belonged to an undivided family. The Supreme Court further observed that the dominant purpose of the second paragraph of Section 44 of the Act 1882 was that if there is any danger of an injury or violation of the corresponding right of the other members of the family, an irreparable harm to the plaintiff and the Court's interference is necessary to protect the interest of the family.

21. The Supreme Court further took into account the judgement of the Full Bench of the Allahabad High Court in the Case of *Sultan Begum Vs Devi Prasad*, reported in *5ALJ 5352* wherein the issue pertained to as regard Section 4 of the Partition Act, 1893. It was observed that the words "undivided family" as used in Section 4 of the Partition Act, 1893 appeared to be borrowed from Section 44 of the Act of 1882. The last Clause of that Section prescribed that where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in Section 44 of the Act of 1882 shall be deemed to entitle him to joint possession or other common or part enjoyment of the dwelling house. It was observed that the said provision is clearly of a general application and the effect of it is to compel the transferee of a dwelling house belonging to an undivided family, who is a stranger to the family to enforce his right in regard to such share by partition. It was further observed that the purpose behind the second paragraph of Section 44 of the Act of 1882 was to prevent a transferee of a member of a family who is an outsider from forcing his way to a dwelling house in which other members of his transferor's family has a right to live and that the words "undivided family" must be taken to mean undivided to a dwelling house in question, and to be a family who owns the house, but has not divided it.

22. In a subsequent judgement by the Supreme Court in the case of *H. Basudeva Pai Vs Kamarunissa*, reported in *(2011) 15 SCC 768*, while dealing with Section 4 of the Act of 1893 it was observed that the said provision was parimateria to Section 44 of the Act

1882. Paragraph Nos.6 & 7 of the said judgment being relevant is reproduced herein under:-

“6. This Court pointed out that in order to attract the second para of Section 44, the subject-matter of the transfer has to be a dwelling house belonging to an undivided family and the transfer should be of a share in the same to a person who is not a member of the family. In order to satisfy the first ingredient, the plaintiff would have to show that the suit property is a dwelling house and it belongs to an undivided family.

7. With regard to the restriction on the rights of a transferee for joint possession, this Court pointed out that the dominant purpose of the second para of Section 44 of the Transfer of Property Act is that there is a danger of an injury or violation of the corresponding rights of the other members of the family and an irreparable harm to the plaintiff and the Court's interference would be necessary to protect the interest of the plaintiff. After referring to Sultan Begam v. Debi Prasad, Nil Kamal Bhattacharjya v. Kamakshya Charan Bhattacharjya and, Kshirode Chunder Ghoshal v. Saroda Prosad Mitra (vide IC para 23), this Court observed that the proposition of law stated in Udayanath Sahu v. Ratnakar Bej was a correct statement of law. We may mention that all these judgments noted by this Court were cases where a stranger to the family attempted to get joint possession of the dwelling house on the ground that the stranger had purchased an undivided share in the property. This Court pointed out in Dorab Cawasji case that the provisions of Section 4 of the Partition Act were pari materia with the provisions of Section 44 of the Transfer of Property Act, 1882. It was observed that the notions of the coparcener property of a Hindu joint family were wholly irrelevant in considering Section 44 of the Transfer of Property Act and what is relevant for the purpose of such proceeding is whether the dwelling house belonged to an undivided family. Says, the Court:

“We have already pointed that even if the family is divided in status in the sense that they were holding the property as tenants in common but undivided qua the property, that is the property had not been divided by metes and bounds, it would be within the provisions of Section 44 of the Act.”

23. This Court further finds it relevant to take note of another judgement of the Orissa High Court in the case of **Bhim Singh & Another vs. Ratnakar Singh & Others**, reported in

AIR 1971 Orissa 198 and paragraph 21 of the said judgment being pertinent to issue involved is reproduced herein under:-

*“21. If in this state of things, a member of the family transfers his share in the dwelling house to a stranger paragraph 2 of [Section 44](#) of the Transfer of Property Act comes into play and the transferee does not become entitled to joint possession or any joint enjoyment of the dwelling house although he would have the right to enforce a partition of his share. The object of the provision in [Section 44](#) is to prevent the intrusion of the strangers into the family residence which is allowed to be possessed and enjoyed by the members of the family alone in spite of the transfer of a share therein in favour of a stranger. The factual position as has been determined is that the property is still an undivided dwelling house, possession and enjoyment whereof are confined to the members of the family. The stranger-transferees being debarred by law from exercising right of joint possession which is one of the main incidences of co-ownership of the property should be kept out. This view has been adopted in this Court in the case of [Udayanath Sahu v. Katnakar Bej](#), *AIR 1967 Orissa 139*. His Lordship the present Chief Justice held:--*

"If the transferee (stranger) gets into possession of a share in the dwelling house, the possession becomes a joint possession and is illegal. Courts cannot countenance or foster illegal possession. The possession of the defendant-transferee in such a case becomes illegal. Plaintiff's co-owners are entitled to get a decree for eviction or even for injunction where the transferee threatens to get possession by force. If there had been a finding that there was severance of joint status but no partition by metes and bounds, defendant 1 was liable to be evicted from the residential houses and Bari under [Section 44](#) of the T. P. Act."

24. Therefore, above principles of law as settled by the Supreme Court as well as the various High Courts, it would be seen that there is no bar in transferring a joint family property by a co-owner who is legally competent to do so. But, if it is a property is in respect to share of a dwelling house belonging to an undivided family and the transferee is not a member of the family or for the matter is stranger to the family, the transferee

would not be entitled to joint possession or other common or part enjoyment of the house. It is also clear that there is no bar in transferring the share of the co-ownership property or even a dwelling house. The transferee would not be entitled to joint possession of the dwelling house but still can claim partition.

25. In the instant case, though the provisions of Section 44 of the Act of 1882 have been pressed into service read with Sections 3 & 4 of the Act of 1893, but the property as described in Schedule-A to Title Suit No.41/1981 have already been partitioned by metes and bounds by way of a revenue partition as far back as on 15.03.1973 for which the Late Tara Singh was issued a separate patta. This issuance of separate patta has not been challenged by the predecessor of the appellants or even by the Appellants. What was challenged was the order by which the separate patta was directed to be created. This order which was put to challenge was not interfered with by the learned Board of Revenue in as much as the Appeal filed by the predecessors of the appellants herein was dismissed on 19.07.1976. This order of issuance of separate patta therefore had attained finality.

26. This Court further takes notes of that the grant of a revenue perfect partition as well as issuance of a separate patta is outside the jurisdiction of the Civil Courts in view of Section 154 of the Assam Land and Revenue Regulations, 1886. This Court at this stage also finds it very pertinent to take note of a recent judgement of the Supreme Court in the case of *Ram Balak Singh vs. State of Bihar & Another*, reported in *2024 SCC OnLine SC 725* wherein the Supreme Court observed that though revenue entries are not documents of title and do not ordinarily confer or extinguish title in land, but nonetheless when the Revenue Authorities or the Consolidation Authorities who are competent to determine the rights of the parties by exercising powers akin to the Civil Courts, any order or entry made by such authorities which attains finality has to be respected and given effect to. In view of the said exposition of law and taking into account that the revenue partition has already attained finality as far back as on 19.07.1976 and there being no challenge to the

same by invoking the jurisdiction under Article 226 of the Constitution before this Court, the substantial question of law as regards application of Section 4 or Section 4 of the Act 1882 or Section 3 or 4 of the Act of 1893 to the instant dispute, in the opinion of this Court do not arise in as much as the property which has been specifically described in Schedule-A in Title Suit No.42/81 had already partitioned by metes and bounds. Under such circumstances, the second substantial question of law which has been formulated is not involved in the instant Appeal.

27. Consequently, both the Appeals stands dismissed with costs quantified at Rs. 25,000/- each. In addition to that, the respondents herein shall be entitled to the costs throughout the proceedings.

28. Return the LCR forthwith.

JUDGE

Comparing Assistant