

GAHC010208952007



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

Case No. : RSA/5/2007

ON THE DEATH OF KAREN NESSA HER LEGAL HEIRS ARE KASIM ALI SON
and 5 ORS,
MUJAFAR ALI SON MURABBAR ALI SON AKABBAR ALI SON SARBHANU
BEGUM DAU JAHURA BEGUM DAU AS PER HON'BLE COURT'S ORDER
DTD 23-01-2012 IN MC. NO. 200/2011

VERSUS

ON THE DEATH OF MD KALIMUDDIN

2:1A. TAIZUDDIN

SON.

3:1B SAHEB ALI ALIAS SAIBUDDIN
SON

4:1C. JAHEDUL ISLAM

SON

5:1D. MAFIDUL HOQUE

SON

6:1E. JIAUL HOQUE
SON

7:1F. DELUARA BEGUM
DAUGHTER

8:1G SANIARA BEGUM

DAUGHTER.

9:1H FULZAN NESSA
WIFE.

10:2. MD. FAJAL ALI

11:3. MD. MAJAR ALI

12:4. MD. KASHEM ALI
NO.2 TO 4 ARE SONS OF HAJI SAMIR UDDIN.

13:5. LEGAL HEIRS OF LATE ALI SHEIKH.

14:A WIFE - MUSTT. TASIRAN NESSA

15:B SON - MD. TASER ALI

16:C SON - MD. RASHID ALI

17:D DAUGHTER - MUSTT. SAHIDA KHATUN

18:E DAUGHTER - MUSTT. SALEHA KHATOON

19:6. LEGAL HEIRS OF SALIMUDDIN

20:A WIFE - MUSTT. BASIRAN NESSA.

21:B SON - MD. MAINAL HOQUE

22:C SON - MD. AINAL HOQUE

23:D SON - MD. MAFIZUL HAQUE

24:E SON - MD. MARTOOZ ALI

25:F SON - MD. SAHIDUL HAQUE

26:G DAUGHTER - MST. MONOWARA BEGUM

27:H DAUGHTER - MUSTT. MARJINA BEGUM

28:7. MUSTT. NAZIRAN NESSA

D/O LATE HAJI SAMIRUDDIN
VILL. MAJGAON
DIST. BARPETA.

29:8. LEGAL HEIRS OF LATE KADBHANU NESSA.

30:A SON - MD. MANNAF ALI

31:B SON - MD. NURUL ISLAM

32:C SON - MD. ABDUL HALIM.

33:9. SHRI TARINI KANTA MANDAL
S/O LATE TARAKANTA MANDAL

34:10. HAIDAR ALI

S/O SAMSUL HOQUE

35:11. KHANDAKAR AKLIMA KHATOON

W/O HAIDAR ALI. NO.1A

1B

1C

1D

1E

1F

1G

2

3

4

5A

5B

5C

5D

5E

6A

6B

6C

6D

6E

6F

6G

6H

8A

8B

8C AND 9 ARE RESIDENTS OF VILL. KALAHBHANGA
MOUZA. DAMAKACHAKABAUSHI

DIST. BARPETA

ASSAM. NO.10 and 11 ARE RESIDENTS OF VILL. BALUGURI
MOUZA. JANIA

DIST. BARPETA

ASSAM

Advocate for the Petitioner : MR.K BASAR

Advocate for the Respondent : MR.D SUR

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

Date : 02-04-2024

JUDGMENT & ORDER

The instant appeal under Section 100 of the Code of Civil Procedure 1908, (for short, the Code) is directed against the judgment and decree dated 25.07.2006 passed by the Court of the learned Civil Judge, Barpeta (for the sake

of convenience is referred to as “the 1st Appellate Court”) in Title Appeal No.57/2005 whereby the judgment and decree dated 26.08.2005 passed in Title Suit No.31/2003 by the learned Munsiff No.1 Barpeta (for the sake of convenience is referred to as “the learned Trial Court”) was set aside and quashed. This Court vide order dated 10.01.2007 admitted the instant appeal by formulating two substantial questions of law which reads as under:

(1). Whether the ground or/rejection of the mutation can confer title of the property?

(2). Whether the oral gift under Mohammedan Law can be held to be proved when the parties in whose favour the alleged gift was made failed to prove the three golden principles of making oral gift of Mohammedan Law i.e. declaration, acceptance and delivery of possession?

2. For the purpose of deciding as to whether the said substantial questions of law are involved in the instant appeal, this Court finds it relevant to take note of the brief facts which led to the filing of the instant appeal.

3. The appellant herein as the plaintiff instituted a suit being Title Suit No.31/2003, claiming declaration of her share as per the Mohammedan Law in respect to the lands fully described in Schedule A, Schedule B, Schedule C and Schedule D to the plaint as well as for partition and for permanent injunction. The cause of action for which the said suit was filed was that after the judgment and decree passed against the plaintiff by the learned 1st Appellate Court in Title Appeal No.30/1989, which was confirmed by this Court in second appeal being SA No.191/1989, the defendants were trying to dispossess the plaintiff

from her possession of the suit land.

4. Pursuant to the filing of the said suit, the defendants collectively filed a written statement wherein the rights of the plaintiff to claim any partition or share in respect to the schedule lands was denied. It was the specific case of the defendants in their written statement that the father of the plaintiff as well as the defendants Nos.1 to 6 gifted 21 bighas 0 kathas 14 lessas of land by oral gift covered by Dag Nos.331, 333, 352, 365, 362, 379, 383 and 775 and, thereupon they had been possessing the said land in equal shares. It was also the specific case of the defendants that in respect to patta No.78, land measuring 27 bighas 0 kathas 1 lessa was also donated by the father of the said defendant Nos.1 to 6 and the plaintiff to his six sons and the said defendants duly accepted the gift and had been in peaceful possession thereof equally distributing amongst themselves. It was also the specific stand that the father of the plaintiff as well as the defendant Nos.1 to 6 purchased 4 kathas of land under Dag No.82 and 2 kathas 3 lessas of land under Dag No.698 of village Kalahbhanga in the name of Late Hatem Ali, which was the share of the plaintiff and the said land is in possession of the plaintiff. It was also stated that the plaintiff had no right title and interest over the suit lands. Apart from that, it was also the stand of the defendants that the plaintiff filed as many as five applications seeking mutation of her name in respect to the suit lands which were rejected by the learned SDC Barnagar Circle by passing an order dated 23.02.1989 and thereupon the plaintiff did not file any appeal against the said order.

5. Pursuant to the pleadings, the learned Trial Court framed as many as six

issues. The issue No.4 relates to as to whether the plaintiff has right, title and interest by way of inheritance to the extent of her share as per the Mohammedan Law in respect to the lands as described in the Schedules to the plaint. The learned Trial Court while deciding the said issue duly took into account the evidence of the defendant witness No.1 that Late Samiruddin the father of the plaintiff as well as the defendants had gifted his properties in favour of his six sons and they are in possession of the suit land in equal shares. However, the learned Trial Court without considering that pursuant to the gift made in the year 1971, the lands have been duly mutated in favour of the six sons of Late Samiruddin which was evidenced as per Exhibit 'Ka' to 'Gha' and 'Unga' to 'Ja' held that defendants failed to prove the three requirement of gift as per the Mohameddan Law declaration acceptance and delivery of possession. It was also observed that mere mutation of the suit land did not confer right, title and interest and as such came to an opinion that as there was no valid gift, the plaintiff was entitled to her share as per the Mohammedan Law over the suit properties.

6. Being aggrieved, an appeal was preferred by the defendants before the Court of the learned Civil Judge Barpeta, which was registered and numbered as Title Appeal No.57/2005. The learned 1st Appellate Court after discussing the materials on record came to a categorical finding of fact that during the lifetime of Late Samiruddin the father of the parties gifted his properties amongst his sons by way of gift and the defendants were possessing the suit land since 1971. It was also opined by the learned 1st Appellate Court that the defendants by accepting the gift by their father have been enjoying peacefully the land of their share separately. It was opined that the defendant admitted that their

father Late Samiruddin purchased 4 kathas of land under dag No.82 and 2 kathas 3 lessas of land under Dag No.698 of village Kalahbhanga in the name of Late Hatem Ali, the husband of the plaintiff and this 1 bigha 1 katha 3 lessas of land was given to the plaintiff as her share by Late Samiruddin. It was, therefore, opined that the plaintiff had no right, title over the remaining suit lands. On the basis of the said opinion, the learned 1st Appellate Court decided the said appeal in favour of the defendants thereby allowing the appeal and dismissing the suit. Being aggrieved, the present appeal has been filed.

7. In the backdrop of the above, this Court had heard Mr. H Das, the learned counsel appearing on behalf of the appellant, who urged that the substantial question of law which had been formulated by this Court on 10.01.2007 are duly involved in the instant appeal. The submissions so made have been duly considered. Under such circumstances, this Court now finds it relevant to take into consideration as to whether the said substantial questions of law formulated are actually involved in the instant appeal.

8. The first substantial question of law is as to whether the ground of rejection of the mutation can confer title of the property. In the opinion of this Court, the said cannot be said to be a substantial question of law involved in the instant appeal taking into account that in order to be a substantial question of law the question of land would be of such substance that any decision rendered in the said question would not affect the decision in the proceedings. This Court had also duly taken note of that the learned 1st Appellate Court did not decide the appeal merely on the basis of the rejection of the mutation application filed

by the plaintiff, rather the learned 1st Appellate Court has decided the appeal on the basis of the evidence on record to the effect that Late Samiruddin during his lifetime in the year 1971 had duly gifted the suit land in favour of the defendant Nos.1 to 6 and thereupon during the lifetime of Late Samiruddin the lands were mutated in favour of the defendant Nos.1 to 6, who had been occupying and enjoying their lands in separate possession. Therefore, the first substantial question of law so formulated in the case by this Court cannot be regarded as a substantial question of law involved in the instant appeal.

9. The second substantial question so formulated is as to whether the oral gift under Mohammedan Law can be held to be proved when the parties in whose favour the alleged gift was made, failed to prove the three golden principles of making oral gift of Mohammedan Law i.e. declaration, acceptance and delivery of possession. The said question so formulated in the opinion of this Court is a question of fact or at best a mixed question of law and fact cannot be said to be a substantial question of law involved in the instant appeal, inasmuch as, whether the gift was accompanied by declaration, acceptance and delivery of possession are questions of fact. It is also seen that the learned 1st Appellate in paragraph 15 of the judgment have categorically held that there was a valid gift. This finding of fact cannot be interfered with in a proceeding under Section 100 of the Code sans any perversity, which the appellant failed to show.

10. This Court had also taken note of Section 152 of the Mohammedan Law and from the materials on record and the findings arrived at by the learned 1st Appellate Court, it is seen that the said gift so made was in consonance with the

said provision.

11. Under such circumstance, this Court does not find any substantial question of law involved in the instant appeal for which, the appeal stands dismissed with costs quantified at Rs.11,000/-. Further to that, the respondents herein, shall also be entitled to costs throughout the proceedings.

12. Registry is directed to return back the LCR.

JUDGE

Comparing Assistant