

GAHC010005822009



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

Case No. : RSA/138/2009

AM NARAYAN UPADHAYA and ANR,
S/O LATE JAYANARAYAN UPADHYAY.

2: SMTI. GANGA DEVI

W/O LATE JAYANARAYAN UPADHYAY
BOTH ARE RESIDING AT VILL. KANYAGHAT
MOUZA BALIPARA
P.S. RANGAPARA
DIST. SONITPUR
ASSAM

VERSUS

ON THE DEATH OF MAYA DEVI BAMUNI HER LEGAL HEIRS SMT.
BHAGIRATHI DEVI DAU.
AS PER HON'BLE COURT'S ORDER DTD. 07.02.2012 IN MC. NO. 3689/2011

Advocate for the Petitioner : D MAZUMDAR

Advocate for the Respondent : MR.S CHAKRABARTY

Linked Case : RSA/127/2014

AM NARAYAN UPADHYAY
S/O LT. JAY NARAYAN UPADHAY
R/O VILL. KANYAGHAT
MOUZA-BALIPARA

DIST. SONITPUR
ASSAM.

VERSUS

BHAGIRATHI DEBI and ANR.
D/O LT. JOY NARAYAN UPADHAYAY
R/O VILL. KANYAGHAT
MOUZA-BALIPAA
DIST. SONITPUR
ASSAM.

2:ABDUL JABBAR
S/O LT. ABDUL GAFUR
VILL. KEKOKALI
MOUZA-BALIPARA
DIST. SONITPUR
ASSAM

Advocate for : MR. D MAZUMDAR
Advocate for : MS.B DAS appearing for BHAGIRATHI DEBI and ANR.

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 28-03-2024

JUDGMENT AND ORDER

(CAV)

Heard Mr. D. Mozumder, learned senior advocate, assisted by Mr. P. Borah, learned counsel for the appellant in both the appeals and also heard Mr. A. Dasgupta, learned senior counsel, assisted by Ms. B. Das, learned counsel for the respondents.

Facts of the case, in brief:

2) One Smt. Maya Debi Bamuni (mother of the respondent) was

the plaintiff in Title Suit No. 55/2002. There were two defendants in the said suit, namely, (1) Sri Am Narayan Upadhyay (the appellant herein), and (2) Smt. Ganga Debi (mother of the appellant herein). The said suit was filed for declaration, eviction of the appellant herein and his mother and for permanent injunction.

3) The said Title Suit No. 55/2002 was initially dismissed by the learned Civil Judge (Junior Division), Sonitpur, Tezpur vide judgment and decree dated 06.10.2005. Therefore, aggrieved by the dismissal of the suit, Smt. Maya Debi Bamuni, the mother of the respondent herein had preferred an appeal, which was registered and numbered as Title Appeal No. 10/2005. The learned Civil Judge, Sonitpur, Tezpur, vide first appellate judgment and decree dated 07.12.2006, allowed the appeal and the judgment and decree passed by the learned Trial Court was reversed by allowing the appeal and accordingly, the suit was decreed. Thereafter, the appellant herein, namely, Am Narayan Upadhyay and his mother, namely, Smt. Ganga Debi (defendants in TS 55/2002) had preferred an appeal before this Court under section 100 CPC, which was registered and numbered as RSA No. 138/2007. It may be mentioned that the said RSA 138/2007 is also being disposed -of by second appellate judgment and decree passed separately today.

4) The suit land involved in both the suits is a plot of land measuring 8 bigha- 4 katha- 10 lessa. The said land is morefully described in Schedule-A of the plaint in TS 32/2012. The appellant- plaintiff herein claims that the suit land was not the self acquired property of the respondent/ defendant no.1, namely, Bhagirathi Debi and her mother, namely, Maya Devi Bamuni. Without referring to the pleadings made in the plaint, it would suffice to mention that it is pleaded in the plaint that as on date, the names of (1)

Maya Debi Bamuni, the mother of Smt. Bhagirathi Devi (respondent/ defendant no.1), who died on 01.12.2011; (2) Smt. Bhagirathi Debi (respondent herein); (3) Am Narayan Upadhyay (appellant); and (4) Smt. Ganga Devi (mother of the appellant) are entered in the record of rights in respect of the schedule-A land.

5) It was claimed that on 21.09.2011, Md. Abdul Jabbar (respondent no.2) had trespassed into 1 bigha of the Schedule-A land, which is morefully described in Schedule-B land and while the appellant and his mother were not at home, the respondent no. 2 had erected therein a bamboo post shed with plastic sheet roof. Later on, when the appellant had traced out the respondent no. 2 and confronted him, he produced a registered sale deed executed by the respondent no. 1 in his favour whereby the Schedule-B land was sold to him. Accordingly, on 29.11.2011, the appellant had obtained the certified copy of registered sale deed no. 396/2010 dated 15.03.2010 and came to know that without the consent of the appellant and his mother, the land described in Schedule-B was sold by the respondent no.1 to the respondent no.2.

6) Accordingly, by stating that cause of action for the suit arose on 15.03.2010, 21.09.2011 and 29.11.2011, the said Sri Am Narayan Upadhyay (appellant herein) had filed TS No. 32/2012, with prayer for declaration of right and title over Schedule-A land, for delivery of possession of Schedule-B land to the plaintiff by demolishing the bamboo shed with plastic roof, described in Schedule-D, for cancellation of registered sale deed no. 396/2010 dated 15.03.2010 of Tezpur Sub-Registry and declared it as illegal, null and void and inoperative against the plaintiff, and for permanent injunction against defendant no. 2 from interfering with the right, title and possession of the plaintiff over Schedule-B land, and for cost of the suit.

Stand of the respondents:

7) It appears from the judgment dated 15.10.2012, passed by the learned Court of Munsiff No. 1, Sonitpur, Tezpur that although the respondents had appeared in the suit, but they did not file any written statement.

Evidence in the suit:

8) The appellant had examined himself as PW-1 and he had exhibited the copy of *jamabandi* (Ext.1), and registered sale deed no. 396/2010 (Ext.2). No evidence was led by the respondents.

Decision by the learned Trial Court:

9) Owing to lack of pleadings by the respondents- defendants, no issues were framed for trial.

10) However, the following points of determination was framed by the learned Trial Court:-

- i. *Whether the suit is hit by principles of res judicata?*
- ii. *Whether the plaintiff has right, title, and interest over the suit*

Schedule-A land?

- iii. *Whether the Sale Deed No. 396 of 2010 is null, void and inoperative in law?*
- iv. *Whether the plaintiff is entitled to the decree as prayed for?*

Decision of the learned Trial Court:

11) In respect of point no.1, the learned Trial Court took notice of the pleadings in the plaint that the suit Schedule-A land was *lis pendens* in this Court in RSA 138/2009 and moreover, in view of the pleadings in the plaint that objection to the sale of the said land is on the basis that most likely the judgment in RSA 138/2009 would come in their favour, it was held that the

matter in issue in the instant suit was directly and substantially in issue in the TS 55/2002. It was further held that the second requirement on principles of *res judicata* is that the former suit must have been between the same parties or between parties under whom they or any of them claim. Accordingly, as TS 55/2002 was filed by the mother of the respondent no.1 against the appellant-plaintiff and his mother and that the respondent no.1 is claiming through her mother and the respondent no. 2 is claiming through the respondent no.1, it was held that the former suit was between the same parties. Referring to the third postulate of *res judicata* that such parties must have been litigating under the same title in the former suit, the learned Trial Court had held that in the present suit, the appellant was claiming the right, title and interest over Schedule-A land as son of Late Jay Narayan Upadhyay and the respondent no. 1 also claims the same as daughter of Late Jay Narayan Upadhyay, it was held that they are litigating under the same title in the former suit. Referring to the fourth postulate of *res judicata* that the Court which decided the former suit must be a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised, it was held that the former suit was decided by Civil Judge (Junior Division) No.1, Sonitpur, Tezpur, but the nomenclature of the said Court was changed to Court of Munsiff No.1, Sonitpur, Tezpur. Accordingly, it was held that the said Court had the jurisdiction to decide both the suits. By referring to the fifth postulate of *res judicata* that the matter directly and substantially in issue in subsequent suit must have been heard and finally decided by the Court in the former suit, it was held that it was the admitted case of the appellant that TS No. 55/2002 was dismissed by the learned Trial Court, and the decision was reversed in TA No. 10/2005, which is under challenge in RSA 138/2009. Accordingly, it was held that the matter directly and

substantially in issue in the instant suit was heard and finally decided by the Court in the former suit i.e. TS No. 55/2002. Accordingly, it was held that all the necessary ingredients of *res judicata* were fulfilled and the suit was held to be barred by the principles of *res judicata*.

12) On the point no. 2, it was held that TS No. 55/2002 was heard and decided vide judgment and decree dated 06.10.2005, and the question is now pending for adjudication before this Court in RSA No. 138/2009 (*sic*. wrongly typed in trial court judgment as RSA 138/2007). Accordingly, it was held that the Court did not have the power to decide the matter again and is barred under section 11 CPC as discussed in point no.1 above.

13) On the point no.3, it was held that the right, title and interest of the vendor (respondent no.1) was already decided in TS No. 55/2002 and accordingly, it was held that the Court did not have the power to decide the matter again and is barred under section 11 CPC as discussed in point no.1 above.

14) On point no.4, it was held that the right, title and interest of the appellant over Schedule-A land was already decided in TS No. 55/2002 and accordingly, it was held that all other reliefs claimed in the suit flows therefrom, the point was decided in the negative and against the appellant.

15) Resultantly, it was held that the appellant was not entitled to any relief as prayed for. The suit was accordingly, dismissed, but without cost.

First Appeal by the appellant:

16) Aggrieved by the judgment and decree dated 15.10.2012, passed by the learned Court of Munsiff No. 1, Sonitpur, Tezpur in TS No. 32/2012, the appellant had preferred an appeal, which was registered as Title Appeal No.

6/2013, which was dismissed by the learned Civil Judge, Sonitpur, Tezpur, by the first appellate judgment and decree dated 15.11.2013.

17) The learned first appellate Court had revisited the points of determination and after evaluating the materials available on record, held that the right, title and interest of the appellant- plaintiff had already been decided in T.S. No. 55/2002 and therefore, it was held that essential ingredients of *res judicata* was attracted in the case. Moreover, upon re-evaluating the materials available on record, the learned first appellate court had concurred with the finding of the learned Trial Court in point of determination nos. 2, 3 and 4. Resultantly, the appeal was dismissed without cost.

Second Appeal by the appellant- plaintiff:

18) Aggrieved by the dismissal of TA 6/2013, by the impugned first appellate judgment and decree dated 15.11.2013, passed by the learned Civil Judge, Sonitpur, Tezpur , this instant appeal was preferred by the appellant- plaintiff.

19) This appeal was admitted for hearing by order dated 26.11.2014, on the following substantial question of law:-

Whether learned Courts below committed error in not adjudging the sale deed no. 396 of 2010 dated 15.03.2010 (Exhibit-1) illegal being barred by section 52 of the Transfer of Property Act?

Submission by the learned senior counsel for the appellant:

20) The learned senior counsel for the appellant had strenuously pressed all the grounds of appeal. The pleadings and evidence was meticulously referred.

21) It was submitted that as the sale deed referred above was

executed and registered during the pendency of RSA 138/2009, by operation of principle of *lis pendens*, the said sale deed was null and void *ab initio*.

Submissions by the learned senior counsel for respondent no.1:

22) Per contra, the learned senior counsel for the respondent no1 had made his submission in support of the impugned judgments, and it was stated that concurrent finding of fact ought not to be interfered in second appeal.

Reasons and decision:

23) Considered the submissions made by the learned senior counsel for the appellant and the respondent no.1. Perused the plaint as well as the evidence-on-affidavit filed by the appellant.

24) It is seen that the appellant, who had examined himself as PW-1 had stated in his evidence-on-affidavit that his father, namely, Jay Narayan Upadhyay had two wives and from the first wife, namely, Maya Debi Bamuni, the respondent no.1, namely, Smt. Bhagirathi Debi was born and from the second wife, Smt. Ganga Debi, the appellant was born. It was claimed that the mother of the respondent no.1 was not the legally married wife of Jay Narayan Upadhyay. It was also claimed that the respondent no.1 was married to Gopal Chetry in the year 2001 and since then she was living with her husband. He also claimed that the possession of the Schedule-A land was purchased by his father from one Bedanidhi Sarmah and paid the land revenue during his lifetime.

25) It was claimed that after the death of his father, Jay Narayan Upadhyay, the appellant, his mother, Smt. Ganga Debi, respondent no.1, and her mother Smt. Maya Debi Bamuni had all inherited the Schedule-A land and that he had cultivated the land and gave half of the produce therefrom to the mother of the respondent no.1 and that the respondent no.1 had made all the

constructions on the said land and that the land revenue was paid from the earning out of cultivation made on the land.

26) It was also claimed that in the year 1996, the respondent no.1 had surreptitiously got her name mutated in the entire Schedule-A land after both wives of Jay Narayan Upadhyay had separated and then Smt. Maya Debi Bamuni, mother of the respondent no.1 had become furious and instructed him to lodge a protest with the Circle Officer. Accordingly, on a claim made by him, the Circle Officer, Chariduar Revenue Circle, vide his order dated 15.02.1997, had entered (i) his name, (ii) his mother's name, (iii) name of mother of the respondent no.1, and (iv) the name of the respondent no.1 in the land revenue records in respect of Schedule-A land.

27) It was stated that later on, at the behest of the respondent no.1, her mother Maya Debi Bamuni had instituted TS No. 55/2002 for declaration, for right, title and interest and cancellation of mutation of the appellant and his mother and for eviction. However, the said TS 55/2002 was dismissed and in appeal filed by the respondent no. 1's mother, which was registered as T.A. No.10/2005, the judgment and resultant decree passed by the learned Trial Court was reversed. The first appellate Court's judgment and decree dated 07.12.2006 has been assailed before this Court by filing second appeal, which has been registered as RSA 138/2009.

28) It was claimed that the respondent no.1 and her mother had no share in Schedule-A land as the mother of the respondent no.1 was a concubine of Jay Narayan Upadhyay and not his legally wedded wife and it was claimed that in second appeal before this Court, the verdict of the learned first appellate Court in TA No. 10/2005 arising out of decree passed in TS 55/2002, was likely to be reversed.

29) The PW-1, in his evidence-on-affidavit, further asserted that the respondent no.2 did not have any specific share in respect of Schedule-B land and that he was in continuous possession of the same. Moreover, it was stated that during the pendency of litigation, the respondent no.1 did not have any right to transfer any part of Schedule-A land to any person and therefore, it was stated that the said sale deed was null and void and not operative against him. Thus, the relief in terms of prayer made in the plaint was sought for.

30) On examination of the materials available on record, it is seen that the matter in its entirety was considered by the learned Trial Court and the learned First Appellate Court and a concurrent finding was returned to the effect that the issues raised in the present suit was hit by principles of *res judicata*. As this matter was analogously heard along with RSA 138/2009, the said concurrent finding by both the learned Courts is found to be a correct appreciation of pleadings and evidence.

31) In respect of the principles of *res judicata*, it would be appropriate to refer to the case of *Usha Rani Banik v. Haridas Das, AIR 2005 Gau 1*, wherein this Court had held that a sale deed executed during the pendency of the suit was not invalid to the extent it does not affect the rights of the respondents and it was further held that the effect of section 52 of the Transfer of Property Act, 1882 was not to wipe out the sale altogether even though such sale is *pendente lite*.

32) Moreover, it is also noted that in the case of *T. Ravi & Anr. v. B. Chinna Narasimha & Ors., (2017) 7 SCC 342*, the Supreme Court of India had examined the doctrine of *lis pendens* as provided under section 52 of the Transfer of Property Act, 1882 and it was held that the said doctrine does not render such transfer void but renders it subservient to rights of the parties to

litigation, until the proceedings attain finality.

33) Thus, it is a well settled proposition of law that a sale deed that is executed during the pendency of litigation is not *ex facie* illegal and void. The transfer does not become void, but right arising out of transfer is subservient to rights of the parties to litigation, until the proceeding attains finality.

34) Therefore, in the considered opinion of the Court, the learned Courts below have not committed any error whatsoever in not adjudging the Sale Deed No. 396 of 2010 dated 15.03.2010 (Ext. 2) as illegal and being barred by section 52 of the Transfer of Property Act, 1882. However, the rights flowing therefrom shall be subject to the outcome of RSA No. 138/2009, which is the extension of litigation that has arisen out of T.S. No. 55/2002, filed before the Court of Civil Judge (Junior Division) No.1, Sonitpur, Tezpur.

35) Therefore, in the considered opinion of the Court, no case is made out by the appellant for interfering with the concurrent finding of the learned Trial Court and the learned First Appellate Court.

36) In light of the discussions above, the Court is inclined to hold that the learned Trial Court and the learned First Appellate Court had not committed any error in not adjudging the sale deed no. 396 of 2010 dated 15.03.2010 (Exhibit-2) to be illegal, being barred by section 52 of the Transfer of Property Act.

37) Hence, with the observations made in the foregoing paragraph, the present appeal fails and resultantly, this appeal stands dismissed.

38) The parties are left to bear their own cost.

39) Send back the TCRs.

JUDGE

Comparing Assistant