

GAHC010244882019



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

Case No. : RSA/52/2020

SHRI ANIL BANDHU BHATTACHARJEE
S/O- LATE DINA BANDHU BHATTACHARJEE, R/O- VILL.- MANKACHAR,
P.S. MANKACHAR, P.O. MANKACHAR, DIST.- SOUTH SALMARA-
HATSINGIMARI-MANKACHAR, ASSAM, PIN- 783131.

VERSUS

ON THE DEATH OF NIMAI CHANDRA BHATTACHARJEE, HIS LEGAL HEIRS
REPRESENTING
MANKACHAR, ASSAM

1.1:SMTI. JYOSTNA BHATTACHARJEE
W/O- LATE NIMAI CHANDRA BHATTACHARJEE
R/O- VILL.- MANKACHAR
P.S. AND P.O. MANKACHAR
DIST.- SOUTH SALMARA-HATSINGIMARI-MANKACHAR
ASSAM
PIN- 783131.

1.2:RAMPRASAD BHATTACHARJEE
S/O- LATE NIMAI CHANDRA BHATTACHARJEE
R/O- VILL.- MANKACHAR
P.S. AND P.O. MANKACHAR
DIST.- SOUTH SALMARA-HATSINGIMARI-MANKACHAR
ASSAM
PIN- 783131.

1.3:BABLOO BHATTACHARJEE
S/O- LATE NIMAI CHANDRA BHATTACHARJEE
R/O- VILL.- MANKACHAR
P.S. AND P.O. MANKACHAR
DIST.- SOUTH SALMARA-HATSINGIMARI-MANKACHAR

ASSAM
PIN- 783131.

1.4:HABLOO BHATTACHARJEE
S/O- LATE NIMAI CHANDRA BHATTACHARJEE
R/O- VILL.- MANKACHAR
P.S. AND P.O. MANKACHAR
DIST.- SOUTH SALMARA-HATSINGIMARI-MANKACHAR
ASSAM
PIN- 783131.

1.5:SMTI. BANI ACHARJEE
D/O- LATE NIMAI CHANDRA BHATTACHARJEE
R/O- VILL.- MANKACHAR
P.S. AND P.O. MANKACHAR
DIST.- SOUTH SALMARA-HATSINGIMARI-MANKACHAR
ASSAM
PIN- 783131.

1.6:SMTI. IYTI BHATTACHARJEE
D/O- LATE NIMAI CHANDRA BHATTACHARJEE
R/O- VILL.- MANKACHAR
P.S. AND P.O. MANKACHAR
DIST.- SOUTH SALMARA-HATSINGIMARI-MANKACHAR
ASSAM
PIN- 783131.

2:ON THE DEATH OF AJIT BANDHU BHATTACHARJEE
HIS LEGAL HEIRS REPRESENTING
WEST GARO HILLS
MEGHALAYA

2.1:ABHIJIT BHATTACHARJEE
S/O- LATE AJIT BANDHU BHATTACHARJEE
R/O- FANCY VALLEY
P.O. TURA
DIST.- WEST GARO HILLS
MEGHALAYA
PIN- 794001.

2.2:MADHUMITA MISHRA BHATTACHARJEE
D/O- LATE AJIT BANDHU BHATTACHARJEE
R/O- FANCY VALLEY
P.O. TURA
DIST.- WEST GARO HILLS
MEGHALAYA
PIN- 794001.

3:ON THE DEATH OF SUSHIL BANDHU BHATTACHARJEE
HIS LEGAL HEIR REPRESENTING
JALPAIGURI
WEST BENGAL.

3.1:SHRI SUKANTA BHATTACHARJEE
R/O- FISH MARKET ROAD
HYDERPARA
SILIGURI TOWN
DIST.- JALPAIGURI
WEST BENGAL
PIN- 734001

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

JUDGMENT & ORDER

Advocate for the appellant : Sri P. K. Deka, Advocate.

Advocates for respondents : Sri S. Sharma, Senior Advocate,
Shri T.K. Bhuyan, Advocate.

Date of hearing : 20.06.2024

Date of judgment : 16.07.2024

The instant appeal has been preferred under Section 100 of the Code of Civil Procedure against a judgment and decree dated 24.06.2019 passed by the learned Civil Judge, Dhubri in Title Appeal No. 06/2004, whereby the judgment and decree dated 24.12.2003 of the learned Civil Judge (Junior Division) No. 1, Dhubri in Title Suit No. 27/1998 has been partly affirmed. The appellant was

one of the plaintiffs in the said suit.

2. Before going to the issue which requires a determination towards answering the substantial questions of law formulated by this Court on 11.03.2020, it would be convenient if the basic facts of the case are narrated in brief. It is to be clarified that while the suit was instituted by 3 nos. of plaintiffs, the present appeal is preferred by the plaintiff no. 3 as appellant. The other two plaintiffs had passed away in the meantime and though their legal heirs were initially made pro-forma respondents, subsequently vide an order of this Court dated 17.02.2021, their names have been struck off. Likewise, in the suit there was only one defendant and on his demise, his legal heirs have been made respondents. Therefore, in this judgment the reference would be as appellant and respondents.

3. The appellant, as one of the plaintiffs had instituted the aforesaid Title Suit No. 27/1998 for a declaration of right, title and interest and recovery of khas possession. As per the projection made in the plaint, the plaintiffs were the owners of a plot of land covered by Dag No. 361, Khatian No. 283 of Village - Mancachar, which was the Schedule-A land. Within the said Schedule- A land, the suit land is an area of 30 feet x 50 feet which was the Schedule-B land. It was contended that the defendant (the predecessor-in-interest of respondents) had encroached upon the Schedule-B land and accordingly the suit was instituted.

4. The defendant had contested the suit by filing written statement in which there was an admission that the plaintiffs were indeed the owner of Schedule-A land. However, the area of land under Schedule-B was under his possession on the strength of Rayati Khatian No. 315 under Dag No. 3229 (Old) 2500 (New) pertaining to a plot measuring 1 Katha 19 Lecha. It was contended that the

defendant was the tenant of the plaintiffs and accordingly, the Rayati Khaitian was issued. Though the plaintiffs had adduced evidence through 3 nos. of plaintiff witnesses, no documents were exhibited or proved by the plaintiffs in the suit. On the contrary, the defendant had adduced evidence through 2 nos. of Defendant witnesses and had also proved the Rayoti Khatian as Ext-Ka, Land Holding Certificates as Ext-Kha and Revenue receipts as Ext-Ga.

5. The learned Trial Court had formulated the following issues:

- “(i) Whether the defendant acquired Raiyati status under the plaintiff in respect of the suit land?*
- (ii) Whether the defendant is evictable?*
- (iii) Whether the plaintiff is entitles to get any relief?*
- (iv) Is this suit not properly valued?”*

6. Vide the initial judgment and order dated 24.12.2003, the learned Trial Court had dismissed the suit by deciding all the issues in favour of the defendants and against the plaintiffs.

7. The appellant had thereafter preferred Title Appeal No. 06/2004 in the Court of the Civil Judge, Dhubri. The learned First Appellate Court, vide the judgment and order dated 11.05.2007 had dismissed the appeal affirming the judgment of the learned Trial Court.

8. The appellant had thereafter preferred RSA 134/2007 before this Court. The said RSA was disposed of vide Judgment and Order dated 16.08.2018, whereby the matter was remanded back to the First Appellate Court for a fresh decision. This Court had observed that no finding was recorded by the Court below regarding the possession of the defendants over Schedule-B land.

9. On such remand, the learned Civil Judge, Dhubri, as the first Appellate

Court had passed the impugned judgment and order dated 24.06.2019 by which the appeal has been dismissed. It is the said judgment which is the subject matter of challenge in this appeal.

10. This Court vide order dated 11.03.2020 had formulated the following substantial questions of law.

(i). Whether the respondents/defendants have clearly admitted that the appellant/plaintiffs are the owners of the schedule-A land and that the schedule-B land is a part of the said schedule-A land and that they are tenant under the appellant/plaintiffs?

(ii). Whether the learned first appellate Court could have burdened the appellant to prove their ownership over the land described in schedule-A of the plaint despite admission regarding ownership of the appellant over the said land and, as such, whether the finding on points of determination No.1, 2 and 3 are vitiated being contrary to section 58 of the Evidence Act?

11. I have heard Sri P. K. Deka, learned counsel for the appellant. I have also heard Sri S. Sharma, learned Senior Counsel assisted by Shri T.K. Bhuyan, learned counsel for the respondents.

12. Sri Deka, the learned counsel for the appellant has submitted that the conclusion arrived at by the learned First Appellate Court in the impugned judgment is not consistent with the discussion made in the judgment. He submits that the consideration was to be made pursuant to an order of remand passed by this Court wherein a specific issue was noticed by this Court. It is submitted that there are clear findings arrived at by the learned First Appellate Court that the defendant had admitted that the plaintiffs were the owners of Schedule-A land. The learned First Appellate Court had also come to a finding that land holding certificate does not mean that the person is rightfully having

the suit land. It is also submitted that the learned First Appellate Court had also observed and had come to a finding that the defendant had not been able to prove that he was a tenant under the plaintiffs and accordingly the Issue No. 1 was decided in favour of the plaintiffs and against the defendant. There is a clear finding that the defendant was evictable and accordingly the Issue No. 2 was also decided in favour of the plaintiffs. The learned counsel however submits that in spite of the aforesaid findings the learned First Appellate Court had made a contrary finding that the defendant is a tenant of land measuring 1 katha 19 lecha out of the Schedule-A land and has got Rayati Khatian.

13. It is submitted that the learned First Appellate Court has thereafter gone to the aspect of production and exhibiting document by the plaintiffs to show that they are the owner of A-Schedule land and in absence of any document, no declaration for right, title and interest could be issued. The learned First Appellate Court had come to a finding that since the plaintiffs had failed to prove that they are the owner of A- schedule land, Issue No.3 was decided against the plaintiff and in favour of the defendant.

14. Shri Deka, the learned counsel has submitted that the aspect of the impugned judgment which has held the defendant to be evictable was not put to challenge by the defendant. He has also highlighted on the aspect that though there was a relief in the suit for declaration of right, title and interest, there was another relief for ejectment and delivery of khas possession. It is submitted that both the relief being exclusive, rejection of the first relief would not automatically mean rejection of the second relief.

15. By referring to the provisions of Order 26 Rule 9 of the Code of Civil Procedure, the learned counsel for the appellant has submitted that the aforesaid provision of law stipulates appointment of a local Commission for any

factual verification and this recourse was not taken by the learned First Appellate Court. It is submitted that though there was no such specific observation made by this Court in the order of remand, a proper implementation of the direction of this Court and the object of remand would have been fulfilled by taking recourse to the aforesaid provision of law. In this regard, the learned counsel has relied upon the case of ***Bali Ram vs Mela Ram & Anr. reported in AIR 2003 (HP) 87.***

16. *Per contra*, Sri Sharma, the learned Senior Counsel for the respondents has submitted that in the remand order of this Court, there was no issue framed by this Court requiring appointment of a local Commission. It is submitted that the defendant's khatiyani was not the subject matter of challenge. The learned Senior Counsel also submits that when the appeal was dismissed, there was no reason or occasion to challenge any findings of other issues. He reiterates that the plaintiffs did not have any right, title or interest or could establish any such right, title or interest.

17. The learned Senior Counsel has also submitted that the defendant was an unequivocal tenant under Assam (Temporarily Settled Areas) Tenancy Act, 1971 and in case of any proceeding to evict him, it has to be done only under Section 54 of the said Act which lays down certain pre-conditions and none of those pre-conditions have been fulfilled. He reiterates that the plaintiffs could not produce any documentary evidence or otherwise to prove that they were the owners of the Schedule-A property. It is further submitted that admission by the defendant will not make the plaintiffs owners of the land as there was no documentary evidence. It is also submitted that in absence of any documentary evidence, the learned Court below did not have any materials to compare the same, more particularly, the land under Schedule-A and the land under

Schedule-B. The learned Senior Counsel accordingly submits that no grounds for interference are able to be made out in this appeal and accordingly the same should be dismissed.

18. In support of his submission, Sri Sharma, the learned Senior Counsel has relied upon the following decisions:

i. (2014) 2 SCC 269 [Union of India and Ors. vs Vasavi Cooperative Housing Society Limited and Ors.]

ii. (2019) 6 SCC 82 [Jagdish Prasad Patel (Dead) Through Legal Representatives and Anr. Vs. Shivnath and Ors.]

iii. (2019) 11 SCC 309 [Poona Ram vs. Moti Ram (Dead) Through Legal Representatives and Ors.]

iv. AIR 1956 SC 593 [Nagubai Ammal & Ors. Vs. B. Shama Rao & Ors.]

v. 1976 ALR 125 [Bidyadhar Bora & Ors. Vs. Sm. Tarinibala Bora & Ors.]

19. The case of **Vasavi** (supra) has been cited to bring home the contention that in a suit for declaration of right, title and interest, the burden always lies on the plaintiff and not on the weakness of the defendant. The case of **Jagadish Prasad** (supra) has been cited on the aspect of burden of proof as provided in Section 58 of the Evidence Act. Similarly the case of **Poona Ram** (supra) has been cited to bring home the contention that the plaintiff has to prove his own case. The case of **Nagubai Ammal** (supra) has been cited in support of the contention that an admission is not conclusive as the truth of the matter is still to be enquired by the court. The case of **Bidyadhar Bora** (supra) has been cited on the aspect of Order 26 Rule 9 CPC that such recourse is to be taken on

the satisfaction of the court.

20. The rival contentions have been duly considered. The LCR has also been carefully perused.

21. It is not in dispute that the impugned judgment of the First Appellate Court has been passed pursuant to an order of remand of this Court dated 16.08.2018. In the said order, this Court, after discussing the background facts and circumstances had remanded the matter for a fresh decision on the Title Appeal. This Court has noticed that there was a discrepancy in the identity of the land as projected by the pleadings. For a better appreciation, the relevant observations made in paragraph 10 of the order dated 16.08.2018 is extracted herein below.

“10. I have considered the submission advanced by the learned counsel for the parties and have also gone through the materials available on record. As noted above, the key controversy involved in this proceeding relates to right of the plaintiffs in respect of B-Schedule land which claim was declined by the learned Trial Court on the ground that said plot land was under possession of the respondent, who is a non-evictable tenant. However, there is no finding recorded by the court below as to whether the defendant is in possession of the Schedule –B land. The discrepancy in the identity of the land, as projected through the pleadings of the parties, prima facie, goes to show that both the lands are not the same plot of land or alternately at least their descriptions projected through the pleadings are not correct. I am, therefore, of the view that the learned Court below was not correct in dismissing the plaintiffs’ suit without ascertaining the said aspect of the matter. Although, Mr. Mazumder, has submitted that there are materials available on record to establish the claim of the defendant, yet, I am of the view that in exercise of power under Section 100 CPC, a second appellate Court would not embark upon task of recording any finding of fact for the first time. In such view of the matter, this Court is left with no other alternative but to set aside the impugned decree dated 24.12.2003 and remand the matter to the lower appellate court for a fresh decision of the title appeal.”

22. The learned Civil Judge, Dhubri, on such remand had taken up the appeal afresh for consideration. The appeal was considered on the four issues which have already been extracted above.

23. The learned First Appellate Court had come to a categorical finding that the Issue No. 1 which was with regard to acquiring Rayati status by the defendant was held in favour of the plaintiffs and against the defendant. There is a categorical finding on the Issue No. 2 that the defendant had failed to prove that he is a tenant under the plaintiffs and therefore it was held that the defendant was evictable.

24. It may be noted that the aforesaid findings of Issue Nos.1 & 2 are not the subject matter in any appeal or cross objection. Further, in view of such findings which have attained finality, the application of the provisions of the Assam Temporary Settled Areas Tenancy Act 1971 is ruled out.

25. This brings us to the discussion and findings of the First Appellate Court so far as the Issue No. 3 is concerned which is directly connected to the Issue Nos. 1 and 2. The Issue No. 3 is with regard to the aspect as to whether the plaintiff is entitled to get any relief. The learned First Appellate Court, after noting the observations of this Court while remanding the matter had come to a finding that there was nothing on record to demonstrate that the plaintiffs were in fact the owners of Schedule A land. The learned Court accordingly had decided the third issue against the plaintiffs and in favour of the defendant on the ground that the plaintiffs had failed to prove that they are the owners of Schedule A land. The said finding is mainly on the basis that there was no document from the side of the plaintiff to support their claim.

26. To examine the said finding and the reasons assigned thereof it would be necessary to examine the prayer and relief sought for in the suit.

27. In the cause title, the suit was said to be instituted for declaration of khas possession. However, in the prayer portion there are two specific prayers. Firstly, for declaration of right, title and interest and the second prayer is for khas possession by evicting the defendants.

28. The defendant in his written statement had made certain categorical admission that he was the tenant of the plaintiffs and therefore had contended that he could not be evicted. In paragraph 8 of the written statement it is clearly admitted that the suit land covered by Schedule B is a part of Schedule A land. In paragraph 11 of the written statement, the defendant had stated that he had got Rayati khatian of land measuring 1 katha 19 lecha which includes the Schedule B land and a similar statement has been made in paragraph 13 that the Schedule B land is a part of the defendant land measuring 1 katha 19 lechas.

For ready reference, the relevant pleadings of the written statement mentioned above are extracted herein below:

“8. That as regards the statements of para 1 of the plaint defendant beg to state as per land record plaintiff have got 4:1:11 lechas situated in village Mankachar part-I covered by Khatian No. 283 and A schedule land is a part of the said khatian and defendant is a “tenant” of land measuring 1 Katha 14 lechas out of A schedule land measuring 1-3-11 lechas and defendant has got “Rayati Khatian” under the plaintiffs and possessing and living thereon by constructing dwelling house with his family members since last 35 years.

...

11. That the statements of para 4 are not true. That the defendant is possessing the B schedule land and living thereon since last 35 years and defendant has got Rayati Khatian of land measuring 1 katha 19 lechas

including B schedule land under the plaintiffs and photo state copy of the same is annexed herewith as Annexure-A.

...

13. That as regards the statements of para 6 of the plaint defendant beg to state that the land mentioned in schedule B is part of defendant tenanted land measuring 1 katha 19 lechas covered by Rayati Khatian 315 dag No. old 3229 new 2500 and the defendant is living on the said and with his family members since last 35 years and due to shortage of accommodation defendant constructed a building with CI sheets roofing on his said tenanted land hence the question of protest from any person does not arise and defendant had no notice to harass the plaintiffs."

29. A bare perusal of the plaint as well as the written statement and the other materials on record would make it clear that Schedule B land is an area of 30 feet x 50 feet. On the other hand, the defendant had contended that he was the Rayati khatian holder of land measuring 1 katha 19 lechas covered by Dag nos. 3229 (old) 2500 (new) and the khatian number was 315. It appears that this crucial factor that there was a huge variance of the land claimed by the defendant to be a khatian holder which is 1 katha 19 lechas whereas the suit land is only of an area of 30 feet x 50 feet has been overlooked.

30. The pleadings in the Written Statement, as quoted above makes it clear that the suit land covered by Schedule B is claimed to be a part of 1 katha 19 lechas. Therefore, it is apparent that the Dag No. 3229 (old) and 2500 (new) pertains only to the plot of land measuring 1 katha 19 lechas. What is also required to be noted is that the first two issues have been decided by the First Appellate Court in favour of the plaintiff namely that the defendant did not acquire Raiyoti status under the plaintiff of the suit land and also that the defendant is evictable.

31. The suit land being confined to the Schedule B area only which measures 30 feet x 50 feet and is admittedly a part of Schedule A land, this Court is of the

considered opinion that the decision of the First Appellate Court on Issue No. 3 is wholly inconsistent and based on irrelevant factors. This Court has also noted that the relief prayed for in the suit by the plaintiffs were not only restricted to declaration of right, title and interest and also included a decree for evicting the defendant and recovery of khas possession. Therefore, while the absence of any document to prove the ownership may lead to non-grant of a decree declaring right, title and interest but such absence would not come in the way to pass a decree for evicting the defendant and recovery of khas possession. This Court has clearly observed that in paragraphs 5, 8, 11, and 13 of the Written Statement, there is a clear admission by the defendant regarding the fact that Schedule B land is a part of Schedule A land which were under the possession of the defendant and he was not a tenant of the plaintiffs.

32. An argument was sought to be advanced by the learned Senior Counsel for the respondent that by mere admission, a collusive suit can be instituted. However, such argument cannot be countenanced for more than one reason. The instant suit was for eviction of the defendant which was strenuously resisted by the defendant, albeit on a different ground that he was a tenant and the said defence was negated by the First Appellate Court by holding that the defendant neither acquired Raiyoti status nor was an unequivocal tenant. The failure/refusal of the First Appellate Court to grant relief to the plaintiffs in spite of holding the first two issues in their favour is not in accordance with law. Though some deliberations were made on the aspect of having a local Commission done to identify the land, this Court is of the considered opinion that the said aspect is not required to be gone into in view of the clear admission that the suit land (Schedule B land) which is an area of 30 feet x 50 feet being admittedly a part of Schedule A land, and there is no ambiguity

regarding its identification.

33. In view of the aforesaid discussions, this Court is of the opinion that the instant appeal has got merit and accordingly the same is allowed.

34. Consequently, the substantial questions of law are decided in favour of the appellant and against the respondents. The suit accordingly stands decreed so far as it pertains to ejectment of the defendant / respondents from the Schedule B land. The consequential action for preparation of decree be taken in accordance with law.

35. Send back the records.

JUDGE

Comparing Assistant