

GAHC010007212011



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

Case No. : RSA/148/2011

MD SHANAI MIA CHOWDHURY
S/O LATE TAJAMUL ALI CHOWDHURY, R/O MAJIRGRAM, P.O. SONAI,
PARGONA, SONAPUR, P.S. SONAI, DIST. CACHAR.

VERSUS

ON THE DEATH OF HABIBUR RAHMAN LASKAR HIS LEGAL HEIRS AND
ANR
NAMELY-

1.1: MUSTT RAHIMA BEGUM LASKAR
W/O LATE HABIBUR RAHMAN LASKAR

R/O VILL SATKORAKANDI PT II
P.O SATKORAKAMDI - 788113
DIST CACHAR
ASSAM

1.2: MD. EYADUL HAQUE LASKAR
S/O LATE HABIBUR RAHMAN LASKAR

R/O HOUSE FED COMPLEX
QR. NOT BOMA
HATIGAON
GUWAHATI 781038

1.3: MD AMINUL HAQUE LASKAR
S/O LATE HABIBUR RAHMAN LASKAR

R/O VILL SATKORAKANDI PT II
P.O SATKORAKAMDI - 788113
DIST CACHAR
ASSAM

1.4:MD MONIRUL HAQUE LASKAR
S/O LATE HABIBUR RAHMAN LASKAR

R/O VILL SATKORAKANDI PT II
P.O SATKORAKAMDI - 788113
DIST CACHAR
ASSAM

1.5:MUSSTT. RANJU BEGUM BORBHUIYA
W/O MONJUR AHMED BORBHUIYA

D/O LATE HABIBUR RAHMAN LASKAR
R/O HATIGAON SHA NAGAR
GUWAHATI - 781038

1.6:MUSSTT. AYESHA BEGUM LASKAR
W/O BOKTAR HUSSAIN LASKAR

D/O LATE HABIBUR RAHMAN LASKAR

R/O VILL TULARGRAM PT I. P.O. SONAI
-788119

2:ALAUR RAHMAN LASKAR ALIAS HIFZUR RAHMAN LASKAR
SON OF LATE LALU MIA LASKAR

R/O VILL SATKARAKANDI PT II
P.H SONAPUR DIST CACHA

For the Petitioner(s) : Mr. G. N. Sahewalla, Sr. Advocate
: Ms. S. Todi, Advocate

For the Respondent(s) : Mr. B. J. Ghosh, Advocate
: Mr. I. Alam, Advocate

Date of Hearing : **28.03.2024**
Date of Judgment : **28.03.2024**

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

1. The instant appeal has been filed against the judgment and decree dated 11.04.2011 passed by the learned Court of the Civil Judge No.1, Cachar at Silchar in Title Appeal No.09/2010 (for short "the First Appellate Court") whereby the judgment and decree dated 23.12.2009 passed by the learned Court of the Munsiff No.2, Cachar, Silchar (hereinafter referred to as "the learned Trial Court") in Title Appeal No.20/2008 was reversed.
2. This Court pursuant to the filing of the instant appeal, admitted the appeal by formulating 3 (three) substantial questions of law vide an order dated 19.05.2014 which are reproduced herein under:
 - (i) *Whether the learned first Appellate Court erred in law in constructing Ext. 2, 3 and 4?*
 - (ii) *Whether the first appellate judgment is in compliance of Order XLI Rule 31 of the CPC?*
 - (iii) *Whether having been admitted into evidence without objection Ext. 2, 3 and 4 could have been discarded by the learned first Appellate Court as inadmissible evidence?"*
3. In order to ascertain as to whether the three substantial questions of law so formulated vide the order dated 19.05.2014 are involved in the instant appeal, let this Court briefly take note of the facts leading to the filing of the instant appeal.
4. From a perusal of the materials on record more particularly the plaint,

it reveals that the 2nd R.S. Patta No.100 was issued with Dag No.266 with an area of 5 Bighas 11 Kathas 5 Chataks. The said Patta was issued in the name of three persons including one Rashid Ali Laskar. It is relevant to take note of that the 2nd R.S. Patta No.100 was curved out from R.S. Patta No.75 and the said Rashid Ali Laskar during the R.S. period, purchased 3 Bighas 8 Kathas of land from the recorded co-sharer and he got the possession of the land. Subsequent thereto, his name was duly mutated in the R.S. Period.

5. During the lifetime of the said Rashid Ali Laskar, he sold the 3 Bighas 8 Kathas of the land to one Monojir Ali Choudhury (since deceased) and delivered the possession. The name of Late Monojir Ali Choudhury was duly mutated in the Jamabandi of the suit patta.

6. Be that as it may, in terms with Hanafi Law of Inheritance, the sons of the Late Monojir Ali Choudhury namely Rahim Uddin Choudhury and Siraj Uddin Choudhury got 2/6th share each i.e. 1 Bighas 2 Kathas 10 Chataks 12 Gondas each and the daughters received 1/6th share each i.e. 11 Kathas 5 Chataks 6 Gondas. The land which was inherited by the sons of Late Monojir Ali Choudhury was purchased by the defendants whereas the plaintiff vide registered Deed No.966/2006 dated 02.06.2006 purchased the 7 Kathas 8 Chataks 6 Gondas from one of the daughters of Late Monojir Ali Choudhury i.e. one Smti Moina Bibi. In addition to that, the plaintiff purchased another plot of land measuring 7 Kathas 8 Chataks 5 Gondas vide registered Deed of Sale bearing Deed No.1805/2006 on 01.11.2006 from the other daughter i.e. one Lachu Begum. Both the lands which were purchased by the plaintiff were contiguous lands and the plaintiff after getting physical possession, started growing paddy through his men. It was the further case of the

plaintiff that in the last part of April, 2007, the defendants dispossessed the plaintiff from the land which the plaintiff purchased from Smti Lachu Begum and the same was specifically described in the Schedule to the plaint. It is under such circumstances, the suit was filed seeking declaration of right, title and interest in respect to the land described in Schedule to the plaint; for recovery of khas possession by removing the defendants, their men, agents by demolishing any obstacles or hindrances if any from the schedule to the plaint, for permanent injunction restraining the defendants from alienating the suit land and from changing the nature and character of the suit etc. The said suit was registered and numbered as Title Suit No.20/2008.

7. The defendants jointly filed a written statement. In the written statement, various preliminary objections were taken as regards the maintainability of the suit. It was further mentioned that Late Monojir Ali Choudhury had three sons and two daughters. It was mentioned that the three sons of Late Monojir Ali Choudhury sold out their shares to the defendants vide registered document dated 20.09.1995 for a valuable consideration of Rs.40,000/- for more or less 2 Bighas 5 Kathas 8 Chataks. The defendants further claimed that their entitlement was only limited to 2 Bighas 5 Kathas 6 Chataks and nothing more. It was also mentioned that the plaintiff had made a hotch-potch with the calculation of the entitlement of the daughters without taking into consideration the share of the third son. In addition to that, it was also mentioned that without impleading the co-sharers of the patta to the suit, the suit was not maintainable.

8. On the basis of the above pleadings, as many as 7 (seven) issues were framed. The issue No.3 related to whether the suit was barred by limitation.

The issue No.4 related to as to whether the plaintiff has right, title and interest over the suit land and the issue Nos. 5 and 6 were related to as to whether the plaintiff was entitled to recovery of khas possession as prayed for and also as to whether the plaintiff is entitled to a decree of permanent injunction as prayed for. In the said suit, the plaintiff adduced 3 witnesses and exhibited 5 documents. Exhibit-1 was the certified copy of the Jamabandi of the 2nd R.S. Patta No.100, Exhibit Nos. 2, 3 and 4 are certified copies of the Deeds of Sale dated 18.05.1954, 02.06.2006 and 01.11.2006 whereas Exhibit No.5 is the land revenue paying challan of 1414 BS.

9. It is relevant to take note of that these documents were exhibited without any objection. On the other hand, the Defendants only adduced the evidence of DW-1. Further to that, the defendant exhibited various documents as Exhibit-A to Exhibit-H. It is relevant to take note of that Exhibit-H is the original Deed No.1595/1587 dated 20.05.1995 by which the Defendants purchased their land. The learned Trial Court on the basis of the said evidence, decreed the suit in favour of the plaintiff thereby granting the reliefs which were sought for vide the judgment and decree dated 23.12.2009.

10. Being aggrieved, an appeal was preferred by the defendants before the Court of the Civil Judge No.1, Cachar, Silchar which was registered and numbered as Title Appeal No.09/2010. The said appeal however was allowed vide the judgment and decree dated 11.04.2011. In doing so, the suit of the plaintiff was dismissed on the ground that the plaintiff only adduced the certified copies of Exhibit 3 and 4 and that too without complying with the mandate of Section 65 of the Indian Evidence Act, 1872. Being aggrieved

the instant appeal has been framed and this Court vide order dated 19.05.2014 had admitted the appeal by formulating the substantial questions of law as already reproduced hereinabove.

11. Mr. G. N. Sahewalla, the learned Senior counsel appearing on behalf of the plaintiff/appellant submitted that it was an admitted fact by the defendants during their cross examination that the plaintiff had purchased the two plots of land from the daughters of Late Monojir Ali Choudhury. He further submitted that from the written statement, the claim of the defendants were limited to 2 Bighas 5 Kathas 6 Chataks and the remaining land thereafter was 15 kathas 4 Chataks and as such, the vendors of the plaintiff were duly authorized as per the share to transfer or convey the said land to the plaintiff. He submitted that although there are three substantial questions of law but the three substantial questions of law are inter linked and can be subsumed as to whether the learned First Appellate Court was justified in rejecting Exhibit Nos. 3 and 4 that too when the said documents were duly admitted into evidence without any objection and the defendants duly admitted the said purchase in their cross-objection. The learned Senior counsel further referred to the judgment of the Supreme Court in the case of ***R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and Another*** reported in **(2003) 8 SCC 752** and drew the attention of this Court to paragraph Nos. 19 and 20.

12. On the other hand, Mr. B. J. Ghosh, the learned counsel for the Respondents submitted that the fact that the said exhibited documents being Exhibit Nos. 3 and 4 were duly exhibited without objection is not in dispute. He however submitted that the plaintiff having not filed the suit for

partition which he ought to have done for which the suit itself was not maintainable inasmuch as without ascertaining which plot of land actually belongs to the plaintiff and which plot of land belongs to the defendants on the basis of the Deeds of Sale which was executed in favour of the Defendants, Exhibit-H, the decree for recovery of khas possession cannot be given due effect. He further submitted that a perusal of Exhibit-H, would clearly show that the said document was executed in the year 1995 i.e. much prior to the plaintiff having claimed any right or title over the shares which fell in favour of the daughters of Late Monojir Ali Choudhury.

13. This Court had given due consideration to the respective submissions made by the learned counsels for the parties. This Court had duly perused the judgment passed by the learned First Appellate Court and from a perusal thereof, it reveals that the learned First Appellate Court allowed the appeal and dismissed the suit primarily on the ground that the certified copies of the registered Deeds of Sale which were exhibited as Exhibit Nos. 3 and 4 could not have been taken into consideration by the learned Trial Court without due compliance to the provisions of Section 65 of the Indian Evidence Act, 1872. Under such circumstances, the question arises as to whether the learned First Appellate Court was justified in doing so in the present facts. No doubt, it is the mandate of law that the primary evidence is required to be adduced as evidence. It is not in dispute that a certified copy of a Deed of Sale can be admitted into evidence provided the formalities which were required in terms with Sections 63 and 65 of the Indian Evidence At, 1872 are duly complied with. The above aspect makes it clear therefore that the certified copies can be admitted into evidence provided the mode of proof is complied with. Therefore the admissibility of such certified copies is

dependent on mode of proof and not complying with such mandate can be termed as irregular or insufficient.

14. It is well settled by the judgment of the Supreme Court in the case of **R.V.E. Venkatachala Gounder(supra)** that a document which is otherwise admissible but on the ground of exhibiting the same in an irregular or insufficient manner can be duly regarded as evidence, if objections were not taken at the time of tendering the said document into evidence. Paragraph Nos. 19 and 20 of the said judgment are quoted herein below:

“19. Order 13 Rule 4 CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the court, which endorsement signed or initialled by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document should be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the court to the person from whose custody it was produced.

20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in

evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."

15. In the instant case, it would be seen that Exhibit-1 to 5 all were admitted into evidence without any objection. This Court also finds it relevant to take note of that the learned Trial Court has also dealt with the said aspect of the matter and observed that the said exhibited documents could be read into evidence. However, the learned First Appellate Court observed that the said documents more particularly Exhibit Nos. 3 and 4 having been adduced without complying with the proper mode of proof, could not have been taken into consideration by the learned Trial Court. In the opinion of this Court, the said Exhibit Nos. 3 and 4 having already admitted into evidence without any objection and more so when the said documents were otherwise admissible, the learned First Appellate Court erred in law in doing so.

16. This Court also finds it very pertinent to observe that there is no dispute that during the course of the trial, the defendants in their cross-examination did not dispute the said two Deeds of Sale. Even in the pleadings, there was no dispute as regards the two deeds of Sale being Exhibit Nos. 3 and 4. Under such circumstances, this Court is of the opinion that the substantial questions of law so framed duly arises in the instant appeal and accordingly, the impugned judgment and decree stands set aside and quashed and the judgment and decree passed by the learned Trial Court is restored.

17. Before concluding, this Court finds it relevant to address to the submission of Mr. B. J. Ghosh, the learned counsel for the Respondents to the effect that the suit was not maintainable as the plaintiff did not seek the relief of partition. This Court is of the opinion that the said submission

cannot be raised at this second appellate stage for the first time. Moreover, in the opinion of this Court, the suit otherwise was maintainable in terms with proviso to Section 34 of the Specific Relief Act, 1963.

18. With above observations and directions, the instant appeal stands allowed with costs quantified at Rs.11,000/- for the present proceedings. The Plaintiffs shall also be entitled to costs throughout the proceedings.

19. The Registry is directed to forthwith return the LCR to the Court below.

JUDGE

Comparing Assistant