

GAHC010005382009



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

Case No. : RSA/113/2009

SRI UTPAL CHANDRA DAS
S/O SRI DHIRENDRA NATH DAS, R/O AMOLAPATTY, BARPETA, MOUZA and
DIST. BARPETA, ASSAM.

VERSUS

SRI NARAKANTA DEKA and ANR
S/O LATE AMRIT RAM KANTA DEKA, R/O AMBARIHAT, BARPETA, MOUZA
and DIST. BARPETA, ASSAM.

2:THE SECRETARY

MANAGING COMMITTEE
BARPETA KIRTANGHAR
BARPETA
ASSAM

Advocate for the Petitioner : MR. Z MUKIT

Advocate for the Respondent : DR. B AHMED (R1)

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

Date : 12-03-2024

JUDGMENT & ORDER

This is an appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, the Code) is directed against the judgment and decree dated 18.03.2009 passed in Title Appeal No.43/2007 whereby the judgment and decree dated 19.11.2007 passed by the learned Munsiff No.1, Barpeta in Title Suit No.167/2005 was affirmed. This Court vide an order dated 03.08.2009 had admitted the instant appeal framing 4 substantial questions of law which are reproduced hereunder:

- 1. Whether, in a suit for declaration, eviction, partition and khas possession together with permanent injunction, the learned Trial court is justified to first simply pass an order for declaration of right, title and interest and khas possession in favour of the plaintiff/respondent No. 1 and thereby sending the parties before the Revenue Authority for partitioning of the land without exercising the jurisdiction vested in the said court with regard to partitioning of the land and house itself ?*
- 2. Whether, a decree for khas possession of the suit land without specified boundaries in a partition suit of the joint property could be passed without there being any partition by meets and bounds amongst the co-sharers under the supervision of the said court?*
- 3. Whether the learned Courts are justified in sending the parties to the revenue authority for ascertaining the disputed land after granting a decree on the basis of the measurements made by the Amin Commissioner as is evident from the Amin Commissioner's report?*
- 4) Whether both the courts below are justified in decreeing the suit invoking the provision of Section 48 of the Transfer Property Act, 1882, though the Amin Commission appointed by the court has found otherwise*

in respect of the right , title and interest of the plaintiff relating to the land mentioned in the schedule of the plaint?

2. For 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 relevant facts infra:

The respondent herein as plaintiff had instituted a suit being Title Suit No.167/2005. From a perusal of the plaint, it reveals that the plaintiff had purchased a plot of land measuring 17 lessas from dag No.3268 of NK Patta No.2 of Barpeta Town. The said dag No.3268 contains a total land of 1 katha 15 lessas. In addition to that, the plaintiff had purchased another plot of land measuring 17 lessas from dag No.3269 of the same NK Patta No.2. The said dag No.3269 contained 1 katha 14 lessas of land. Therefore, as per the plaintiff, he was the owner of 1 katha 14 lessas of land covered by both dag Nos.3268 and 3269, which were contiguous in nature. The said land was, more specifically described in Schedule A of the plaint. It has been alleged in the plaint that the defendant trespassed into the plaintiff's land to the extent of a portion of land measuring 5 feet into 45 feet. The said land has been, more specifically, described in Schedule B. Under such circumstances, the suit was filed by the plaintiff seeking declaration of his right, title and interest over the suit land; decree for khas possession of the schedule B land by evicting the defendant; permanent injunctions restraining the defendant from re-entering into the suit land after being evicted and from disturbing the plaintiff in the peaceful possession of the suit land. In addition to that, the plaintiff also sought for a decree of partition of the schedule A land from the NK patta No.2 of Barpeta Town.

3. The said suit upon being filed, the defendant filed a written statement, admitting, *inter alia*, that the plaintiff and the defendant are co-sharers of the dag No.3268 and 3269 and the shares have not been partitioned. It was denied that the defendant had trespassed into the plaintiff's land. It was also duly admitted in the written statement, *more particularly* at paragraph 9 that the plaintiff though have claimed to have purchased a part of dag No.3268 and 3269, the rest part of the dag No.3268 measuring 18 lessas and the rest part of the dag No.3269 measuring 17 lessas was purchased by the defendant by registered deeds of sale.

4. It is, relevant to observe at this stage that the vendor of both the plaintiff and the defendant was one and the same and the plaintiff had purchased his portion of the land prior to the defendant.

5. On the basis of the said pleadings, the learned trial court framed as many as 5 issues, which includes the issues pertaining to as to whether the plaintiff had right, title and interest over the suit land; and also whether the plaintiff was entitled to the decree of khas possession of Schedule B land by evicting the defendants.

6. The learned trial court after taking into account the evidence on record and applying the principles as set out under Section 48 of the Transfer of Property Act, 1882 (for short 'the Act of 1882') came to a finding that the plaintiff had right, title and interest over the 17 lessas of land under dag No.3268 and further 17 lessas of land in dag No.3269 of NK patta No.2. Further to that, the learned

trial court observed that the plaintiff was entitled to the decree of partition and as such had directed the Revenue Authorities to partition the suit land. In addition to the above, the learned trial court vide its judgment and decree dated 19.11.2007 decreed the delivery of khas possession of the schedule B land subject to partition to be made by the Revenue authority. It was further decreed that the Revenue authority shall partition the plaintiff's land at first and if schedule B land is found to be encroached by the defendant he shall be evicted therefrom.

7. The defendant being aggrieved had preferred an appeal before the learned 1st Appellate Court, which was registered and numbered as Title Appeal No.43/2007. The learned 1st Appellate Court after framing a point of determination decided the appeal by a judgment and decree dated 15.03.2009 thereby affirming the learned trial court judgment and decree. It is against the said judgment and decree passed by the learned First Appellate Court dated 18.03.2009, the present appeal has been filed.

8. This Court vide order dated 03.08.2009 had admitted the appeal by formulating the four substantial questions of law as already above noted. In the backdrop of the above, let this Court, therefore, take into consideration as to whether the said substantial questions of law so formulated are actually involved in the instant appeal.

9. The substantial questions of law so formulated at Sl.No.1 and 2 are interlinked to the effect that as to whether the learned courts were justified in

passing a decree for partition as well as a decree for khas possession. At the same time, this Court has duly taken note of the judgment and decree passed by both the court's below, wherein the learned courts below had categorically observed that the plaintiff has right title and interest over the 17 lessas of land in dag No.3268 and another 17 lessas of land in dag No.3269 of NK Patta No.2 of Barpeta Town. The learned courts below having already ascertained the share of the land of the plaintiff and had directed the Revenue authorities to carry out the partition. Under such circumstance, the Revenue authorities are required to carry out the partition in terms of Section 54 of the Code read with the provisions of the Assam Land and Revenue Regulations, 1886 (for short, the Act of 1886) taking into account that the land of the plaintiff had been duly ascertained. The learned courts below further had directed that first the plaintiff's land has to be ascertained and partitioned and thereupon, if it is found after partition that the Schedule-B land falls within the land of the plaintiff, then the decree of khas possession would come into play. This Court upon hearing the learned counsel for the appellant and also taking into account the above provisions of law is clearly of the opinion that these two substantial questions of law which had been formulated are not substantial questions of law involved in the instant appeal.

10. Now let this Court take into account the third substantial questions of law, which was framed as to whether the learned courts below were justified in sending the parties to Revenue authorities for ascertaining the land after granting the decree on the basis of measurement made by the Amin Commission, as is evident from the Amin Commissioner's report. The said substantial question of law so formulated in the opinion of this court is totally

misconceived on a reading of the judgment and decree passed by both the courts below, *inasmuch as*, both the courts below categorically had taken into account that the plaintiff was entitled to 17 lessas of land in dag No.3268 and another 17 lessas of land in dag No.3269 of NK patta No.2. The Amin Commission report would at best be taken as an evidence and nothing further. The learned courts below on the basis of the said Amin Commission report and also on the extant materials on record had therefore directed the partition to be carried out in terms with Section 54 of the Code.

11. At this stage, this Court finds it relevant to take note of the submissions of Mr. A Sattar, the learned counsel for the appellant who submits that perusal of the Amin Commission report would show that in fact the defendant is in possession of 4 lessas of less land and as such the learned courts below ought to have taken into consideration the said aspect of the matter. This submission would be dealt with by this Court while deciding the 4th substantial questions of law No.4, so formulated to the effect as to whether the courts below were justified in decreeing the suit invoking the provisions of Section 48 of the Transfer of Property Act, 1882, though the Amin Commission appointed by the court had found otherwise.

12. The provisions of Section 48 of the Act of 1882, simply stated mandates that where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be

subject to the rights previously created.

13. Under such circumstances, as the vendor of both the plaintiff and defendant is one and the same person and the sale deeds which were executed in favour of the plaintiff were admittedly prior in point of time and nothing being brought on record about the existence for special contract or reservation binding the plaintiff, in the opinion of this Court the plaintiff in respect of the land sold to him would have a superior right to the land so conveyed from that of the defendant in so far as the title conveyed to the defendant in any manner conflicts with the title conveyed to the plaintiff. Therefore, in view of the said statutory provisions of law, the Amin Commissioner's report would not in any manner disentitle the plaintiff to his share of land to the extent the same had been conveyed by the vendor of the plaintiff.

14. Therefore, the fourth substantial question of law in the opinion of the Court is also not a substantial question of law involved in the instant appeal.

15. Under such circumstances, this Court finds no merit in the instant appeal for which the same stands dismissed with cost quantified @ Rs.10,000/-.

16. The Registry shall forthwith remit the LCR to the learned trial court.

JUDGE

Comparing Assistant