

GAHC010004962009



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

Case No. : RSA/87/2009

SRI BHABEN DEORI
S/O LATE MONESHWAR DEORI, R/O SARUMOTORIA, MOUZA- BELTOLA,
P.S.- DISPUR, DIST- KAMRUP, ASSAM.

VERSUS

SRI AMIYA MEDHI
S/O LATE DHIRUDUTTA MEDHI, R/O STANDROAD FOUZDARI PATTI, P.O. and
P.S.- NAGAON, DIST- NAGAON, ASSAM.

Advocate for the Petitioner : MR. R DUBEY

Advocate for the Respondent : MR.B K BHAGAWATI

Linked Case : RSA/9/2010

SRI AMIYA MEDHI
S/O LATE DHIRUDUTTA MEDHI
R/O STANDROAD
FAUZDAR PATTI
P.O. and P.S. NAGAON
DIST. NAGAON
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VERSUS

SRI BHABEN DEORI
S/O LATE MONESWAR DEORI
R/O SARUMOTORIA
MOUZA-BELTOLA
P.S. DISPUR
DIST. KAMRUP
ASSAM.

Advocate for the appellant : Mr. R Dubey
In RSA No.87/2009 Ms. AB Kayastha

Advocate for the respondent : Mr. B Kaushik
In RSA No.87/2009

Advocate for the appellant : Mr. B Kaushik
In RSA No.9/2010

Advocate for the respondent : Mr. R Dubey
In RSA No.9/2010 Ms. AB Kayastha

B E F O R E
HON'BLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT & ORDER (ORAL)

Date : 30-05-2024

Heard Mr. R Dubey, the learned counsel appearing on behalf of the

appellant in RSA No.87/2009 and Mr. B Kaushik, the learned counsel appearing on behalf of the respondent in the said appeal. Mr. B Kaushik, the learned counsel appears on behalf of the appellant in RSA No.9/2010 and Mr. R Dubey, the learned counsel represents the respondent in the said appeal.

2. Taking into account that both the appeals are interconnected, arising out of the same suit and the appeals filed there against, both are taken up for disposal by this common judgment.

3. Both the appeals are filed under Section 100 of the Code of Civil Procedure, 1908, challenging the judgment and decree dated 18.05.2009 passed in Title Appeal No.4/2008 by the Court of the learned District and Sessions Judge, (FTC) No.1, Kamrup, Guwahati thereby setting aside the judgment and decree dated 22.01.2008 passed in Title Suit No.256/2005 by the Court of the learned Civil Judge (Senior Division) No.3. Kamrup.

4. For the purpose of deciding both the appeals, this Court finds it relevant to take note of the facts which led to the filing of the appeals and in that regard the substantial questions of law, which were formulated. For the sake of convenience, the parties herein are referred to the same status as they stood in the learned Trial Court.

5. The Appellant in Title Appeal No.87/2009 as plaintiff claimed that he had purchased a plot of land measuring 4 kathas by a registered sale deed 2231 dated 17.12.1972 in Dag No.70 of Patta No.9 of village Sarumataria under

Beltola Mouza in the district of Kamrup. The said land was more specifically described in Schedule-A to the said plaint. Taking into account the relevance, this Court reproduces Schedule-A of the plaint hereinunder:

“Schedule – A

A plot of land measuring 4 kathas covered by Dag No.70 K.P. Patta No.9 of village Sorumotoria under Mouza-Beltola in the district of Kamrup, Assam. The land is bounded by:

North: Land of Mrs. Verma

South: Own land.

East: Land of Mrs. Verma and Mrs. Gogoi

West: Public Road.”

6. It is the further case of the plaintiff that pursuant to the purchase he constructed an Assam Type House after taking due permission which has been assessed by the GMC and in that regard, holding No.253 (old) and 106 (new) was issued in the year 1991. The plaintiff's name was also recorded in the chitha mutation on 28.12.1994 and the ASO issued the certificate dated 25.04.1995 and entered the name of the plaintiff in the record of rights.

7. It is the further case of the plaintiff that one Pinaki Ranjan Medhi, who is the brother of the defendant Amiya Medhi filed a case being Case No.31/1990 under Section 145 Cr.P.C. in respect of a plot of land measuring 4 kathas 1 lecha, covered by Dag Nos.66, 67 and 70 of KP Patta No.9 claiming that the land was his paternal land and in possession with an Assam Type house.

However, the said proceedings were dropped thereby directing the parties to approach the appropriate Civil Court. In addition to that, the defendant also filed a petition before the Settlement Officer for cancellation of the plaintiff's chitha mutation which was also rejected by the order dated 15.03.2002. It was further alleged that the defendant accompanied by hired gundas tried to forcefully enter into the suit land on 26.08.2003 and 04.11.2003 as well as on 12.07.2005. However, they failed to do so. It is under such circumstances, the plaintiff filed the said suit being Title Suit No.256/2005 seeking a decree for confirmation of possession of the plaintiff over the suit land as well as for granting of permanent injunction restraining the defendant, his agents, servants, workers etc. from interfering with the peaceful possession of the plaintiff over the suit land and the house described in Schedule A and B to the plaint. It is further very pertinent to mention that the plaintiff for reasons best known, did not seek for declaration of his right title and interest. From the allegations made in the plaint, it is apparent that the plaintiff's title was duly questioned by the defendant not only by initiating various proceedings, but also claiming that part of the land to be the land of the defendant.

8. The record further reveals that the defendant filed a written statement-cum-counter claim, wherein the plaintiff's case was duly denied and stating, *inter alia*, that the sale deed on the basis of which the plaintiff claimed any right was a non-existent sale deed and as such no right could be conferred upon the plaintiff. In addition to that, the defendants in the counter claim sought for a declaration that the chitha mutation dated 28.12.1994 in favour of the plaintiff was illegal and fraudulent; for decree declaring that the order dated 15.03.2002 passed by the Settlement Officer in Misc.Case No.24/2001 and the order dated

31.10.2005 are null and void and inoperative in law; for a decree for recovery of khas possession by removing the plaintiff, his men, materials, and also demolishing the illegal construction, structures etc. upon the land mentioned in the Schedule to the counter claim and for permanent injunction. Interestingly, in the counter claim also, the counter claimant i.e. the defendant No.1 did not seek for a declaration of his right, title and interest, inspite of the fact that the defendant duly had sought for cancellation of various orders being passed by the Revenue Authorities on the ground that the said orders infringe upon the right of the counter claimant in respect to his land. The schedule so mentioned in the said counter claim is reproduced hereinunder:

“A plot of land measuring 4(four) kathas 1(one) lecha covered by Patta No.9, Dag No.66, 67, 70 of village Sarumotoria under Beltola Mouza within the Districts of Kamrup, Assam and bounded as:

North: Land of Mrs. Verma

South: Govt. Land occupied by plaintiff

East: Land of Mr. Verma

West: Public Road”

9. It is also seen that a written statement was filed by the plaintiff against the counter claim filed by the defendant. In the written statement, the plaintiff again reiterated that he had purchased the suit land vide registered sale deed 2231 dated 17.12.1972 and that the plaintiff was in possession of the suit land.

10. On the basis of the said pleadings, the learned Trial Court framed as many

as 13 issues. Issue No.5 related to whether the plaintiff purchased the suit land from Girijananda Choudhury. Issue No.9 pertains to as to whether the father of the defendant purchased the land from Girijananda Choudhury. Issue No.11 pertained to whether the sale deed 2231 dated 17.12.1972 is fraudulent as claimed by the defendant.

11. The learned Trial Court vide the judgment and decree dated 22.01.2008 has decreed the suit of the plaintiff for confirmation of possession and permanent injunction and thereby injuncting the defendant permanently from causing interference in the plaintiff's possession. The counter claim filed by the defendant was dismissed.

12. At this stage, this Court finds it very pertinent to take note of as to how the learned Trial Court decided the Issue No.5 and Issue No.11. While deciding the Issue No.5 the learned Trial Court on the basis of the evidence on record came to a categorical finding that the owner of the land Girijananda Choudhury did not sell the land to the plaintiff by sale deed i.e. Ext. 1 to the plaintiff. While deciding the Issue No.11, the learned Trial Court came to a categorical finding that from the evidence on record, the sale deed Ext. 1 was not a genuine one and observed that the said issue was decided in favour of the defendant. In respect to the Issue Nos.9 and 10, the learned Trial Court came to a finding that the defendant did not purchase the suit land which has been described in Schedule-A to the plaint. It is very interestingly to take note of that the learned Trial Court while doing so has also taken note of the evidence of the DW-1. This evidence becomes very relevant taking into account that Ext.A, which is the deed of sale bearing sale deed No.7036, which the defendant claimed to be in

favour of their father did not mention the boundaries of the land, so sold. The DW-1 in his evidence described that the boundaries of the Schedule-A land were **North** Ms. Verma, **South**-Road, **East** –land of another person not known, **West** – Bhaben Deori or plaintiff. It was categorically observed by the learned Trial Court that the suit land i.e. the land claimed by the plaintiff was outside the four boundaries described by the DW-1.

13. The judgment and decree so passed by the learned Trial Court, was not challenged by the plaintiff either by filing an appeal or by filing a cross objection, more so, when the Issue No.5 and Issue No.11 which touches on the very right of the plaintiff over the suit land was held that the document on the basis of which the plaintiff claimed his right over the suit land was not a genuine document. The defendant, however, filed an appeal which was registered and numbered as Title Appeal No.4/2008. The learned First Appellate Court partly allowed the appeal by setting aside the judgment and decree passed by the learned Trial Court in so far as granting the relief of confirmation of possession and permanent injunction in favour of the plaintiff. The learned First Appellate Court however dismissed the said counter claim vide judgment and decree dated 18.05.2009.

14. Being aggrieved, therefore, the plaintiff as well as the defendant have filed two appeals. The plaintiff's appeal being RSA No.87/2009 and this Court vide an order dated 19.06.2009 admitted the said appeal by formulating two substantial questions of law which reads as under:

“1. Whether the finding of the Courts below in respect of Exhibit-1 based

on inadmissible hearsay evidence is hit by the provision of Section 61, 62, 63, 90 and 114 of the Evidence Act?

2. *Whether the Court below is justified in declaring the sale deed (Ext.10) as fraudulent one, although the defendant has not sought any relief in his counter claim for declaration of the sale deed (Ext.1) as fraudulent one and whether the issue No.11 can be framed although the plaintiff did not claim any right, title and interest over the suit land on the basis of the suit land?"*

15. The appeal filed by the defendant is RSA No.9/2010 and this Court vide order dated 24.09.2010 admitted the said appeal by formulating a substantial question of law, which reads as under:

"Whether the learned Court below was justified in refusing to pass the decree for recovery of khas possession by evicting the plaintiff from the suit land when the finding has been recorded that the plaintiff came into possession by means of a forged document?"

16. This Court has duly taken note of the submissions so made by the learned counsels appearing on behalf of the plaintiff as well as the defendant in their respective appeals.

17. Let this Court consider as to whether the substantial question of law so formulated in both the Appeals are involved in the instant appeals. The first substantial question of law so formulated in RSA No.87/2009 is as to whether the finding of the Courts below in respect of Ext-1 based on inadmissible

hearsay evidence is hit by the provisions of Section 61, 62, 63, 90 and 114 of the Evidence Act. In the opinion of this Court, the said substantial question of law is not involved in the instant appeal taking into account that the Issue No.5 and Issue No.11 were duly decided by the learned Trial Court categorically holding that the deed of sale exhibited as Ext.1 is not a genuine document and further the owner of the land Girijananda Choudhury did not sell the land to the plaintiff by Ext.1. This finding of fact which has been arrived at by the learned Trial Court had not been put to challenge before the learned First Appellate Court either by filing an appeal or by cross objection. Under such circumstances, the said substantial question of law which has been formulated is not involved in the instant appeal being RSA No.87/2009.

18. The second substantial question of law is as to whether the Courts below were justified in declaring the sale deed as fraudulent one, although the defendant has not sought any relief in his counter claim for declaration of the sale deed as fraudulent one and whether the issue No.11 can be framed although the plaintiff did not claim any right, title and interest over the suit land on the basis of the suit land? The said substantial question of law would have arisen had the plaintiff questioned the decision in respect to Issue No.5 and Issue No.11 by filing an appeal or by cross objection, which the plaintiff did not. Under such circumstances, the second substantial question of law also is not involved in the instant appeal being RSA No.87/2009.

19. Now coming to the substantial question of law framed in RSA No.9/2010 which pertains to as to whether the learned Court below was justified in refusing to pass the decree for recovery of khas possession by evicting the

plaintiff from the suit land when the findings have been recorded that the plaintiff came to possession by means of a forged document? This Court had already in the previous segments of the instant judgment reproduced the Schedule to the counter claim in respect of which the counter claimant/defendant sought for recovery of possession. There is no denial to the fact that the Ext.A did not contain any boundaries, except the Dag Nos.66, 67 and 70. The DW-1, who was the defendant during his cross examination had categorically mentioned the boundaries and the same had also been dealt with hereinabove. The learned Trial Court as well as the learned First Appellate Court had come to categorical findings that the boundary mentioned in Ext.A by the DW-1 was not the suit land. Under such circumstances, the question of passing a decree for recovery of possession over the suit land could not have been passed by the learned Courts below, taking into account the concurrent findings of fact has been arrived at that the suit land and the land mentioned in Ext. A are both distinct and different. Consequently, irrespective of the plaintiff possessing any land, the defendant being the counter claimant had the burden to prove that it is the suit land which the defendant had a title over it and as the defendant failed to do so, both the Courts below were, therefore, justified in dismissing the counter claim. Accordingly, the said substantial question of law so formulated is not involved in the appeal being RSA No.9/2010. In that view of the matter, the substantial questions of law so formulated in both the appeals are not involved, for which both the appeals stand dismissed. There shall be no order as to costs.

20. Registry is directed to return the LCR back to the Courts below.

21. Both the appeals stand dismissed.

JUDGE

Comparing Assistant