

GAHC010013592013



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

Case No. : RSA/264/2013

MUSSTT. SAFURUN NESSA and 6 ORS,

2: MD. MUDABBIR HUSSAIN

3: MD. EKRAM HUSSAIN

4: MUSTT. MINA BEGUM

5: MUSTT. MINA BEGUM

6: MUSTT. MIRA BEGUM

7: MUSTT. KUSUM BEGUM

8: MUSSTT. BABITA BEGUM

NO. 1 IS THE WIFE
NOS. 2 AND 3 ARE THE SONS AND NOS. 4 TO 7 ARE THE DAUGHTERS OF
LATE KERAMAT ALI
ALL ARE RESIDENT OF VILL. BATAMARI
MOUZA BATADRAVA IN THE DIST. OF NAGAON
ASSAM

VERSUS

MUSSTT. SURUJ BANU and 15 ORS,
W/O BABAR ALI, VILL. HAIDUBI, MOUZA BATADRAVA, DIST.NAGAON,

ASSAM.

2:MD. WAKIL ALI

3:MD. MAJIBUR RAHMAN

4:MD. NAZIMUDDIN

5:MD. BULBUL
NOS. 2 TO 5 ARE SONS OF ABDUL NABI

6:MD. TARA BANU
W/O LATE ABDUL NABI

7:MD. MUKUL LASKAR
S/O LATE KERAMAT ALI

8:MUSSTT. FARIDA BEGUM

9:MUSSTT. RANI BEGUM

10:MUSSTT. MAJIDA BEGUM

11:MD. ANUWAR HUSSAIN

NOS. 8 TO 11 ARE SONS AND DAUGHTERS OF LATE KERAMAT ALI

12:MD. SAMSUL HAQUE

S/O MD. AHMED

13:MUSSTT. ASIA KHATUN
W/O MD. ABDUL MANAN

14:MUSSTT. SULEMA KHATUN

W/O ABDUL KADER

15:MD. WAHED ALI

S/O IBRAHIM

16:TARUN CH. AICH

S/O AMAR CH. AICH ALL ARE RESIDENTS OF VILL. BATAMARI
MOUZA BATADRAVA IN THE DIST. OF NAGAON
ASSAM

Advocate for the Appellants : Mr. B. D. Deka, Advocate

Advocate for the Respondents : Mr. S. Ali, Advocate

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

Date of Hearing : 30.07.2024

Date of Judgment : 30.07.2024

JUDGMENT AND ORDER (ORAL)

Heard Mr. B. D. Deka, the learned counsel appearing on behalf of the appellants and Mr. S. Ali, the learned counsel appearing on behalf of the respondent No.1.

2. The instant Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code') challenges the judgment and decree dated 15.06.2013 passed by the learned Additional District Judge, Nagaon in Title Appeal No.11(N)/2004 thereby affirming the judgment and decree dated 17.11.2004 passed by the learned Civil Judge (Senior Division), Nagaon in Title Suit No.23/1999.

3. This Court vide an order dated 06.12.2013 had admitted the instant Second Appeal by formulating two substantial questions of law which are reproduced herein under:-

(1) Whether the lower Appellate Court was justified in affirming the judgment and decree passed by the Trial Court which had decreed plaintiff's suit for declaration of the shares in the suit property?

(2) Whether on admitted facts, pleaded and proved by the parties in their respective pleadings finding recorded by the two Courts determining the shares of the parties to the suit in the suit property is the principles of Muslim law applicable to inheritance because the parties to the suit are admittedly governed by Muslim Law being Muslim by caste?

4. Thereupon after hearing the learned counsels appearing on behalf of the parties, this Court vide the order dated 30.05.2024 had formulated three more additional substantial questions of law which are reproduced herein under:-

(i) Whether the Courts below were justified in not applying the provision of Section 90 of the Indian Evidence Act, 1872 in respect to the Deed of Sale bearing Deed No.7316 dated 28.12.1965 taking into account that the said document was 30 years old as on the date on which the same was received as evidence by the learned Trial Court?

(ii) Whether the Courts below were justified in decreeing the suit in favour of the plaintiffs in absence of the Deeds of Sale bearing Deed No.7316 dated 28.12.1965 as well as the Deed No.6121 dated 14.09.1973 being put to challenge by the plaintiff even after coming to learn about the same pursuant to filing of the written statement?

(iii) Whether the Courts below were justified in decreeing the suit in

favour of the plaintiffs in respect to the Schedule land after having arrived at the specific finding that the mother of the plaintiffs did not relinquish her share of the land in favour of the plaintiff and the defendant No.5 and had also gifted her share to Abdul Nabi (sic Ali)?

5. The question which arises in the instant proceedings is as to whether the said substantial questions of law which have been formulated in terms with Section 100 (4) of the Code are involved in the instant Appeal. For ascertaining the said aspect of the matter, this Court finds it relevant to take note of the brief facts leading to the filing of the instant Appeal.

6. For the sake of convenience, the parties herein are referred to in the same status as they stood before the learned Trial Court.

7. The plaintiff along with one Tara Banu admittedly were the daughters of one Nagor Ali (since deceased). The father of Late Nagor Ali was one Rusmat Ali who admittedly owned various plots of land admeasuring 19 bighas 4 kathas 18 lechas. Late Nagor Ali had one wife namely Safia Khatun Bibi. It is the admitted fact that Safia Khatun Bibi had remarried post death of Late Nagor Ali. It is the specific case of the plaintiff that Safia Khatun Bibi, the mother of the plaintiff and the defendant No.5, at the time of her marriage relinquished her share to her two daughters and thereupon, the two daughters had amicably partitioned half share of the land. It is on that basis the plaintiff had claimed right, title and interest in respect to the land described in Schedule Nos.A, B, C and D to the plaint.

8. The plaintiff further pleaded in her plaint that as she was married away to a different village and it was inconvenient for her to cultivate the suit land so she entrusted the defendant Nos. 1 to 5 with the work of

cultivation. The arrangement so continued till 1994 when the husband of her sister, one Abdul Nabi (expired). It is the case of the plaintiff that the defendant Nos.1 to 5 thereupon denied the title of the plaintiff in active collaboration with the defendant No.6 who is the brother of Late Abdul Nabi. It is the further case of the plaintiff that the plaintiff initiated a proceedings under Section 145/146 of the Code of Criminal Procedure, 1973 which was registered as MR Case No.938/96. The said proceedings were disposed of vide an order dated 01.08.1998 in favour of the defendants and it is under such circumstances, the suit was filed in the year 1999. The plaintiff sought for the reliefs that the plaintiff is the owner of the suit land as described in Schedule Nos.A, B, C and D having all the right, title, interest over the said lands; for delivery of khas possession of the suit land as described in Schedule Nos.A, B, C and D to the plaintiff by evicting the defendants from the land with their men and materials demolishing their houses and structures; etc.

9. This Court has also perused the Schedules appended to the plaint and from the said schedules, it is seen that in respect to Schedule Nos.A, B and C, the plaintiff had sought for half the land contained in the respective Dags and Patta Numbers. However, in respect to Schedule-D, the plaintiff had only sought for 2 kathas 10 lechas of land out of Dag No.215 containing 9 bighas 3 kathas 14 lechas of land under Periodic Patta No.97. There is no reason assigned in the plaint as to why the plaintiff had sought for only 2 Kathas 10 lechas out of 9 bighas 3 kathas 14 lechas of land contained in Dag No.215 of Patta No.97.

10. Pursuant to the filing of the said suit which was registered and numbered as Title Suit No.23/99, only the defendant No.6 participated in

the said suit. As regards the other defendants, the Court proceeded ex-parte. In the written statement filed by the defendant No.6, he had stated that the plaintiff had vide the registered Deed of Sale bearing Deed No.7316 dated 28.12.1965, sold 1 bigha of land covered by Dag No.241 (new), 259 (old) of Patta No.114 (old), 140 (new) to three persons, namely, Rahmat Ali, Ibrahim Ali and Abdul Rahim and delivered possession to them. It is pertinent to note that this land so alleged to be sold pertains to Schedule-C to the plaint. Thereupon, the said Rahmat Ali, Ibrahim Ali and Abdul Rahim vide another registered Deed of Sale bearing Deed No.6121 dated 14.09.1973 sold the said 1 bigha of land to the defendant No.6 and since then the defendant No.6 has been possessing the said land. It is also stated in the written statement that the said Rahmat Ali, Ibrahim Ali and Abdul Rahim purchased 3 bighas of land from one Abdul Ali vide the registered Sale Deed No.6252 dated 22.07.1977 from Dag No.241 of PP No.140 under Batamari Mouza. At the time of execution of the said Deed, the said Abdul Ali was a minor and the sale was executed by his natural guardian/father one Abdul Rahman by obtaining due permission from the District Judge, Nagaon in Misc.(G) No.2/71. After getting the permission of the sale from the District Judge, Nagaon, the said Abdul Rahman executed the Deed and Sale and delivered possession to said Rahmat Ali, Ibrahim Ali and Abdul Rahim. Thereafter, there was a partition amongst the said three persons and 2 bighas of land was sold by Ibrahim Ali to the defendant No.6-Keramat Ali by a registered Sale Deed No.4911 dated 31.05.1984 and delivered possession to him. It was on the basis thereof, the defendant No.6 had alleged that he had purchased the 3 bighas of land and his name has been mutated in the record of rights. It

has also been mentioned that the plaintiff also sold land to Late Abdul Nabi on 28.12.1965 by the registered Sale Deed No.7315 and thereupon, there is no land which stood in the name of the plaintiff in Schedule-C to the plaint.

11. On the basis of said pleadings, the learned Trial Court framed as many as six issues. Issue No.2 is as to whether the suit was maintainable in its present form; the Issue No.3 is as to whether the plaintiff has got right, title and interest in the suit land and the Issue No.4 was whether the plaintiff has been dispossessed by the defendants from the suit land.

12. From the record, it is seen that both the plaintiff and the defendant No.6 adduced evidence of witnesses as well as documentary.

13. The learned Trial Court decreed the suit in favour of the plaintiff vide the judgment and decree dated 17.11.2004. The learned Trial Court while deciding the Issue No.2 as regards the maintainability of the suit in view of the provisions of Sections 3, 17 & 54 of the Assam Tenancy Act, 1971 had rejected the said objections on the ground that there was no specific plea raised in the written statement. As regards the Issue Nos.3 & 4, the learned Trial Court came to a categorical finding that the original owner of the land was Late Rusmat Seikh who left behind his son, Nagor Ali as his legal heir. Late Nagor Ali also left behind his wife Safia Khatun along with his two daughters, the plaintiff and the defendant No.5. It was also observed by the learned Trial Court that Safia Khatun remarried while the two daughters were young. The learned Trial Court further came to a finding from a perusal of Exhibits 1 to 6 that the suit land originally included in Dag Nos.274, 260 & 259 under PP No.114 of 1939-40 Settlement in Dag No.248 under PP No.103 and thereafter in 1968-69

Settlement included in Dag No.232 of PP No.145, Dag No.245 of PP No.141, Dag No.241 of PP No.140 and Dag No.215 of PP No.97, total 5 bighas 3 kathas 2 lechas land and the name of the plaintiff was found in the record of rights from the evidence of PW3.

The learned Trial Court taking into account the denial of the plaintiff of selling of the land vide Ext.Ga, Deed No.7316 dated 28.12.1965 and vide Sale Deed No.7315 dated 28.12.1965 came to a categorical finding that the plaintiff deposed on 07.03.2001 stating that she was 56 years old. Her age as per the learned Trial Court would have been in the year 1965, 10/11 years old minor girl, incapable of performing execution of the registered Sale Deed Nos.7315 and 7316 dated 28.12.1965.

It was also observed that the defendant side had not proved the documents as per the provisions of law. The learned Trial Court further rejected the application of Section 90 of the Indian Evidence Act, 1872 in respect to Ext.Ga which were exhibited on the grounds the plaintiff had denied the execution and her age seems to be minor. The learned Trial Court further came to a categorical finding that in absence of any proper evidence and in absence of any expert opinion, the Deeds of Sale bearing Deed No.7316 dated 28.12.1965 was not believable and Section 90 of the Indian Evidence Act, 1872 being discretionary and not obligatory, the said provisions could not have been applied.

In addition to that, the learned Trial Court came to a categorical opinion that purchase made by Rahmat, Ibrahim Ali and Rahim of 3 bighas from Abdul Ali vide registered Sale Deed No.6252 exhibited as Ext.Gha could not be relied upon as the father of Abdul Ali had no title over the suit land. It was also observed that there was no evidence in respect to

the relinquishment of shares by Safia Khatun, the mother of the plaintiff from her share, but Safia Khatun's second husband has no right to sell the said land from the suit Patta beyond the share of Safia Khatun, i.e. 3 bighas land. The learned Trial Court also came to a categorical opinion that Ibrahim Ali though sold 2 bighas of land after partition to Keramat Ali, the defendant No.6 by a registered Sale Deed No.4911 dated 31.05.1984 vide Ext.Ka, out of Dag No.241 of PP No.140, but the said document was held to be not acceptable. The learned Trial Court also took note of the evidence of DW1 who is the son of Keramat Ali who admitted during his cross-examination that the land of the plaintiff, i.e. half share was cultivated by Abdul Nabi, brother-in-law of the plaintiff and after death of Abdul Nabi, the defendant refused to give share to the plaintiff which is also supported by PW2. In view of the above findings, the learned Trial Court was not inclined to accept the evidence of the defendant No.6 and the evidence of the plaintiff was accepted and accordingly held that the plaintiff had right, title and interest over the suit land and the plaintiff had constructive possession of the suit land which was dispossessed by the principal defendants.

On the basis of the said, the learned Trial Court decreed the suit in favour of the plaintiff declaring that the plaintiff is the owner of the suit land described in the Schedule Nos.A, B, C and D to the plaint having all the right, title and interest over the suit land. In addition to that, the learned Trial Court also decreed for delivery of khas possession of the suit land described in the Schedule Nos.A, B, C and D to the plaint by evicting the defendants from the suit land with their men and materials by demolishing their houses and structures thereon.

14. Being aggrieved, the defendant No.6 approached the learned First Appellate Court by filing an Appeal which was registered and numbered as Title Appeal No.11(N)/2004.

15. The learned First Appellate Court vide the judgment and decree dated 15.06.2013 dismissed the said Appeal and affirmed the judgment and decree passed by the learned Trial Court. It is seen that the learned First Appellate Court had decided the Appeal issue-wise. The Issue No.2 was decided in favour of the plaintiff holding that the suit was maintainable. While deciding the Issue Nos.3 & 4, the learned First Appellate Court taking into account the evidence on record and upon perusal of the certified copy of the Jamabandi of PP No.140 (new) of Batamari Gaon came to a finding that the said document shows that the said Dag No.241 had 8 bighas 0 katha 16 lechas of land. The said Patta consisted of three original pattadars, i.e. the plaintiff, the defendant No.5 and one Abdul Ali. In the Note *Ka* dated 12.12.1980, 1 bigha of land was mutated in the name of the defendant No.6. In the Note *Kha*, a plot of land measuring 3 bighas of land was mutated in the names of the Rahmat Ali, Ibrahim Ali and Abdul Rahim at Sl. Nos.5, 6 & 7 in place of Abdul Ali. As per Note *Ga*, 2 bighas of land was mutated in the name of the defendant No.6 in place of one Ibrahim Ali. As per Note *Unga*, a plot of land measuring 1 bigha 2 kathas 10 lechas had been retained vide order dated 30.12.1995 in the name of the plaintiff. The learned First Appellate Court also came to a categorical finding that no document could be produced by the plaintiff to show that Safia Khatun Bibi had relinquished her share of land in their favour and in the cross-examination of the plaintiff No.1, i.e. the plaintiff, she had also admitted Abdul Ali was the son

of her mother from the second husband and as per Chitha, her mother Safia Khatun Bibi gifted her share of land to Abdul Ali. The learned First Appellate Court disbelieved the stand taken by the plaintiff of relinquishment being made her mother on the basis of Ext.3. The learned First Appellate Court disregarded the Deed of Sale bearing Deed No.7316 dated 28.12.1965 in favour of Rahmat Ali, Ibrahim Ali and Abdul Rahim by the plaintiff on the ground that the presumption under Section 90 of the Indian Evidence Act, 1872 could not have been applied as the said document was not 30 years old as on the date on which the suit was filed. The learned First Appellate Court had rejected the claim of the defendant No.6, regarding the purchase of 1 bigha from Rahmat Ali, Ibrahim Ali and Abdul Rahim vide registered Deed No.6121 of 1973 as the same was not proved in accordance with law and the other 2 bighas as claimed by the defendant No.6 had no relation of the land falling under the share of plaintiff. It was also opined that as per Ext.3, it was crystal clear that the plaintiff still had her land in the said Patta. Accordingly, the learned First Appellate Court dismissed the Appeal vide the impugned judgment and decree dated 15.06.2013 and it is under such circumstances, the instant Appeal has been preferred.

16. In the backdrop of the above, let this Court decide as to whether the substantial questions of law so formulated by this Court are involved in the instant Appeal.

17. Mr. B. D. Deka, the learned counsel appearing on behalf of the appellants submitted in support of the substantial questions of law which have been formulated. He submitted that this is a case where both the learned Trial Court as well as the learned First Appellate Court had

committed gross perversity in taking into account the Deed of Sale bearing Deed No.7316 dated 28.12.1965 and not applying the presumption in terms with Section 90 of the Indian Evidence Act, 1872. He submitted that the learned Trial Court disregarded both the Deeds being Deed Nos.7315 and 7316 dated 28.12.1965 on the ground that the plaintiff was 10/11 years in year 1965 though on 07.03.2001 when the plaintiff adduced her evidence she had duly admitted that she was 56 years. He therefore submitted that taking into account that the plaintiff was 56 years as on 07.03.2001, her age would be 20 years as on 28.12.1965. The learned counsel for the Appellant further submitted that the learned First Appellate Court while deciding the applicability of Section 90 of the Indian Evidence Act, 1872, counted the same in terms with 1973 which was the Deed by which the defendant No.6 had purchased it from the three persons which was sold by the plaintiff vide the registered Deed No.7316 dated 28.12.1965. He therefore submitted that as on the date on which the evidence was submitted, the registered Deed which is Ext.Gha bearing Deed No.7316 dated 28.12.1965 was 30 years old and as such the presumption ought to have been applied. The learned counsel for the Appellant duly submitted that though the application of presumption by the Court in terms of Section 90 of the India Evidence Act, 1872 is discretionary but then also the reason for not doing so has to be properly assigned. The learned counsel for the Appellant further submitted that from the perusal of the materials on record, nothing could be seen that there was an amicable partition thereby identifying the specific boundaries to which the plaintiff had claimed rights over the land in question. The finding arrived at by the learned Trial Court as well as the learned First

Appellate Court do not also identify that these lands which have been specifically described in Schedule Nos.A, B, C and D have been duly partitioned. Even perusal of the plaint would show that the plaintiff had only stated that half of the share belonged to the plaintiff and it was only mentioned that there was a partitioned which was not proved. He therefore submitted that the question of issuance of a declaration of right, title and interest in respect to the land specifically described in the Schedules could not have been made unless there was specific finding arrived at by the learned Trial Court as well as the learned First Appellate Court that these were the lands which fell into the share of the plaintiff. In addition to that, the learned counsel for the Appellant submitted that though the defendant No.6 had only issue as regards the Schedule-C but if the registered Deed of Sale bearing Deed No.7316 dated 28.12.1965 is duly taken note of, it would be seen that the plaintiff had sold 1 bigha of land. He further submitted that the plaintiff had categorically failed to prove the relinquishment which has been duly held by both the learned Trial Court as well as the learned First Appellate Court and as such without calculating the share to which the mother would have been entitled to, the learned Trial Court as well as the learned First Appellate Court could not have specifically decreed the suit with the land specifically described in the Schedules to the plaint. The learned counsel for the appellants further submitted that the plaintiff upon filing of the written statement had the opportunity to challenge the registered Deed of Sale bearing Nos.7315 and 7316 dated 28.12.1965, registered Deed of Sale bearing No.6252 dated 22.07.1997 as well as the Deed of Sale bearing No.4911 dated 31.05.1984, but having not challenged, the plaintiff would have no right to

get a declaration in respect to the Schedule-C land.

18. Per contra, Mr. S. Ali, the learned counsel appearing on behalf of the respondent No.1 submitted that as to whether there was an amicable partition or not there ought to have a denial by the defendant Nos.1 to 5 who neither participated in the suit nor filed any written statement. Referring to plaint at paragraph No.3 and the written statement of the defendant No.6 at paragraph No.11, the learned counsel for the respondent No.1 submitted that at paragraph No.3 of the plaint it was categorically stated that there was a relinquishment by the mother and thereupon, both the sisters had partitioned the total land of 19 bighas 4 kathas 18 lechas in equal portions. There was no denial to the said aspect by the defendant No.6. It was only stated that it was factually and completely not correct. Referring to the provisions of Order VII Rule 3 & 5 of the Code, the learned counsel for the respondent No.1 submitted that there being no denial to that aspect, the learned Trial Court as well as the learned First Appellate Court were justified in coming to an opinion that there was a partition of the suit land between the two sisters. He further submitted that the learned First Appellate Court had rightly come to a finding that the document of the year 1973, no presumption under Section 90 of the Indian Evidence Act, 1872 could have been applied and such the question of making any interference to the said findings do not arise. The learned counsel for the respondent No.1 further submitted though the learned counsel appearing on behalf of the appellants submitted that the suit ought to have been a suit for partition but the said plea was never taken up in the written statement and as such if there is no foundation laid in pleadings, it cannot be a substantial question of law involved in the

instant Appeal. In addition to that, the learned counsel appearing on behalf of the respondent No.1 referring to Section 103 of the Code submitted that this Court, if the evidence on record is sufficient determine any issue necessary for the disposal of the Appeal which was not determined by the learned First Appellate Court or by the learned Trial Court or for that matter, if both or any of the Courts below have wrongly determined which is a substantial question of law involved in the instant Appeal.

19. I have heard the learned counsel for both the parties had perused the materials on record. From the perusal of the materials on record, it is clear that one Rusmat Seikh was the original owner of various plots of land measuring 19 bighas 4 kathas 18 lechas in various Dags and corresponding Patta numbers. There is no denial to the fact that the said land did not devolve upon his son one Nagor Ali (since deceased). Late Nagor Ali was survived by his wife one Safia Khatun and two daughters, i.e. the plaintiff and the defendant No.5. As per the applicable laws of inheritance, the wife would be entitled to $1/8^{\text{th}}$ share of his said land and the daughters would be entitled to $2/3^{\text{rd}}$ and the residuary would again be partitioned in the said proportion. During the course of hearing, it has been submitted that applying the law of inheritance, the share of the mother of the plaintiff and the defendant No.5 would not have been more than 3 bighas. The consequential effect therefrom would be that each daughter would be entitled to half of the 16 bighas 4 kathas 18 lechas of land or in other words, each daughter's entitlement would be 8 bighas 2 kathas 9 lechas.

20. At this stage, this Court takes note of the registered Deed of Sale bearing No.7316 dated 28.12.1965. It is a document which was 30 years old as on the date on which the said document was admitted into evidence. The learned Trial Court had decided against the said document on a completely perverse finding that the plaintiff as on the date of execution of the said Deed was 10/11 years old which finding could not have been arrived at in as much as the plaintiff had herself adduced in evidence that she was 56 years old on 07.03.2001. The learned First Appellate Court however did not decide that aspect of the matter in relation to the document exhibited as Ext.Gha, i.e. the registered Sale Deed No.7316 dated 28.12.1965, but however only decided in respect of registered Sale Deed No.6121 dated 14.09.1973. This aspect of the matter also touches on the perversity on the part of the learned First Appellate Court in applying the provision of Section 90 of the Indian Evidence Act, 1872. The reason so assigned by both the learned Trial Court as well as the learned First Appellate Court for not taking into consideration Ext.Gha is not in consonance with the provisions of law and as such, this Court is of the opinion that the a substantial questions of law so formulated on 30.05.2024 as to whether the Courts below were justified in not applying the provisions of Section 90 of the Indian Evidence Act, 1872 in respect of the Deed of Sale bearing Deed No.7316 dated 28.12.1965 taking into account that the said document was 30 years old as on the date on which the same was received in evidence by the learned Trial Court is duly involved.

21. This Court further takes note of that none of the defendants contested the suit by taking their written statement except the defendant

No.6. There is no denial to the effect that there was no partition amongst the two sisters, i.e. the petitioner and the defendant No.5 which is otherwise the mandate of law in terms with Order VIII Rule 3 & 5 of the Code. The defendant No.6 whose successors-in-interest are the appellants herein claims further rights on the basis of a sale being made by one Abdul Ali through his father after taking due permission from the learned District Judge in Misc.(J) Case No.7/71. No doubt, an oral gift is permissible as per the Mohammedan Law but the same has to be in consonance with Section 149 of the Mohammedan Law which stipulates the three essential conditions, namely, (i) that there should be a declaration of the gift by the donour and (ii) acceptance of the gift expressed or implied by or on behalf of the donee and (iii) the delivery of possession of the subject of the gift by the donor to the donee as mentioned under Section 150 of the Mohammedan Law. Nothing however has been proved during the course of the trial as could be seen from the evidence on record that there was a gift by the mother, namely, Safia Khatun Bibi in favour of Abdul Ali in terms with the mandate of Section 149 of the Mohammedan Law. In addition to that, there is also no proof that guardian of the minor Abdul Ali had accepted the gift which is one of the pre-conditions for a gift taking into account that admittedly Abdul Ali was a minor when the registered Deed bearing Deed No.6252 dated 22.07.1972 was executed. Under such circumstances, the question as to whether any right devolved upon the said gift so purportedly made by the mother Safia Khatun Bibi in favour of her son Abdul Ali who was a minor and as to whether the sale could have been made in favour of Rahmat Ali, Ibrahim Ali and Abdul Rahim of 3 bighas of land has to be answered in the

negative. Under such circumstances, the gift having not been proved, the Deed of Sale being registered Deed No.6252 dated 22.07.1977 by the father of Abdul Ali in favour of Rahmat Ali, Ibrahim Ali and Abdul Rahim is apparently nonest. The same being nonest and void, the further sale by one Ibrahim Ali in favour of the defendant No.6 by the registered Sale Deed No.4911 dated 31.05.1984 would not confer a valid title over the said land conveyed.

22. The learned counsel appearing on behalf of the appellants submitted that these two Deeds being registered Sale Deed No.6252 dated 22.07.1977 and registered Sale Deed No.4911 dated 31.05.1984 was not put to challenge and as such the question of disturbing the right to conveyed by those Deeds do not arise.

23. This Court is of the opinion that the submission so made is misconceived for two reasons. First, a Deed which is nonest and void is not required to be specifically challenged in as much as the said Deed does not confer a right, title or interest over the land so conveyed. Secondly, there is no plea raised in the written statement that without the Deeds of Sale being declared to be illegal in an appropriate proceedings, the declaration so sought for cannot be issued. The consequential effect of not taking the plea is that there is no issue framed. Under such circumstances as the said cannot be urged before this Court as it would not be a substantial question of law in the instant appeal.

24. Be that as it may, this Court however is of the opinion that the registered Sale Deed No.7316 dated 28.12.1965 as well as the Deed of Sale bearing Deed No.6121 dated 17.09.1973 have been duly proved as is apparent from the materials on record, and as such, without a challenge

being made to the said Deeds of Sale, the plaintiff could not have claimed any right over the 1 bigha of land which the plaintiff had sold vide the registered Deed of Sale bearing Deed No.7316 dated 28.12.1965 to the said Rahmat Ali, Ibrahim Ali and Abdul Rahim and thereupon, the said Rahmat Ali, Ibrahim Ali and Abdul Rahim transferred it vide the registered Deed of Sale bearing Deed No.6121 dated 14.09.1973 to the defendant No.6. Accordingly, the second additional substantial question of law which was framed on 30.05.2024 as to whether the Courts below were justified in decreeing the suit in favour of the plaintiffs in absence of the registered Deed of Sale bearing Deed No.7316 dated 28.12.1965 as well as the Deed No. 6121 dated 14.09.1973 being put to challenge by the plaintiff even after coming to learn about the same pursuant to the filing of the written statement is a substantial question of law duly involved in the instant Appeal.

25. This Court further takes note of that though in the written statement, the defendant No.6 has stated that the plaintiff after having sold land to one Abdul Nabi on 28.12.1965 vide the register Deed No.7315 and accordingly did not have any further land in the same suit patta, this Court is of the opinion that the said document was never exhibited during the evidence and as such the alleged sale cannot be deemed on the basis of mere pleadings in the written statement. It is well settled that pleadings are not proof.

26. In the backdrop of the above, if this Court duly takes note of the two substantial questions of law which were framed on 06.12.2013, it would be seen that from what has been stated in the foregoing paragraphs of the instant judgment that even applying the principles as

principles of inheritance as per the Mohammedan Law, the plaintiff would be entitled to 8 bighas 2 kathas 9 lechas of land. She has specifically claimed only 5 bighas 3 kathas 2 lechas of land as could be seen from Schedule Nos.A, B, C and D which is much less than to which the plaintiff would be otherwise entitled to. The relinquishment whether made by the mother of the plaintiff or not, in the opinion of this Court, would not however affect the rights of the plaintiff in respect to the claim of land made taking into account that she has only claimed 5 bighas 3 kathas 2 lechas of land whereas she is otherwise entitled to 8 bighas 2 kathas 9 lechas of land. Accordingly, in opinion of this Court, the third additional substantial question of law so formulated on 30.05.2024 is substantial question of law involved in the instant Appeal. The above decision so rendered herein would also show that the substantial questions of law which were framed on 06.12.2013 would not be involved in the instant Appeal taking into account that both the Courts below have come to a categorical finding on the basis of evidence that there was a partition and the plaintiff was entitled to the land described in Schedule-A, B, C, & D to the plaintiff to the extent so claimed in the suit.

27. In the backdrop of the above observations and findings, this Court duly takes note of that the plaintiff herein would not be entitled to 1 bigha of land which the plaintiff had transferred vide the Deed of Sale bearing Deed No. 7316 dated 28.12.1965 in favor of Rahmat Ali, Ibrahim Ali and Abdul Rahim which was subsequently transferred to the defendant No.6 by a registered Sale Deed No.6121 dated 14.09.1973. This Court taking into account the provisions of Section 103 read with Order XLI, Rule 33 of the Code observes that the plaintiff herein would be entitled to the

declaration of the right, title and interest as well as recovery of possession in respect of Schedule Nos. A, B and D lands as claimed. However, as regards Schedule-C, the plaintiff would only be entitled to 3 bighas 0 katha 8 lechas of land taking into account that the plaintiff has already sold 1 bigha of land by the registered Deed of Sale bearing Deed No.7316 dated 28.12.1965.

28. Accordingly, the Appeal therefore stands disposed of with the above modification of the judgment and decree passed by the learned Trial Court which has been affirmed being the first Appeal.

29. The Registry is directed to prepare a fresh decree in terms with the above declaration to the effect that the plaintiff is entitled to right, title and interest as regards the land which has been specifically described in Schedule Nos.A, B and D as well as for recovery of possession and as regards the Schedule-C land, the plaintiff would only be entitled to a declaration of a right in respect of 3 bighas 8 lechas of land along with recovery of possession.

30. This Court further directs the Executing Court to execute the decree by removing that portion of the land as it appears from the Schedule mentioned in Ext.Gha, i.e. 1 bigha of land.

31. Return the LCRs.

JUDGE

Comparing Assistant