

(2009) 10 GAU CK 0010

Gauhati High Court

Case No: Second Appeal No. 143 of 1993

Tupidhar Gogoi

APPELLANT

Vs

Gopesh Chandra Das
and Others

RESPONDENT

Date of Decision: Oct. 30, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27

Citation: (2006) 1 GLT 701

Hon'ble Judges: Brojendra Prasad Katakey, J

Bench: Single Bench

Advocate: B.K. Goswami, for the Appellant; G.N. Sahewalla, for the Respondent

Final Decision: Allowed

Judgement

B.P. Katakey, J.

This appeal by the Defendant No. 1 in Title Suit No. 92/1968 is directed against the judgment and decree dated 10.06.1993 passed in Title Appeal No. 32/1986 by the learned Assistant District Judge, Tinsukia (now Civil Judge) dismissing the appeal and affirming the judgment dated 30.08.1975 passed by the learned Munsiff No. 1, Dibrugarh in Title Suit No. 92/1968 decreeing the plaintiffs' suit for declaration of right, title and interest in respect of the land described in Schedule-2 to the plaint and for recovery of khas possession by ejecting the Appellant (Defendant No. 1).

2. The predecessors-in-interest of Appellant Nos. 1(a) to 1(k), namely Gopesh Ch. Das and Smti. B&santi Bala Das instituted Title Suit No. 92/1968 in the Court of the learned Sadar Munsiff at Dibrugarh against the present Appellant, Sri Tupidhar Gogoi, Md. Husuf and Aminullah as principal Defendant Nos. 1, 2 and 3 and 5(five) others as proforma Defendants praying for a decree declaring their right, title and interest in respect of a plot of land measuring 2 Kathas, 8 Lechas in Dag No. 594 of Periodic Patta No. 144 of Digboi town, Mouza - Makum together with a house standing thereon and in occupation of the

present Appellant/Defendant No. 1, bounded by in the North - plaintiffs own land, in the South - AOC Road, in the East - Saheb Dayal Tewari and in the West - Road, contending inter alia that the plaintiffs purchased a plot of land measuring 1 Bigha, 1 Katha, 5 Lechas from its owner Smti. Tezubala Devi by a registered deed of sale dated 25.04.1966 (Exhibit-1), of which she was in exclusive possession and fell on her share, on amicable partition amongst the co-pattadars, alongwith the houses standing thereon and though the plaintiffs pursuant to such purchase got the actual physical possession in respect of the land measuring 3 kathas 17 Lechas out of the said land, the remaining land measuring 2 Kathas 8 Lechas with houses standing thereon was at the time of such purchase in occupation of the Appellant/Defendant No. 1 as tenant under said Smti. Tezubala Devi on payment of the monthly rent of Rs. 40/-. It has further been pleaded in the plaint that the Appellant/Defendant No. 1 being informed about such transfer attorned to the plaintiffs and though agreed to pay the monthly rent to them, he avoided such payment of monthly rent on some pretext or other for which the notice of ejectment dated 07.12.1966 (Exhibit-5) was issued asking him to quit and deliver the vacant possession of the house immediately on expiry of 31st December, 1966 but he refused to accept the said notice. According to the plaintiffs, the Appellant/Defendant No. 1 became refractory and in collusion with Aminullah (Defendant No. 3), one of the sons of the recorded pattadar Md. Safi, got a sale deed executed by said Md. Aminullah in favour of Mr. Eusuf (Defendant No. 2), which gave rise to lodging of a complain, which was pending. The plaintiffs further pleaded in the plaint that another ejectment notice dated 28.03.1968 (Exhibit-14) was thereafter, issued to quit and give up the vacant possession of the rented houses in favour of the plaintiffs on expiry of 30th April 1968, which was also refused to accept by the Appellant/Defendant No. 1. It has further been pleaded in the plaint that Aminullah (Defendant No. 3), the vender of Md. Eusuf (Defendant No. 2), had no right, title and interest over the suit land and the sale deed (Exhibit-X) executed by said Aminullah in favour of the Defendant No. 2 is a shame, colourable and collusive transition and does not effect the plaintiffs title. The plaintiffs further pleading in the plaint is that the Appellant/Defendant No. 1 has collected building materials for construction of the house on the suit land. The plaintiffs, there fore, instituted the suit for declaration of right, title and interest against the principal Defendants, namely, Tupidhar Gogoi (present Appellant No. 1), Md. Eusuf (Defendant No. 2) (whose name has been struck off from the list of Defendants vide order dated 04.10.1 % 9 on the prayer of the present Appellant) and Aminullah (Defendant No. 3, who did not contest the suit by filing any written statement). The names of proforma Defendant Nos. 5 (Kurbai Dusad); 6 (Bhabi Begum) and 7(Md. Samiullah) have also been struck off from the list of Respondents in the appeal vide orders dated 15.6.1995 and 07.06.1996 passed on the basis of the applications filed by the present Appellant.

3. The said suit has been contested by the present Appellant/Defendant No. 1 (Tupidhar Gogoi), Md. Eusuf (Defendant No. 2) by filing joint written statement denying the claim of the plaintiffs in the plaint and contending inter alia that the Appellant/Defendant No. 1 (Tupidhar Gogoi) is in occupation of the suit land since 1964 on lease under Md. Eusuf

(Defendant No. 2) after purchasing the house from Lakheswar Buragohain, who was formerly in occupation of the land on lease initially under Aminullah (the Defendant No. 3) from 1954 to 1960 and thereafter, under Md. Eusuf (Defendant No. 2) from 1960 to 1963 and subsequently in the year 1967 the Appellant/Defendant No. 1 purchased the said land by registered deed of sale for valuable consideration from Md. Eusuf (Defendant No. 2), who was the rightful owner of the suit land and since then he is in possession of the land as his own having his own houses thereon. In the said written statement it has further been denied that the Appellant/Defendant No. 1 was ever a tenant under Smti. Tezubala Devi, the vendor of the plaintiffs.

4. The learned Trial Court on the basis of the pleadings framed the following issues for decisions:

- 1) Is there any case of action?
- 2) Is the suit bad for non-joinder of the parties?
- 3) Whether the suit has been properly valued and C.F. paid accordingly?
- 4) Whether the registered sale deed executed by Smt. Tezubala is legal?
- 5) Whether the suit land is properly described?
- 6) Whether the plaintiff got physical possession after purchase?
- 7) Whether the deftd. returned to the plaintiff and agreed to pay rent?
- 8) Whether the deftd. Collusively obtained a sale deed from Aminullah and Md. Eusuf?
- 9) Whether the ejectment notice served upon the deftd. Is bad in law?
- 10) Whether the plaintiff is entitled to a permanent injunction?
- 11) Whether the deftd. No. 1 after purchase from Yusuf, got any valid title over the S.I.?
- 12) Whether the plaintiff are entitled to a decree?
- 13) To what relief, if any, the parties are entitled?

5. The plaintiffs in support of their case examined 13 (thirteen) witnesses, which includes the plaintiff No. 1, Sri Gopesh Ch. Das and also proves a number of documents including the sale deed dated 25.04.1966 (Exhibit-1) by which Tezubala Devi transferred the land, which includes the suit land, in favour of the plaintiffs and sale deed dated 25.11.1967 executed by Md. Eusuf (Defendant No. 2) in favour of Sri Tupidhar Gogoi (Appellant/Defendant No. 1) as Exhibit-12 and the notices dated 07.12.1966 and 28.03.1968 being Exhibits 5 and 14. The principal Defendant Nos. 1 and 2, who

contested the said suit by filing written statement, have also examined 5 (five) witnesses, which includes the Appellant/Defendant No. 1 and also the Defendant Nos. 2 and 3 and exhibited a number of documents, which includes the sale deed dated 25.11.1967 executed by Md. Eusuf (Defendant No. 2) in favour of the Appellant/Defendant No. 1, as Exhibit-Ka, the deed of rectification dated 01.07.1968 executed by Md. Eusuf as Exhibit-Kha. All the witnesses were duly cross-examined by the respective parties. The learned Trial Court, upon appreciation of the evidences on record, vide judgment dated 30.08.1975 decreed the suit of the plaintiffs declaring the right, title and interest over the suit land and also for recovery of khas possession. Being aggrieved, only the present Appellant Sri Tupidhar Gogoi preferred Title Appeal No. 32/1986 in the Court of the learned Assistant District Judge, Tinsukia (now Civil Judge), which had also been dismissed by the learned First Appellate Court vide judgment and decree dated 10.06.1993, affirming the judgment and decree passed by the learned Trial Court. The Appellant/Defendant No. 1 thereafter, filed the present appeal before this Court.

6. During pendency of the appeal an application under Order 41, Rule 27 of the CPC was filed by the present Appellant with a prayer for allowing him to adduce additional evidence to prove the registered deed of sale dated 18.02.1960 executed by Md. Aminullah (Defendant No. 3) in favour of Md. Eusuf (Defendant No. 3). Such prayer has been allowed by a Single Bench of this Court vide order dated 20.12.1999 and accordingly the records were sent back to the learned First Appellate Court for recording the additional evidence. The said sale deed dated 18.02.1960 has thereafter, been proved by the present Appellant as Exhibit-X by adducing additional evidence.

7. The appeal was though initially admitted vide order dated 03.12.1993, no substantial question of law having been formulated, another Single Bench of this Court vide order dated 23.06.2009 framed the following substantial questions of law for hearing:

1. Whether the impugned judgment suffers from infirmity of non-consideration of the pleadings and the exhibited documents?

2. Whether the learned lower appellate Court erred in law in accepting the identity of the suit land on the fact of the objection raised by the Defendant in its written statement as regards the identity?

3. Whether the findings of the learned Court below as regards tenancy and collusiveness of the sale deed of the Defendant are arrived at without any proof of the relevant facts to that effect?

4. Whether in view of the additional evidence adduced by the Defendant, the findings of the learned Court below as regards failure of the Defendants to prove his title is sustainable?

8. I have heard Mr. B.K. Goswami, the learned Sr. Counsel for the Appellant and Mr. G.N. Sahewalla, the learned Sr. Counsel for the responder t Nos. 1(a) to 1(k). None appears

for the other Respondents despite service of notices.

9. Mr. Goswami, the learned Sr. Counsel for the Appellant referring to the pleadings in the written statement as well as the judgment and decree passed by the learned Court below and also the description of the suit land given in the Schedule-2 to the plaint and in the notices of ejectments being Exhibit-5 and Exhibit-14, has submitted that though the Appellant/Defendant No. 1 in paragraph 5 of the written statement has specifically pleaded that the land under his possession is not the part of the land purchased by the plaintiffs and the description of the land given in the said ejectment notices being Exhibit-5 and Exhibit-14 and the boundaries given in the suit land does not tally, the learned Court below ought not to have decreed the suit of the plaintiffs and ought to have held that the plaintiffs have failed to establish the identity of the suit land and also have failed to prove that the suit land is part of the land covered by the Exhibit-1 sale deed. Mr. Goswami referring to the boundaries of the suit land as described in Schedule-2 to the plaint as well as the boundaries given in the said ejectment notices being Exhibit-5 and Exhibit-14 has submitted that it is apparent that the boundaries as described by the plaintiffs in the plaint and in the ejectment notices are different. It has further been submitted that the plaintiffs could not prove by adducing any evidence that the suit land is part of the land purchased by them vide Exhibit-1 sale deed. On the other hand, according to Mr. Goswami, since the Appellant/Defendant No. 1 could prove by adducing evidence and by proving the sale deeds being Exhibit-X and Ka by which Aminullah sold the land to Eusuf, the vendor of the Appellant/Defendant No. 1 and by Eusuf in favour of the Appellant/Defendant No. 1, respectively, the learned Court below ought not to have decreed the suit of the plaintiffs, in view of such positive evidence relating to the right, title and interest acquired by the Defendants by virtue of such sale deeds.

10. Referring to the finding recorded by the learned First Appellate Court relating to the decree declaring that the sale deed Exhibit-X was collusive and fraudulent, Mr. Goswami has submitted that the learned First Appellate Court has passed such decree on the basis of presumption only. Mr. Goswami submits that no finding relating to the fraud or collusion can be recorded on the basis of presumption unless there is high degree of proof available on record and in the instant case, there being no evidence to demonstrate that either the Exhibit-X or Ka sale deeds are fraudulent and collusive, the learned Courts below ought not to have decreed the suit of the plaintiffs by declaring the said sale deed as fraudulent and collusive on the basis of presumption. It has further been submitted by Mr. Goswami that there being several other co-pattadars in respect of Periodic Patta No. 144 and there being no partition of land amongst the co-pattadars, no decree declaring the right, title and interest over the specific portion of the land can be decreed, as has been done by the learned Courts below and hence the decree passed by the learned Courts below are liable to be set aside.

11. Mr. Sahewalla, the learned Sr. Counsel appearing for the Respondent Nos. 1(a) to 1(k) on the other hand, supporting the judgments and decrees passed by the learned Courts below has submitted that there is concurrent finding of fact by both the Courts

below relating to the identity of the land and the Appellant/Defendant No. 1 having not questioned the identity of the suit land in the written statement filed by him, he cannot in the second appellate stage raise such question of fact. It has further been submitted by Mr. Sahewalla that it is the specific case of the plaintiffs that there was amicable partition amongst the pattadars and the land measuring 1 Bigha, 1 Katha, 5 Lechas fell into the share of Smti. Tezubala Devi, which was sold to the plaintiffs by a registered deed of sale being Exhibit-1 together with the houses standing thereon, in respect of which the Appellant/Defendant No. 1 was a tenant under Tezubala Devi, who though subsequently attorned to the plaintiffs but refused to vacate the suit premises, on the ground of his defaulter in making payment of the monthly rent for the houses under his occupation as tenant, the contention of the Appellant/Defendant No. 1 that the suit of the plaintiff for khas possession in respect of the specific plot of land without partition cannot be decreed, is not sustainable in facts as well as in law. According to Mr. Sahewalla, neither Eusuf (Defendant No. 2) nor Aminullah (Defendant No. 3) has challenged the decree passed by the learned trial Court by filing any appeal and they have also not filed any appeal against the appellate decree and thereby they have accepted the findings recorded by the learned Courts below relating to the amicable partition amongst the co-pattadars and sale of 1 Bigha 1 Katha 5 Lechas of land by Tezubala Devi, which fell in her share, to the plaintiffs, part of which is the suit land. The Appellant/Defendant No. 1 being the tenant in respect of the houses cannot, therefore, challenge the title of the plaintiffs, who acquired the same by right of purchase vide Exhibit-1, submits Mr. Sahewalla.

12. It has further been contended by the learned Sr. Counsel that the notices, Exhibit-5 and Exhibit-14, were issued asking the Appellant/Defendant No. 1 to vacate the houses, which are in his possession and, therefore, it is natural that the description of land given in the said notices naturally would not tally with the description given in the schedule to the plaint, said notices being relating to the houses and land operating thereto. According to Mr. Sahewalla, the plaintiffs could prove by adducing cogent and reliable evidence that the suit land is part of the land covered by Exhibit-1 sale deed. It has further been submitted that the Defendant No. 3 (Aminullah), after the amicable partition amongst the co-pattadars had no saleable interest in respect of the land measuring 1 Bigha, 1 Katha, 5 Lechas, which fell in the share of Smti. Tezubala Devi and which land was sold to the plaintiffs by a registered deed of sale dated 25.07.1966 (Exhibit-1) and, therefore, sale of such land by Aminullah in favour of Eusuf vide Exhibit-X shall not confer any right, title and interest on Md. Eusuf and consequently the transfer of such land by Md. Eusuf in favour of the Appellant/Defendant No. 1 by Exhibit-Ka sale deed dated 25.11.1967 also does not confer any right, title and interest on the Appellant/Defendant No. 1. Mr. Sahewalla further submits that the Appellant/Defendant No. 1 could not establish, by adducing any evidence that the land transferred vide Exhibit-X and Exhibit-Ka is the suit land. Relating to the contention of the Appellant/Defendant No. 1 that decree has been passed by the learned Lower Appellate Court declaring the Exhibit-Ka sale deed as fraudulent and collusive on the basis of presumption, Mr. Sahewalla has submitted that since Aminullah had no saleable interest in respect of the suit land, after the land was

amicably partitioned amongst the co-pattadars and the suit land I fell into the share of Smti. Tezubala Devi, the vendor of the plaintiffs, no right, title and : interest would pass on the Appellant/Defendant No. 1 by virtue of Exhibit-X and Exhibit-Ka sale deeds.

13. I have considered the submissions of the learned Counsel for the parties and also perused the materials available on record.

14. The learned Trial Court vide its judgment dated 50.08.1975 decreed the suit of the plaintiffs by deciding all the issues in their favour, including the question relating to the identity of the: suit land being issue No. 5. Such findings of the learned Trial Court are affirmed by the learned First Appellate Court vide judgment and decree dated 10.06.1993. The learned First Appellate Court while considering the issue No. 5 has observed that the description of the suit land given in the plaint has not been disputed by the contesting Defendants in the written statement and hence decided the said issue in favour of the plaintiffs. Both the Courts below have also recorded the finding relating to the right, title and interest of the plaintiffs over the suit land in view of Exhibit-1 sale deed by virtue of which Tezubala Devi transferred her right, title and interest in favour of the plaintiffs. It has further been held by both the Courts below that the Appellant/Defendant No. 1, in view of not proving the sale by Aminullah (Defendant No. 3) in favour of Eusuf (Defendant No. 2), could not prove that the title over the land described in Exhibit-Ka sale deed and the deed of rectification being Exhibit-Kha has passed on him. It also appears from the judgment and decree passed by the learned Trial Court that no specific finding has been recorded relating to issue No. 5 while taking up the issue Nos. 4,5,6,8 and 11 together, which issue is the most contentious issue and has mainly been argued by the learned Sr. Counsel appearing for the Appellant/Defendant No. 1, apart from contending that since the suit is not for partition and there being no partition of the land covered by Dag No. 594, amongst the co-pattadars, no decree for possession over a specific portion of the land can be passed. It has further been contended by the Appellant/Defendant No. 1 that in the absence of any proof relating to the fraud and collusion, it ought not to have been declared that the sale deed being Exhibit-Ka was fraudulent and collusive.

15. It appears from the judgments and decrees passed by the learned Courts below that the plaintiffs could prove that a plot of land measuring 1 Bigha, 1 Katha, 5 Lechas covered by Dag No. 594 of Periodic Patta No. 144 of Digboi Town, Mouza - Makum had been transferred to them by proving the Exhibit-1 sale deed dated 18.6.1966 executed by Tezubala Devi in their favour and also by proving the Exhibit-19 sale deed dated 21.3.1945 by which the original owner, namely Paraya Tasa, who owned the entire land measuring 5 Bighas, 10 Lechas in Dag No. 594, transferred 2 Bighas, 2 Kathas, 10 Lechas of land in favour of Jayanta Kr. Deshmukh and Sashi Mohan Seal in equal proportion as well as by proving Exhibit-20 sale deed dated 27.06.1958 executed by Sashi Mohan Seal transferring his share of 1 Bigha 1 Katha and 5 Lecha of land to Tezubala Devi, the vendor of the plaintiff Nos. 1 and 2. It has not been disputed by the learned Sr. Counsel for the Appellant/Defendant No. 1 that Paraya Tasa was the absolute owner in respect of the entire 5 Bighas 10 Lechas of land covered by Dag No. 594, out of

which 2 Bighas, 2 Kathas, 10 Lechas, was initially transferred to Jayanta Kr. Deshmukh and Sashi Mohan Seal in equal proportion vide Exhibit-19 registered deed of sale dated 21.03.1945 and Sashi Mohan Seal transferred the land fell in his share with specific boundary measuring 1 Bigha 1 Katha 5 Lechas in favour of Tezubala Devi vide Exhibit-20 registered deed of sale dated 27.06.1958 and Tezubala sold the said land to the plaintiffs vide Exhibit-1 registered deed of sale dated 18.06.1966. The said sale deeds have duly been proved by the plaintiffs. No argument is advanced by the learned Sr. Counsel for the Appellant/Defendant No. 1, questioning the admissibility of such sale deeds and acquisition of right, title and interest by the plaintiffs over the land described in Exhibit-1. But the question, as raised by the Appellant/Defendant No. 1 in his written statement is whether the suit land is part of the land purchased by the plaintiffs, over which the plaintiffs are claiming right, title and interest and also for a decree for recovery of khas possession.

16. The most contentious issue, therefore, is issue No. 5, i.e.--whether the suit land is properly described? The said issue has been framed on the basis of the claim of the plaintiffs in the plaint that the suit land measuring 2 Kathas, 18 Lechas covered by Dag No. 594 is part of 1 Bigha, 1 Katha, 5 Lechas of land purchased by them from Tezubala Devi vide Exhibit-1 registered sale deed dated 18.06.1966 and is under possession of the Appellant/Defendant No. 1 as tenants in respect of the houses standing thereon as well as the pleading of the Defendant Nos. 1 and 2 in their joint written statement in paragraph 5 that "the schedule described in the deed and in the plaint is not correct and it did not disclose the actual boundary of the land in suit. The land in occupation of Defendant No. 1 was not purchased by the plaintiff." Some evidence has also been adduced by the parties on the said issue. It is also the contention of the Appellant/Defendant No. 1 that the plaintiffs could not prove the identity of the land as the description of the land given in Exhibit-1, the schedule in the plaint as well as in the notice of eviction being Exhibit-5 and Exhibit-14 are different.

17. According to the Appellant/Defendant No. 1, though the plaintiffs have purchased some land vide Exhibit-1 sale deed, the suit land, which is under the possession of the Appellant/Defendant No. 1 is not the part of the land purchased by the plaintiffs. According to the Appellant/Defendant No. 1, the suit land has been purchased by him from Eusuf by Exhibit-Ka (which has also been proved by the plaintiffs as Exhibit-12), schedule of which has been rectified vide Exhibit-Kha. The plaintiffs' case is that the suit land is part of the land purchased by them vide Exhibit-1 sale deed.

18. It appears from Exhibit-Ka as well as Exhibit-Kha that by the said deeds the land measuring 2 Kathas, 1½ Lecha in Dag No. 594 has been transferred out of 3 Kathas of land sold by Aminullah (Defendant No. 3) in favour of Md. Eusuf (Defendant No. 2) by Exhibit-X sale deed dated 18.02.1960 and not 2 Kathas, 18 Lechas of land for which the plaintiffs have instituted the suit. Aminullah sold his entire share of land measuring 1 Bigha, 1 Katha, 7½ Lechas by executing sale deeds, one in favour of the plaintiff No. 1 (Exhibit-3), one in favour of Khurban Dushad (Exhibit-13) and the other in favour of Eusuf

(Exhibit-X), without leaving any land in Dag No. 594. Samiullah, who is the brother of Aminullah also sold his entire share of land measuring 1 Bigha, 1 Katha, 77., to the plaintiff No. 1 by Exhibit-2 sale deed. Thus Aminullah and Samiullah transferred their entire shares of land measuring 2 Bighas, 2 Kathas, 15 Lechas, which according to Aminullah (Defendant No. 3) was purchased by their father Md. Safi from Paraya Tasa, being the half portion of land measuring 5 Bighas, 10 Lechas in Dag No. 594, though Aminullah (Defendant No. 3) in his deposition claims that he is still in possession of some land in Dag No. 594.

19. The learned First Appellate Court, as discussed above, answered the issue No. 5 in favour of the plaintiffs by observing that the identity of the land has not been disputed by the Defendant 5 in their written statement, though it appears from the averments made in paragraph 5 of the written statement that such dispute had been raised and the parties have also led some evidence in that regard. Such question of fact has to be decided by the learned Court below before passing the decree declaring right, title and interest of the plaintiffs over the suit land and for recovery of khas possession by evicting the Appellant/Defendant No. 1 from the said land, by recording finding as to whether the suit land measuring 2 Kathas, 18 Lechas, which is under possession of the Appellant/Defendant No. 1, is part of the land measuring 1 Bigha, 1 Katha, 5 Lechas purchased by the plaintiff vide Exhibit-1 sale deed from Tezubala Devi. No specific finding has been recorded by the learned Courts below in that regard, though as noticed above, such plea has been taken by the contesting Defendants in the written statement and some evidence was led by the parties to that effect. Exhibit-5 and Exhibit-14 advocate's notices, however, cannot be the basis for holding that the land in possession of the Defendant No. 1 is not part of the land covered by Exhibit-1 sale deed, as by the said notices the Appellant/Defendant No. 1 asked to vacate the houses under their occupation as tenant and the description of the land measuring 1 (one) Katha given was pertaining to the houses standing thereon and hence, naturally cannot be the description of the land in respect of 2 Bighas, 18 Lechas of land, which is the suit land.

20. The contention of the Appellant/Defendant No. 1 that since there are several pattadars in respect of the land covered by Dag No. 594 of Periodic Patta No. 144, comprising in all 5 Bighas, 10 Lechas of land, no decree for declaration of possession over a specific portion of the land can be passed without their being any partition amongst the co-owner, does not merit acceptance in view of the fact that vide Exhibit-19 sale deed dated 21.03.1945 the original owner Paraya Tasa sold 2 Bighas, 2 Kathas, 10 Lechas of land to Jayanta Kr. Deshmukh and Sashi Mohan Seal with specific boundary and pursuant to such sale actual physical possession was handed over to said Jayanta Kr. Deshmukh and Sashi Mohan Seal. It is also in evidence that both of them were possessing 1 Bigha, 1 Katha, 5 Lechas of land separately with definite boundary. Exhibit-20 sale deed dated 27.06.1958 further reveals transfer of ownership of 1 Bigha, 1 Katha, 5 Lechas of land with specific boundary, possessed by Sachi Mohan Seal in favour of Tezubala. The said land has subsequently been transferred by Tezubala in

favour of the plaintiff Nos. 1 and 2 vide Exhibit-1 registered deed of sale dated 18.06.1966. The case of the Appellants/Defendants, as it appears from the pleadings in the written statement as well as the evidence adduced by him, is also that land measuring 2 Bighas, 2 Kathas, 15 Lechas out of 5 Bighas, 10 Lechas of land in Dag No. 594 of Periodic Patta No. 144 was sold by Paraya Tasa in favour of Md. Sail, father of Aminullah (Defendant No. 3) with specific boundary. Such transfer, however, has not been proved by producing the sale deed. The Defendant No. 3 (Aminullah) in his evidence has stated about such purchase by his father from Paraya Tasa. It also appears from the evidence available on record as adduced by the Appellants/Defendants that Md. Safi had two sons Aminullah (Defendant No. 3) and Samiullah and each one of them have got 1 Bigha, 1 Katha, 7½ Lechas of land out of the said 2 Bighas, 2 Kathas, 15 Lechas of land, allegedly purchased by their father from Paraya Tasa, the original owner. Samiullah sold his entire share being 1 Bigha, 1 Katha, 77, Lechas to the plaintiff No. 1 by registered deed of sale dated 05.08.1989 with specific boundary. Aminullah (Defendant No. 3) has sold 1 katha 77, Lechas out of his share of 1 Bigha 1 Katha 77, Lechas to the plaintiffs No. 1 by registered deed of sale being Exhibit-3 dated 19.03.1959; 2 Kathas of land vide Exhibit-13 registered deed of sale dated 07.04.1951 in favour of Khurban Dushad and 3 Kathas by Exhibit-X registered deed of sale dated 18.02.1960 to Eusuf (Defendant No. 2). By all the aforesaid sale deeds specific lands with definite boundaries were sold to the purchasers. Moreover, the specific case of the plaintiffs that there was amicable partition amongst the pattadars, which has been accepted by the learned Courts below by recording finding in that regard has not been challenged by the Defendants. Hence, the contention of the learned Sr. Counsel for the Appellant/Defendant No. 1 that no decree for possession in respect of a specific portion of the land, in the absence of the partition, can be passed, stands rejected.

21. The further contention of the Appellant/Defendant No. 1 is that the learned Courts below have answered the issue No. 8 in favour of the plaintiffs by holding that the Defendants have collusively obtained the sale deed executed by Aminullah in favour of Eusuf and by Eusuf in favour of the Appellant/Defendant No. 1, even though no evidence in that regard are on record and such finding has been recorded on the basis of the presumption only. It is true that when the fraud or collusion is alleged, the burden lies on the plaintiffs to prove the same. It requires a high degree of proof to substantiate the allegation of fraud and collusion. The appellate judgment reveals that the issue No. 8 has been answered in favour of the plaintiffs on the basis of the presumption only, as it has held that "it can be said that presumption can be drawn for purchase of the suit land and premises by the Appellant/Defendant No. 1 from Md. Eusuf Ali and Md. Aminullah in 1967 vide the alleged sale deed Exhibit-Ka or Exhibit-Kha was obtained collusively." Be that as it may, whether such sale deeds were obtained collusively and such sale deeds are fraudulent, is not relevant for the purpose of the present case, as the plaintiffs claim right, title and interest in respect of 2 Kathas, 18 Eechas of land (suit land) being part of 1 Bigha, 1 Katha, 5 Eechas in Dag No. 594 of Periodic Patta No. 144 by right of purchase from Tezubala Devi. As held above, the plaintiffs could prove transfer of the land

measuring 1 Bigha, 1 Katha, 5 Lechas comprised in Dag No. 594 of Periodic Patta No. 144, out of which, according to the plaintiffs 2 Kathas, 18 Lechas is the suit land and in possession of the Appellant/Defendant No. 1, about which, as observed above no finding, however, has been recorded by the learned Courts below.

22. In view of the above, the case is remanded to the learned First Appellate Court to decide the issue No. 5 relating to the identity of the suit land, i.e. to decide as to whether the suit land measuring 2 Bighas, 18 Lechas, which is under possession of the Appellant/Defendant No. 1 is part of the land purchased by the plaintiffs vide Exhibit-1 sale deed dated 18.06.1966 from Tezubala Devi and to pass necessary decree thereafter. Such decision shall be given on the basis of the evidences already on record. The judgment and decree passed by the learned First Appellate Court is set aside to the extent indicated above. The learned lower Appellate Court is directed to decide the same within a period of 45 days from the date of appearance of the contesting parties, who are directed to appear before the learned First Appellate Court on 11th November, 2009.

23. The Registry is directed to send down the record by special messenger to the learned First Appellate Court so as to reach the said Court on or before 6th November, 2009.

24. The appeal is accordingly allowed to the extent indicated above. Keeping in view the facts and circumstances of the case, the parties are, however, directed to bear their own cost.