

(2013) 08 GAU CK 0034

Gauhati High Court

Case No: Regular Second Appeal No. 179 of 2002

Sri Keshar Singh Barman

APPELLANT

Vs

Sri Fauzdar Kahar and Others

RESPONDENT

Date of Decision: Aug. 19, 2013

Acts Referred:

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

Hon'ble Judges: Brojendra Prasad Katakey, J

Bench: Single Bench

Advocate: P. Khataniar, for the Appellant; S.C. Keyal, S.K. Ghosh and Mr. R.C. Paul, for the Respondent

Judgement

Brojendra Prasad Katakey, J.

This appeal by the plaintiff is directed against the judgment and decree dated 11.06.2002 passed by the learned Civil Judge (Sr. Division), Nagaon, in Title Appeal No. 28/2001, whereby and whereunder the appeal preferred by the present appellant has been dismissed by affirming the judgment and decree dated 11.07.2001 passed by the learned Civil Judge (Jr. Division), Hojai, Sankardevnagar in Title Suit No. 99/1990, dismissing the suit of the plaintiff. The appellant as plaintiff instituted the aforesaid suit for declaration of right, title and interest in respect of the land measuring 6 bighas 3 kathas 10 lechas in Dag No. 85 of annual patta No. 19, more fully described in schedule to the plaint, and also for recovery of khas possession by evicting the defendants therefrom, contending inter alia that he is the owner of the land measuring 11 bighas 3 kathas 12 lechas covered by Dag Nos. 85 and 86 of annual patta No. 19, out of which though his possession in respect of 5 bighas of land in Dag No. 86 is not disturbed, the defendants dispossessed the plaintiff from the land measuring 6 bighas 3 kathas 10 lechas in Dag No. 85 of annual patta No. 19, which is the suit land, which necessitated filing of the suit as aforesaid.

2. While the defendant Nos. 1 and 3 as well as the defendant Nos. 5 and 6 have filed their respective written statements, the other defendants, namely, the defendant Nos. 2 and 4 did not contest the suit. The defendant Nos. 1 and 3 in their written statement as well as the additional written statement filed have claimed that the entire land covered by earlier annual patta No. 43, which was renumbered as annual patta No. 19, belonged to their father, after whose death the defendant Nos. 1 and 2 have inherited the property in equal shares, out of which the defendant No. 2 has given 5 bighas of land to the father of the plaintiff and accordingly his name was recorded along with the remark in that respect in the Chitha. It has further been pleaded that the plaintiff has sold the entire 5 bighas of land to other persons and hence the plaintiff has no right, title and interest over any land covered by annual patta No. 19. The defendant Nos. 5 and 6, in their written statement claimed to have purchased the land from the plaintiff contending that the plaintiff has sold out the land belonging to him, measuring 5 bighas to different persons including them by registered instruments.

3. Based on the pleadings of the parties, the Trial Court framed the following issues for determination:-

(i) Is there any cause of action for the suit?

(ii) Is the suit maintainable in its present form?

(iii) Is the suit bad for non-joinder or mis-joinder of parties?

(iv) Whether the suit is properly valued?

(v) Whether the plaintiff has right, title and interest over the suit land?

(vi) Whether the plaintiff was dispossessed by the defendants from the suit land?

(vii) Whether the plaintiff is entitled to any relief?

(viii) What relief, if any, the parties are entitled?

4. The plaintiff and the defendants had examined three witnesses each and proved a number of documents. The Trial Court based on the evidence on record dismissed the suit of the plaintiff by holding that annual patta No. 43 (old) was initially issued in the name of three persons, namely, defendant No. 1, defendant No. 2 and the plaintiff and the share of the plaintiff was to the extent of 5 bighas only. It has further been held that since the plaintiff has sold his entire share, namely, 5 bighas of land, to other persons including the defendant Nos. 5 and 6, he cannot claim right, title and interest over any land covered by annual patta No. 43 (old) 19 (new).

5. The plaintiff being aggrieved preferred the aforesaid appeal, which has also been dismissed by the First Appellate Court by affirming the judgment and decree passed by the Trial Court. Hence the present appeal.

6. This appeal was admitted for hearing on 20.12.2002 on the following substantial questions of law.

(i) Whether the Courts below misdirected themselves in not considering the vital evidence on record in the matter of right of the plaintiff/appellant over the suit property and coming to a wrong conclusion in dismissing the suit?

(ii) Whether the Courts below committed serious error of law in giving undue importance to Exts.-Ka and Kha and brushing aside Ext.-2 and the admission of DW-1 and thereby coming to a wrong conclusion in deciding the right and title of plaintiff/appellant over the suit property?

7. I have heard Mr. P. Khataniar, learned counsel for the appellant/plaintiff and Mr. S.C. Keyal, learned counsel for the respondent No. 1/defendant No. 1. The respondent No. 2/defendant No. 2, who did not contest the suit, died during pendency of the appeal. The respondent No. 3/defendant No. 3 also died during pendency of the appeal, whose heir, defendant No. 1, being already on record, his name was struck off from the list of respondents.

8. Mr. Khataniar, the learned counsel for the appellant referring to Ext.-Kha, annual patta No. 43, as well as the Jamabandi (Ext.-1), has submitted that since the annual patta was issued in favour of three persons, namely, defendant No. 1, defendant No. 2 and the plaintiff, the Courts below were wrong in holding that the plaintiff had title in respect of 5 bighas of land only, out of the total land of 46 bighas 2 kathas 2 lechas. In support of his contention has also placed reliance on Ext.-1 Jamabandi, which contains the names of all the three persons, which, according to the learned counsel, indicates that all of them have equal shares over the land covered by aforesaid annual patta No. 43 (old) 19 (new). The learned counsel, therefore, submits that the Courts below ought not to have dismissed the suit of the plaintiff by holding that he was entitled to only 5 bighas of land, which he has already sold to different persons including the defendant Nos. 5 and 6, more so when the defendants could prove only three sale deeds being Exts.-Gha, Unga and Cha, transacting total 1 bigha 2 kathas 10 lechas of land. Mr. Khataniar, the learned counsel, therefore, submits that the plaintiff is at least entitled to a decree declaring his right, title and interest in respect of 3 bighas 2 kathas 10 lechas of land, apart from recovery of khas possession.

9. Mr. Keyal, the learned counsel appearing for the respondent No. 1/defendant No. 1, on the other hand, supporting the judgments and decrees passed by the Courts below, has submitted that it is apparent from the Ext.-Kha annual patta No. 43, which was subsequently renumbered as annual patta No. 19, as well as the copy of the Chitha being Ext.-Ga that the plaintiff had right, title and interest in respect of only 5 bighas of land, which was given by one of the pattadars, namely, Hari Kumar to the father of the plaintiff, which has been recorded in the remark column of the Chitha. It has also been submitted that since the plaintiff has sold his entire share

i.e. 5 bighas of land to different persons including the defendant Nos. 5 and 6 by various sale deeds including the sale deeds being Exts.-Gha, Unga and Cha, the plaintiff's suit has rightly been dismissed by both the Courts below.

10. I have considered the submissions advanced by the learned counsel for the parties and also perused the judgments and decrees passed by the Courts below apart from the evidence, both oral and documentary adduced by the parties.

11. As noticed above, both the Courts below based on the documents proved by the parties, have recorded the finding that though initially annual patta No. 43 (Ext.-Kha) was issued in respect of 46 bighas 2 kathas 2 lechas of land, in the name of the defendant Nos. 1 and 2 and the plaintiff, it is apparent from the said annual patta as well as the copy of the Chitha (Ext.-Ga) that the plaintiff had share of only 5 bighas of land out of the said land covered by the said annual patta.

12. The plaintiff though in the plaint has pleaded that he owned and possessed 11 bighas 3 kathas 12 lechas of land, in annual patta No. 19, he, however, could not prove the same by producing any document i.e. the annual patta in that respect. The defendants, in fact, came to the rescue of the plaintiff, to the extent of his share of 5 bighas of land, by proving the annual patta being No. 43, which has been marked as Ext.-Kha, containing the name of the plaintiff apart from the names of the defendant Nos. 1 and 2. In the said patta, it has clearly been mentioned that the plaintiff's share is to the extent of 5 bighas only, which may be the reason for which the plaintiff did not produce the document before the Trial Court. The defendants have also proved the copy of the Chitha (Ext.-Ga). In the remark column of Chitha the revenue staff has mentioned that the defendant No. 2 out of his share has given 5 bighas of land in favour of the father of the plaintiff and accordingly, after the death of the father, the plaintiff's name was recorded in respect of 5 bighas of land. The plaintiff, therefore, cannot claim more than 5 bighas of land, in the aforesaid annual patta. The Courts below, therefore, have not committed any illegality in recording the finding relating to the plaintiff's share of land i.e. 5 bighas.

13. The next question, which requires consideration and determination is whether the plaintiff has sold his share of land i.e. 5 bighas to different persons including the defendant Nos. 5 and 6. The defendants in support of that claim have proved three sale deeds being Exts.-Gha, Unga and Cha, from which it appears that the plaintiff has sold 1 bigha 2 kathas 10 lechas of land in all by the aforesaid three sale deeds. It also appears from the copy of the Jamabandi, marked as Ext.-Jha, that a number of non-renewal proceedings were initiated because of the transfer, made by someone, of the land covered by annual patta No. 19, which was earlier numbered as 43. From the notes recorded in the said Jamabandi, it is, however, not possible to record any finding whether such non-renewal proceedings, initiated and finalized by the revenue authority under the provisions of Assam Land and Revenue Regulation, 1886, were because of the sale by the plaintiff or any other pattadars. The Courts below looking at the said document, therefore, ought not to have held that the

plaintiff has lost his right, because of the sale, even over 5 bighas of land.

14. Since the most pertinent question i.e. the quantum of land sold by the plaintiff has not been answered, I am of the view that the appeal is required to be remanded to the First Appellate Court to record finding in that regard, if necessary, by allowing the parties to adduce additional evidence, for which the parties may file their applications under Order 41 Rule 27 CPC.

15. In view of the above, the judgment and decree dated 11.06.2002, passed by the learned Civil Judge (Sr. Division), Nagaon, in Title Appeal No. 28/2001 is set aside. The appeal is remitted to the First Appellate Court for deciding the question whether the plaintiff has sold his share of land i.e. 5 bighas of land or any part thereof. The parties are directed to appear before the First Appellate Court on 20.09.2013, who shall decide the said appeal within 3 (three) months thereafter.

16. The appeal is allowed to the extent as indicated above. No costs. The Registry is directed to send down the records to the First Appellate Court so as to reach the said Court on or before 12.09.2013.