

**(2012) 05 GAU CK 0045**

**Gauhati High Court**

**Case No:** Regular Second Appeal No. 6 of 2000

On the death of the Hazarat Ali,  
his legal heir Md. Fakaruddin Ali  
Ahmed

APPELLANT

Vs

On the death of Jamiruddin his  
heirs and legal representatives-  
Abdul Razzak and Others and On  
the death of Abdul Mannan his  
heirs and legal representatives-  
Md. Nazmul Hussain Khanom  
(Anjel) and Others

RESPONDENT

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**Date of Decision:** May 14, 2012

**Acts Referred:**

- Evidence Act, 1872 - Section 61, 62, 63, 64, 65

**Hon'ble Judges:** Brojendra Prasad Katakey, J

**Bench:** Single Bench

**Advocate:** A.C. Sarma and Mr. P. Chakraborty, for the Appellant; S. Sarma and Mrs. J. Deka, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

B.P. Katakey

1. This appeal by the plaintiffs is directed against the judgment and decree dated 18.11.1999 passed by the learned Civil Judge (Sr. Division), Nagaon in Title Appeal No. 7/1998 allowing the appeal preferred by the defendants by setting aside the judgment and decree passed by the Trial Court dated 29.01.1998 in Title Suit No. 126/1993. The appellant as plaintiff instituted Title Suit No. 126/1993 in the Court of the learned Civil Judge (Jr. Division) No. 1, Nagaon, (now Munsiff) claiming right, title and interest, by purchase, in respect of 7 bighas 1 katha 8 lechas of land covered by Dag No. 216(old)/413(new) of periodic patta No. 12(old)/168(new), more fully

described in Schedule-A to the plaint and also for confirmation of possession in respect of Schedule-B land measuring 4 bighas 1 katha 8 lechas and for recovery of khas possession by evicting the defendants from Schedule-C land measuring 3 bighas, both part of the Schedule-A measuring 7 bighas 1 katha 8 lechas, contending inter alia that the land measuring 10 bighas 2 kathas 19 lechas originally belonged to Ali Sheikh, who died leaving behind his wife Kadarjan Bibi, 4 sons and 3 daughters, who have inherited the land belonging to Ali Sheikh. It has also been pleaded in the plaint that as during the lifetime of Ali Sheikh, his 3 daughters were married away and started living separately, they abandoned their claim over their father's property and hence the land measuring 10 bighas 2 kathas 19 lechas covered by Dag No. 216(old)/413(new) of periodic patta No. 12(old)/168(new) was mutated in the names of Ali Sheikh's wife Kadarjan Bibi and his 4 sons, namely, Subed Ali, Fajar Ali, Najar Ali and Samed Ali. It is also the contention of the plaintiffs that subsequently Fajar Ali, Najar Ali and Samed Ali, 3 sons of Ali Sheikh sold 7 bighas 1 katha 8 lechas of land to the plaintiffs by 12 registered deeds of sale (Exts.-1 to 11A) between the years 1959 to 1972 and delivered possession. The further contention of the plaintiffs is that by virtue of such purchase though they have acquired the right, title and interest in respect of 7 bighas 1 katha 8 lechas of land, the defendant Nos. 1 and 2 with an ulterior motive of grabbing a portion of the suit land of the plaintiffs, tried to mutate their names, which, however, was not granted by the revenue authority and thereafter in the year 1990 they made the first attempt for dispossession, which eventually they succeed in respect of 3 bighas of land, which is described in Schedule-C to the plaint. The plaintiffs further contended that the remaining land was sold by the 4th son of the proforma defendant Nos. 3 and 4.

2. The defendant Nos. 1 and 2 have contested the suit filed by the plaintiffs by filing the joint written statement. While admitting the averments made in the plaint that the land measuring 10 bighas 3 kathas 19 lechas originally belonged to Ali Sheikh, who died leaving behind his wife, 4 sons and 3 daughters, they, however, denied the contention of the plaintiffs that 3 daughters relinquished their right over the land as they were married away and started living separately. It has been contended by the defendant Nos. 1 and 2 in the written statement that after the death of Ali Sheikh, 1/8th share of the land devolved on his widow and remaining portion devolved on 4 sons and 3 daughters and they had been possessing their respective shares of land. The further contention of the defendants is that during the lifetime of the wife of Ali Sheikh, she purchased the share of Subed Ali, one of the sons of Ali Sheikh, which was later on alienated to one Kubdul Khan. The further contention of the defendants is that after the death of Ali Sheikh's wife, her share devolved on her 4 sons and 3 daughters and accordingly the daughters became the owner of more than 4 kathas 17 lechas of land each, and the 3 daughters thereafter sold 2 bighas 4 kathas 11 lechas of land in their favour by two registered deeds of sale dated 25.01.1974 and 25.01.1975, and delivered possession and as such they acquired the right, title and

interest in respect of the said land. The alternative plea of adverse possession was also taken by the defendants in the written statement contending inter alia that if it is found that the plaintiffs could prove their right, title and interest, their right over the land has extinguished because of the long possession of the suit land described in Schedule-C by the defendants.

3. The Trial Court on the basis of the pleadings of the parties, framed as many as 9(nine) issues, which are quoted below:-

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

(ii) Whether the suit is maintainable in its present form?

(iii) Whether the suit is bad for non-joinder of necessary parties?

(iv) Whether the suit is barred by principle of adverse possession?

(v) Whether the plaintiff has right, title and interest over the "A" schedule land?

(vi) Whether the plaintiff has possession over the "B" schedule land and the defendants dispossessed the plaintiff from the "C" schedule land as alleged in the plaint?

(vii) Whether the defendants have right, title and interest over the "B" schedule land by right of purchase as alleged in the W.S.?

(viii) Whether the plaintiff is entitled for the decree as prayed for?

(ix) To what relief, the parties are entitled?

4. The Trial Court on the basis of the evidences on record and upon hearing the learned counsel for the parties decreed the suit of the plaintiffs by holding that the plaintiffs have acquired right, title and interest in respect of the Schedule-A land and they have been illegally dispossessed by the defendants in respect of the Schedule-C land. The Trial Court has also held that the defendants by the aforesaid sale deeds dated 25.01.1974 (Ext.-Kha) and 25.01.1975 (Ext.-Ga) purchased the land measuring 2 bighas 4 kathas 11 lechas of land from the 3 daughters of Ali Sheikh.

5. Being aggrieved the defendant Nos. 1 and 2 filed the aforesaid appeal before the First Appellate Court, which has been allowed by the aforesaid judgment and decree passed by setting aside the judgment and decree passed by the Trial Court. The First Appellate Court has held that though the plaintiffs did not prove the original sale deed but exhibited the certified copies of the sale deeds, those are admissible in evidence, despite being the secondary evidence, there being no objection raised by the defendants at the appropriate stage of the proceeding, relating to their admissibility. The First Appellate Court, however, has held that since the sons would inherit 2 shares as against one share by the daughters, 3 sons of Ali Sheikh after the death of Ali Sheikh's wife at the most could have the right over 5 bighas 3 kathas 17 1/2 lechas of land and hence cannot transfer the land more than the said land. It

has, therefore, been held that by the Exts.-1 to 11A sale deeds the plaintiffs did not get any right, title and interest over the suit land.

6. Though the 3 sons and 3 daughters of Ali Sheikh were party defendants in the suit, they did not contest the suit by filing any written statement. They have also not filed any appeal against the decree passed by the Trial Court.

7. By order dated 11.02.2000 the appeal was admitted for hearing on the following substantial question of law:-

Whether the lower appellate court misinterpreted the Mohammedan Law of inheritance?

8. I have heard Mr. A.C. Sarma, learned counsel for the appellant and Mr. Deka, learned counsel appearing for the respondent Nos. 1 and 2, who are the defendants in the aforesaid suit.

9. It has been contended by Mr. Sarma, learned counsel for the appellant that since he has acquired the right, title and interest by right of purchase vide Exts.-1 to 11A over the land measuring 7 bighas 1 katha 8 lechas in Dag No. 216(old)/413(new), described in Schedule-A, the First Appellate Court ought not to have allowed the appeal after holding that the secondary evidence of the said sale deeds being the certified copies are admissible in evidence. The learned counsel submits that the finding recorded by the First Appellate Court that 3 sons would inherit 5 bighas 3 kathas 17 1/2 lechas of land is based on the land in Dag No. 216(old)/413(new) of periodic patta No. 12(old)/168(new), measuring 10 bighas 2 kathas 19 lechas only and not on the entire land left behind by Ali Sheikh. Referring to the Schedules mentioned in Exts.-Kha and Ga, by which the defendants have claimed their right, title and interest in respect of the land measuring 2 bighas 4 kathas 11 lechas, it has also been submitted by Mr. Sarma that it is evident therefrom that Ali Sheikh had other land in different pattas and the share of each of the heirs has to be ascertained on the basis of the entire land, not on the land described in Schedule-A only, as has been done by the First Appellate Court in the instant case. The learned counsel further submits that the plaintiff being the bonafide purchaser without notice, the First Appellate Court ought not to have disturbed the decree passed by the Trial Court. Mr. Sarma does not dispute that the widow of a male mohammedan dying intestate would inherit 1/8th share of the property left, while the sons would get 2 shares each and the daughters one share out of the remaining property, as has been held by the First Appellate Court in the impugned judgment and decree passed.

10. Mr. Deka, learned counsel appearing for the respondent Nos. 1 and 2, on the other hand, has submitted that the First Appellate Court was not correct in recording that the sale deeds i.e. Exts.-1 to 11A are admissible in evidence, as those are secondary evidence and there being no explanation forthcoming from the plaintiffs, as required u/s 65 of the Evidence Act, relating to the reason for

non-production of the original sale deeds. It has also been submitted that it is apparent from the aforesaid sale deeds as well as the deposition of PW-1, the record keeper in the office of the Sub-Registrar, that some of the sale deeds do not relate to the land covered by Dag No. 216(old)/413(new) of periodic patta No. 12(old)/168(new), which is the suit land. The learned counsel, therefore, has submitted that since the plaintiffs have failed to prove their title over the land by virtue of such sale, the First Appellate Court has rightly allowed the appeal by setting aside the judgment and decree passed by the Trial Court. The learned counsel also submits that there is no dispute about the share of land of the wife, sons and daughters as found by the First Appellate Court in its impugned judgment and decree.

11. In reply Mr. Sarma, learned counsel for the appellant submits that it is evident from the deposition of the PW-1, record keeper of the office of the Sub-Registrar, that he has produced the original volume maintained by the Sub-Registrar under the provisions of Indian Registration Act and deposed about the exhibits being Exts.-1 to 10 on the basis of such original volume and hence the plaintiffs could prove the original documents on the basis of which certified copies were issued.

12. I have considered the submissions of the learned counsel for the parties and also perused the impugned judgments and decrees passed by both the Courts below apart from the exhibits and the evidences brought to the notice of this Court by the learned counsel for the parties.

13. It is an admitted fact that Ali Sheikh was the original owner in respect of 10 bighas 2 kathas 19 lechas of land described in Schedule-A to the plaint. It is also an admitted fact that Ali Sheikh left behind apart from his wife, 4 sons and 3 daughters. The plaintiffs, however, claim that the 3 daughters during the lifetime of Ali Sheikh, who were married and started living separately, have relinquished their rights in respect of the land described in Schedule-A. The said position, however, has been disputed by the defendants in the written statement, in respect of which evidence was also adduced. Though the plaintiff claims relinquishment of right by the daughters, no evidence, however, could be adduced to substantiate that the daughters have relinquished their right over the land described in Schedule-A. In the absence of any evidence and failure on the part of the plaintiff to prove such pleading, the property left behind by Ali Sheikh devolved on his widow, 4 sons and 3 daughters and they will inherit the property as per the Mohammedan Law. As noticed above, there is no dispute relating to share the heirs will inherit after a male mohammedan died intestate. While the widow will get 1/8th share of the property, the sons will get 2 shares each as against the one share by each of the daughters. It is also not in dispute that after the death of the widow of Ali Sheikh, 2 shares will be inherited by each of the sons and one share by each of the daughters, in respect of the land belonged to the widow. Out of the total land of 10 bighas 2 kathas 19 lechas, which originally belonged to Ali Sheikh, the 3 sons would, therefore, have the

right in respect of only 5 bighas 3 kathas 171/2 lechas of land and each of the daughters would be entitled to 2 bighas 2 kathas 2/3 lechas apart from the land inherited by them after the death of the widow of Ali Sheikh. The said position has not been disputed by any of the parties.

14. According to the appellant though the share in the property has to be ascertained taking into account the entire property originally belonged to Ali Sheikh and determination of share in respect of Schedule-A land only is not proper, to the inclusion of the other land of Ali Sheikh, in the instant case, the same cannot be accepted, as no evidence was laid by the plaintiffs to demonstrate the total land devolved on all the heirs of Ali Sheikh apart from the Schedule-A land. As noticed above, the plaintiffs also have failed to prove the contention that the daughters have relinquished their right in respect of the land described in Schedule-A. Consequently the submission of the learned counsel for the appellant that the daughters have taken land in other pattas, in the absence of any proof in that regard, also cannot be accepted and hence it has to be taken that 3 daughter had also inherited their share in respect of Schedule-A land.

15. This leads to the question as to whether the plaintiffs could prove their title by virtue of Exts.-1 to 11A, which are the certified copies of the sale deeds. Section 61 of the Evidence Act provides that the contents of the documents may be proved either by primary or by secondary evidence. Section 62 defines the primary evidence as the document itself produced for inspection by the Court. Section 63 defines the secondary evidence as, amongst other, certified copies given under the provisions contained in the Evidence Act. Section 64 provides that the documents must be proved by primary evidence except in the cases mentioned in Section 65. The cases in which the secondary evidence relating to the documents may be given are enumerated in Section 65 of the Evidence Act. It provides that the secondary evidence can be allowed to be adduced when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it. It also provides that the secondary evidence can allowed to be adduced when the existence, condition or contents of the original has been proved to be admitted in writing by the person against whom it is proved or by his representative in interest; when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time; when the original is of such a nature as not to be easily movable; when the original is a public document within the meaning of Section 74; when the original is a document of which a certified copy is permitted by this Act, or by any other law in force to be given in evidence; when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

16. In the instant case, though PW-1 was examined by the plaintiffs, who though has deposed relating to the production of the volume maintained by the office of the Sub-Registrar, he, however, did not prove the said volume. PW-1 has exhibited only the certified copies of those documents being Exts.-1 to 10 and he has not even deposed that the contents of those documents are as recorded in the original volume produced by him. Though there is an explanation given by the plaintiffs in his evidence relating to the loss of original of those documents because of the theft, no evidence, however, could be adduced to demonstrate lodging of F.I.R. relating to such theft as contended. Hence such mere statement cannot be accepted. In the absence of any explanation for non-production of the original documents, the secondary evidence is not admissible in evidence. It is also a settled position of law that mere marking of a document as exhibit does not amount to proof of its contents. That apart it is evident from the Exts.-6, 7, 8, 10 and 11 that those sale deeds relate to the land covered by patta No. 169 and not to the patta No. 168(new)/12(old).

17. In view of what has been discussed above, I am of the view that the plaintiffs have failed to prove their title in respect of the Schedule-A land and hence the First Appellate Court has rightly set aside the judgment and decree passed by the Trial Court, however, for the reasons recorded above.

18. The appeal is, therefore, stands dismissed. The Registry is directed to sent down the records.