

(2014) 10 GAU CK 0008

Gauhati High Court

Case No: RSA No. 74 of 2003

Sahar Ali Sheikh

APPELLANT

Vs

Korap Ali Sheikh

RESPONDENT

Date of Decision: Oct. 30, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 11
- Evidence Act, 1872 - Section 33

Hon'ble Judges: Nishitendu Chaudhury, J**Bench:** Single Bench**Advocate:** M.A. Sheikh, Advocate for the Appellant; M.K. Sarma, Advocate for the Respondent

Judgement

Nishitendu Chaudhury, J.

Appellate judgment and decree dated 27.11.2002 passed by learned Civil Judge (Senior Division), Dhubri in Title Appeal No. 46 of 2000 decreeing the suit of the plaintiffs reversing of judgment and decree dated 07.07.2000 passed by the learned Civil Judge (Junior Division) No. 1 in Title Suit No. 305 of 1992 has been challenged in the present Second Appeal by the defendants.

2. Md. Korap Ali Sheikh and two others as plaintiffs instituted Title Suit No. 305 of 1992 in the Court of learned Munsiff No. 1, Dhubri, against the present appellants as principal defendants No. 1 to 3 and 5 others as proforma defendants praying for declaration of right, title and interest and possession over the suit land and for further declaration that defendants have no right, title and interest and possession over the Schedule-B land. There is no prayer for consequential relief in the prayer for decree of declaration. It is the case of the plaintiffs that they have been in possession of Schedule-B land as tenant under proforma defendants No. 1 to 5 who are legal heirs of original Jotdar late Joinuddin Mondal. Plaintiffs claimed to be in possession of the suit land since 1964 as tenant paying land revenue for the entire

land described in Schedule-A to the plaint. According to the plaintiffs, since settlement operation 1960-62 had started after creation of their tenancy, Khatian was not prepared in their favour and so their names did not occur as recorded tenants. The defendants No. 1 to 3 started claiming the land asserting title and also made an abortive attempt to dispossess the plaintiffs on 18th day of Kartik 1399 B.S. Situated thus, the right, title and interest of the plaintiffs over the suit land got clouded necessitating filing of the suit for declaration of their right, title and interest and possession over the suit land and for further declaration that defendants did not have right, title and interest or possession thereon.

3. On being summoned, the defendants appeared and submitted written statement denying the case of the plaintiffs. In Paragraph-6 of the written statement principal defendants No. 1, 2 & 3 disclosed that they had filed T.S. No. 678 of 1982 against one Deraj Dewany with respect to the same suit land and their suit was decreed on 06.04.1984. According to them, the defendants of the former suit have filed the present suit as plaintiff to frustrate the right, title and interest of the present defendants. In Paragraph-10 of the written statement the defendants claimed to have right, title, interest and possession over the suit land and in Paragraph-14 thereon they asserted that plaintiffs do not have right, title and possession over the suit land. With these pleadings the defendants prayed to dismiss the suit with cost.

4. On the basis of these rival contentions of the parties, the learned Trial Court framed as many as 7 issues. However, subsequently, 2 additional issues were also framed by the learned Trial Court. These issues are stated below:

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

ii) Whether the plaintiffs have right, title and interest and possession over the suit land?

iii) Whether the suit suffers from defendant of parties?

iv) Whether the plaintiffs are tenants under the proforma defendants?

v) Whether the suit land has been properly described?

vi) Whether the suit is maintainable?

vii) To what relief/reliefs, the parties are entitled?"

Additional Issues:

"viii) Whether the suit is barred by res-judicata?

ix) Whether the suit is bad for want of further relief under Section 34 of S.R. Act as alleged?"

5. The plaintiffs examined as many as 5 witnesses and proved documents, while defendants examined 3 witnesses and exhibited some documents. After

consideration of the evidence of both sides and after hearing the parties the learned Trial Court by judgment and decree dated 07.07.2000 dismissed the suit holding that in view of decision of a competent Civil Court in former suit i.e. T.S. 678 of 1982 subsequent suit by the plaintiffs was barred by res-judicata although parties in both the suits are not same. The learned Trial Court also held that the plaintiffs do not have any documents to show that they are tenants under the original Jotdar. Aggrieved, the plaintiffs preferred Title Appeal No. 46 of 2000 in the Court of learned Civil Judge (Senior Division), Dhubri. By this judgment and decree dated 27.11.2002, learned First Appellate Court set aside the findings of the learned Trial Court and decreed the suit of the plaintiffs for declaration of right, title and interest. In so doing the learned First Appellate Court held that parties in the former suit, namely, Title Suit No. 678 of 1982 and those in the present suit i.e. Title Suit No. 305 of 1992 being different and parties in the present suit not having derived title from the parties of the former suit, res-judicata does not apply. Coming to the question of granting lease, the learned First Appellate Court discussed oral evidence of four witnesses who deposed their personal knowledge as to tenancy of the plaintiffs under original owner, namely, Md. Joinuddin Mondal, the learned First Appellate Court also considered the revenue receipt issued by legal heirs of the original pattadar late Joinuddin Mondal and held that these documents as well as oral evidence of P.W. 1 to 5 establish tenancy of the plaintiffs under original khatiandar late Joinuddin Mondal. The learned First Appellate Court also considered Exhibit-10, the records of rights, which shows that Joinuddin Mondal was original jotdar of the land.

6. The aforesaid appellate judgment of reversal passed by the learned Civil judge (Senior Division) Dhubri has been brought under challenge in the present Second Appeal by the defendants No. 1 to 3. This Court while admitting the Second Appeal on 29.09.2003 framed the following two substantial questions of law and the same are as below:

"1) Whether the suit is barred by res-judicata?

2) Whether the respondent/plaintiff can be treated as tenant without pattanama (Kurfa Khatian) under Jotdar?"

7. I have heard Mr. M.A. Sheikh, learned counsel for the appellants and Mr. M.K. Sarma, learned counsel for the respondents in the present appeal. I have also perused the evidence adduced by the parties before the learned Trial Court to understand the pleadings and evidence of the parties.

8. The former suit i.e. Title Suit No. 678 of 1982 was instituted by Md. Sukur Ali and three others in which defendants were Deraj Diwani and 8 others. The sons of Md. Sakur Ali Mollah, namely, Md. Sahar Ali Mollah, Md. Habibar Sheikh & Md. Surat Jamal Sheikh were also made parties as plaintiff No. 2, 3 & 4 in the former suit. These plaintiffs No. 2, 3 & 4 of the former suit are the defendants No. 1, 2 & 3 of the

present suit, but the defendants of the former suit are not made parties in the present suit either as plaintiffs or defendants. The plaintiffs here in the present case have not derived any title through any of the parties of the former suit i.e. Title Suit No. 678 of 2002. So, the learned First Appellate Court has not committed any error in holding that principle of res-judicata does not apply in the present case. Question of res-judicata would arise if the question being directly or substantially in issue in a former suit between the same set of parties was conclusively decided between the same set of the parties and then same parties could be estopped from raising same issues, a subsequent suit. This is in the interest of the finality of a judicial decision and has been recognised in Section 11 of the Code of Civil Procedure which is quoted below:

"11. Res-Judicata:- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I:--The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II:--For the purpose of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III:--The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV:--Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V:--Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.

Explanation VI:--Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

[Explanation VII:--The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII:--An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res-judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]"

9. Admittedly former suit i.e. Title Suit No. 678 of 1982 was not between the parties of the present suit i.e. Title Suit No. 305 of 1999. The learned Trial Court, therefore, committed error in holding that Title Suit No. 305 of 1992 is barred by res-judicata. The learned First Appellate Court reversed the findings of the learned Trial Court. The first substantial question of law, therefore, is liable to be decided in negative and in favour of the plaintiffs and it is accordingly decided.

10. The Second substantial question of law is referred to above deals with status of the plaintiffs as tenant under late Joinudin Mondal. According to the plaintiffs they came into possession of the suit land in the year 1964 initially under late Joinudin Mondal and after his death they have been continuing under legal heirs of late Joinudin Mondal and in support of such contention they have brought on record Exhibits-1 to 9 which are revenue receipts issued by Samsul Haque a decedent of late Joinuddin Mondal. The fact that Joinuddin Mondal was recorded as jotdar in the suit land is evidenced by Exhibit-10 which is a Khatian prepared in the year 1965. The plaintiffs further pleaded that their tenancy having been created after commencement of settlement operation in 1960, their names were not reflected in the records of rights but their possession over the suit land has been evidenced by oral evidence of P.W. 2 to 5. P.W. 2 during his cross-examination deposed that he was present when the plaintiffs were accepted as tenant under the original jotdar. P.W. 2 to 4 categorically stated that they did not find defendants in possession of the land in any point of time. What is conspicuous from the evidence led by the plaintiffs' side is that although in the plaint plaintiffs claimed right, title and interest but ultimately during course of the trial they restricted their claim to the right of tenancy only and that is why even in the First Appellate Court while decreeing the suit, the learned Court took cognizance of tenancy right of the plaintiffs and not title.

11. Mr. M.A. Sheikh, learned counsel for the appellants unsuccessfully sought to persuade this Court to rely on Exhibit-4 of former suit i.e. Title Suit No. 678 of 1982 to show that defendants No. 1 to 3 having purchased the title of the suit land from original Jotdar, namely, Joinuddin Mondal, they acquired right, title, interest and possession to the suit land but since parties of the two suits are not the same, the evidence of the former suit does not appear to be relevant for the present suit in view of the specific provision of Section 33 of the Indian Evidence Act. The witness of the former suit i.e. defendants herein are neither dead nor incapable of coming to the witness box and so, the question of bringing the certified copy of the deposition in former proceeding does not arise in the present case. Be that as it may, while the

plaintiffs have proceeded to stake claim of tenancy right over the suit land even if the defendants have acquired title to the land by purchase the same would not have any adverse consequence on the right of tenancy of the plaintiffs. It is to be noted here that in the proceeding before the learned Trial Court defendants chose not to file any counter claim staking claim of title and possession and so it is too late in the day to make this claim at the Second Appellate stage. The learned First Appellate Court considered the claim of tenancy of the plaintiffs in the light of oral evidence of P.W.s 2 to 5 and Exhibits-1 to 10. Exhibits-1 to 9 are rent receipts collected by Samsul Haque who is a descendant of the recorded Jotdar Joinuddin Mondal. Joinuddin Mondal has died. His status as original Jotdar is not only evidenced in Exhibit-10 but also not disputed by the defendants. Having so found, this Court felt the necessity to examine as to whether the special statute Goalpara Tenancy Act, 1929 required pattanama as an indispensable proof of tenancy or not. Section 4(20) of Goalpara Tenancy Act defined tenancy which is quoted below:

"(20) 'Tenant' means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person and includes a person who, under the system generally known as 'adhi' (whether Guchiadhi or Gutiadhi), 'barga', 'bhag', 'chukti' or 'chukani', 'cultivates the land of another person on condition of delivering a share or quantity of the produce of such land to that person but does not include--

(a) an ijaradar, that is to say, a person who is primarily a farmer of rent; and

(b) a person holding land on condition of rendering service:

Provided that the labourers employed for personal cultivation shall not be deemed to be tenant within the meaning of this clause."

12. What is required in Section 4(20) is possession of one person under the original owner on the condition of payment of rent. It does not require execution of any document. Since, it is a special statute it would have applicability and is supposed to have overriding effect over the general law of lease because of the maxim *Generalia Specialibus Non-derogant*. The special Act does not require execution of lease document and so, the second substantial question of law is also liable to be decided in favour of the plaintiffs and against the appellants. Accordingly, the second substantial question of law is decided in affirmative and in favour of the respondents/plaintiffs.

13. Both the substantial questions of law having been decided in favour of the plaintiffs/respondents, the Second Appeal fails. It is accordingly dismissed.

14. No order as to cost.

15. Send down the Lower Courts records after framing of decree. Interim order passed earlier, if any, stands automatically vacated.