

(2015) 02 GAU CK 0051

In the Gauhati High Court

Case No : Regular Second Appeal No. 69 of 2008

Atul Roy and Others

APPELLANT

Vs

Rajib Lochan Kakoti and Others

RESPONDENT

Date of Decision : 13-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 6 Rule 15, Order 6 Rule 15(4)

Evidence Act, 1872 — Section 101

Citation : (2015) 2 GLT 45

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : P.K. Deka and N. Sarkar, for the Appellant; D. Borgohain, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Suman Shyam, J.—This Second Appeal has been directed against the judgment and decree dated 20.12.2007 passed by the learned Civil Judge, Lakhimpur, North Lakhimpur, in Title Appeal No. 8/2007 reversing the judgment and decree dated 14.05.2007 passed in Title Suit No. 53/2006 whereby the learned Munsiff No. 1, Lakhimpur had dismissed the suit filed by the respondents/plaintiffs. The brief factual matrix of the case, as set out in the plaint, is that land covered by dag No. 1414 of P.P. No. 402 of Ward No. 10, Norm Lakhimpur Town measuring 1 bigha 1 katha 8 lechas originally belonged to Sashidhar Phukan and Dhananjay Deori in equal shares. The aforementioned plot of land, besides other land covered by dags No. 1415 of the same patta, had been amicably partitioned between Sashidhar Phukan and Dhananjay Deori pursuant whereto Sashidhar Phukan was enjoying actual physical possession of half the land covered by dag No. 1414 i.e. 3 kathas 4 lechas for more than 20 years till his death. The plot of land measuring 3 katha 4 lechas covered by dag No. 1414 of P.P. No. 402 which is described in the Schedule-B of the plaint is the suit land.

2. Sashidhar Phukan died in the year 1961 whereafter, the suit land together with other land covered by dag No. 1415 devolved upon his wife Hemalata Phukan and three daughters, i.e. plaintiff Nos. 2 to 4. Although Sashidhar Phukan died leaving behind the aforementioned four legal heirs, yet after his death the name of his wife Hemalata Phukan alone was recorded as the pattadar in respect of the suit land covered by dag No. 1414 and land covered by dag No. 1415 in place of Shashidhar Phukan. Being in need of money for making certain constructions Late Hemalata Phukan, during her life time, sold the suit land measuring 3 katha 4 lechas covered by dag No. 1414 of Patta No. 402 together with another adjacent plot covered by dag No. 1415 comprising a total area of 1 bigha 10 lechas of land, described in schedule - A to the plaint, by executing a registered deed of sale bearing No. 489/1986 dated 27.06.86 in favour of her son-in-law Devendra Nath Kakati i.e. father of the plaintiff No. 1. The aforesaid registered deed of sale was executed by Late Hemalata Phukan after obtaining consent of her three daughters i.e. plaintiff Nos. 2 to 4 herein. After execution of the aforesaid sale deed Devendra Nath Kakati was put in possession in respect of the Schedule-A land which he continued to possess by paying land revenue. Devendra Nath Kakati died in the month of May, 1992. After his death the Schedule-A land devolved upon his legal heirs, viz., plaintiff No. 1 i.e. his son, plaintiff No. 2 i.e. his wife and the pro-forma defendant Nos. A and B who are the married daughters. The plaintiff No. 4 as well as the proforma defendant Nos. A and B had relinquished their claim over the Schedule-A land in favour of the plaintiff No. 1 and as such he had become the exclusive owner of the Schedule-A land having possession over the same by right of inheritance being the legal heir of Devendra Nath Kakati.

3. The plaintiff's case is that he had constructed a house over the land covered by Dag No. 1415 and kept a man as caretaker to look after both the lands owned by him covered by dag Nos. 1414 and 1415. He has also been regularly paying land revenue in respect of the plot of land owned by him falling under both the aforementioned dags. On 11.03.2003 his caretaker Ramu Rai told the plaintiff that some persons were digging the suit land and on receiving the said information the plaintiff came to the land and found that the defendants No. 4 and 5, being accompanied by their men, were digging the suit land for making some constructions thereupon. On being questioned by the plaintiff the said defendant Nos. 4 and 5 told him that the defendant No. 4 had purchased the land from heirs of Late Dhananjay Deori by registered deed of sale and would construct pucca boundary wall and building thereupon. Plaintiff No. 1 protested against such illegal incursion by the Defendant Nos. 4 and 5 saying that he is the owner of the land and has been in long and continuous possession of the same but the defendants Nos. 4 and 5 refused to stop such illegal construction. Subsequently, on making due enquiry in the office of the Sub-Registrar, North Lakhimpur, the plaintiffs came to know that the defendant No. 2, Moni Deori, who is the son of Prabhakar Deori and grandson of Late Dhananjay Deori, sold some land to the defendant No. 4 by means of a registered deed of sale bearing

No. 128/2003 dated 20.02.2003. Upon obtaining the certified copy of the said deed the plaintiff could come to know that the defendant No. 2, Moni Deori, had sold 3 kathas of land to the defendant No. 4 i.e. younger brother of the defendant No. 5, pertaining to dag No. 1414 of P.P. No. 402. As such, the plaintiffs were compelled to institute the suit praying for declaration of right, title and interest of the plaintiff No. 1 over the Schedule-A land, recovery of khas possession of the Schedule-B land and also for a declaration that the sale deed No. 128/03 was void/inoperative insofar as the suit land is concerned and for other consequential reliefs.

4. The defendant Nos. 4 and 5, who are the main defendants, had contested the suit filed by the plaintiffs by filing a joint written statement. While denying the averments made by the plaintiffs in the plaint, the defendant Nos. 4 and 5 questioned the competence of Hemalata Phukan to transfer the suit land by executing the registered deed of sale bearing No. 489/1986. The said defendants have denied that there was any amicable partition in respect of the land jointly owned by Sashidhar Phukan and Dhananjay Deori. They claimed to have purchased land measuring 3 kathas covered by dag No. 1414 under P.P. No. 402 of Lakhimpur Mouza from the defendant No. 2 by means of registered deed of sale No. 128/03 dated 20.02.2003. In their written statement the aforesaid defendants have also mentioned that in the sale deed dated 20.02.2003, initially the boundary of the land was wrongly mentioned due to oversight as a result of which an amended deed had to be executed and registered on 10.04.2003 giving the correct boundaries vide registered deed No. 303/2003 which represents the suit land barring the 4 lechas of land.

5. The defendant No. 1, Akanman Deori appeared in the case and submitted his written statement supporting the case of the plaintiffs stating, inter alia, that the land in question was in fact a part of the plot of land jointly owned by Sashidhar Phukan and Dhananjay Deori which was amicably partitioned by and between them. In his written statement, the Defendant No. 1 had further stated that pursuant to such amicable partition, the parties have been enjoying peaceful possession over their respective share of land without any dispute. The defendant Nos. 2 and 3 i.e. Moni Deori and Dipjoy Deori did not contest the suit despite receipt of summons.

6. On the basis of the pleadings of the parties the learned trial Court framed as many as 8 issues which are as follows:-

"(1) Is there cause of action for the suit?

(2) Whether the suit is properly valued?

(3) Whether the plaintiff have right, title and interest over the suit land i.e. half of the total area of the patta land?

(4) Whether the defendant No. 2 had any saleable right over the 3 kathas of land of dag No. 1414 to defendant No. 4 over the share of Dhananjay Deori, the co-

pattadar?

(5) Whether the plaintiff still have equal share of land under dag No. 1414?

(6) Whether the sale deed No. 128/03 executed on 20.02.2003 can be again corrected by virtue of amended rectification deed No. 303 on 10.04.2003?

(7) To what relief the plaintiffs are entitled?

(8) Additional issue:-Whether the original joint patta land containing the suit land was amicably partitioned between the pattadars?"

7. The plaintiffs' side examined four witnesses and exhibited some documents while the defendants' side examined two witnesses and also adduced some documentary evidence. On hearing the parties the learned trial Court dismissed the suit filed by the plaintiffs by holding that the plaintiff was not entitled to the decree as prayed for on account of the fact that they have failed to prove and establish that the land had been amicably partitioned between its original owners and pattadars i.e. Sashidhar Phukan and Dhananjoy Deori. Accordingly, the learned trial Court answered the issue Nos. 1, 5 and 8 against the plaintiffs whereas issue Nos. 4 and 6 had been struck off since the defendants did not file any counter-claim.

8. Being aggrieved by the aforesaid judgment and decree dated 14.05.2007 passed in Title Suit No. 53/2006 the plaintiffs as appellants preferred Title Appeal No. 8/2007 in the Court of Civil Judge, Lakhimpur, North Lakhimpur. Title Appeal No. 8/2007 was allowed by the learned Lower Appellate Court by the judgment and decree dated 20.12.2007 whereby the plaintiffs' suit was decreed by reversing the judgment and decree passed by the trial Court. The learned Lower Appellate Court held that from the materials available on record it was established that the land measuring 1 bigha 1 katha 8 lechas covered by dag Nos. 1414 of P.P. No. 402 had been amicably partitioned between Sashidhar Phukan and Dhananjoy Deori pursuant where to one half share of land i.e. 3 katha 4 lechas under the said dag and patta had gone to Sashidhar Phukan who had been possessing the said land. After his death his legal heirs owned and possessed the said land. The learned Appellate Court held that Hemalata Phukan was competent to transfer the plot land measuring 3 katha 4 lechas in dag No. 1414 in favour of Devendra Nath Kakati i.e. the predecessor-in-interest of the plaintiffs. The learned Lower Appellate Court had also taken note of the written statement filed by the defendant No. 1 whereby it has been admitted that the land had been amicably partitioned between the two pattadars in equal shares. Taking note of the pleaded stand of the parties as well as the materials on record the learned Lower Appellate Court further held that the land of dag No. 1414 of P.P. No. 402 having been divided in equal share between the two pattadars, an area of 3 katha 4 lechas fell in the share of Dhananjoy Deori. Since Dhananjoy Deori had two sons, viz., Prabhakar Deori and Akanman Deori i.e. defendant No. 1, hence, each of the said sons would be entitled to 1 katha 12 lechas from the said plot of land. Prabhakar Deori has two sons, namely, Moni Deori and Dipjoy

Deori i.e. the defendant Nos. 2 and 3 and as such the aforesaid land measuring 1 katha 12 lechas would fall in equal shares upon the two sons of Late Prabhakar Deori. Such being the position, Moni Deori would be entitled to a share of only 16 lechas of land in the suit dag and as such he could not have transferred 3 kathas of land pertaining to dag No. 1414 in favour of defendant No. 4 by executing the sale deed No. 128/03.

9. Being aggrieved by the aforesaid judgment and decree passed by the Civil Judge, Lakhimpur, the appellants/defendant Nos. 4 and 5 have preferred this Second Appeal which was admitted for hearing on the following substantial questions of law:-

"(1) Whether the written statement of the defendant No. 1 not being supported by an affidavit as required under Order VI Rule 15(4) of the C.P.C. and having been rejected by the learned trial Court, the Lower Appellate Court was justified in taking the same into consideration and giving the finding on the basis of the said pleading that there was amicable partition between the parties over the suit land?

(2) Whether a suit for declaration of right, title and interest and khas possession in respect of esmail (esmaili) patta land can be decreed if there is no proof of partition against the co-sharer?"

10. Heard Mr. P.K. Deka, assisted by Mr. N. Sarkar learned counsel appearing for the appellants as well as Ms. D. Borgohain, learned counsel appearing for the respondent No. 1.

11. Mr. Deka has fairly submitted that in the facts and circumstances of the case, the contesting defendants are not questioning the title of the Plaintiffs in the undivided portion of the land jointly owned by Shashidhar Phukan and Dhananjay Deori. According to him, the plaintiffs have failed to lead any evidence to establish that the land in dag No. 1414 and 1415 had been amicably partitioned by and between the original co-owners. The written statement submitted by the Defendant No. 1 not being supported by an affidavit as per requirement of order VI Rule 15(4) C.P.C., the First Appellate court could not have taken cognizance of the contents thereof. Plaintiffs have also failed to call as a witness, the Defendant No. 1 and as such adverse presumption within the meaning of section 114(G) of the Evidence Act ought to be drawn against them. He submits that since the plaintiffs have failed to prove and establish the amicable partition, hence, the plaintiff No. 1 cannot claim exclusive right over any portion of the undivided land unless a partition suit is filed. As such, no decree for recovery of khas possession can be passed in favour of the plaintiff. In support of his arguments, Mr. Deka has relied upon two decisions of this court reported in , AIR (7) 1950 ASSAM 1 [Boloram Kumar and Ors. Vs. Dandiram Kumar and Ors.] as well as Sri Parimal Ch. Saha and Others Vs. Smt Snehalata Saha and Others, (2012) 1 GLD 510 to contend that a suit for declaration of title and exclusive possession in respect of any portion of land held jointly is not maintainable in the absence of proof of

partition amongst the co-sharers.

12. Ms. D. Borgohain, learned counsel for the Respondents/Plaintiffs, on the other hand, submits that the fact that the land in question had been amicably partitioned between Sashidhar Phukan and Dhananjay Deori had been categorically admitted by the Defendant No. 1, who is one of the sons of Dhananjay Deori, in the written statement filed by him. The Defendant Nos. 2 and 3 being the other surviving heirs of late Dhananjay Deori did not appear and dispute the claim of the Plaintiffs despite service of summons upon him. Therefore, having regard to the evidence led by the plaintiffs, there was sufficient basis for the First Appellate Court to draw a conclusion that the land had in fact been amicably partitioned between its co-owners. She submits that since the heirs have not disputed the fact of amicable partition of the land between the co-owners hence, the Appellants/Defendants being third parties do not have any locus standi to question the same more.

13. I have considered the rival submissions of the parties and have also perused the records. From a perusal of the pleadings as well as the materials on record what emerges is that Late Sashidhar Phukan and Late Dhananjay Deori, during their life time, were the joint owners in possession of a plot of land measuring 1 Bigha 1 katha 8 lechas covered by Dag No. 1414 besides other land of patta No. 402 measuring 8 Bigha 1 katha 18 lechas in total having equal share over the land. Since, the dispute in this proceeding is only pertaining to the land covered by Dag No. 1414 of Patta No. 402, hence, the discussions regarding land covered by other dag is considered unnecessary.

14. The case of the plaintiff is that besides the land covered by the other dag, land measuring 1 Bigha 1 Katha 8 Lechas of Dag No. 1414 had also been amicably partitioned between the co-owners in equal shares as a result of which land measuring 3 Kathas 4 Lechas had fallen in the share of Sashidhar Phukan. This 3 Kathas 4 Lechas forms part of the total land measuring 1 Bigha 10 Lechas of land covered by Dag Nos. 1414 and 1415 described in the Schedule "A" to the plaint, which was purchased by late Devendra Kakati, i.e. the father of the plaintiff No. 1, by the registered deed of sale No. 489/86.

15. In paragraph 16 of the written statement filed by the defendant Nos. 4 and 5 it has been mentioned that:

"The plaintiffs still have the equal share of land under dag No. 1414 contiguous to their own land".

In paragraph 18 of the written statement, it has been mentioned that:

"The Plaintiffs are trying to get the share of land of late Dhananjay Deori under dag No. 1414 to own the vast area of land in the heart of the town covered by both dag Nos. 1414 and 1415 and to fulfill such evil intention they instituted this suit to force the defendants to give up".

Again in paragraph 25 of the written statement it has been stated that by taking

possession of the suit land, the Appellant/Defendants have not ousted the Plaintiffs from their right as they still have equal share of land adjacent to their own land. From above averment made in the written statement, it is evident that the Appellants/Defendants Nos. 4 and 5 are not disputing the title of the plaintiff over half portion of the land covered by dag No. 1414 but are merely claiming that the suit land pertains to share of Dhananjoy Deori. In the above backdrop, what will be relevant for determination is that whether the land failing in Dag No. 1414 had been partitioned between Shashidhar Phukan and Dhananjoy Deori and if so whether the plaintiffs have succeeded in proving and establishing their case so as to entitle the Plaintiff No. 1 to decree prayed for.

16. On 6.12.2003. The Defendant No. 1, Akanman Deori had filed his written statement and the same was taken on record by the learned trial court by an order passed on 06.12.2003 itself. A perusal of the said written statement goes to show that the same has been duly verified but was not supported by an affidavit in terms of Order VI Rule 15(4) C.P.C.

17. Order VI Rule 15 C.P.C. requires pleadings to be verified. Sub-Rule (4) of Order VI Rule 15 additionally requires the person verifying the pleadings to also furnish an affidavit in support of his pleadings. Order VI Rule 15 C.P.C. reads as follows:-

"15. Verification of pleadings.-

(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

(4) The person verifying the pleading shall also furnish an affidavit in support of his pleadings."

18. In the case of G.M. Siddeshwar Vs. Prasanna Kumar, AIR 2013 SC 1549 : (2013) 2 CTC 444 : (2013) 4 JT 47 : (2013) 2 RCR(Civil) 340 : (2013) 3 SCALE 287 : (2013) 4 SCC 776 : (2013) AIRSCW 1777 : (2013) 2 Supreme 193 , the Hon"ble Apex Court has held that since Order VI Rule 15(4) C.P.C. requires an affidavit "also" to be filed, the same does not mean that the verification of the pleadings is incomplete if an affidavit is not filed. The affidavit in this context was held to be a standalone document. In the said decision the Hon"ble Apex Court has observed that although the filing of an affidavit in support of the pleadings filed under Order VI Rule 15(4) C.P.C. may be mandatory, however, the affidavit is not a part of the verification of the pleadings. From the above decision of the

Hon"ble Supreme Court it is thus clear that mere omission to file an affidavit in terms of Order VI Rule 15(4) would not render the verification of the pleadings as incomplete.

19. In the present case, the defendant No. 1 Akanman Deori, who is the son of Dhananjay Deori, had filed his written statement duly verified as per the requirement of law. However, the said written statement was not supported by an affidavit as per the requirement of Order VI Rule 15(4) C.P.C. Omission to do so had certainly rendered the written statement as defective but such defect was curable in nature. It appears from the record that on 18.8.2007, Akanman Deori had filed an affidavit before the First Appellate Court inter-alia supporting his stand taken in the written statement filed earlier. On 29.09.2007 the Appellants/Defendant No. 4 and 5 had filed a written objection objecting to the filing of the said affidavit with a further prayer to reject the same. By the order dated 29.09.2007, the First Appellate Court rejected the objection filed by the Appellant/Defendants Nos. 4 and 5 and directed that the affidavit would form part of the record. From the above it can be seen that there has been substantive compliance of Order VI Rule 15(4) C.P.C. in so far as the written statement filed by Akanman Deori is concerned. In any case, failure to support the pleadings by an affidavit as per Order VI Rule 15(4) C.P.C. may have other consequences upon the defendant but the same would not altogether efface the written statement itself from the records of the case.

20. Order XII Rule 6 C.P.C. permits the Court to deliver a judgment on admission. Order XII Rule 6 C.P.C. reads as follows:-

"6. Judgment on admissions.-

(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

21. The usage of terms "pleadings or otherwise" and "whether orally or in writing" denotes that the Court would have wide powers to take note of any admission of fact of which it can take judicial notice of. In the instant case, the written statement filed by the defendant No. 1 was available on record wherein he had categorically admitted that the land in question was amicably partitioned between Sashidhar Phukan and Dhananjay Deori. Being the son of Dhananjay Deori, he was competent to admit the said fact. Since the written statement had not been struck off from the records of the case and the defect was also cured by filing an affidavit subsequently, hence, the First Appellate Court was well within its jurisdiction and competence to take cognizance of the admissions made in

favour of the plaintiff in the written statement and delivered the judgment on the basis of such admission.

22. The plaintiff No. 1 had examined himself as the P.W. - 1 wherein he has deposed that the suit land forms a part of dag No. 1414 of P.P. No. 402 which fell into the share of Sashidhar Phukan upon amicable partition of the land between the pattadars. The P.W. 1 has also exhibited the copy of jamabondi showing the inclusion of the name of Hemalata Phukan together with the legal heirs of Dhananjay Deori in respect of dag No. 1414. The sale deed Ext.-3 by which the land mentioned in Schedule-A was sold in favour of the father of the plaintiff No. 1 had been adduced in evidence by the plaintiffs, besides producing the revenue paying receipts i.e. Exts. - 2(1) to 2(5) by Late Sashidhar Phukan as well as Ext.-4(1) to 4(3) paid by Devendra Nath Kakati in respect of the suit land. The P.W. 1 has also exhibited Exts. - 5(1) to 5(6) which are the receipts of the land revenue paid by him in respect of the suit land. In the oral testimony of the P.W. 1 he has categorically deposed that the land in question had been amicably partitioned between Late Sashidhar Phukan and Late Dhananjay Deori pursuant whereto the land measuring 3 katha 4 lechas out of 1 bigha 1 katha 8 lechas falling in dag No. 1414 had been exclusively possessed by Late Sashidhar Phukan for 20 years till his death, openly and to the knowledge of all and that such possession had been continued by his successor-in-interest. In his deposition the P.W. - 1 has also stated that after death of his father in May, 1992 the suit land along with the land of dag No. 1415 had devolved upon the legal heirs including himself and the other plaintiffs as well as proforma defendant Nos. A and B. Since his mother as well as the proforma defendants had relinquished their claim in respect of the said plot of land, as such, he has been continuously occupying the land as the owner having actual physical possession over the Schedule "A" land which includes the Schedule "B" land. He has been possessing the land by constructing a house and keeping a man by the name Ramu Rai. Such oral testimony of the P.W. - 1 had virtually gone unchallenged in his cross-examination. Save and except making a suggestion that the fact of amicable partition mentioned in the plaint was incorrect, the defendants side could not discredit the oral testimony of the P.W. 1.

23. The P.W. - 2 is a person who owns a plot of land located on the eastern boundary of the suit land. In his deposition the P.W. - 2 had confirmed that the suit land consists of land measuring 3 katha 4 lechas and had also indicated the boundary of the suit land which tallied with the boundary mentioned in the plaint. The said witness in his testimony had said that the "Kakatis" were the owner and possessor of the suit land since past many years. However, about 1 or 2 years back the defendants had dispossessed the plaintiffs from the suit land and thereafter constructed a brick wall over the land. He had also deposed that since the time that his memory serves, he has seen the plaintiffs in possession of the land who had also constructed a small house over the land and posted caretaker by the name Ramu who had been staying in that house since 8/9 years. In the cross-examination nothing could be brought out by the defendants

to discredit such testimony of the P.W. - 2.

24. P.W. 3, Ramu Rai, had also clearly mentioned in his deposition that he had been living in the land since the year 1987 as a caretaker on being engaged by the plaintiff No. 1 for the said purpose. The P.W. - 3 has also stated that on 11.03.2003 the defendant Nos. 4 and 5 being accompanied by some labourers and masons came to the suit land and forcibly dispossessed the plaintiff. Since that day, they have been filling up the land by making earth filling by engaging trucks. In his cross-examination the aforesaid testimony of the P.W. 3 could not be shaken by the contesting defendants.

25. On the other hand, the defendant No. 5 had examined himself as D.W. - 1. However, surprisingly, the defendant No. 4 who claims to be the purchaser of the suit land from Moni Deori did not examine himself as a witness. The D.W. - 1 in his cross-examination had admitted that no permission was obtained from the Deputy Commissioner before executing the amended deed of sale correcting the boundary. He had admitted that at the time of purchasing the land they were not aware that Moni Deori was the owner of only 16 Lechas of land but came to know about it subsequently. He had also admitted that he was aware that the plot of land had been divided between Sashidhar Phukan and Dhananjoy Deori in equal shares. In his cross-examination the said witness has also admitted that he has no knowledge about the dag No. and patta No. of the suit land and that his brother i.e. Atul Ch. Roy has not executed any power of Attorney in his favour to depose on his behalf in the suit. He also deposed that he did not know any person by the name of Moni Deori. In his cross-examination he has further deposed that the wall had been raised over the suit land about two years back and immediately thereafter this case was filed and the construction work had to be stopped.

26. The D.W. - 3, Mukul Bora, who was the town Mondal, had produced the relevant revenue records in connection the dag No. 1414. The D.W. - 3 had stated that by the order dated 26.03.2003 of the Circle Officer the name of Atul Chandra Roy (Defendant No. 4) had been mutated in respect of 3 kathas of land covered by dag No. 1414 of P.P. No. 402 on the basis of right of purchase. The D.W. 3 had confirmed from the records that originally dag No. 1414 comprised of 1 bigha 1 katha 8 lechas of land. The said witness has, however, mentioned that the land falling under dag No. 1414 was "L" shaped which description matches with the sketch map shown in Schedule-A to the Plaint. He further deposed that there was no indication of the boundary of the land which was mutated in favour of Atul Chandra Roy. It will be significant to note that the amended deed showing the correct boundary was admittedly executed on 10-04-2003 which is subsequent to the date of mutation of the name of Atul Ch. Roy. Therefore, if the testimony of the D.W. - 3 is to be believed then the mutation of the name of Defendant No. 4 was evidently done on the basis of the Sale Deed showing the in-correct boundary of the purchased land.

27. On an analysis of the bulk of evidence available on record, it can be seen

that the plaintiffs' side has clearly pleaded the facts showing the flow of title in respect of the land claimed by the plaintiff No. 1. The plaintiffs have produced the copy of the jamabomndi Ext.-1, the sale deed Ext.-3 and also the revenue paying receipts showing payment of land revenue in respect of the suit land right since the time the same had been possessed by Sashidhar Phukan till the plaintiff No. 1 had come into possession of the suit land. The plaintiffs have also led sufficient evidence to show that the suit land was in possession of the Plaintiff No. 1 all along until the time when he was dispossessed by the Defendant Nos. 4 and 5. Upon such evidence being led by the plaintiff the burden to lead evidence would shift upon the defendant Nos. 4 and 5, more particularly in view of the claim made by the defendants in the written statement that they had purchased the suit land from Moni Deori by means of a registered deed of sale dated 20.02.2003.

28. In their written statement the defendants No. 4 and 5 have not mentioned as to whether the possession of the suit land was ever delivered to them by the vendor and if so in what manner the same was done. The said defendants have vaguely stated in the written statement that pursuant to execution of the sale deed bearing No. 128/03 they took over possession of the land which was lying vacant. On a close scrutiny of the evidence led by the defendants it can be seen that they have completely failed to lead any evidence to show that their vendor was in possession of the suit land prior to 11.03.2003 on which date they had allegedly entered into the suit land and taken possession. On the contrary, the materials on record go to show that the Plaintiff No. 1 was in possession of the suit land since past many years.

29. It is true that the plaintiff has to succeed in proving and establishing his own case by leading cogent evidence as the burden of proof under Section 101 of the Evidence Act would never shift. But once the plaintiff's side has led evidence so as to establish a prima facie case in support of their claim for title and possession over the suit land the evidential burden would shift upon the defendants to lead evidence to disprove the case of the plaintiff. From the weight of the evidence on record it can be seen that the plaintiffs have succeeded in proving their case. However, defendants side has failed to dislodge the case of the Plaintiff by leading cogent evidence.

30. The aforementioned aspect would have a significant bearing in view of the fact that although the defendants No. 4 has claimed his right and title over the suit land on the strength of the registered deed of sale executed on 20.03.2003 yet they have neither challenged the sale deed No. 489/86 dated 27.06.1986, which was earlier in point of time, by means of which the suit land had been purchased by the predecessor-in-interest of the plaintiff No. 1, nor have they made any counter claim in respect thereof. The Defendant No. 4, who is the alleged purchaser of part of the Schedule-B land from Moni Deori neither examined himself as a witness nor did he call his vendor as a witness. The aforesaid omissions afford a reasonable ground to draw adverse presumption

against the Defendant No. 4. The contesting defendants have also failed to lead even an iota of evidence to show that their vendor Moni Deori was the registered owner having possession of the Schedule-B land on the date of execution of the sale deed in favour of the Defendant No. 4.

31. It is settled law that a suit for exclusive possession based on title would not be maintainable in the absence of proof of partition of the immoveable property amongst the co-sharers. However, in the present case none of co-sharers i.e. the legal heirs of Shashidhar Phukan or Dhananjoy Deori have disputed the fact of amicable partition of the land. The defendant Nos. 1, 2 and 3 despite having the opportunity to dispute the said factual position have not done so. Rather, the defendant No. 1 has supported the case of the Plaintiff's. The above facts go to show that there was no dispute between the co-sharers as regards the title and possession over the suit land.

32. Evidence on record suggests that Shashidhar Phukan was in possession of the suit land until prior to his death in the year 1961 and thereafter, his legal heirs continued in possession. Eventually, the plaintiff No. 1 had been in possession of the suit land since the year 1986 on the basis of a registered deed of sale wherein the boundary of the land has also been clearly mentioned. In the absence of amicable partition amongst the co-sharers, the plaintiffs would not have been able to enjoy exclusive possession over their purchased land for such a long period. Curiously enough, even the Appellants/Defendant No. 4 is claiming title over the suit land on the basis of his purchase deed containing definite boundary of the land. The sale deed could not have indicated the land with specific boundaries unless the shares of the co-owners had been clearly partitioned. As such there is no substance in the argument made by the appellants that there has been no partition of the land in question. Moreover, the Appellant/Defendants, are not the co-owners of the land in the suit patta. Their entry into the land being unlawful, the status of the said defendants is that a trespasser. Partition of the land between co-owner is a matter exclusively arising between the co-sharers. Since the co-sharers have not disputed the same, a trespasser cannot be allowed to raise question regarding the partition of the land merely for the purpose of defeating the suit. In view of the foregoing discussion, the judgment and decision rendered in the case of Balaram Kumar (supra) as well as Parimal Chandra Saha (supra) will have no application in the facts of the present case. As such, it is held that the Second Appeal is devoid of any merit and the same is accordingly dismissed. Stay order passed earlier shall stand vacated. However, having regard to the facts and circumstances of the case, there would be no order as to cost.

The LCR may be sent back by the Registry.