

(2004) 12 GAU CK 0039

In the Gauhati High Court

Case No : Second Appeal No. 34 of 1996

Jahur Uddin Mazarbhuiya and Another

APPELLANT

Vs

Resida Khatun and Others

RESPONDENT

Date of Decision : 09-12-2004

Acts Referred:

Citation : (2005) 1 GLR 724 : (2006) GLT 710 Supp

Hon'ble Judges : D. Biswas, Acting C.J.

Bench : Single Bench

Advocate : B.C. Das, Sandita Roy and R.C. Paul, for the Appellant; H.R.A. Choudhury, A.S. Choudhury and K.A. Mazumdar, for the Respondent

Final Decision : Allowed

Judgement

D. Biswas, Actg. C.J.

1. This Second Appeal is directed against the judgment and decree dated 23.3.1995 passed by the learned District Judge, Hailakandi in Title Appeal No. 13 of 1994 allowing the appeal and reversing the Judgment and Decree dated 14.11.1990 passed by the learned Assistant District Judge, Hailakandi in Title Suit No. 41 of 1986.

2. This appeal was admitted for hearing on 1.3.1996 on the following substantial questions of law :-

(i) Whether the learned Appellate Court committed an error of law in holding that Laloi Bibi was married for the second time to Khurshed Ali, and Rashida Khatun was born out of this wedlock despite clear finding of both the Courts below that Laloi Bibi was wife of Ismyl Mia ?

(ii) Whether the learned Lower Appellate Court committed any error in law in shifting the onus of proof of parentage of Rashida Begum upon the plaintiff appellants ?

3. It may be mentioned here that the appellants herein as plaintiffs filed Title

Suit No. 41 of 1986 in the Court of Assistant District Judge, Hailakandi praying for declaration of title, confirmation of possession etc.

4. The learned Assistant District Judge decreed the suit granting all reliefs. The issues framed have been answered in favour of the plaintiff-appellants. Issue No. 6 is the core issue which deals with the question of parentage of Rashida Khatun. The learned District Judge reversed the aforesaid judgment and decree passed by the Assistant District Judge and dismissed the suit.

5. The appellants No. 1 and 2 are brothers. They filed the Title Suit No. 41 of 1986. They purchased the land from defendants Nos. 3 and 14 by registered sale deeds vide Exts. 4 and 5 executed on 19.2.1985. They are the son and daughter of late Khurshed Ali, the original owner of the land. The plaintiff No. 1 purchased 1 Bigha 4 Kathas 4 Chattaks and the plaintiff No. 2 purchased 1 Bigha 4 Kathas and 5 Chattaks of land. The land purchased by plaintiffs vide Ext. 4 are in two schedules. Schedule - 2 is not disputed by the defendants. The title to the land in first Schedule of Ext. 4 and the last of Ext. 5 is in dispute. The defendant No. 4 dispossessed the plaintiff No. 2 from a part of the land of Ext. 5 of 7.3.1985 and took possession of 15 Kathas 2 Chattaks and 10 Gondas of land. This land has been described in Schedule - C to the plaint. The defendant No. 4 and others have been disturbing the possession of the plaintiffs. Hence, the suit was filed for declaration of title, confirmation of possession and for recovery of possession of Schedule - C land. Further declaration has also been sought that the defendant No. 1 Rashida Khatun is not the daughter of late Khurshed Ali, the original owner of the land and that the sale made by her on 6.3.1986 to defendant No. 4 is illegal.

6. The defendants No. 1 and 4 contested the suit by filing separate written statements. The case of the defendant No. 1 is that her mother Laloi Bibi was married to one Ismyl Mia, who died leaving her mother Laloi Bibi, brother Md. Abdul Khalik Mazarbhuiya (defendant No. 16) and two other sisters. Laloi Bibi on death of her husband Ismyl Mia was given on marriage to Khurshed Ali, the younger brother of Ismyl Mia and out of this wedlock the defendant No. 1 was born. On death of Khurshed Ali, defendant No. 1 and her mother Laloi Bibi along with other brothers and sisters succeeded the estate of Khurshed Ali. The defendant No. 4 claimed title over the Schedule-A and B land by virtue of his purchase from defendant No. 1 vide Exts. 7 and 15.

7. The defendant Nos. 3 and 14, the son and daughter of late Khurshed Ali, sold the land vide Exts. 4 and 5 on 19.2.1985 in favour of the plaintiffs No. 1 and 2. The sale deeds Exts. 4 and 5 were executed and registered on 19.2.1985. But the defendant No. 3 executed another sale deed on 18.2.1985, in favour of son, defendant No. 5 and this Ext. 14 was registered on 19.2.1985 i.e. the same day when the sale deeds in favour of the plaintiffs were registered. The defendant No. 5 again sold the land vide Ext. 15 on 10.6.1985 to the defendant No. 4. The defendant No. 4 after purchase vide Ext. 15 claimed title over the Schedule-A and B land.

8. There is no dispute that the land described in Schedule-A and B originally belong to Khurmed Ali who died leaving his wife Noor Jehan Bibi, one son Md. Jonab Ali Barbuiya and one daughter namely Joygun Bibi. All of them are now dead. The plaintiffs No. 1 and 2 purchased the suit land from defendants No. 3 and 14 by Registered Deeds No. 933 and 934 of 19.2.1985 and took delivery of possession. It is clear from the evidence on record that the defendant No. 1 Roshida Khatun claiming to be a daughter of Khurshed Ali sold a piece of land in the same Dag and Patta by the sale deed No. 1441 of 6.3.1985 to the defendant No. 4. The defendant No. 4, after purchase from defendant No. 1 Rashida and in collusion with defendant No. 13 dispossessed the plaintiff on 7.3.1985 from an area of 15 kathas of land covered by Ext. 5. The defendant No. 3, before execution of the sale deeds in favour of the plaintiffs on 19.2.1985, executed another sale deed in favour of defendant No. 5 on 19.2.1985 covering a part of the land described in Schedule-A. The defendant No. 5, thereafter, sold the same land to the defendant No. 4 on 19.5.1985. The question is whether Rashida, defendant No. 1, had any title over the land of late Khurshed Ali. Answer to this question depends on the parentage of Rashida Khatun.

9. It would appear from the above that the dispute with regard to right, title and interest of the plaintiffs over the land purchased by them from defendants No. 3 and 14 became clouded because of sale deed executed by defendant No. 1 Rashida Khatun claiming herself to be a daughter of Khurshed Ali and also because of sale deed dated 19.2.1985 executed by defendant No. 3 in favour of his son in respect of same land appertaining to Schedule-A.

10. First let us address the dispute with regard to these two sale deeds executed by defendant No. 3 Md. Jobab Ali Mazarbhuiya during his lifetime on the same day, one to the plaintiff No. 1 and other to his son Md. Jalal Uddin Mazarbhuiya (defendant No. 5). Ext. 4 is the sale deed dated 19.2.1985 executed by defendant No. 3 in favour of plaintiff No. 1. Ext. 14 is the sale deed executed by the said defendant No. 3 in favour of his son defendant No. 5 on the same day. It appears that these two documents were registered on the same day. But the sale deed executed and registered in favour of the plaintiff No. 1, i.e., Ext. 4 was registered prior to the registration of the Sale Deed executed in favour of the defendant No. 4. The sale of the land in favour of Defendant No. 5 by Deed No. 936 could not convey title as the title to the land was already alienated by Ext. 4, the Deed No. 933. Therefore, Ext. 4 will get precedence over Ext. 14. The defendant No. 4 was obviously not vested with any transferable right. Consequently, the sale deed (Ext. 15) executed by defendant No. 4 in favour of defendant No. 5 on 10.6.1985 is also of no significance. The inevitable conclusion under the given circumstances is that the defendants acquired no title on the strength of Exts. 14 and 15.

11. The learned Trial Court dealt with the question of parentage of Rashida Khatun in Issue No. 6. It appears that Rashida Khatun in her evidence-in-chief stated that Khurshed Ali was her father. She claimed that she got land measuring

about a kedar from her father by way of inheritance as well as gift. In her cross-examination, she stated that she had a discussion with her mother about her parentage, but her mother could not give any documentary proof that Khurshed Ali was her father. She, however, denied a suggestion that her mother Laloi Bibi did not get any property from Khurshed Ali. The learned Trial Court observed that Laloi Bibi, who was proforma defendant No. 18, did not contest the suit and even she was not examined to prove that she was married to Khurshed Ali after death of her husband Ismyl Mia. Besides, neither the name of Rashida Khatun nor her mother Laloi Bibi was mutated in the Jamabandi after death of Kurshed Ali. The voter lists of 1951, 1965, 1970 and 1977 and 1985 (Exts. 27 to 31) show that Ismyl Mia was recorded as the husband of Laloi Bibi all through. Therefore, marriage of Laloi Bibi after death of Ismyl Mia with Khurshed Ali become doubtful. The plaintiffs have exhibited these documents in order to show that Laloi Bibi has been consistently shown as the wife of Ismyl Mia and not Khurshed Ali. The Sale Deed (Ext. 25) was executed on 4.7.1985 by Laloi Bibi describing herself as wife of Ismyl Mia and not of Khurshed Ali. Ext. 24 is another Deed of Sale executed by Laloi Bibi on 22.7.1980 wherein also the name of Khurshed Ali does not figure. A glance at the voters list and the sale deeds executed by Laloi Bibi would lead to a presumption that she was not the wife of Khurshed Ali as claimed by Rashida Khatun, defendant No. 1. In view of the evidence adduced by the plaintiff-appellants, the burden obviously shifted to the defendants to establish that Laloi Bibi was married to Khurshed Ali, and Rashida Khatun was borne out of this wedlock. But they have not adduced any acceptable evidence to this effect. Even the statements made by Rashida Khatun in her evidence do not inspire confidence of the Court to come to the conclusion that she is the daughter of Khurshed Ali, the original owner of the land.

12. In view of the above discussion, it appears that the defendants failed to establish that Laloi Bibi inherited one-eighth of the property of Khurshed Ali which she had gifted to defendant No. 1. Consequent thereupon, it cannot be established that defendant No. 1 Rashida Khatun in turn inherited any property of Khurshed Ali by inheritance and gift. Therefore, the sale deeds executed by her in favour of defendant No. 5 who in turn sold it to the defendant No. 4 did convey no title to the defendants.

13. For discussion above, it can be said that the decision of the learned First Appellate Court appears is perverse for improper appreciation of evidence. In so far the second question is concerned, it would appear that the plaintiff-appellants have been able to discharge their burden to show prima facie that Rashida Khatun was not the daughter of Khurshed Ali. The onus thus shifted to the defendants to prove the parentage of Rashida Khatun. The defendants have, obviously, failed to discharge their burden. No other conclusion is possible on the evidence on record. The questions formulated are answered accordingly.

14. In the result, the appeal is allowed. The judgment and decree dated 23.3.1995 passed by the learned District Judge, Hailakandi in Title Appeal No. 13

of 1994 are hereby set aside and the judgment and decree dated 14.11.1990 passed by the learned Assistant District Judge, Hailakandi in Title Suit No. 41 of 1986 are affirmed.