
(2016) 06 GAU CK 0007
In the Gauhati High Court
Case No : R.S.A. No. 121 of 2003

Khalilur Rahman

APPELLANT

Vs

Akram Ali

RESPONDENT

Date of Decision : 02-06-2016

Acts Referred:

Assam State Acquisition of Zamindari Act, 1951 — Section 147
Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2016) 6 GauLJ 331 : (2016) 6 GauLR 453

Hon'ble Judges : Mr. N. Chaudhury, J.

Bench : Single Bench

Advocate : Mr. G. Sharma, Govt. Advocate, Assam, for the Respondent Nos. 4, 5 and 6; Mr. U. Dutta, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

Mr. N. Chaudhury, J.(Oral) - The present Second Appeal has been preferred against the first appellate judgment and decree dated 27.03.2003 passed by learned Civil Judge (Senior Division), Karimganj in Title Appeal No. 28/1996 whereby the trial court judgment and decree of dismissal passed on 30.03.1996 by learned Civil Judge (Junior Division) No.1, Karimganj in Title Suit No. 7/1990 has been reversed. The learned trial Court found the suit to be bad for non-joinder of necessary parties and also deficient in material particulars regarding claim of proprietary right or landholders' right of the plaintiffs. The first appellate Court reversed the findings and held that the plaintiffs succeeded to establish their right, title and interest and that settlement made in favour of the defendant No.1 on 09.04.1987 by the Government was not in accordance with law and consequently the settlement was cancelled. Against such judgment of reversal the Second Appeal has been admitted.

2. The brief facts involved in the Second Appeal are required to be stated first. Three respondents as plaintiffs instituted Title Suit No.7/1990 in the Court of learned Munsiff No.1 at Karimganj stating that Haji Mahmud Ali, Asaid Ali and

Jamshed Ali along with other co-sharers had title and khas possession over the suit land. While enjoying the land by raising "Boro" paddy and harvesting fishes Haji Mahmud Ali, Asaid Ali and Jamshed Ali died. After their death their respective legal heirs held amicable settlement and thereupon plaintiff No.1, Akram Ali, being son of Late Haji Mahmud Ali, plaintiff No.2, Sayad Ali being son of Late Asaid Ali and plaintiff No.3, Siraj Uddin, being son of Late Jamshed Ali got the land described in the schedule to the plaint along with other land in their share while other co-sharers got their respective shares. Since before settlement operation the land described in the schedule to the plaint remained under possession and enjoyment of the plaintiffs and defendant No.1 had no right, title and interest thereto. Even then he managed to get settlement with respect to 8 Bighas of land by order dated 09.04.1987 from the Government which is illegal and collusive. The land has not been correctly described as paddy land type and without giving any opportunity to the plaintiffs and others the same has been allotted to the defendant No.1. The land is still under the possession of the plaintiffs but they have been publicizing to take possession thereof. Under such circumstances the suit was instituted praying for a decree declaring that settlement made on 09.04.1987 in favour of the defendant No.1 is illegal, void and inoperative; that plaintiffs have hereditary right, title and interest with respect to 10 Kedars of land described in schedule to the plaint by way of amicable partition as land holder; and for injunction restraining the defendants from disturbing peaceful possession of the plaintiffs over the suit land. In the schedule of the plaint it is mentioned that the suit land is covered Decennial Taluk of Hurmat Khan, Durlab Khan and Sheikh Sina and others under Umarpur Mouza of Chapghat Phargana.

3. On being summoned the defendant No.1 appeared and submitted written statement denying the case of the plaintiffs, inter alia, on the ground of maintainability as well as on merit. According to the defendant No.1, the suit is bad for non-joinder of necessary parties as legal heirs of deceased sons and one live son of Mahmud Ali and legal heirs of Asaid Ali and Jamshed Ali have not been made party. Amraj Ali, Abdul Latif, Rois Ali, Abdul Hussain, Hasan Ali and Aftar Ali being the legal heirs of the original alleged Pattadars they are necessary party to the suit. Defendant No.1 denied continuous possession of the plaintiffs over the suit land and he had been possessing the land adversely and without interruption for a period beyond the period of limitation and he being an ex-serviceman made a prayer before the Government for settlement in his favour. Accordingly, the settlement has been made in his favour on 09.04.1987. The suit of the plaintiffs, therefore, is liable to be dismissed with cost.

4. The defendant Nos.2 to 4, who are the State respondents, submitted a joint written statement, inter alia, stating that the suit is bad for want of service of notice under Section 80(1) of the Civil Procedure. It is further stated that the suit land covered by Dag No.75 was included under Khatian No.123, 148 and 178 of Mouja Umarpur Part-III in Phargana-Chapghat having an area of 84.60 acres and was classified as "Beel". Subsequently it was made khas under Section 6(4) of

the Assam Acquisition of Zamindaries Act, 1951. Kutcha patta No.49 measuring 8 Bighas of land pertaining to said Dag No.75 had already been issued to defendant No.1 vide Misc. Case No. 121/86-87 by the Settlement Officer, Karimganj and so plaintiffs are not entitled to any decree as prayed for.

5. On the basis of the aforesaid pleadings of the parties, the learned trial Court framed following six issues :-

"1. Whether there is cause of action for the suit ?

2. Whether the plaintiffs have right, title, interest and possession over the suit land?

3. Whether the suit is bad for defect or parties?

4. Whether the suit land is Khas land of the Govt.?

5. Whether the plaintiffs are entitled to a decree as prayed for?

6. To what reliefs are the plaintiffs entitled?"

6. In course of trial plaintiffs examined two witnesses and adduced five documents. The defendant Nos. 2 to 4 examined one employee as DW 1 and exhibited final khatian as Exts-A, B and C. The defendant No.1 examined himself as DW 2 and exhibited documents to show that he was an ex-Army personnel and that the land was settled with him.

7. Upon perusal of the evidence led by the parties the learned trial Court formed the opinion that the plaintiffs having instituted the suit for decree of declaration of right of inheritance through amicable partition among all legal heirs of their predecessors, all the legal heirs ought to have been impleaded but they have not been made parties. The Issue No. 3 was accordingly decided against the plaintiffs holding that the suit is bad for non-joinder of necessary parties.

8. Coming to the Issue No.4 the learned trial Court held that the suit land falls under C.S. Dag No.75 being a beel class land and was made Khas under Section 6(4) of the Assam State Acquisition of Zamindaries Act, 1951 ("the Act"). Final Khatians were proved in original by the DW 1 to prove so and during cross-examination DW 1 was asked about the procedure in making the land Khas. But since making the land Khas under Section 6(4) of the Act has not been challenged in the suit such questions were ignored by the learned trial Court and held that the order passed under Section 6(4) of the Act stands and so the suit land is a Government khas land.

9. Issue No. 2 relates to right, title, interest and possession of the plaintiffs over the suit land and the same was taken up being the core issue. In deciding the issue the learned trial Court considered evidence of PWs 1 and 2 along with the evidence of DWs 1 and 2. The learned trial Court noticed that during cross-examination PW 1 could not assert his right of inheritance. He replied that Ext-1 was not in his father's name. He also could not say as to whether Exts-1 and 3

were issued in the name of the father of the plaintiff Nos. 1 and 3. He said that he cannot say whether his father's name is available in Ext-2 as well. Because of such reply given by the PW 1 in course of cross-examination the learned trial Court held that Exts-1 and 2 could not be properly proved by the plaintiffs in their favour. Moreover, Ext-3 brought on record by PW 1 does neither disclose the name of the plaintiffs nor their predecessors. Under such circumstances, Ext-3 was kept out of consideration. Noticing the deposition of PW 2 the learned trial Court opined that though PW 2 tried to support PW 1 but his deposition is of no use as he is neither a formal witness in respect of settlement of the suit land nor is he a co-sharer of the property referred to in Exts-1, 2 and 3. He only said that defendant No.1 was never in possession of the suit land covered by C.S. Dag No.75 but he said that Haji Mahmud Ali and Asaid Ali had their title over the land of C.S. Dag No.75 but statement of DW 1 in this regard could be of no help to confer title on the plaintiffs. After all, the plaintiffs are to establish their own right, title and interest. Although plaintiffs alleged to have been in possession of the suit land since the time of their predecessors but defendant Nos.2 to 4 issued allotment order in favour of defendant No.1 and so it is the burden of the plaintiffs to establish that despite issuance of allotment order on the basis of possession, the defendant No.1 was really not in possession of the suit land and it is the plaintiffs who have been possessing the same. On the other hand, defendant No.1 produced Kutcha Patta Ext-D and allotment order as Ext-E in support of his claim of settlement which were obtained prior to institution of the suit and so by way of preponderance of probability plaintiffs could not establish their right, title, interest and possession over the suit land. With these findings Issue No.2 was decided in the negative and against the plaintiffs. On the basis of the said findings Issue Nos.1, 5 and 6 were also decided accordingly thereby dismissing the suit of the plaintiffs in entirety by judgment and decree dated 30.03.1996.

10. Aggrieved, the plaintiffs preferred Title Appeal No. 28/1996 in the Court of Civil Judge (Senior Division), Karimganj. The learned First Appellate Court by its judgment and decree dated 27.03.2003 allowed the appeal and decreed the suit of the plaintiffs adjudging the allotment order dated 09.04.1987 as illegal, inoperative and void. The learned First Appellate Court after recording the respective pleadings of the parties and quoting the issues framed did not frame point(s) for determination as is required under Order 41, Rule 31 of the Code of Civil Procedure. The learned First Appellate Court has not decided the appeal issue-wise as well and so neither the issues were discussed nor were point(s) for determination framed by the learned First Appellate Court before reversing the findings of the learned trial Court. According to the learned First Appellate Court, the learned trial Court has committed error in not disclosing as to whether conversion of land khas under Section 6(4) of the Act was made by observing all procedures or not. The learned First Appellate Court thereby held that the plaintiffs although do not have any cause of action but since cause of action is a bundle of facts resulting from assertion by one party and existence of which

denied by the other party, the learned trial Court fell in error in holding that there is no cause of action for the suit. According to the learned First Appellate Court, there is cause of action for the suit. Plaintiffs have been claiming their landholders right and they have been claiming to be in possession of the suit land which has been denied by the defendants and so these bundle of facts gives rise to good cause of action for the suit.

11. Coming to Issue No.4, the learned First Appellate Court found the same to be the crux of the dispute. The suit land along with other lands were acquired by the Government under the Assam State Acquisition of Zamindaries Act, 1951. Plaintiffs claimed that the suit land belonged to their predecessors and they are in possession of the same since the time of their predecessors and they were not served with any notice and no offer was made to them before making allotment in favour of defendant No.1. The procedure prescribed under Section 6(4) of the Act, therefore, was not complied with. Consequently, the allotment of the suit land in favour of the defendant No.1 was not proper. Considering Exts-1, 2 and 3 the learned First Appellate Court was of the view that the predecessors of the plaintiffs along with others were the proprietors of the land along with others under Khatian Nos.123, 148 and 178. Besides DW 1 himself stated that land of Exts-1, 2 and 3 were originally issued to the predecessors of the plaintiffs, namely, Haji Mahmud Ali, Asaid Ali and Jamshed Ali and they had title over the suit land and that the land of C.S. Dag No.75 falls inside the land covered by Exts-1, 2 and 3. Since DW 1 has made such averment the learned trial Court committed error in giving burden on the plaintiffs to prove their title and so by exhibiting Exts-1 to 3 the plaintiffs have succeeded to establish their right. Accordingly, it was held that the suit land was not made Khas by the Government by complying with the requirements of Section 6(4) of the Act and that allotment was made illegally in favour of the defendant No.1. Accordingly, finding of the learned trial Court in regard to Issue No.4 was reversed. It was further held in the impugned first appellate judgment that the suit land along with other lands originally belonged to father of the plaintiffs vide Exts-1, 2 and 3 and plaintiffs have been paying land revenue accordingly. The plaintiffs claimed to be in possession of the suit land and since the allotment has been illegally given in favour of the defendant No.1 the claim of the defendant No.1 of being in possession of the suit land is not tenable. Although defendant No.1 claimed that he was in possession of the same for over 50 years but since allotment has been granted in his favour, his plea of adverse possession cannot stand. PW 2 rather corroborated the claim of the plaintiffs that defendant No.1 was not in possession of the suit land in any point of time and it was the plaintiffs who were in possession of the suit land. So the findings of the learned trial Court as against Issue No.2 is also incorrect. The learned First Appellate Court also found fault in the decision of the learned trial Court in Issue No.3 in regard to non-joinder of necessary parties. According to the learned First Appellate Court, an executable decree can be passed on the basis of the parties on record and since interest of other co-sharers is not adverse to that of the interest of the plaintiffs the

question of suit being bad for non-joinder of necessary parties cannot arise. With these findings the learned First Appellate Court allowed the appeal, set aside the judgment and decree of the learned trial Court and held that plaintiffs are entitled to get a decree as prayed for. This appellate judgment and decree passed on 27.03.2003 is the subject matter of the present Second Appeal.

12. This Court while admitting the Second Appeal on 12.08.2003 framed the following two substantial questions of law :-

"1. Whether the plaintiffs not having challenged the Government Order making the suit land Khas under Section 6(4) of the Assam State Acquisition of Zamindari Act, the learned lower Appellate Court was justified in holding that the above order had not been made in compliance of the provisions of law and as such allotment of suit land in favour of the defendant No.1 was illegal?

2. Whether the learned lower Appellate Court was justified in deciding right, title and interest and possession of the plaintiffs over the suit land on the basis of the Khatians Ext.1, 2 and 3 which stand rebutted by the evidence on record including the Kutcha patta (Ext.D) and allotment order (Ext.E)?"

13. I have heard Mr. U. Dutta, learned counsel for the appellant and Mr. G. Sarma, learned Govt. Advocate, Assam appearing on behalf of respondent Nos.4, 5 and 6. Although names of two learned counsel are mentioned in the cause list on behalf of the respondents but no one has come forward to argue on behalf of the plaintiffs-respondent Nos.1 to 3 in the present appeal. Under such circumstances I have perused the pleadings of the parties, the evidence adduced by both sides and thereupon proceeded to decide the appeal in the absence of the learned counsel for respondent Nos. 1, 2 and 3 (Plaintiff Nos.1, 2 and 3).

14. Mr. U. Dutta, learned counsel for the appellant, would argue that the plaintiffs claimed that the suit land was owned and possessed by their predecessors but by Exts-1, 2 and 3 they could not establish the fact, rather in course of cross-examination PW 1 himself admitted that name of his father does not appear in the Exts-1 and 2. He could not say as to whether names of the predecessor of other plaintiffs appear in the final Khatian, Exts- 1 to 3. Though he claimed that no opportunity was given to him before making the land Khas he could not give any reply as to whether other legal heirs of the original Pattadars were impleaded. Mr. Dutta further says that in the plaint a claim for being in possession has been made but nowhere is it stated that the predecessors of the plaintiffs were the settlement holder or proprietor of the permanently settled estates. No document to that effect having been produced the learned First Appellate Court committed error in declaring the right, title and interest of the plaintiffs over the suit land and that too in the absence of the legal heirs of the co-sharers. The plaintiffs did not challenge conversion of the land into Khas land under Section 6(4) of the Act and so there was no reason for the learned First Appellate Court to venture into an enquiry as to whether conversion was in accordance with the provisions of Section 6(4) of the Act. The exercise was

unauthorized and consequently the impugned first appellate judgment is vitiated thereby. On the other hand, the defendants having produced Kutcha Patta as Ext-D and allotment order as Ext-E which were proved in original, the earlier final khatians issued vide Exts-1, 2 and 3 have paled into insignificance, Mr. Dutta argued. With these submissions the learned counsel for the appellant prayed that both the substantial questions of law be decided in favour of the appellants and the first appellate judgment and decree be set aside.

15. Mr. G. Sarma, learned Govt. Advocate, Assam appearing on behalf of the respondent Nos.4, 5 and 6, supports the findings of the learned trial Court wherein it has been held that the suit land is a Government Khas land and the same has been settled with the defendant No.1 vide Ext-E. According to Mr. Sarma, the learned trial Court has passed the judgment on due perusal of the materials on record but the learned First Appellate Court has declared title of the plaintiffs without there being any document of title on record. Mr. Sarma also argued that the appeal be allowed deciding both the substantial questions of law in favour of the appellant and thereby setting aside the judgment and decree passed by the learned First Appellate Court.

16. I have given my anxious consideration to the submissions put forward by both the learned counsel. In the absence of the learned counsel of the plaintiffs I have carefully gone through the plaint and the depositions of the two PWs. In the plaint it is claimed that Haji Mahmud Ali, Asaid and Jamshed Ali owned and possessed the suit land along with other lands with their co-sharers and they were enjoying the land. The names of the co-sharers have not been disclosed. It is thereafter claimed in paragraph 2 of the plaint that after death of Haji Mahmud Ali, Asaid Ali and Jamshed Ali their legal heirs got the properties partitioned amicably and thereupon plaintiffs came to possess and own the suit land while other co-sharers have been possessing other parts of the joint properties. The foundation of the plaintiffs' case is that suit land measuring 10 Bighas along with other land were owned by a number of people (unspecified) along with Mahmud Ali, Asaid Ali and Jamshed Ali. But Exts-1 to 3 which have been brought on record do not show as to who are the other co-sharers. Name of one Umar Ali has been disclosed in Ext-3. It is not disclosed in the plaint as to who are the legal heirs of Umar Ali. If the land was really owned by others then in which capacity? Was the predecessors of the plaintiffs proprietors or mere possessors? Who were the zamindars within the meaning of Assam State Acquisition of Zamindari Act, 1951? There is no mention of Touji, Thak or Suji. The land belongs to the permanently settled estate and so it could have been established by calling for Touji, Thak and Suji (sic) (perhaps, Suchi = index) as to who were the original talukdars. Plaintiffs described the suit land to be covered by taluk of Hurmat Khan, Durlab Khan and Sheikh Sina. Are the plaintiffs legal heirs of these talukdars, or were they tenants under them, or they were merely squatting on the land? All these ought to have been disclosed in the plaint. To establish that the plaintiffs had right, title and interest with respect to the suit land as landholder they had to show that land was settled with them under the provision

of the Assam Land and Revenue Regulation, 1886. Otherwise, they are to claim that either they were landlord within the meaning of Section 2(p) of the Assam State Acquisition of Zamindaries Act, 1951 or that they were raiyot within the meaning of Section 2(w) of the said Act. In the latter case, the plaintiffs ought to have disclosed under whom were they Raiyots and what was the rent paid. In fact, the plaint is deficient in furnishing the material facts as well as particulars as to the nature and character of the possession of the plaintiffs. Once they make the prayer for declaration that they had inherited the property along with others from the original owners and then they got it amicably partitioned among them, burden falls on them to establish such facts. Amicable settlement along with others can be established only if the persons with whom such settlement has been made are either impleaded or are examined as witnesses. The learned First Appellate Court abruptly arrived at the finding that the interest of the co-sharers are not in conflict with that of the plaintiffs but no such material is available on record to support such view. If no other co-sharers are impleaded, in that case where is the scope to say that the interest of the other cosharers are not in conflict with the interest of the plaintiffs. The plaintiffs wanted declaration of their absolute right, title and interest with respect to the suit land after having admitted that this land was owned and possessed by their predecessors along with others. To get a declaration of exclusive title it is to be proved that other legal heirs of the co-sharers had relinquished their title or claim with respect to the suit land. In the absence of such pleading and material, the learned First Appellate Court does not appear to be correct in holding that interest of the cosharers is not in conflict with that of the plaintiffs.

17. Admittedly, the land was made Khas under Section 6(4) of the Act. Section 6(4) of the Act lays down the procedure for an appeal under Section 7 to the Deputy Commissioner or such officer against an order passed under Section 6. No dispute has been raised by the plaintiffs before the appropriate authority under Section 6. No appeal has been preferred. Even in the suit the plaintiffs did not make any prayer for declaration that order passed under Section 6(4) of the Act is illegal, inoperative or void. Only prayer has been made for adjudging consequent allotment as illegal. By challenging the consequent action of allotment it cannot be inferred that initial order of conversion of the land into Government Khas land stood automatically challenged. Since there is no prayer in the plaint challenging the decision taken by the Government under Section 6 of the Act and since there is no indication anywhere that an appeal under Section 7 of the Act was preferred by the plaintiffs or anybody else, the order passed under Section 6 of the Act continues to hold the field. The learned First Appellate Court went beyond pleading and beyond the scope of prayer in holding that conversion was not in accordance with the procedure prescribed by law. When the conversion itself was not challenged there was no occasion for the learned First Appellate Court to make an enquiry as to the nature and character of the conversion. The learned trial Court was right in holding that in the absence of any challenge to conversion under Section 6(4) of the Act the validity thereof

cannot be occasioned. The first substantial question of law is accordingly decided in the negative and in favour of the appellant holding that the learned First Appellate Court committed error in adjudging that the conversion of land in accordance with Section 6(4) of the Act was not in accordance with the procedure prescribed by law.

18. Coming to the second substantial question of law it is to be seen that the land was made khas by the Government under Section 6 of the Act and thus it is vested in the State Government. After the land vested in the State Government the State Government had liberty to make settlement and this has been done by making allotment vide Ext-E and thereupon Patta has been issued vide Ext-D. A settlement order or issuance of Patta could have been challenged by the plaintiffs before the appellate forum and the same has not been done. There is no challenge against kutchra patta (Ext-D) and it still continues to hold the field. If Ext-D is not adjudged illegal and it remains in force, in that event earlier records of rights vide Exts-1 to 3 paled into insignificance. The plaintiffs could not establish absolute right, title and interest with respect to the suit land by showing the lineage with the persons named in Exts-1, 2 and 3. The plaintiffs could not specifically plead as to whether their predecessors were proprietors or Raiyots. Plaintiffs could not establish the amicable partition resulting in exclusive possession and ownership of the suit land and that being the position Exts-1, 2 and 3 being the records of rights cannot come to their aid in establishing their title over the suit land. Fact remains that the suit land is a Government Khas land and it has been allotted with the defendant No.1. Ext-D and Ext-E eclipsed the earlier endorsements in the records of rights including Exts-1, 2 and 3. The second substantial question of law is accordingly decided in favour of the defendants and against the plaintiffs.

19. Both the substantial questions of law having been decided in favour of the appellant (defendant No.1) the Second Appeal stands allowed. The impugned first appellate judgment and decree is set aside and that of the trial Court is hereby restored.

No order as to cost. Send down the records.