

(2018) 07 GAU CK 0013

In the Gauhati High Court

Case No : Regular First Appeal 24 of 2009

Md. Moniur Ali And Ors

APPELLANT

Vs

Mustt. Safina Khatoon And Ors

RESPONDENT

Date of Decision : 10-07-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Section 96, Order 26 Rule 9, Order 26 Rule 10(2),
Order 41 Rule 2
Code of Criminal Procedure, 1973 — Section 145
Specific Relief Act, 1963 — Section 34

Citation : (2018) 07 GAU CK 0013

Hon'ble Judges : KALYAN RAI SURANA, J

Bench : Single Bench

Advocate : N. Alam, S.U. Ahmed, K. Jain, A. Hawari, N. Dutta, M. H. Mazarbhuiyan

Final Decision : Dismissed

Judgement

(1) Heard Mr. N. Alam, learned counsel for the appellant. Also heard Mr. N. Dutta, learned senior counsel, assisted by Mr. M.H. Mazarbhuiyan,

learned counsel for the respondents.

(2) This appeal under Section 96 CPC is directed against the judgment and decree dated 18.09.2007 passed by the Civil Judge (Senior Division) No. 3,

Kamrup, Guwahati in T. S. No. 324/2003, thereby decreeing the suit with cost and dismissing the counter claim.

(3) It would pertinent to mention that one Md. Sharif Ali, son of Late Fulsha Sk. was arrayed as defendant No. 3 in the suit. However, the said

defendant No. 3 has not been arrayed as a party in this appeal. Therefore, reference to the appellants in reference to the suit would deem to include

the defendant No. 3, but reference to the appellants in this appeal would only

include the appellants and not the defendant No. 3.

(4) As per the plaint, the case of the respondents as plaintiffs, in brief, is that their mother Late Gulijan Musalmani (name is found to be spelt

differently at various places in pleadings, evidence and judgment) was the original owner of a plot of land measuring 1 katha- 16 lechas (land

measurement of Bigha, Katha and lechas are hereinafter abbreviated as B-K-L for short), covered by Dag No. 240 of K.P. Patta No. 5

of Village Garpandu, which is more fully described in the schedule of the plaint. After her death, the respondents inherited the said land. It was

projected that the total land in Dag No. 214 of K.P. Patta No. 5 was 3K16L. Out of that land, the respondents had sold 1K- 6L land to one Sri

Bowarilal Jain in the year 1985 by registered sale deed, and his name was mutated vide Mutation Case No. 1202/85-86. By unregistered sale deed,

the respondents also sold land measuring 14L of the said Dag and Patta to Sri Champat Lal Khater and Novaratan Khater, which was also mutated in

their names. It was projected that a small portion of the land was acquired by P.W.D for widening of road and the balance land remained in

possession of the respondents. In the year 1986, on an application made the defendant No. 3 in the suit, namely, Md. Sharif Ali, a proceeding under

section 145 Cr.P.C., being Case No. 206M/1986, was drawn-up by order dated 13.03.1986, passed by the Executive Magistrate, thereby both parties

were prohibited from entering the disputed land. Thereafter, the appellants No. 1 and 2 had instituted T.S. No. 30/2002 and claimed their right, title,

interest over a plot of land measuring 2K-3L of Dag No. 238, of Patta No. 16 of village Garpandu under Mouza Jalukbari. It was projected that after

the respondents had prayed for local inspection of the disputed land, the appellants remained absent in the proceeding and the said T.S. 30/2002 was

dismissed for non-prosecution by the learned Civil Judge (Junior Division) No. 2, Guwahati. However, by virtue of an interim status quo order passed

by the said learned Court in the connected injunction petition, the appellants had illegally had made some construction on the suit land without any

permission from the Guwahati Municipal Corporation or Guwahati Metropolitan Development Authority. It was projected that against the illegal

construction, the respondents had complained before the Chief Executive Officer, GMDA, who called for a report from the Settlement Officer,

Guwahati. In the report dated 22.07.2002, the Settlement Officer reported that the appellants had constructed house in the suit land but no action was taken. Hence, the present T.S. No. 324/2003 was filed, containing the following prayers:-

- a. For a decree declaring right, title, interest of the respondents over the land describe in the schedule of the plaint, and
- b. For eviction of the appellants and all others living under them by demolishing the sheds and houses constructed by them over the suit land and for delivery of vacant and khas possession of the suit land to the respondents through the process of the Court, and
- c. For survey and demarcation of the suit land by appointing permanent injunction restraining the appellants (and defendant No. 3) from making any further construction over the suit land and from transferring the said land or any part thereof to any other persons, and
- d. For cost of the suit and other reliefs.

(5) The appellants i.e. defendants No. 1 and 2 had contested the suit by filing their joint written statement. The defendant No.3 had not contested the suit. In their written statement, the appellants had denied the statements made in the plaint. Their stand was that the defendant No.3 owned and possessed 1/5th share out of land measuring 1B- 1K- 8L, covered by Dag No. 238 of K.P. Patta No. 16 of Village- Garpandu, Kumarpara under

Mouza Jalukbari in the district of Kamrup in the eastern side of the plot and that the defendant No. 3 was in no way connected with the land described in the schedule. It was projected that the suit was not filed by necessary parties as there were 12 legal heirs left behind by Late Gulijan Musalmani,

namely, (1) Mustt. Safina Khatoon, (2) Mustt. Zarina Begum, (3) Mustt. Fatiza Begum, (4) Md. Hasmata Ali, (5) Late Habibur Rahman, (6) Md.

Khabiruddin Ahmed, (7) Md. Jamir Ali, (8) Md. Sirazuddin Ahmed, (9) Musstt. Hasan Begum, (10) Musstt. Rupjan Begum, (11) Musstt. Anima

Khatoon, (12) Mustt. Ashron Khatoon.

(6) Therefore, it was stated that the suit was bad for non-joinder of necessary parties and for mis-joinder of unnecessary parties. It was also stated

that the respondents were married women residing elsewhere. It was projected that the brother of the appellants/defendants namely, Md. Habibullah

had purchased a plot of land measuring 1B- 1K- 12L, covered by Dag No. 940 of

K.P. Patta No. 9 of Village- Garpandu, Kumarpara, from one Jolti

Ram Kumar vide Registered Sale Deed No. 4992 dated 26.12.1953 and since the date of purchase, the appellants-defendants along with their brother

had divided the land into five equal shares and started to separately reside there since 1953 by constructing residential houses thereon. It was stated

that the mother of the respondents had owned and possessed a plot of land measuring 2 katha- 5 lechas, covered by Dag No.955 in the south-western

side of land of the appellants-defendants, out of which 2K-1L land was sold by the respondents to other persons as stated in the plaint and after such

sale, only land measuring 1K-0L remained in the names of the respondents, which was thereafter acquired by P.W.D. along with land in Dag No. 954

for widening the road. Hence, as per the plaint, there was no land remaining in the name of the respondents, as such, the respondents had no right, title

and interest over the land covered by Dag No. 940, as shown within the wrong boundary given in the plaint and in this connection it was stated that

the in order to mislead the Court, wrong boundary was shown in the plaint, which was covered by Dag No. 940 but not the Dag No. 240. Hence,

apart for praying for dismissal of the suit, the appellants prayed for following reliefs in counter claim:-

a. Decree for declaration that the appellants No. 1 and 2 had the right, title, interest over the suit land, and

b. Decree for declaration of confirmation of possession that the appellants No. 1 and 2 were having the physical and constructive possession over the suit land since 1953, and

c. For any other reliefs.

(7) The respondents had submitted their written statement- cum- counter claim. It was projected that Md. Habibullah, the brother of the appellants had

purchased a plot of land measuring 1B-1K-12L, covered by Dag No. 940 of K.P. Patta No.9 of village Garpandu Kumarpara, bounded by North- Sri

Bonti Kumar, South- P.W.D. boundary, East- Sri Tarini Charan, West- Own land from one Sri Jolti Ram Kumar vide registered Sale Deed No. 4992

dated 26.12.1953. Since the date of purchase, the appellants along with their brothers divided the land into 5 (five) equal shares and used to reside

over the land separately by constructing residential house since 1953 to till date. It was projected that the mother of the respondents had owned and

possessed a plot of land measuring 2K-5L, covered by Dag No. 955 situated in South-Western side of the appellant's land. It was stated that the

land covered by Dag No. 954 was originally Govt. land adjacent to the southern side of the appellant's land. The land measuring 2K-1L covered

by Dag No. 955 was sold by the respondents to other persons, which is stated in the paragraph No. 3 of the plaint, and that after selling 2K, only 1K

land remained in the name of the respondents, which was acquired by P.W.D. along with land in Dag No. 954 for widening the road. It was stated

that as no land remained in the name of the respondents, they had no right, title, interest over the land covered by Dag No. 940, which is allegedly

within the wrong boundary given in the plaint. In the counter-claim, the appellants had prayed for a decree â

(a) For a declaration that the defendant No.1 and 2 having the right, title, interest over the suit land.

(b) For a declaration of confirmation of possession that the defendant No.1 and 2 having the physical and constructive possession over the suit land

since 1953.

(c) For any other relief or reliefs to which the defendant No.1 and 2 are entitled to under the law and equity.

(8) The respondents herein had filed their written statement against the counter-claim filed by the appellants, wherein, it was inter-alia, stated that the

entire land measuring 4K-16L described in the schedule of the plaint appertains to Dag No. 241 of Patta No. 5 of Village Kumarpara, Garpandu under

Mouza- Jalukbari, and that the patta was issued in the name of Gulijan Musalmani, their mother and she was the exclusive owner in possession of the

entire land in the said patta. It was stated that the mother of the respondents had died in the year 1963, leaving behind four daughters named Sofina

Khatun, Hasina Begom, Joina Begom and Fatiza Begom, who were unmarried at the time of her death. She also left another four daughters who were

already married at the time of her death. That apart, she had also left her five sons named Habibur Rahman, Khabir Uddin Ahmed, Jamir Ali,

Hashmat Ali and Siraj Uddin. After the death of Gulijan Musamlani, it was amicably settled and agreed between her heirs that the entire land involved

in Dag No. 240 of Patta No. 5 shall be given to the four sisters, namely, Musstt. Ssfina Khatun, Hasina Begom, Jenia Begom and Fitaza Begom.

Accordingly, a mutation case was filed vide Mutation Case No. 2503 of 1981-82, in which notices were issued to all co-shares of the patta and no objection having been received, the names of the aforesaid four sisters were mutated vide order dated 28.08.1982 in respect of the entire 4K-16L land of the patta. Subsequently, Hasina Begom died without any issue and all the three sisters are enjoying the entire land of the patta. It was stated that the respondent No.4, who is the brother of the other three respondents are looking after the land on their behalf. It was projected that some land was subsequently sold by the respondents to other persons as stated in paragraph-3 of the plaint and an area of 1K-16L land has remained after such sale and that the appellants had encroached upon the said remaining land and illegally constructed some shop houses there on even during pendency of a case under section 145 Cr.P.C. It was stated that the appellants have no right, title, interest and lawful possession over the suit land and that they had constructed the shop house by giving false dag and patta and thereby, collusively obtained municipal holding concerning a land which is not related to the suit land. Hence, it was projected that the respondents had filed the eviction suit against the appellants.

(9) On the basis of the pleadings, the following issues were framed:(1) Whether the suit is maintainable?

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

(3) Whether the suit is barred by limitation?

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

(5) Whether the plaintiff has right, title and interest over the said land?

(6) Whether the defendant is liable to be evicted from the suit land?

(7) Whether the counter-claim is maintainable?

(8) Whether the counter-claim is barred by limitation?

(9) Whether the defendants No.1 and 2 have been in possession over the suit land and are entitled to get the decree of confirmation of possession?

(10) Whether the defendant No.1 and 2 have been in possession over the suit land and are entitled to get the decree of confirmation of possession?

(11) To what relief the parties are entitled to?

(10) In course of trial, the respondents had examined the respondent No. 1 as sole witness, and had exhibited six documents, viz. (i) Order dated

25.10.2005 in Case No. 206M/1986 (Ext.1); (ii) Written statement in Case No. 206M/1986 (Ext.2); (iii) Written Statement in T.S. No. 30/2002

(Ext.3); (iv) Copy of order dismissing T.S. No. 30/2002 (Ext.4); (v) Copy of the map of concerned Dag (Ext.5); (vi) Revenue receipt (Ext.6). The

appellants had examined 5 witnesses, namely, (1) Md. Mainul Ali (DW-1), (2) Md. Aajit Ali (DW-2), (3) Firoz Ali (DW-3), (4) Md. Momtaj Ali (DW-

4), (5) Md. Atwor Ali (DW-5), and the following documents were exhibited, viz. (i) Deed No. 4972 dated 26.12.56 (Ext.1); (ii) Draft Chitha of Dag

No. 940 of the year 1957 (Ext. 2); (iii) Certified copy of Sadar Jamabandi (Ext.3); (iv) Draft Jamabandi of the year 1959/64 (Ext. 4); (v) Land

revenue paid receipt [Ext.5(A) to Ext.5(R)]; (vi) Electricity Bill (Ext. 6).

(11) On the basis of pleadings and the evidence on record, in respect of issue No.1, it was held that the suit for declaration of right, title and interest

was maintainable as per Section 34 of the Specific Relief Act. In respect of issue No. 2, it was held that there was cause of action for the suit. In

respect of issue No. 3, it was held that the suit was filed within limitation. In respect of issue No. 4, it was held that the appellants had not mentioned

in the written statement about relationship of 12 persons with Gulijan Musalmani, but the DWs had not stated in their evidence about necessary parties

who were not impleaded in the suit. Hence, the suit was held to be not bad for non-joinder of necessary parties. In respect of issues No. 5 and 9, the

learned trial Court arrived at a finding that although the PWs had not exhibited any document to show that the land of Patta No. 5 was in the name of

their mother, but the DW 1 (appellant No. 1) by exhibiting the draft jamabandi (Ext.4) showed that Gulijan Musalmani was the pattadar of Patta

No.15, Dag No.240(New)/ 955(Old) in respect of land measuring 4 katha-16 lechas. By discussing the cross-examination of PW, the learned trial

court arrived at a finding that the respondents had sold 2K-0L land by Registered Sale deed and 4K land by unregistered sale deed and that the PWD

had acquired 1K- 10L land from Dag No. 240 of Patta No. 5, as such, it was held that after deducting the sold land and acquired land from 4K-16L

land, land measuring 1K- 2L remained in the suit Dag and Patta. By discussing the evidence of DW 1, the learned trial Court arrived at a finding that

as per Draft Chitha (Ext.2), Dag No. 940 was renewed to Dag No. 238 of Patta No. 9 and that the land purchased by the brother of the appellants

was covered by Dag No. 940 (Old)/ 238(New). By discussing the report and sketch map of the Survey Commissioner (i.e. Assistant Settlement Officer), the learned trial Court held that the Commissioner had stated in his report that the appellants were in possession of 1B- 1K -6L land in Dag No. 238 of Patta No.9 and in addition to that area, the appellants were found in occupation of land measuring 1K- 4L in Dag No. 240 and that the appellants are found in possession of total land measuring 1B- 3K- 8L. In the sketch map, the land of Dag No. 240, which was found in possession of the appellants was shown in red colour in the map, marked as 'Kha', measuring 1K- 4L and therefore, it was held that the appellants- defendants had occupied the land of the respondents. It was further held that as there was no objection against the report of the Commissioner, the report was taken into consideration and that the appellants herein had not applied for cross-objection of the Commissioner. Accordingly, it was held that though the respondents had prayed for declaration of their right, title and interest and eviction of the appellants-defendants from the suit land measuring 1K-16L, but the land found under occupation of the defendants was measuring 1K-4L only and that the appellants-defendants were declared to have no right, title and interest over the said 1K-4L land of Dag No. 240. It was further held that the defendants had failed to prove that the suit land measuring 1K-4L was a part of Dag No. 238 of Patta No. 9. Hence, issue No. 5 was decided in the affirmative by holding that the respondents had right, title and interest in respect of land measuring 1K-4L, covered by Dag No 240 of Patta No.5 and consequently, issue No. 9 was also decided in the negative against the appellants-defendants.

(12)Issues No. 6 and 10 were taken up together. In view of discussions in respect of issues No. 5 and 9, it was held that the defendants had no claim over the land in Dag No. 240 and they were liable to be evicted from the said land and as the defendants were found possessing 1K-4L land of Dag No. 240 of Patta No. 5 of village Garpandu, claiming that the said land was a part of Dag No. 238. Therefore, it was held that the defendants had no claim over the land in Dag No. 240, as such, the appellants- defendants were held to be not entitled to a decree for confirmation of possession of 1K-4L land, hence, both the said issues were decided against the appellants-defendants. In respect of issue No. 7, it was held that as the appellants-

defendants had no right, title and interest over the suit land measuring 1K- 4L and, as such, the counter claim was held to be not maintainable. In

respect of issue No. 8, it was held that the respondents had not pressed the issue. In respect of issue No. 11, it was held that the issues No. 1 to 7 and

9 to 10 were decided in favour of the respondents, they were entitled to decree and the appellants were not entitled to get a decree at their counter

claim. Accordingly, the counter claim of the appellants was dismissed and the suit was decreed on contest by declaring that the defendants had right,

title and interest over suit land measuring 1K- 4L, covered by Dag No 240 of Patta No. 5 and that the defendants were liable to be evicted therefrom.

(13)The learned counsel for the appellants submits that it was the pleaded case of the respondents in the plaint that the total area of land of Dag No.

214 was 3K- 16L. There was no statement to link the said land with the suit land described in the schedule of the plaint which was covered by Dag

No. 240 of K.P. Patta No.5. In contrast, as per the Commissioner's report, the land in Dag No. 240 of K.P. Patta No. 5 was 4K- 16L and out of

the said land, 2K- 7L land was being used as P.W.D. Road. According to the respondents, land measuring 1K- 6L was sold by registered deed and

land measuring 14L was sold by unregistered deed. However, as per the Commissioner's report, the purchasers had purchased 1K- 5L land from

the pattadars and were occupying it. Therefore, on the basis of the case projected in the plaint by the respondents, the Commissioner's report did

not match and, as such, the Commissioner's report could not have been the basis of decree in the suit. It is submitted that the Commissioner was

appointed to fish out evidence for the respondent. In support of his contention, the learned Counsel for the appellant has placed reliance on the case of

Muthusamy Gounder Vs. Mysamy Gounder, AIR 2007 Mad 50. By relying on the case of M/s. Praga Tools Corporation Ltd. Vs. Smt. Mahboonnissa

Begum & Ors., AIR 2001 SC 2361: (2001) 6 SCC 238, it is submitted that the report of the Commissioner could only be an aid to trial Court in arriving

at its finding.

(14). Per contra, the learned Senior Counsel for the respondent has submitted that from the pleadings, it is apparent that the mentioning of Dag No.

214 in paragraph 3 of the plaint was erroneous because elsewhere in the plaint including the statements made in paragraph 2 as well as in the

Schedule of the plaint, the land is described to be in Dag No. 240. In this connection, By relying on the case of Syed Dastagir Vs. T.R. Gopalakrishna

Setty, (1999) 6 SCC 337 and Santokh Singh Vs. Mahant Iqbal Singh, (2000) 7 SCC 215, the learned Senior Counsel for the respondent has submitted

that no prejudice was caused to the appellant because of wrong mentioning of land covered by Dag No. 214 in one place of the plaint, while in the rest

of the plaint, the land was stated to be covered by Dag No. 240.

(15) It is submitted that the plea of non- joinder of necessary of legal heirs of Late Gulijan Musalmani as parties to the suit cannot be considered to be

fatal because there was o dispute between the legal representatives of Late Gulijan Musalmani and moreover, the suit by any one of the co-owner

was maintainable. It is submitted that even in the absence of the other legal representatives of Late Gulijan Musalmani, the decree in the suit could be

validly passed. In support of his submissions, the learned senior counsel for the respondent has placed reliance on the case of Deputy Commissioner,

Hardos, etc. Vs. Rama Krishna Narain, AIR 1953 SC 521 (FB), and Tractor & Farm Equipment Ltd. Vs. Secretary to the Govt. of Assam, Dept. of

Agriculture, 2004 (1) GLT 117: (2004) 2 GLR 56.

(16) By referring to the pleadings and the Commissionerâ??s report, the learned Senior Counsel for the respondent has submitted that as per the

Commissionerâ??s Report, the land in Dag No. 240 was 4K-16L, out of which 2K-7L has gone for PWD Road, as such, and the land possessed by

the appellant was 1K-4L. Moreover, the appellant was found to be holding 1B-3K-8L land, out of which the appellants had claimed that their brother

had purchased 1B-1K-8L land, but as per the Commissionerâ??s report, they were holding 1B-1K-8L own land, 16L Govt. land and 1K-4L suit land

belonging to the respondent. Hence, it is submitted that the suit was rightly decreed only for 1K-4L land, as found established. By referring to the

evidence of the DWs as well as the decision of the learned trial court on issue No. 5 and 9, it is submitted that the admitted case of the DWs was that

no part of land of Dag No. 240 was encroached, which was admitted to be the land of Late Gulijan Musalmani. The DWs had established that Dag

No. 940 (Old) was converted to Dag No. 238 (New). It is also submitted that the appellant were not contended with their purchased land measuring

1B-1K-8L, but illegally trespassed and occupied 1K-4L land owned by the

respondents, as identified by the Commissioner's Report. Hence, the learned senior counsel for the respondent has prayed for dismissal of the appeal.

(17) On the basis of the submissions made by the learned Counsel for the appellant and the learned Senior Counsel for the respondent, it appears that

the following points for determination arise for consideration in this appeal:-

a. Whether the learned trial court erred on facts and in law in relying on the Commissioner's Report submitted pursuant to his appointment under

Order XXVI Rule 9 CPC?

b. Whether the decision of the learned trial court on various issues is sustainable on facts and in law?

c. To what reliefs are the parties entitled to?

(18) Point of determination No.(a) is taken up first. At the outset, it is seen that in this appeal, the appellant has challenged the impugned judgment,

amongst others, on the ground No. (e) that the learned trial court had misread and misconstrued the report submitted by the Commissioner after

survey of the suit land and, as such, the impugned judgment and decree is liable to be set aside. Thus, the appellant has neither challenged the order of

appointment of the Commissioner, passed under Order XXVI Rule 9 CPC, nor the manner in which he had made the investigation is under challenge.

It also does not appear from the record that any attempt had been made by the appellant during trial to examine the Commissioner. The order-sheet

dated 02.08.2007 of the learned trial court reflects that the Commissioner, i.e. The A.S.O., (Asstt. Settlement Officer) had submitted his report and

the next date of the suit was fixed on 02.08.2007 for filing of objection by the defendants. On 02.08.2007, as per the order-sheet, it is recorded the

learned Counsel for the defendants had not filed written objection and it was verbally submitted that the next date should be fixed for hearing and it

should be mentioned that the defendant had raised objection against the report of the A.S.O. in respect of demarcation of the suit. Hence, it was

ordered that the said report would be considered at the time of hearing the argument of the suit and delivering the judgment. In view of the discussions

above, the ratio laid down in the case of Muthusamy Gounder (supra) is not applicable under the distinguishable facts of the present case in hand

because in the said case, the order for appointing an Advocate Commissioner for field inquiry of the suit property was challenged by way of revision.

Under the circumstances, in the absence of any challenge to the appointment of the Commissioner and/or his report, in the considered opinion of this

Court, as per the provisions of Order XXVI Rule 10(2) CPC, the report of the Commissioner and the evidence taken by him was allowed to become

evidence in the suit. Thus, in the absence of testing the veracity of the said evidence by the appellant, by cross-examining the said A.S.O., the said

evidence can be relied upon by the learned Court just like all other evidence tendered in the suit. Moreover, the ratio laid down in the case of M/s.

Praga Tools Corpn. Ltd. (supra) is not applicable in this case. In the said case, the Honâ??ble Supreme Court had directed the trial Court to record

findings as such, it was held that though the trial court may have appointed the Commissioner, to carry out survey, but ultimately the finding had to be

recorded by the Court. In the present case also, though the learned trial Court had appointed a Survey Commissioner, but the finding was recorded by

the learned trial Court.

(19) It is seen that Musstt. Safina Khatun (PW-1) had deposed to the effect that the suit land appertains to Patta No.5, Dag No. 240 belongs to

Musstt. Gulijan, mother of the plaintiffs. She did not state about the measurement or the boundaries of the suit land or about the measurement of the

land sold. However, in course of cross examination, the PW-1 gave the measurement of the suit land by stating that the total land of Patta No.5 was

4K16L, of which the case was for 2K-12L, and that she had also stated that the measurement of the land sold was 4L without registration and 2K

land was sold by registered sale deed. It is also seen that while in his cross examination, the DW-1 had categorically stated that they were not

claiming any land of Dag No. 240. He had denied that the garage and the house was on land bearing Dag No. 240, but stated that the garage was on

land bearing Patta No.16, Dag No. 238 and he had also stated that now 1K-2L land remained in Dag No. 238. He had further stated that a counter-

claim had been filed in respect of land bearing Dag No. 238. It is seen that in their cross examination, the DW-2, DW-3 and DW-4 had described the

four boundaries of the suit land. Thus, by virtue of statement made in cross-examination, the appellants through their DWs had established the case of

the respondent.

(20) Coming to the report submitted by the Commissioner, who is the A.S.O., it

has been mentioned in the said report that as per record, Dag No. 240 of K.P. Patta No. 5 contained 4K-16L land. The names of Patta holders were: (1) Musstt. Safina Khatun, (2) Musstt. Hasina Begum, (3) Musstt. Jaina Begum, (4) Musst. Fatiza Begum, (5) Champat Mal Khater, (6) Novaratan Khater, (7) Sri Bowarilal Jain. It was stated that there was 1B-1K-8L land in Dag No. 238 of K.P. Patta No. 16. The names of the Co-pattadars are â?" (1) Md. Habibulla Seikh, (2) Sri Gopal Chandra Das, (3) Sri Kula Ram Das, (4) Sri Tajoram Das. It was reported that on spot verification, it was seen that (1) Md. Safiq Ali, (2) Md. Moinul Ali, (3) Md. Atowar Hussain had constructed house on 1K-4L land of Dag No. 240. Thus, the finding recorded in the Commissionerâ??s report, the appellant was found in occupation of land measuring 1K- 4L in Dag No. 240 of K.P. Patta No. 15, over which the appellant admittedly had no claim. Therefore, a dispute of such a nature can only be resolved by carrying out the local inspection of the suit land by the land revenue staff. Therefore, the ASO, being one of the concerned Land Revenue Officer, was not only competent to carry out local inspection of the suit land, but his report as a Commissioner appointed by the Court, having not been challenged by cross- examining him, cannot be discarded. Thus, when the learned trial court has based its decision on the basis of pleadings and evidence on record, this Court is unable to accept that the decision on the relevant issues are based on Commissionerâ??s report alone.

It is reiterated that no ground has been taken to challenge the veracity or correctness of the Commissionerâ??s report or on the manner in which the inspection was carried out.

(21) It is a well recognized principle of Rule 2 of Order XLI that without leave of the Court, the appellant shall not be heard on any ground not set forth in the memo of appeal. Nonetheless, this being the last Court of facts, the pleadings and evidence was reappreciated to see if the impugned judgment is vitiated by relying on the Commissionerâ??s Report. However, no infirmity in this Court could be successfully demonstrated by the appellant. Thus, the point of determination No. (a) is answered in the negative and against the appellant by holding that the learned trial court is not found to have erred either on facts or in law in relying on the Commissionerâ??s Report submitted pursuant to his appointment under Order XXVI

Rule 9 CPC.

(22) Point of determination No. (b) is considered now. In this connection, the various issues as decided by the learned trial court is re-appreciated

again. Issue No.1 is "whether the suit is maintainable? In this connection, nothing could be shown from record that the instant suit for declaration of

right, title and interest was not maintainable under facts and in law. Issue No. 2 is - whether there is cause of action for the suit? In this regard, it is

well settled that cause of action is a bundle of facts, as such, while the respondents had filed the suit for reliefs as prayed for, the petitioner had denied

the claim, as such, there is no infirmity in the finding of the learned trial court by holding that there was cause of action for the suit. Issue No. 3, is "whether

the suit is barred by limitation? In this connection, there is no specific pleading as to why the suit was barred by limitation. As limitation is a

mixed question of law and facts, in the absence of any pleading as to how and/or why the suit was barred by limitation, this Court finds that the

learned trial Court had not committed any error by holding that the suit was filed within limitation.

(23) Issue No.4 is "whether the suit is barred by non- joinder of necessary parties? In this connection, the case projected by the appellant was

that there were 12 legal heirs of Gulijan Musalmani. It is seen that there is no dispute that the respondents are the legal representatives of Late Gulijan

Musalmani, as such, there is no dispute that the respondents are co-owners of the suit property. Thus, in the opinion of this Court, the present suit for

eviction of an alleged illegal trespasser by a co-owner is maintainable. The right that the respondents are asserting regarding the right as an owner of

the suit property is qua the appellant, as such, it cannot be said that without impleading other legal representatives the suit by a co-owner was not

maintainable. Nothing is shown before this Court to establish the point that a suit simpliciter by a co-owner for declaration with consequential relief for

eviction against the appellant was not maintainable under Section 34 of the Specific Relief Act, 1963. Hence, in the absence of any pleading that why

the suit was not maintainable for nonjoinder of other legal representatives of Late Gulijan Musalmani, this Court does not find any infirmity with the

decision of the learned trial court on issue No.4. In this case there was no impediment for passing an effective decree against the appellants for their

eviction from the decreetal land even in the absence of any other purported co-owner of the suit land.

(24) The issues No.5 and 9 were decided together. The said issues are - (5) Whether the plaintiff has right, title and interest over the said land? (9)

Whether the defendants No.1 and 2 have been in possession over the suit land and are entitled to get the decree of confirmation of possession? On a

perusal of the exhibits, it appears that the learned trial Court had erroneously mentioned the Ext.4 to be 'draft jamabandi', which should be read

as 'draft chitha'. A 'jamabandi' is the final record of right, as such, it cannot be in 'draft' form, but a 'chitha' is a

'draft' of such record of right, which is entered in field verification, which is not final and is subject to final revision or correction and after such

revision and/or correction is made, the final entry of such record is entered in 'jamabandi' and entry in a jamabandi will prevail over entry made

in 'draft chitha', as such, a draft chitha is like a link document and nothing more. Thus, an entry in the draft chitha (Ext.4) cannot determine the

final right of any person, but it is merely a corroborative piece of evidence to show that even in the year 1957-64, the land measuring 4k-16L covered

by Dag No. 955 (Old)/ 240(New) of Village- Garpandu Kumarpara, Mouza- Ramcharani in the district of Kamrup was entered in the name of Gulijan

Musalmani. Therefore, as the appellant had proved the draft chitha, it would amount to admission by the appellant regarding ownership of the said 4K-

16L land by the predecessor- in- interest of the respondents at the relevant period of the year 1957-64. As per the plaint, it was only pleaded that 2K

land was sold by a registered deed and 4L land was sold by unregistered sale deed and it was stated that some land was acquired for road, without

mentioning any measurement, but in course of cross examination, PW-1 was asked about the land acquired for road and the PW-1 had replied that

she had not filed document acquiring 1K-10L land for road. Thus, the deficiency in the pleadings was removed in course of cross- examination. It is

well settled that the evidence beyond pleadings is not admissible, but the said principle is not attracted when the witness gives a reply in course of

cross examination. Thus, as per evidence of respondents- plaintiffs on record, out of total land of 4K-16L in Dag No. 240, 2K-4L land was sold and

1K-10L land was acquired for road, as such, there appears to be no infirmity in the finding recorded by the learned trial Court that 1K-2L land

remained in Dag No. 240. Hence, a point arises, whether in view of finding that 1k-2L land had remained in Dag No. 240, the suit could have been

decreed for recovery of 1K-4L land. It is seen that in this regard, the learned trial Court had placed reliance on the Commissioner's report

accompanied with sketch-map. As per evidence, Habibulla, the brother of the appellants had purchased 1B-1K6L land in Dag No. 940, which was

converted to Dag No. 238 as per entry made in draft chitha (Ext.2). The name of Habibulla is reflected as the first out of 3 pattadars in respect of

land measuring 1B-1K-5L. as per Commissioner's report, the appellants were in possession of land measuring 1B-1K-6L in Dag No. 238 of Patta

No. 9 and the appellants were found to be in possession of 1K-4L land under Dag No. 240 as such, the appellants were found to be in possession of

total land measuring 1B-3k-8L, and the land under Dag No. 240, under occupation of the appellants is shown in red ink in the trace map submitted by

the Commissioner. The learned trial Court has mentioned that no objection was field against the report of the Commissioner and to appellants did not

apply for cross examination of the Commissioner, thus, this Court does not find any infirmity in the finding recorded in respect of issues No. 5 and 9 to

hold that the appellants had failed to prove that land measuring 1K-4L formed a part of land of Dag No.238 and that the said land measuring 1K-4L

formed a part of Dag No. 240.

(25) The issue No.6, 7, 8, 10 and 11 are re-visited again. The said issues are â?" (6) Whether the defendant is liable to be evicted from the suit land?

(7) Whether the counter-claim is maintainable, (8) Whether the counter-claim is barred by limitation? (10) Whether the defendant No.1 and 2 have

been in possession over the suit land and are entitled to get the decree of confirmation of possession? (11) To what relief the parties are entitled to?

Therefore, in view of the decision in respect of issues No. 5 and 9, this Court does not find any infirmity in the decision of the learned trial Court in

respect of issue No.6, 8, 10 and 11, wherein it was held that the appellants were not entitled to a declaration of confirmation of possession in respect

of 1K4L land of Dag No. 240 and to hold that the counter-claim of the appellants was not maintainable.

(26) However, in respect of issue No.7, it is required to be stated that in the counter-claim, the appellants had prayed for the following reliefs:-

a. For a declaration that the defendant No.1 and 2 having the right, title, interest over the suit land?

b. For a declaration of confirmation of possession that the defendant No.1 and 2 having the physical and constructive possession over the suit land

since 1953.

^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ In this connection, it is seen that the appellants had not led any evidence to prove their right, title and interest over

the suit land or any part thereof. Moreover, the appellants have not been able to discharge their burden to prove how they were holding actual and

constructive possession of the suit land since the year 1953. Moreover, there are two more aspects of the matter, which have not been gone into by

the learned trial Court. One of such aspect relates to whether the counter-claim for a mere declaration without any consequential relief was

maintainable. The other aspect relates to non- payment of any court fee on the counter-claim.

^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ On the first aspect of maintainability of counter-claim, it is seen from the prayers of counter-claim as extracted

above, by both the prayers, the appellants are seeking mere declaratory relief. Such a suit for a mere declaration is not maintainable under Section 34

of the Specific Relief Act, 1963.

^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ In respect of the second aspect as stated above, on a perusal of the LCR, it appears that the written statement-

cum- counter-claim was filed on 10.03.2004. But, it does not contain any endorsement by the Sheristadar of the Court of learned Civil Judge (Junior

Division) No.3, Guwahati that any court fee, not to speak of proper court fee had been paid on the counter-claim. The order-sheet of the suit also does

not reflect any record of Court fee having been paid on the written statement-cum- counter-claim. It is well settled that nonpayment of court fees is

not fatal. However, the said fact has a bearing with the present appeal. Although in the memorandum of this appeal, it has been mentioned that the

appeal was filed being aggrieved with decree in the suit and dismissal of the counter-claim, but the appeal has not been valued for counter-claim and

no separate court fees has been tendered in respect of the dismissal of the counter-claim.

^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ ^ Thus, apart from the finding of the learned trial

Court, the counter-claim is otherwise found to be not maintainable on facts and in law on the two grounds as discussed herein above.

(27) In view of the discussions above, this Court is of the opinion that the decision of the learned trial court on various issues is sustainable on facts and in law. Thus, the point of determination No. (b) is answered accordingly, by affirming the finding on various issues framed by the learned trial Court.

(28) Resultantly, in respect of point of determination No.(c), this Court is of the considered opinion that the appellants are not entitled to any relief.

(29) Thus, the appeal stands dismissed.

(30) The parties are left to bear their own cost for this appeal.

(31) Let the LCR be returned back.