

(2018) 01 GAU CK 0013
In the Gauhati High Court
Case No : 99 of 2009

PARTHA SARATHI CHAKRABORTY and ORS

APPELLANT

Vs

GOPAL NANDA GOSWAMI and ANR

RESPONDENT

Date of Decision : 12-01-2018

Acts Referred:

[Evidence Act, 1872](#), [Section 64](#), [Section 65](#), [Section 63\(1\)](#), [Section 72\(2\)](#) - Proof of documents by primary evidence - Cases in which secondary evidence rela

Citation : (2018) 01 GAU CK 0013

Hon'ble Judges : Mir Alfaz Ali

Bench : Single Bench

Advocate : D MAZUMDAR, B C DAS

Final Decision : Allowed

Judgement

1. This second appeal is filed challenging the judgment and decree dated 31.03.2009 passed by the learned Civil Judge No.1, Cachar at Silchar in

Title Appeal No.4/2008, whereby learned Appellate Court reversed the judgment and decree passed by the learned Munsiff No.1 in Title Suit

No.113/2006 and dismissed the suit of the plaintiff/appellant.

2. Facts leading to the present second appeal may be stated as follows :-

Gopendra Bhusan Chakraborty, the predecessors of the present appellant filed a suit being Title Suit No.113/2006 (48/2004) against the

respondent Gopal Nandan Goswami and Gita Rani Namasudra for declaration of right title and interest, recovery of khas possession, permanent

injunction and other reliefs. During pendency of the suit Gopendra Bhusan Chakraborty died and his legal heirs were brought on record. The

defendant Nos.3, 4 and 5 were also subsequently impleaded as proforma defendants by way of amendment. The case of the plaintiff was that

Prakriti Rani Chakraborty wife of late Gopendra Bhusan Chakraborty was the owner of the land measuring 3 Katha 8 Chataks covered by

Second RS. Patta No.163 and Dag No.713/724. Prakriti Rani Chakraborty died in the year 1998 and her legal heirs by executing a registered gift

deed on 19.03.2001 gifted the aforesaid 3 kathas 8 chataks of land along with other land to Abhra Kanti Chakraborty, the youngest son of

Prakriti Rani Chakraborty. Later on, said Abhra Kanti Chakraborty sold the suit land along with other land to one Ujjal Seal and Amal Mazumdar.

Subsequently, the suit land was repurchased by the plaintiff from the said Ujjal Seal and Amal Mazumdar vide registered sale deed dated

26.03.2002. After purchasing the land from Ujjal Seal and Amal Mazumdar the plaintiffs have been possessing the suit land. The plaintiff allowed

the defendant to occupy 1 (one) katha of land out of the suit land as permissive occupier. Subsequently, the defendant illegally occupied another 1

(one) katha of land out of the 3 katha 8 chataks. The land illegally occupied by the defendants has been shown in schedule 2 and 3 and the entire

suit land has been shown in schedule 1 of the plaint. When the plaintiff asked the defendant to vacate the suit land covered by schedule 2 and 3,

the defendants initially sought for time, however, ultimately refused to vacate the suit land and therefore, the plaintiffs filed the suit for declaration of

right title and interest on schedule A land measuring 3 katha 8 chataks and recovery of possession in respect of land described in schedule 2 and 3

of the plaint.

3. The case of the defendant was that the plaintiffs have no right tile and interest over the suit land, as the suit land was sold to Ujjal Seal and Amal

Mazumdar by registered sale deed and possession was delivered to them. Further case of the defendant was that the defendants have been

possessing the land measuring 3 katha covered by Khas Dag No. 637, and not the land covered by RS Patta No.163. On the basis of the above

pleadings of the parties, learned Munsiff framed the following issues:

1. Whether there is cause of action for the suit?
2. Whether the suit is maintainable in the present form and manner?
3. Whether the suit is barred by law?

4. Whether the suit is barred for defect of parties?

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

6. Whether the plaintiffs are entitled to get any relief as prayed for?

4. Both the parties adduced evidence oral as well as documentary and after hearing both the sides, learned Munsiff decreed the suit in favour of the

plaintiff. Being aggrieved, the defendant/respondent preferred an appeal before the learned Civil Judge and learned Civil Judge by the impugned

judgment and decree, allowed the appeal and dismissed the suit of the plaintiff/appellant.

5. Aggrieved by the judgment and decree of the learned appellate Court reversing the decree of the learned trial Court, the plaintiff/appellant has

preferred the instant second appeal which was admitted to be heard on the following substantial questions of law.

a. Whether the Exhibit-4 (the certified copy of the registered sale deed dated 26.03.2002 executed by Ujjal Seal and Amal Mazumdar in favour of

the original plaintiff Gopendra Bhusan Chakraborty) which was exhibited without any objection is not admissible in evidence for the alleged non-

compliance of Section 65 of the Indian Evidence Act, 1872?

b. Whether the burden of the defendants claiming possession of Khas land of Dag No.637 discharged by merely exhibiting a certificate issued by

the ASO for providing electric connection without there being any description of the land therein as Exhibit-""Ka""?

6. Mr. GN Sahewalla learned senior counsel for the appellant was heard. However, none appeared for the respondents. I have considered the

submissions of Mr. GN Sahewalla and the evidence and materials brought on record.

7. Learned senior counsel Mr. GN Sahewalla submits that the certified copy of the sale deed is an admissible document and once such certified

copy of sale deed is tendered and admitted in evidence without any objection, no objection as to admissibility of such document, being a certified

copy of sale deed, admitted as secondary evidence, can be raised at a later stage. To buttress the submission, learned counsel placed reliance on a

decision of the Apex Court in RVE Venkatachala Gounder V. Arulmigu Viswesaraswami & V.P. Temple reported in (2003) 8 SCC 752. The

Apex Court while dealing with the admissibility of document and scope of raising

objection as to admissibility of a document observed as under:-

20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras in support of his submission that a

document is not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the

proposition of law so laid down in the above said case. However, the present one is a case which calls for the correct position of law being made

precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to

admissibility of documents in evidence may be classified into two classes : (i) an objection that the document which is sought to be proved is itself

inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the

mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an

objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the later case, the

objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the

objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be

raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether

an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such

mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly it enables the

court to apply its mind and pronounce its decision on the question of admissibility then and there and secondly, in the event of finding of the court

on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for

permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the

evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case,

failure to raise a prompt and timely objections amounts to waiver of the necessary for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court.

8. In the instant case, the undisputed position is that the suit land originally belonged to Prakriti Rani Chakraborty. It is also admitted position that the suit land was gifted to the plaintiff Abhra Kanti Chakraborty, who sold the suit land to Ujjal Seal and Amal Mazumdar. It is the case of the plaintiff that the plaintiff repurchased the suit land from Amal Mazumdar and Ujjal Seal by registered sale deed on 26.03.2002. The plaintiff proved the certified copy of the gift deed in favour of the plaintiff as Exhibit-2 and the jamabandi of the suit land as Exhibit-1. The certified copy of sale deed executed by plaintiff Abhra Kanti Chakraborty in favour of Ujjal Seal and Amal Mazumdar had been proved as Exhibit-3 and certified copy of the subsequent sale deed executed by Ujjal Seal and Amal Mazumdar in favour of the plaintiff as Exhibit-4. So far Exhibit-1, Exhibit-2 and Exhibit-3 proved by the plaintiffs, there was no dispute. The plaintiff in his evidence stated that Ujjal Seal and Amal Mazumdar sold the suit land to the plaintiff by executing sale deed on 26.03.2002. Plaintiff further stated that the original sale deed executed by Ujjal Seal and Amal Mazumdar in favour of the plaintiffs was with the sub-registrar and therefore, they proved the certified copy and marked as Exhibit-4. When the Exhibit-4 certified copy of the sale deed was proved as evidence of title over the suit land, by the plaintiff, no objection was raised by the defendants/respondents.

9. It is settled position of law that certified copy of sale deed is admissible in evidence as secondary evidence in view of sub-section (2) of Section 74 read with Section 63 (1) of Evidence Act. Section 61 of the Evidence Act provides that the contents of documents may be proved either by primary or by secondary evidence. Section 64 of the Evidence Act provides that document must be proved by primary evidence except in cases, where production of secondary evidence is permissible. Section 65 of the Evidence Act lays down the procedure and the circumstance under which secondary evidence can be adduced to prove the existence, condition or

contents of the primary document. When the secondary evidence of a document is sought to be adduced, the party seeking to adduce secondary evidence has to satisfy the conditions laid down in Section 65 of the Evidence Act, however, such conditions and requirement are merely procedural and Court can exempt such procedures while admitting a document provided such document is otherwise admissible.

10. In the present case, the secondary evidence in question being a certified copy of sale deed is admissible under the law. It is also evident that when the certified copy of the sale deed Exhibit-4, was tendered in evidence no objection was raised with regards to its admissibility or mode of proof. The Apex Court in R.V.E. Venkatachala (supra) succinctly distinguished the objections as to admissibility of document into two categories

i.e.

(i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and

(ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same

to be irregular or insufficient.

11. The first category of documents are itself inadmissible in evidence, whereas, second category covers the documents, which are not inadmissible

itself, but while adducing such documents in evidence, certain procedural formalities are required to be followed. Therefore, objection as to first

category relates to its admissibility and second category relates to mode of proof. When a document is inherently inadmissible, objection to the

admissibility of such document can be raised at any stage, however, when a document is otherwise admissible but requires some procedural

formality to be followed before tendering it in evidence, in such case, if the objection with regard to the admissibility or mode of proof is not raised

at the time, the document was tendered in evidence and marked exhibit, objection as to admissibility of such document cannot be raised at a later

stage.

12. Section 65 of Evidence Act provides only certain procedural requirement as to mode of proof of secondary evidence. The proposition of law

has been made abundantly clear in RVE Venkatachala (supra) that if a document is otherwise admissible and no objection with regard to

procedural formality or mode of proof is raised at the time of tendering such document in evidence, objection as to admissibility of such document

cannot be raised at a later stage. As already pointed out that the Exhibit-4 being the certified copy of sale deed is admissible in evidence and does

not fall in the category of documents which are inherently inadmissible. Therefore, when objection was not raised at the time of tendering the

Exhibit-4 and the learned Court admitted the document (Exhibit-4) in evidence and marked Exhibit, it shall be construed that the procedural

formality contemplated in Section 65 of the Evidence Act had been exempted. Therefore, the Exhibit-4 shall not be inadmissible merely because of

non-compliance of the procedure provided in Section 65 of Evidence Act. Since the proposition of law with regard to raising objection in respect

of a document which is otherwise admissible is well settled, in the facts and circumstances of the present case Exhibit-4, the certified copy of the

sale deed can by no stretch of imagination be held to be inadmissible for non compliance with the provisions of Section 65 of the Evidence Act.

Being of the above view, the substantial question of law No.1 is answered in favour of the appellants/plaintiffs.

13. The plaintiff filed the suit for declaration of title and recovery of possession in respect of the suit land covered by Dag No.713/724 and RS

Patta No.163. It is also the case of the plaintiff that the defendants were initially occupying a portion of the suit land as permissive occupier and

subsequently they have occupied additional 1 (one) katha of the suit land and therefore, the suit was filed for declaration of tile and recovery of

possession by evicting the defendants. The specific plea of the defendant was that the defendants were occupying the land covered by Khas Dag

No.637 and the land occupied by the defendants has no relation with the suit land. The plaintiffs had adduced evidence in support of their plea that

defendants occupied the suit land covered by Dag No.713/724 and Patta No.163 and such evidence could not be shaken. In fact, the defendant

Gopal Nandan Goswami examining himself as DW-1 stated in cross-examination that he did not know the Dag No. and Patta No. of the suit land.

He also admitted in unambiguous terms that he has no claim over the suit land covered by RS Patta No.163.

14. The defendant No.2 also admitted in cross-examination that he did not know the Dag No. and Patta No of the suit land. Specific plea raised in

the written statement was that the defendants were possessing the land covered by Khas Dag No.637, and a certificate issued by Assistant

Settlement Officer had been proved as Exhibit- Ka, where it had been mentioned that the land measuring 3 kathas covered by Khas Dag No.637

was under occupation of the defendant Gopal Nandan Goswami. Exhibit-"Ka" certificate does not reveal, that suit land was covered by Khas Dag

No.637. The case of the plaintiff was that the defendants occupied the suit land covered by Dag No.713/724 of Patta No.163 and adduced

evidence to that effect. However, though the defendants raised the plea that the suit land was not covered by RS Patta No.163, rather it was

covered by Dag No.637, during evidence both the DWs categorically stated that they were not aware of the Dag No. and Patta No. of the suit

land. It was also stated categorically by the defendant that he had no objection, if any decree is passed in respect of the suit land in favour of the

plaintiff. When admittedly the defendant had no knowledge as to the Dag No. and Patta No of the suit land, mere proving the Exhibit-"Ka" a

certificate issued by the settlement officer stating that the defendants were in occupation of a land measuring 3 katha covered by Khas Dag

No.637, cannot dislodge the case of the plaintiff. Even if it is assumed for the sake of arguments, that the land covered by Dag No.637 was in

occupation of the defendant, that per-se is incapable to establish the plea of the defendants that suit land is covered by Dag No.637. When the

plaintiffs filed the suit for declaration of title and recovery of possession in respect of suit land covered by RS Patta No.163 and Dag No.713/724

and defendant sought to dispute the identity of the suit land with a specific plea that suit land was not covered by RS Patta No.163, rather it was

covered by Khas Dag No.637, it was burden of the defendant to prove such facts disputing the identity of the suit land. But the defendants failed

to discharge their burden. The defendant No.1, rather, categorically stated that he has no objection if a decree is passed in favour of the plaintiff in

respect of the suit land. From the nature of controversy and the facts and circumstances of the case, the issue involved is whether the suit land was

covered by Khas Dag No.637 or Dag No.713/724 of RS Patta No.163 and the plaintiffs have adduced sufficient evidence oral and documentary

showing that the suit land was covered by Dag No.713/724 and RS Patta No.163. Whereas, the defendants and the witness of the defendants

categorically stated that they did not know the Dag No. and Patta No. of the suit land.

15. In view of the above evidence and admitted position, it can by no stretch of imagination be held that the defendant has been able to discharge

its burden to prove its plea that the suit land was covered by Dag No.637. The Exhibit-Ka, which merely indicated that the land measuring 3 katha

covered by Khas Dag No.637 was in occupation of the defendant, does not make any difference to the claim of the plaintiff in respect of the suit

land in view of the evidence and materials discussed herein above. Therefore, the substantial question of law No.2 is decided against the

defendant.

16. The plaintiffs having established their title over the suit land by adducing evidence oral and documentary and the plea of the defendants having

fallen through as discussed in substantial question of law No.2, the plaintiff was certainly entitled to a decree as sought for. However, learned

appellate Court dismissed the suit and allowed the appeal with the observation that Exhibit-4 being the certified copy of the sale deed could not be

admitted in evidence until the procedure for adducing the secondary evidence under Section 65 of Evidence Act was complied. Such finding of the

learned first appellate Court was contrary to the established proposition of law as indicated above and therefore, the learned appellate Court fell in

grave error by dismissing the suit holding the Exhibit-4, certified copy of the sale deed inadmissible in evidence for non-compliance of the

procedure Provided in Section 65 of the Evidence Act.

17. In the above facts and circumstances and the settled position of law, the impugned judgment and decree of the learned appellate Court cannot

be allowed to hold the field. Accordingly, the impugned judgment passed by the learned first appellate Court is set-aside and the judgment and

decree passed by the learned Munsiff in Title Suit No.133/2016 is hereby restored. The second appeal accordingly stands allowed.

18. Send back the LCR.