
(2014) 02 GAU CK 0067

In the Gauhati High Court

Case No : Regular Second Appeal No. 106 of 2003

Smt. Mailata Talukdar and Others

APPELLANT

Vs

Sri Joy Kanta Talukdar

RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Citation : (2014) 02 GAU CK 0067

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Advocate : S.K. Ghosh, for the Appellant; D. Das, Ms. S. Bora and Mr. B. Hazarika, for the Respondent

Final Decision : Allowed

Judgement

B.P. Katakey, J.—This appeal by the defendant Nos. 1 to 9 is directed against the judgment and decree dated 05.04.2003 passed by the learned Civil Judge (Sr. Division), Barpeta, in Title Appeal No. 10/2002, allowing the appeal by setting aside the judgment and decree dated 26.06.2002 passed by the learned Civil Judge (Jr. Division), Barpeta, in Title Suit No. 99/1997, whereby and whereunder the suit of the plaintiff/respondent No. 1 was initially dismissed. The respondent No. 1 as plaintiff instituted the aforesaid suit for partition of the land measuring 57 bighas 3 kathas 0 lecha described in Schedule-A to the plaint and declaration of right, title and interest in respect of 9 bighas 3 kathas 13 lechas of land covered by Dag No. 202 of K.P. Patta No. 15 (Schedule-B), which is part of the Schedule-A land as his share being 1/7th of the Schedule-A land, contending inter alia that Schedule-A land apart from other annual patta land originally belonged to Faguna, who died in the year 1926 and had 7(seven) sons including the plaintiff, the predecessor-in-interest of the defendant Nos. 1 to 7, namely, Madhab Talukdar, defendant No. 8 Madan Talukdar, defendant No. 9 Prankrishna Talukdar, predecessor-in-interest of the proforma defendant Nos. 1 to 8, namely, Girish Ch. Talukdar, predecessor-in-interest of the proforma defendant Nos. 9 to 13, namely, Satish Ch. Talukdar and the predecessor-in-interest of the proforma

defendant Nos. 14 to 20, namely, Jadab Talukdar. It has also been pleaded that the land belonging to Faguna was partitioned amongst the 6(six) sons by the family settlement dated 15.04.1960 (Ext.-2), leaving aside Satish Talukdar, another brother of the plaintiff, as he was settled in Kolkata and not interested in the ancestral property and by virtue of such partition the land described in Schedule-B fell in the share of the plaintiff, which he earlier enjoyed through Girish Ch. Talukdar, predecessor-in-interest of the proforma defendant Nos. 1 to 8. The further pleaded case is that the plaintiff when claimed his right, title and interest in respect of the Schedule-B land, which property he got by virtue of the partition, the same having been denied by the defendant Nos. 1 to 9, he has to brought the suit for declaration as aforesaid and also for recovery of khas possession.

2. The plaintiff's suit has been contested by the defendant Nos. 1 to 9 by filing joint written statement, contending inter alia that the land covered by Dag No. 178, 199 and 202 of periodic Patta No. 15 was not the land belonging to Faguna and was the self-acquired land of Jadab in whose favour the patta was issued by the Revenue Authority, though the plaintiff has included the said land in Schedule-A to the plaint claiming to be of Faguna. According to the defendants, since the said land did not belong to Faguna, the plaintiff cannot claim the right, title and interest in respect of the Schedule-B land, which is covered by Dag No. 202 of periodic patta No. 15, as the heir of Faguna. The further pleaded case of the defendants is that Ext.-2 document dated 15.04.1960 does not include the land covered by periodic patta No. 15.

3. Based on the pleadings of the parties, the Trial Court framed the following issues for determination:-

- (i) Whether there is cause of action for the suit?
- (ii) Whether the suit is maintainable in its present form? (iii) Whether the suit is under valued and plaint is under stamped?
- (iv) Whether the suit is barred by law of limitation?
- (v) Whether the plaintiff has right, title and interest over the suit land?
- (vi) Whether the plaintiff is entitled to get a decree for possession over the 1/7th share of the Schedule-A land?
- (vii) Whether the plaintiff is entitled to get a decree for partition along with precept to the revenue authority to issue separate patta?
- (viii) Whether the land measuring 31B 3K covered by patta No. 15 described in the Schedule-A land is not ancestral property as alleged by the defendant?
- (ix) Whether the share from the land measuring 26B covered by periodic patta No. 162 was sold and consideration money of plaintiff's share was given to the plaintiff?

(x) Whether the plaintiff is entitled to a decree as prayed for?

(xi) To what other relief or reliefs, if any, the plaintiff is entitled to?

4. The Trial Court upon appreciation of the evidence on record dismissed the suit of the plaintiff by holding that the plaintiff could not prove that the land described in Schedule-B to the plaint originally belonged to Faguna. The Trial Court has also recorded the finding that the land, as is evident from the evidence adduced by the plaintiff, belonged to Jadab and as such the plaintiff being the son of Faguna cannot claim the right, title, interest and recovery of khas possession in respect of Schedule-B land by inheritance. The Trial Court has further held that the plaintiff also could not prove due execution of Ext.-2 dated 15.04.1960.

5. Being aggrieved, the plaintiff preferred the aforesaid appeal, which has been allowed by the First Appellate Court by the impugned judgment and decree by holding that the plaintiff is entitled to declaration of right, title and interest in respect of Schedule-B land, as the land covered by patta No. 15 was the coparcenary property thrown into the common stock, though the said land belonged to Jadab. Hence the present appeal.

6. The appeal was admitted for hearing vide order dated 09.09.2003 on the following substantial questions of law:-

(i) Whether the learned lower Appellate Court misinterpreted the meaning and scope of coparcenary property under the Dayabhaga system of Hindu Law and illegally reversed the judgment of the learned Trial Court?

(ii) Whether the learned lower Appellate Court misinterpreted the document, Ext.-2, holding it to be a partition deed amongst the co-sharer in the absence of signatures of all the co-sharers and illegally reversed the judgment of the Trial Court?

(iii) Whether the learned lower Appellate Court erred in law in holding the land in KP Patta No. 15 to be a joint property and illegally passed the impugned judgment?

(iv) Whether the finding of the learned lower Appellate Court is perverse?

(v) Whether the statement of PW-1, attorney of the plaintiff can be taken into consideration on the failure of the plaintiff to examine himself as a witness?

(vi) Whether the plaintiff having renounced the world by taking sanyas is entitled to maintain the suit at all?

7. I have heard Mr. S.K. Ghosh, learned counsel for the appellants/defendants and Mr. D. Das, learned counsel for the respondent No. 1/plaintiff. None appears for the other respondents.

8. Referring to the pleadings in the plaint, it has been submitted by the learned counsel appearing for the appellants that since it is not the pleaded case of the

plaintiff that though the land covered by patta No. 15, which forms part of Schedule-B land, belonged to Jadab, one of the sons of Faguna, since the said land was thrown into the common stock, it forms the coparcenary property under Dayabhaga School of Hindu Law and as such the plaintiff is entitled to the decree in respect of the Schedule-B land, the First Appellate Court ought not to have held that the land covered by Patta No. 15, which belonged to Jadab, forms part of the coparcener's property and as such the plaintiff is entitled to a decree. The learned counsel further submits that the First Appellate Court having not disturbed the finding recorded by the Trial Court that the land covered by patta No. 15 belonged to Jadab and it did not belong to Faguna, ought not to have decreed the suit of the plaintiff as the plaintiff is not entitled to such decree for partition based on the claim of inheritance.

9. The learned counsel appearing for the respondent No. 1, on the other hand, supporting the judgment and decree passed by the First Appellate Court and also referring to the evidence of DW-1, namely, Prankrishna Talukdar, defendant No. 9, has submitted that it is evident therefrom that though the land covered by Patta No. 15 belonged to Jadab, one of the sons of Faguna, it was thrown into the common stock of the coparcenary and hence the First Appellate Court has rightly decreed the suit of the plaintiff declaring his right, title and interest in respect of the Schedule-B property.

10. I have considered the submissions advanced by the learned counsel for the parties.

11. The learned counsel appearing for the parties have advanced their arguments on the substantial questions of law Nos. (i) and (iii), contending inter alia that though as many as 6(six) substantial questions of law were framed while admitting the appeal vide order dated 09.09.2003, the aforesaid two substantial questions of law arise in the present appeal and hence this judgment is confined to the aforesaid two substantial questions of law only.

12. The Trial Court has recorded a clear finding that though the plaintiff has claimed that the land covered by Patta No. 15 originally belonged to Faguna, his father, the plaintiff, however, could not prove the same. It has also been held that the land covered by Patta No. 15, part of which is described in Schedule-B to the plaint, belonged to Jadab, one of the sons of Faguna. The said finding has not been disturbed by the First Appellate Court and in fact has been affirmed. The plaintiff though claimed that the land covered by Patta No. 15 belonged to Faguna and in support of which the plaintiff examined the Latmandal as PW-4, he, however, could not prove that the land covered by Patta No. 15 originally belonged to Faguna and hence the plaintiff being one of the sons is entitled to 1/7th share of the land left by Faguna. The plaintiff also in the plaint never pleaded that though the land covered by Patta No. 15 belonged to Jadab, another son of Faguna, since he has thrown the said land to the common stock of the coparcenary, it forms the coparcenary property and as such the plaintiff is entitled to a share. In the absence of any such pleading and also in the absence

of any evidence led to that effect by the plaintiff, the First Appellate Court ought not to have held that though the land covered by Patta No. 15 belonged to Jadab, the same, however, forms the coparcenary property as the said property was thrown into the common stock of the coparcenary and hence the plaintiff is entitled to a share as claimed by him, which is described in Schedule-B to the plaint. The First Appellate Court, in fact, has allowed the appeal by making out a case which has neither been pleaded by the plaintiff nor by the defendants and no amount of evidence was also led in that respect.

13. In view of the aforesaid discussion, I am of the view that the judgment and decree passed by the First Appellate Court needs to be set aside, which I accordingly do.

14. The appeal is therefore allowed. No costs. The Registry is directed to send down the records forthwith.