

(2015) 06 GAU CK 0088
In the Gauhati High Court
Case No : RSA No. 156 of 2004

Sukumar Namasudra and Others

APPELLANT

Vs

Bhojan Namasudra and Others

RESPONDENT

Date of Decision : 19-06-2015

Acts Referred:

Evidence Act, 1872 — Section 92

Citation : (2015) 4 GLT 123

Hon'ble Judges : Arup Kumar Goswami, J.

Bench : Single Bench

Advocate : R. Choudhury, for the Appellant; N. Dhar, for the Respondent

Final Decision : Partly Allowed

Judgement

Arup Kumar Goswami, J.—Heard Ms. R. Choudhury, learned counsel for the appellants/defendants. Also heard Mr. N. Dhar, learned counsel appearing for the respondents/plaintiffs. This appeal is directed against the judgment and decree dated 30.4.2004 passed by the learned Civil Judge (Senior Division), Karimganj in Title Appeal No. 47/2002 allowing the appeal by setting aside the judgment and decree dated 13.5.2002 passed by the learned Civil Judge (Junior Division), Karimganj in Title Suit No. 74/1993 decreeing the suit.

2. The case of the plaintiff as projected in the plaint, in short, is that Abalabala Namasudra, wife of Piariram Namasudra sold 1st schedule and 3rd schedule lands to the father of plaintiff Nos. 1, 2 and 3 and husband of plaintiff No. 4, namely, Pulin Namasudra by registered sale deed dated 31.1.1973, which was exhibited as Ext. 3. It is pleaded that in the northern part of the land, Pulin Namasudra excavated a tank. 1st schedule land refers to 1 kedar of land, equivalent to .30 decimals, which was purchased by Pulin Namasudra. 2nd schedule is part of 1st schedule land which is a kind of a tank and fishery measuring about. 15 decimal. 3rd schedule is orchard land measuring 1 poa. It is alleged that the defendants who are neighbours of the plaintiffs are causing interference with their peaceful possession in respect of 2nd and 3rd schedule

land with an intention to dispossess them therefrom.

3. At the outset, it will be convenient to reproduce the three schedules for better appreciation:

"1st Schedule

All these pieces and parcels of land covered by settlement surveyed dag No. 493 (added Dag No. 494 & 498) of Mouza Kamargram Part-2, in parganah Egarasati in the district of Karimganj.

East- Chara land of Debendra Namasudra.

West- Chara land of Rajendra Namasudra.

North - Tank of Jageswar Namasudra.

South ? Dhanakhal's Patit land.

Within this boundary an area of one kedar i.e. 30 decimal of land.

2nd Schedule

Northern half of the above stated 1st, schedule land.

East- Chara land of Debendra Namasudra.

West- Chara land of Rajendra Namasudra.

North - Tank of Jogeswar Namasudra.

South - Chara land of the plaintiff i.e. the remaining half of the 1st schedule land.

Within this tank and fishery type measuring. 15 decimals.

3rd Schedule

Land covered by Dag No. 492 of Mouja Kamargram Part-2 in pargana Egarasati:

East - Tank of Jageswar Namasudra.

West - Homestead of late Surjaram Namasudra.

North- Patit land.

South - Homestead of Rajendra Namasudra.

Within this orchard land measuring one poa only."

4. Initially, in respect of 1st schedule, Dag number was referred to as 493. Subsequently, by way of amendment, Dag Nos. 498 and 494 are added and word "Patit land" was added after the word "Dhanakhal" in southern boundary of 1st schedule.

5. The defendant No. 2 is an adopted son of defendant No. 1 and the written statement was filed on behalf of defendant Nos. 2 and 3. It is averred that the

plaintiffs had no title and possession in respect of Dag No. 493 and the land of 1st and 2nd schedule is not related to the land of Dag No. 493 and Dag No. 493 was not sold by Abalabala Namasudra to Pulin Namasudra. Digging of pond was also denied. It is stated that Piariram Namasudra had a pond measuring 1 kedar 3 poa 3 jasti 2 rake appertaining to Dag No. 493/494 and he had sold 1 kedar of the northern side of the pond to Jogeswar Biswas vide a registered sale deed dated 7.6.1954 and Jogeswar Biswas, in turn, vide registered sale deed dated 11.3.1977, sold the land to defendant Nos. 2 and 3 and one Sajal Namasudra who died unmarried. Abalabala had also executed a sale deed dated 5.1.1976 which was registered on 6.1.1976 in respect of land measuring 3 poa 3 jasti 8 pon. It is stated that there is no pond on the settlement Dag No. 493 and entirely on the basis of false statement, suit was instituted against the defendants. It is also averred that they were in possession of Dag No. 493 and 494 during the last Government survey and they have been issued pattas.

6. The learned trial court on the basis of the pleadings, framed the following issues:

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

2. Whether the suit is maintainable in its present form?

3. Whether the plaintiffs have right, title and possession over tank and land described in schedule 2 and 3 respectively?

4. To what relief the plaintiffs are entitled to?"

7. Subsequently, one additional issue was framed, which is as follows:

"5. Whether the suit land is identifiable?"

8. Both the plaintiffs and the defendants examined two witnesses in support of their case and exhibited a number of documents. As noticed earlier, the suit of the plaintiffs was dismissed. However, on appeal by the plaintiffs, it was allowed and the suit was decreed.

9. The second appeal was admitted to be heard on 22.3.2006 on the following two substantial questions of law:

"1. Whether the finding of the learned appellate court in respect of the Ext. 3 is perverse and valid as per Section 92 , Evidence Act?

2. Whether the vendor of Ext. 3 got valid right and title to transfer title to the purchaser of Ext 3?"

10. Ms. R. Choudhury, learned counsel for the appellant submits that the substantial questions of law formulated earlier may not be very relevant. Ms R. Choudhury further submits that one substantial question of law may be framed to the effect as to whether the learned lower appellate court was right in decreeing the suit of the plaintiffs solely on the basis of the oral testimony of D.W. 2?

11. After hearing the learned counsel, it is considered appropriate to formulate the following substantial question of law:

"Whether the learned lower appellate court was right in decreeing the suit of the plaintiffs solely on the basis of the oral testimony of D.W. 2?"

12. Mr. Dhar submits that though this substantial question of law is formulated today, he is ready with the case and he is in a position to argue the case today itself.

13. Ms. R. Choudhury submits that Ext. 3 sale deed, on which the plaintiffs rest their case, do not contain any dag number such as 493, 494 and 498 and, therefore, their claim on the basis of such sale deed in respect of land of the aforesaid dags other than Dag No. 492 is wholly misconceived. It is submitted that plaintiffs purchased land only in Dag No. 492 which is evident from the fact that in plot No. 1 in the sale deed, Ext. 3, Dag No. 492 is given and in 3rd Schedule, same Dag No. 492 is indicated though 3rd Schedule plot of land is not the plot No. 1 in the sale deed.

It is also submitted that no Dag number was given in the other two plots. By way of insertion of dag numbers other than 492, the plaintiffs, amongst others, are trying to grab the land of the defendants. The learned counsel further submits that as the defendants had not purchased any land other than in Dag No. 492, the learned lower appellate court took out certain portion of the evidence given by D.W. 2 with regard to the boundary and thereby held that there is admission on the part of D.W. 2 in respect of description of boundary of land in 1st schedule and therefore, 1st schedule is identifiable without even any Dag and accordingly, allowed the appeal. Ms Choudhury has submitted that the defendants have no claim with regard to the land in 3rd schedule of the plaint within the boundary as specified therein in Dag No. 492.

14. Mr. N Dhar, learned counsel for the respondents has submitted that evidence of D.W. 2 is clinching and no irregularity was committed by the learned lower appellate court in as much as, there is no doubt regarding identity of the suit land. It is submitted by Mr. Dhar that non-mentioning of Dag number in the sale deed, Ext. 3, is of no consequence when the land is identifiable otherwise. It is submitted that sale deed comprises of three plots and dag number was given only in respect of plot No. 1 measuring 1 poa and in respect of other two plots measuring 1 kedar and 1 poa, respectively, no dag numbers were given and plot No. 2 of the sale deed, Ext. 3, corresponds to 1st schedule of the plaint. Therefore, there is no difficulty in identification of the plots of suit land. He relies upon the judgment of The Holy Mother of Aurobindo Ashram of Pondicherry Vs. State of Meghalaya and Others, to support his submission. Accordingly, he submits that no interference is called for in this second appeal and the appeal is liable to be dismissed.

15. I have considered the submission of the learned counsel for the parties and have perused the materials on record.

16. It is relevant to note that plot No. 3 in the sale deed, Ext. 3, corresponds to 3rd schedule of the suit land exactly so far as boundaries are concerned. 3rd Schedule is referred to as part of Dag No. 492. The learned trial court on perusal of Ext. 1, final khatian, recorded the finding that Dag No. 493 and Dag No. 494 are recorded as bank of pond and pond, respectively. It had also been recorded by the learned trial court that P.W. 1 in his evidence had stated that he does not know in which dag the suit land falls and in absence of any explanation, the learned trial court held that there is no evidence on record to hold that suit land falls in Dag Nos. 498, 493 and 494. Obviously, said finding is related to 1st and 2nd schedule. D.W. 2 had testified that there was a very old pond and the plaintiffs never possessed and enjoyed the tank and that the plaintiffs had land on southern side of the bank of the tank. The boundary of the plaintiffs' land was demarcated on the southern side of the bank of the pond and the plaintiffs had uprooted the boundary pillar which was put after demarcation of the boundary.

17. Relevant part of the cross-examination of D.W. 2 with regard to the boundary, upon which reliance was placed by the lower Appellate Court is as follows:

"I know the land of the plaintiff.

East - Chara land of Debendra

West - Rajendra's chara land along with Sukumar and Kanukumar.

North - Pond of Jogeswar

South - Patit and further south is Dhanakhal, The area is little more than one kedar (about 30 decimal)."

18. Materials on record disclose that there is a bank of the pond referred to as pond of Jogeswar Namasudra and the bank is in Dag No. 493. Sale deed does not refer to Dag No. 493. The pond was a massive pond comprising of 1 kedar of land which is approximately equivalent to 12,400 sq. ft. and it will be reasonable to hold that northern boundaries are generally identified with the pond. The moment Dag No. 493 comes in, the bank comes into question. The plaintiffs have failed to bring any acceptable materials on record to show how they have included 1st Schedule Dag Nos. 493, 494 and 498, while filing the suit. The plot Nos. 2 and 3 of the sale deed did not contain any dag number and Dag No. 492 was given only in respect of plot No. 1. Nonetheless, the plaintiff identified the 3rd Schedule land as part of Dag No. 492. It goes without saying that it is the burden of the plaintiffs to prove the case in order to enable them to get a decree. The principle of law relied upon by Mr. Dhar is not attracted in the facts and circumstances of the case. It is correct that when there is a mistake in plot number, if the identity of the land is well demarcated, the mistake in the plot number will not matter. So also in a case where there is a difference in description of the area and the boundary, the description of the boundary will

prevail. Present is not a case of that kind. Dag No. 493, as it appears, is the bank of the pond. It cannot be said on the basis of the sale deed, that the boundary of the pond was sold to the plaintiffs while not selling the pond. Therefore, I am of the considered opinion that the learned trial court was justified in holding that the plaintiffs failed to prove their case. But the learned trial court had also committed an error in as much as materials on record demonstrate, which is also not disputed by Ms. Choudhury with regard to Dag No. 492, that the plaintiffs had clear title and the defendants also do not claim any right over the same. Therefore, this Court is of the considered opinion that while allowing this appeal by setting aside the judgment of the learned lower appellate court, it will be in the interest of justice to decree the suit of the plaintiffs in respect of 3rd schedule land only. In the result, the appeal is partly allowed by setting aside the judgment of the learned Lower Appellate Court and decreeing the suit only in respect of 3rd schedule. No cost. Registry will send back the records.