
(2012) 05 GAU CK 0026
In the Gauhati High Court

Suprava Banik, W/O Lt.Nani Gopal Banik APPELLANT
Vs

Bimala Devi Boxi, W/O Lt.Bhanwarilal Boxi.Proprietor, RESPONDENT
Anandamal Bhanwarilal a proprietary firm dealing with sale of
cloths, East Bazar, Karimganj, PO-Karimganj Bazar, 788711,
PS & Dist.-Karimganj, Assam

Date of Decision : 17-05-2012

Acts Referred:

Citation : (2012) 05 GAU CK 0026

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

Bench : Single Bench

Advocate : Advocate(s) for the Appellants : Mr. A.K. Bhattacharyya (Sr. Adv.),
Mr. B.R. Dey, (Sr. Adv.), Mr. S. Dey.??Advocate(s) for the Respondents : Mr. G.N.
Sahewalla (Sr. Adv.) Mr. Dekaa., Advocates appearing for Parties

Judgement

1. This appeal by the defendants is directed against the judgment and decree dated 20.09.2000 passed by the learned Civil Judge (Sr. Division), Karimganj in Title Appeal No.36/1998, dismissing the appeal preferred by the defendant Nos.1 to 4/appellants by affirming the judgment and decree dated 14.09.1998 passed by the learned Civil Judge (Jr. Division) No.1, Karimganj in Title Suit No.293/1993.

2. The respondent Nos.1 to 6 in this appeal instituted the aforesaid suit as plaintiffs against the present appellants as the principal defendant Nos.1 to 4 praying for a decree declaring the right of the plaintiff No.1 as monthly tenant, in respect of 2nd schedule land, which is part of the 1st schedule land; for declaration of the plaintiff Nos.2, 3 and 4's right as landholders to the extent of 71.02% share in the 2nd schedule land, i.e. 1 powa 4 jasti 5 pan and 5 gandas by virtue of the purchase from the heirs of the original owners vide Exts.8 to 12 sale deeds; for recovery of khas possession in respect of the 2nd schedule land by the plaintiff No.1 in respect of her tenancy right and by the plaintiff Nos.2, 3 and 4 in respect of the right of landholders by evicting the principal defendants

therefrom and also for injunction. It has been contended inter alia that initially the forefathers of the plaintiffs were the tenants under the erstwhile zamindars, for which the tenancy agreement dated 02.12.1913 (Ext.1) was executed initially for a period of 5(five) years, which was extended by the subsequent agreement dated 21.03.1929 (Ext.2) and thereafter by another lease agreement dated 25.02.1948 (Ext.3) such lease was extended in favour of Banwarilal Boxi, who is the husband of the plaintiff No.1. It is also the case of the plaintiffs that after the death of her husband, the plaintiff No.1 stepped into shoes of her husband and became the tenant in respect of the Schedule1 land. It has also been pleaded in the plaint that the plaintiff Nos.2, 3 and 4 thereafter vide registered deeds of sale dated 08.07.1980 (Ext.8), 30.06.1980 (Ext.9), 11.08.1986 (Ext.10), 07.01.1987 (Ext.11) and 21.01.1983 (Ext.12) purchased a plot of land measuring 1 powa 4 jasti 5 pan 5 gandas out of the 1st schedule land and as such acquired the right of the landlords over the said land. It has also been pleaded that in respect of the remaining land in Schedule1 i.e. 4 jasti 7 pan, the proforma defendant Nos.5 and 6 continued to be the owner, they being the heirs of the original owners. The further case of the plaintiffs is that the plaintiff Nos.2 to 4 and the proforma defendant Nos.5 and 6 are possessing the Schedule1 land in their respective shares and the plaintiff No.1 is tenant in respect of the entire land by virtue of the aforesaid lease deeds being Exts.1 to 3. According to the plaintiffs, they had to institute the suit as the defendants on 30.11.1986 forcibly trespass into the 2nd schedule land and placed some readymade split bamboo bridges and blocked the drain as existing over the 2nd schedule land.

3. While the defendant Nos.1 to 4 have contested the suit by filing the joint written statement, the proforma defendants did not contest the suit. In the written statement filed by the defendant Nos.1 to 4 it has been contended that their forefathers were the tenants under the erstwhile landlord by virtue of tenancy created vide Ext.A dated 07.06.1941 in respect of Schedule1 land and thereafter the khatians being Exts.C, D and H, all dated 16.12.1968, were issued in the names of Roymohan Banik and Nani Gopal Banik, the predecessors in interest of the proforma defendants. It is also the pleaded case of the defendants that they continued to be the tenants and they acquired the right of occupancy over the Schedule1 land.

4. The Trial Court on the basis of the pleadings of the parties, framed the following issues for determination:

- (i) Is the suit of the plaintiff maintainable?
- (ii) Is the suit of the plaintiffs barred by limitation and bad for waiver, estoppel and acquiescence?
- (iii) Is the suit of the plaintiffs bad for defect of parties?
- (iv) Have the plaintiffs' right, title and interest in the suit land?
- (v) Is there any cause of action for instituting the above suit?

- (vi) Is the suit land has been identified properly?
- (vii) Has the suit of the plaintiffs been properly valued?
- (viii) To what reliefs the plaintiffs are entitled?

5. The Trial Court upon appreciation of the evidences on record and also hearing the learned counsel for the parties decreed the suit of the plaintiffs by holding that the plaintiff No.1 is the tenant in respect of Schedule1 land, by virtue of Exts.1, 2 and 3 lease deeds and the plaintiff Nos.2, 3 and 4 have acquired the landlord's right in respect of the land purchased by them being 1 pawa 4 jasti 5 pan 5 gandas, which is part of the Schedule1 land, on the basis of the registered deeds of sale being Exts.8 to 12 executed by the heirs of the original owners.

6. Being aggrieved the principal defendants filed Title Appeal No.36/1998, which has also been dismissed by the First Appellate Court by upholding the judgment and decree passed by the Trial Court. Hence the present appeal.

7. This appeal was admitted for hearing on 09.02.2001 on the following substantial questions of law.

?(i) Whether the learned Courts below were justified in relying on the Exts.1, 2 and 3 in violation of Section 107 of the Transfer of Property Act?

(ii) Whether the learned Courts below were justified in decreeing the suit of the plaintiffs in total disregard to the documents, namely, Exts.C and D, issued on 16.12.1968 in respect of Dag Nos.5072, 5073, 5074 and 5069??

8. I have heard Mr. B.R. Dey, learned Sr. counsel for the appellants/defendants and Mr. G.N. Sahewalla, learned Sr. counsel for the respondents/plaintiffs. The proforma respondents have not entered appearance despite service of notice.

9. Mr. Dey, learned Sr. counsel referring to Exts.1, 2 and 3 and also the provisions of Section 107 of the Transfer of Property Act submits that it is evident from the said exhibits that no lease has been created by the lessor and in fact those documents were executed by the lessee and by such documents no lease can be created as required under Section 107 of the Transfer of Property Act. The learned Sr. counsel, therefore, submits that the Courts below ought not to have decreed the plaintiff No.1's tenancy right on the basis of the Exts.1, 2 and 3.

10. Mr. Dey relating to the second substantial question of law submits that since the khatians being Exts.C, D and H were issued in the names of the predecessors in interest of the present defendants/ appellants, they continued to be the occupancy tenant having heritable and transferable right, even if the ownership of the land is changed from the original owner to the plaintiff Nos.2 to 4. According to the learned Sr. counsel, the Courts below, therefore, ought not to have passed any order directing eviction of the defendants from the land in question.

11. Mr. Sahewalla, learned Sr. counsel appearing for the respondents/plaintiffs,

on the other hand, supporting the judgments and decrees passed by the Courts below submits that at the relevant point of time the lease deeds are executed by the lessee informing the lessor i.e. the jamindars that the lessee is taking the property on lease and hence it cannot be said that by virtue of Exts.1, 2 and 3 lease deeds the predecessors in interest of plaintiff No.1 and thereafter the plaintiff No.1 did not acquire the tenancy right as claimed in the plaint.

12. It has also been submitted by Mr. Sahewalla that though the defendants have claimed that the land in respect of which Exts.C, D and H khatians were issued is the land described in Schedule 1 to the plaint, the defendants could not, however, prove the same by adducing any cogent evidence. It has also been submitted that the finding of fact recorded by both the Courts below that both the lands are different, cannot be disturbed by the Second Appellate Court in the absence of any perversity in recording such finding. The learned Sr. counsel further submits that the plaintiff Nos.2 to 4 by proving the sale deeds being Exts.8 to 12 could prove that they acquired the landholder's right in respect of 1 powa 4 jasti 5 pan 5 gandas of land, which is part of the Schedule 1 land, from the original owner. Mr. Sahewalla, therefore, submits that the appeal preferred by the defendants deserves to be dismissed.

13. I have considered the submissions of the learned counsel for the parties and also perused the judgments and decrees passed by both the Courts below apart from the documents exhibited, more particularly, Exts.1, 2, 3, 8 to 12, A, C, D and H to which the learned counsel for the parties have referred to during the course of their arguments.

14. The plaintiff No.1 claims the right of tenancy by virtue of Exts.1, 2 and 3 deeds dated 02.12.1913, 21.03.1929 and 25.02.1948. It is evident from the recital of Ext.1 deed that the same is not the first deed executed, as it is mentioned therein that the said deed has been executed to extend the period of lease. All these three deeds being Exts.1, 2 and 3, are executed by the lessee and not by the lessor. The plaintiffs for the reasons best known to them have not produced the original lease deed, which was executed prior to execution of the Ext.1 deed.

15. Section 107 of the Transfer of Property Act provides how the lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made. It provides that such lease can be made by a registered instrument. A property can be leased out only by the lessor. The lessee by executing a document cannot create any right over a property belonging to some other persons, namely, the lessor. In the instant case, as noticed above, Exts.1, 2 and 3 are not executed by the lessor but by the lessee and as such the plaintiff No.1 who claims to have stepped into the shoes of her husband, in whose favour according to the plaintiffs the lease was created vide Ext.3 dated 25.02.1948, cannot claim that she has the tenancy right over the land in question. Both the Courts below did not notice the said aspect of the matter. Hence the decree passed by the Courts below declaring the plaintiff

No.1's tenancy right in respect of the suit property cannot be sustained and therefore, is set aside.

16. This leads to the consideration of the second substantial question of law. The plaintiffs could prove the transfer of the landholder's right in favour of the plaintiff Nos.2 to 4 by virtue of the registered deeds of sale being Exts.8 to 12. The defendants claim that they are the occupancy tenant in respect of the Schedule1 land, by virtue of the transfer of the lease hold right in favour of their predecessors in interest vide Ext.A deed dated 07.06.1941 and in respect of which the khatians being Exts.C, D and H were subsequently issued in the year 1968. No evidence, however, could be laid by the defendants to demonstrate that the land mentioned in Ext.A as well as Exts.C, D and H is the same land as described in Schedule1 to the plaint. Both the courts below have recorded the concurrent finding of fact that the land in Exts.A, C, D and H is not the land described in Schedule1 to the plaint. Such concurrent finding of fact cannot be disturbed by the Second Appellate Court, no perversity in recording such finding having been demonstrated.

17. In view of the aforesaid discussion, both the Courts below have rightly decreed the suit of the plaintiff Nos.2 to 4 declaring landholder's right in respect of the part of the Schedule1 land i.e. 1 powa 4 jasti 5 pan 5 gandas of land. The decree for recovery of khas possession in respect of the said land has also rightly been passed. Hence the judgments and decrees passed by the Courts below in that regard is affirmed. The judgments and decrees passed by the Courts below declaring the plaintiff No.1's tenancy right over the Schedule1 land apart from the decree passed for recovery of khas possession in respect of the land other than the land measuring 1 powa 4 jasti 5 pan and 5 gandas is set aside.

18. The appeal is partly allowed, as indicated above. No costs.

19. The Registry is directed to draw a decree and sent down the records to the Courts below.