
(2008) 02 GAU CK 0074
In the Gauhati High Court

Syed Nabab Hussain and Others

APPELLANT

Vs

Alkas Ali and Others

RESPONDENT

Date of Decision : 15-02-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144, 145

Citation : (2008) 4 GLT 697

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Judgement

Hrishikesh Roy, J.—Heard Mr. C.K. Sharma Baruah, learned senior counsel representing the appellants/plaintiffs. Also heard Mr. S.K. Barkataki, learned Counsel representing the respondents/defendants.

2. This appeal before the Second Appellate Court is being directed against the judgment and decree dated 10.9.1999 in T.A No. 7/99 rendered by the learned Civil Judge (Sr. Dvn.), Nalbari, whereby the decree of dismissal of the suit by judgment dated 23.6.1999 and decree dated 30.6.1999 in T.S. No. 49/95 rendered by the learned Civil Judge (Jr. Dvn.), Nalbari has been upheld.

3. The case of the appellants/plaintiffs is that the plaintiffs are the raiyats (tenants) of the suit land and raiyati (khatian) has been issued in favour of the father of the plaintiffs, Syed Abdul Mazid in the previous settlement operation. After the death of the recorded raiyat Syed Abdul Mazid, the plaintiffs are possessing the land as his heirs and have been cultivating the land. After the cultivable land was dug out for use in construction of Broad Gauge Railway line, a pond was created and the plaintiffs are in possession thereof and are using the pond for rearing fish. On or about 25.7.1995, when the defendants threatened to dispossess the plaintiffs from the suit land, the Title Suit No. 49/95 was filed for declaration of tenancy rights and for confirmation to possession over the suit land along with appropriate applications for injunction.

4. The defendants entered appearance and contested the suit by filing written

statement. The defendants set up a case claiming that their predecessor in interest Mahar Ali was the raiyat of the suit land under the original land owner Tafiqur Rahman and it is they as legal heirs of the said raiyat who are in possession of land over which a pond is created on construction of railway line. It was also noted in the written statement that plaintiffs had earlier initiated proceeding u/s 144, Cr.P.C. over the suit land by filing Misc. Case No. 17/95 which was dismissed on 18.4.1995 and a second Misc. Case No. 62/95 also initiated by the plaintiffs too was dismissed on 10.7.1995 and that the name of the father of the plaintiffs got recorded as the raiyat in the settlement operation through fraudulent means.

5. On the pleadings of the parties, the following six issues were framed:

- (i) Is there any cause of action?
- (ii) Is the suit barred u/s 66 of Assam Temporarily Settled Areas Tenancy Act?
- (iii) Is the suit properly valued and proper Court fees paid?
- (iv) Was the deceased father of plaintiffs a raiyat and plaintiffs are possessing over suit land as heirs?
- (v) Are the plaintiffs entitled for a decree as prayed for?
- (vi) To what relief/reliefs parties are entitled to?

6. Evidence was produced by the parties and after conclusion of the trial, the trial Court decided issue Nos. 1 and 3 in the affirmative and in favour of the plaintiffs. Issue Nos. 2, 4 and 5 were decided in favour of the defendants and on the basis of the said conclusion, the suit of the appellants/plaintiffs was dismissed.

7. The plaintiffs challenged the decree of dismissal before the First Appellate Court contending, inter alia, that the respondents were not the tenants in respect of the suit land whereas the appellant's predecessor late Syed Abdul Mazid was the occupancy tenant and his status as occupancy tenant was duly recorded in the record of rights, in the land settlement operation carried out for recording the right of occupier, under the provisions of Assam (Temporarily Settled Areas) Tenancy Act, 1971 (hereinafter referred to as "the Tenancy Act").

It was also contended that the trial Court committed a grave error in examining and holding that the record of rights (khatian) exhibited as Ext. 1, which recorded the name of the predecessor of the plaintiffs Syed Abdul Mazid as the raiyat, has been fraudulently obtained.

8. The learned First Appellate Court took the view that plaintiffs have failed to establish the fact that they have been in possession of the suit land as raiyats. This view was taken by disregarding the khatian as it was concluded that the said record of rights was secured by the predecessor of the plaintiffs fraudulently.

The learned first appellate Court also referred to the provisions of Section 66 of the Tenancy Act where the jurisdiction of the Civil Court is declared to be barred

for certain purposes and said section reads asunder:--

66. Matters exempted from cognizance of Civil Court.--Except where otherwise expressly provided for in this Act or the Rules made thereunder, no Civil Court shall exercise jurisdiction in any of the following matters,--

- (a) Claims to enhancement, reduction or alteration of rent of holdings;
 - (b) Claims to deposit rent;
 - (c) Preparation of record of rights under Chapter X and preparation, signing, or alteration of any document contained therein;
 - (d) Maintenance of record of rights;
 - (e) Claims to restoration of possession
- under Section 54-A.

By referring to the aforesaid provisions of Section 66, the learned first appellate Court held that since the basis of the claim of the plaintiffs is the record of rights (khatian) granted under the Tenancy Act, the Civil Court is not competent to make the declaration sought by the plaintiffs and accordingly dismissed the appeal and upheld the judgment and decree of dismissal rendered by the trial Court.

9. The present second appeal is being considered on the substantial questions of law framed by the Court on 30.1.2008 as follows:

(1) Whether u/s 58 of the Tenantled Areas) Tenancy Act, 1971 the Exhibit-1 (khatian) was conclusive proof of occupancy tenancy and if so whether the learned Courts below committed illegality in dismissing the plaintiff's suit for declaration of occupancy right on the basis of such khatian?

(2) Whether the learned Courts below committed illegality in dismissing the plaintiff's suit holding that the Civil Court's jurisdiction barred u/s 66 of the Assam (Temporarily Settled Areas) Tenancy Act, 1971?

10. Mr. C.K. Sharma Baruah, learned senior counsel appearing for the appellants/ plaintiffs urges that the entire case of the plaintiffs was based on the record of rights (khatian) prepared under the provisions of the Tenancy Act in favour of Syed Abdul Mazid, the predecessor-in-interest of the plaintiffs. Such possessory rights have been inherited by the plaintiffs from their father and the entire claim of the plaintiffs is based on Ext. 1, which is the khatian containing the name of the plaintiffs' father Syed Abdul Mazid as a raiyat in respect of the suit land.

It is accordingly submitted that the trial Court ought to have accepted the of record of rights finally published under the Tenancy Act to be conclusive evidence of the possession of the plaintiffs over the suit land, till such record of rights are declared as incorrect by a competent authority/Court and since no such correction of record of rights have been made, the presumption as to the finality

for the record of rights cannot be disturbed by the Civil Court.

The learned senior counsel further submits that the defendants, in fact, had filed a Title Suit No. 1/95 to challenge the record of rights granted in favour of the father of the plaintiffs, but since the said suit was dismissed and that is why the defendants are not forthcoming with any information with regard to the said challenge made by them to the khatian.

Mr. C.K. Sharma Baruah also contends that only by taking recourse to the Appellate provisions u/s 59(1) or to the Revisional provisions u/s 59(2) of the Tenancy Act, the defendants can challenge the record of rights which was finally published under the Tenancy Act and since the present proceeding was not one such proceeding, the trial Court and the first appellate Court were entirely wrong in going behind the record of rights in giving an adverse decision against the plaintiffs by disregarding the Ext. 1 khatian.

11. Mr. S.K. Barkataki, learned Counsel representing the respondents/defendants, on the other hand, contends that it is the defendants who were in possession of the suit land and the defendant No. 1 never relinquished his possessory right in favour of the predecessor in interest of the plaintiffs, which led to recording of the name of Syed Abdul Mazid as the raiyat under the provisions of the Tenancy Act.

The learned Counsel further submits that the plaintiffs had prior to the filing of the instant suit, instituted proceeding u/s 144/145 of the Cr.P.C. and since the said proceedings did not end in favour of the plaintiffs, the plaintiffs filed the present suit and since these developments were not disclosed in the plaint, the trial Court was perfectly justified in dismissing the suit.

It is further contended that the Courts below should be construed to have the authority to examine as to whether the record of rights in favour of the plaintiffs' father was correctly recorded and if the evidences suggest that such record of rights was wrongly made the Courts can definitely go behind the khatian so recorded, in order to decide on the right of the plaintiffs to possess the suit land.

12. In the instant case, it is not in dispute that the name of the plaintiffs' father has been recorded as the raiyat (tenant) in respect of the suit land on the basis of the land settlement operation carried out under the Tenancy Act.

Section 5 of the Tenancy Act provides that occupancy rights are to be granted only in favour of a person who has been in possession of the land in question continuously for a period of three years as a tenant of the land.

Section 6 provides that an occupancy tenant shall have permanent heritable and transferable right of use and occupancy in the land.

Chapter X of the Tenancy Act provides the mode and method of preparation and maintenance of record of rights of tenants.

Section 58 provides for granting of certificate of record of rights and presumption

as to correctness of record of rights.

Section 58(4) provides that when the record of rights are produced in a suit, such record of rights shall be presumed to have been finally published and Sub-section 5 of Section 58 further provides that every entry in the record of rights finally published, shall be conclusive evidence of the matters referred to any such entry.

As earlier noted, Section 66 of the Tenancy Act bars the Civil Courts from exercising jurisdiction with regard to any matter pertaining to preparation of record of rights under Chapter X and also maintenance of such record of rights.

13. Having regard to the provisions of the Tenancy Act, as noted above, it is apparent that when record of rights are produced by a party in a suit, such record of rights shall be presumed to be finally published and shall be conclusive evidence of the matter referred to in such entry.

In the present case the plaintiffs have produced the record of rights over the suit land recording the name of their father Syed Abdul Mazid as the khatian holder and as per the provisions of Tenancy Act the possessory right of the plaintiffs could have been examined and should have been examined, only on the basis of the record of rights produced as Ext. 1 in the suit. But instead the learned trial Court as well as the learned First Appellate Courts by going behind the record of rights proceeded to conclude that the said record of rights have not been recorded bona fide in favour of the predecessor in interest of the plaintiffs and accordingly such record of rights may be disregarded to reject the claim of possession put forward by the plaintiffs.

The substantial question is whether the record of rights which is not otherwise challenged to be fake, can be disregarded by the Civil Court and whether the Civil Court is competent to go behind the record of rights to take a view that Court would not consider the record of rights produced, as conclusive evidence of the matter.

In my view the Civil Court could not have ignored the record of rights or could have ignored the record of rights to be not conclusive evidence of the right of possession put forward on behalf of the plaintiffs.

14. In the instant case the defendants have initiated proceeding to challenge the record of rights granted in favour of Syed Abdul Mazid (father of the plaintiffs) by filing T.S. No. 1/95 and it is obvious that defendants were aware of the necessity to challenge and seek correction of the record of rights recorded in favour of the predecessor of the plaintiffs. Whether a Civil Court was the appropriate forum for challenging the record of rights is a moot question and, in the face of the provisions enacted u/s 59 of the Tenancy Act, need not be answered in the present proceeding. But at the same time it is clear that it was definitely within the comprehension of the defendants that they need to challenge the record of rights granted in favour of the plaintiffs' predecessor Syed Abdul Mazid.

15. The Courts below disregarded the mandate of the Section 58 of the Tenancy Act and decided to go behind the record of rights. The plaintiff based their entire case on the record of rights granted under the Tenancy Act in favour of their father Syed Abdul Mazid and obviously the plaintiffs had no reason to challenge the said entry. It is the defendants who challenged the veracity of record of rights and at the instance of the defendants, the Civil Court by going behind the background of the record of rights took an adverse view against the plaintiffs.

16. According to me, such an exercise could not be carried out by the Civil Court on account of the specific bar imposed by Section 66 of the Tenancy Act and the Courts below erred in going behind the record of rights and holding the khatian (Ext. 1) to be unacceptable.

17. Accordingly, I am of the opinion that this second appeal is liable to be entertained and the impugned judgment and decree passed by the trial Court and the first appellate Court are liable to be set aside and quashed.

18. Ordered accordingly.

19. Consequently, the decree sought by the plaintiffs in T.S. No. 49/95 be granted.