

Form No.(J)3
 HEADING OF JUDGMENT ON APPEAL
 District :: Nalbari

IN THE COURT OF CIVIL JUDGE :::::::::::::::::::::NALBARI

Present : Himakshi Thakuria Buragohain
 Civil Judge
 Nalbari.

Saturday, the 26th day of November, 2018

TITLE APPEAL No. 03/17

From the Judgment & Decree dated 22-12-16 passed by Learned Munsiff No.1,
 Nalbari in Title Suit No.68/13.

Ghograpar Nimna Buniyadi Prathamik Vidyalaya

Represented by the

Headmaster cum Secretary,

Md. Ibrahim Ali

-----Plaintiff/Appellant

- VS -

1. Syed Nabab Hussain,

2. Syed Khursed Ali

-----Defendants/Respondents

This appeal having been heard on 8/11/2018 in presence of :-

Advocate for the Appellant :- Mr. Arup Baishya.

Advocate for the Respondents :- Mr. Dhiren Barman.

J U D G M E N T

1. The judgment and decree dated 22/12/16 passed by the Ld. Munsiff No.1, Nalbari i/c with T.S. No.68/13, are the subject matter under challenge in this present Civil first appeal.

2. Being highly dissatisfied and aggrieved with the Judgment delivered in T.S. No.68/13 which was decreed in favor of the plaintiffs vide the Judgment and decree dated 22/12/16 passed by the Ld. Munsiff No.1, Nalbari, the defendants as appellant has preferred the instant appeal on the following grounds:-

G R O U N D S

a) That the learned Munsiff committed grave error of law and facts in passing the impugned Judgment and Decree, hence it is liable to be set aside

b) That the impugned Judgment and Decree manifests miscarriage of justice in as much as there appears no prima facie material to decree the suit in favor of the plaintiff/respondent.

c) That the Learned Munsiff No.1 has erred both in law and facts in deciding the issues in its proper perspective view which causes injury and injustice to the appellant school. Hence the impugned Judgment and Decree are illegal and liable to be set aside.

d) That the impugned Decree is not a decree in view of the meaning as laid down u/s 2(2) of the Code of Civil Procedure, hence the same is liable to be set aside.

e) That the description of the suit land as given the schedule of the plaint is apparently ambiguous. So passing of the decree on such ambiguous scheduled land is not at all sustainable and is liable to be set aside.

f) That the Issues No.4/5/6/7 have the separate perspective. Hence the clubbing of those issued and deciding the same together in one finding in the

impugned Judgment is quite bad in law and is also against the spirit of the provision of Order XX Rule 5 of CPC.

g) That it is established proposition of law that the party asserting his right, title and interest must prove the same and produce the deed of his title and prove the same in the manner provided under the law of evidence. In the instant suit the basis of the claim of right, title and interest of the plaintiffs/respondents/ over the suit land is Ext.1. The Ext.1 is the certified copy of a Sale Deed No.2603/98. The Ext.1 was not any way proved by the plaintiffs during trial and thus not at all admissible in evidence. The Ext.1 was also kept under objection by the defendant/appellant during trial. The Jamabandi or records of right are not the document of the title and no decree can be passed on the basis of records of right and consequential entry in revenue papers. But the Ld. Munsiff No.1 in deciding the Issue No.4 did not consider such legal proposition and placed much reliance on Ext.4 i.e. Jamabandi and thus erroneously decided the Issue No.4. Hence the impugned Judgment and Decree are liable to be set aside.

h) That there no findings of the Ld. Court bellow in respect of Issue No.5 in the impugned Judgment.

i) That the materials available in record as well as the evidence adduced by all the PWs including the plaintiff no.1 himself during cross-examination sufficiently proved the existence of the appellant school over the land where it was established in 1944. So the claim of alleged dispossession of the plaintiff by the appellant school apparently proved to be false and baseless. But the Ld. Trial Court in passing the impugned Judgment in Issue No.4/5 did not at all consider such clear and candid evidence of the plaintiffs and consequently passed the impugned Judgment and Decree erroneously, hence the same is liable to be set aside/reversed.

j) That the evidence of the PWs including the plaintiff no.1 himself adduced during cross-examination clearly and sufficiently nullified the claim of the plaintiff/respondent. Hence the impugned Judgment and Decree is arbitrary, illegal and bad in law.

k) That the Ld. Munsiff No.1 failed to appreciate the law of burden of proof in a civil suit.

l) That it is established principle of law that the plaintiff is to prove his own case and he cannot succeed on the weaknesses of the defendant. But the trial court totally ignored such established legal principle and decreed the suit erroneously only on the failure of the defendants to adduce the evidence.

m) That the burden to prove the right, title and interest in Issue No.4 is clearly on the plaintiff/respondent to substantiate the same by adducing legal and trustworthy evidence of both oral and documentary. But the plaintiff totally failed in this aspect. As such the defendant/appellant does have nothing to prove anything by adducing evidence. Hence non-adducing of evidence by the defendant cannot be the ground for taking adverse opinion. Hence the entire Judgment and Decree are vitiated and liable to be set aside.

n) That on the materials available in records, the Ld. Court bellow ought to have decided all the issues in favor of the appellant/defendant and to dismiss the suit of the plaintiff/ respondent in Toto.

o) That in any other view of the matter the impugned Judgment and decree is liable to be set aside.

p) That the appellants reserve the right of taking additional ground(s) at the time of hearing.

q) That the appeal is preferred bonafide and for ends of justice.

3. On the above grounds the appellant has prayed for setting aside the impugned judgment and decree. After admitting the appeal the record of T.S. No.68/13 was called for and the same was received.

4. On appraisalment of the original case record, it appears that the plaintiff has filed the suit for declaration of right, title, interest and for recovery of khas possession.

5. The plaintiff's case ineralia is that the plaintiff purchased 4 katha 4 lechas of land under Dag No.594 of KP Patta No.124 of village Baghmara by registered Sale Deed No.2603/98 from one Umar Khursid. The father of the plaintiff was an occupancy tenant of that suit land and he obtained Khatian No.121 and was possessing the land as tenant till the plaintiff purchased the

land from Md. Umar Khurshid. That the managing committee of Nimna Buniadi Prathamik Vidyalaya, the defendant, installed a pucca wall covering about 1 katha 10 lechas of land which is referred to as the suit land, with the consent of the plaintiff and are now trying to extend further this wall to cover other lands. The defendant president earlier instituted a revenue appeal against the plaintiff which was rejected by order of Addl. Deputy Commissioner, Nalbari dated 31-10-2000. Thereafter, the defendants lodged a criminal case against the plaintiffs in which the plaintiffs were acquitted. During the second week of July, 2008, the defendants' school illegally started construction of a kitchen house. The plaintiffs prayed before Circle Officer, Ghograpar to stop the construction and accordingly, vide order dated 09-07-08 the Circle Officer passed the order in favour of the plaintiff.

6. Again the defendant school started construction of a wall in place of the kitchen house and the plaintiffs preferred an objection before Addl. Deputy Commissioner, Nalbari and ADC, Nalbari directed the Circle Officer, Ghograpar to settle the matter amicably. But on 22-03-12, the school, by sending one Ratan Barman threatened the plaintiffs to occupy the suit land by force. The plaintiffs stated that the school has constructed 150 mtrs of pucca wall without the consent of the plaintiffs illegally and this land, which is about 1 ½ katha is described as the suit land. Hence this case.

7. On receiving the notice the defendants No 1 to 8 appeared and filed the written statement denying all the averments made by the plaintiff. The defendants stated in their written statement that the defendants' school was established in the year 1944 and the campus of the said school is situated over a plot of land measuring 2 bigha 2 katha 1 lecha of land, which includes land of the suit patta and land of Patta No.152. There is the school building of the defendant no.1 and boundary wall over the suit land from many years. The plaintiffs did not have any possession over the suit land. The suit land has been under the possession of the defendants since 1944. The defendants stated that the suit of the plaintiff is bad for non-joinder of necessary parties, as the vendor of the plaintiffs Umar Khushid and Ratan are not made party to

the suit. The defendants stated that Ghograpar Nimna Buniadi Prathamik Vidyalaya was established in the year 1944. The campus of the suit land is situated over a plot of land measuring 2 bigha 2 katha 1 lecha which includes 1 bigha 9 lechas of Dag No.593 and 4 katha 4 lechas of Dag No.494 (suit land) of Patta No.124, i.e. the suit patta and also 9 lechas of land of Dag No.588 and 1 katha 19 lechas of Dag No.589 of Patta No.152 of village Baghmara. But the school managing committee, stage by stage on receipt of grant from the government improved the school premises, constructed school building, Anganwadi Kendra etc. Further, in the year 2003 the school got approval for another grant from the government and for that purpose as it was required, the school committee applied for a certificate of possession and then the Learned Circle Officer, Ghograpar issued one certificate of possession to the said school dated 21-06-03 stating that the school has possession over 2 bigha 2 katha 1 lecha of land which includes the suit land also. On receipt of the said grant, the school committee constructed another building of the school in the premise and also constructed pucca boundary wall in its four boundaries in the year 2003. The school is bounded on its North by Railway line, South- by Damodardham road, East- by Anowar and West-by Hari Mandir. The said land is under the possession of the defendants since 1944. So the fact of possession of the suit land by the plaintiffs or their father or vendor is totally false, baseless and absurd. The plaintiff is taking advantage of the defendants having no mutation over the suit land and has filed this false case. Hence the suit is liable to be dismissed.

8. Upon pleadings of the parties learned trial court has framed the following issues:

I S S U E S

- i) Whether there is any cause of action for the suit?
- ii) Whether the suit is maintainable?
- iii) Whether the suit is bad for non-joinder of necessary parties?
- iv) Whether the plaintiffs or their predecessor had any manner of right,

title and interest and possession over the suit land?

- v) Whether the suit land has been all along in the possession of the defendant no.1 since 1944?
- vi) Whether the plaintiffs are entitled to the relief(s) as prayed for?
- vii) To what other relief/reliefs the parties are entitled to?

9. The plaintiff side had adduced the evidence of 3(three) witnesses and exhibited 7(seven) documents only. The defendant side has neither adduced any witnesses nor has exhibited any documents.

10. The vital issue in the suit are issue No. (iv) and (v) and the result of the case is depended upon the discussion and findings in these two issues.

I have heard the Ld. Counsels for both the parties and gone through the materials on records as well as the memorandum of appeal.

FINDINGS AND REASONS THEREOF

11. **Issue No (i) is relating to the cause of action for the suit.**
The learned trial court has decided this issue in the affirmative and in favour of the plaintiff. Cause of action means "every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support to his right to a judgment of the court." In the instant suit the plaintiff has claimed the land mentioned in the schedule of the plaint by right, title and interest. The plaintiff has further alleged in the plaint that the defendant school have illegally constructed a pucca wall over the suit land and are trying to extend the wall further. The defendants on the other hand, has stated that the suit land claimed by the plaintiff is included in the land of the school which was established in the year 1944 and that the plaintiff does not have any possession over the suit land. As there is assertion of right by the plaintiff and denial of right by the defendant there is cause of action for the suit. Hence, findings of the learned trial court in issue No. (i) warrants no interference.

12. **Issue No (ii) is relating to the question of maintainability**

of the suit. In their written statement the defendant has stated that the suit is not maintainable in its present form. However, there is no specific pleading that the plaint is not in its present form or in the manner in which it should have been filed. The plaintiffs have claimed their right over the suit land by way of declaration and recovery of Khas possession. I find nothing to hold that the suit is not maintainable in its present form. Hence, the findings of the learned trial court in issue No (ii) warrants no interference.

13. Issue No. (iii) is relating to the question as to **“Whether the suit is bad for non joinder of necessary parties ?”** The defendant has stated in their written statement that the suit of the plaintiff is bad for non joinder of necessary parties as the vendor of the plaintiffs Omar Khursid and Ratan are not made parties to the suit. The plaintiff have filed this suit praying for a decree for declaration of his right, title, interest over the suit land and for recovery of khas possession by erecting the defendant's school from the suit premises. The necessary party is a person or entity whose interest are at stake in the outcome of a law suit , whose absence as a party in the suit prevents a judgment of all issues, but who can not be joined in the law suit because that would deny jurisdiction of the particular court. A necessary party is a party in the law suit whose participation is required for jurisdiction or for the parties of rendering judgment. Often a necessary party is any party whose rights are directly affected by dispossession of the case. In our case the plaintiffs has claimed all the relief against the present defendant by alleging that the defendant has disposed them from the suit land. In the event a decree is granted to the plaintiff, the rights of Omar Khursid and Ratan will not be effected in any manner as the plaintiff did not claim any relief against them. Accordingly the learned Munsiff has rightly decided this issue in favour of the plaintiff and as such issue No. (iii) warrants no interference and the same is upheld.

14. Coming up next for discussion is issue No (iv) which is contingent upon the question as to **“ Whether the plaintiffs or their predecessor had any manner of right, title and interest and**

possession over the suit land ?”

In their pleadings the plaintiff has pleaded that vide registered sale deed No. 22306/98 they had purchased 4 katha 4 lechas land covered by Dag No. 594 of KP patta No 124 from Md. Umar Khursid, S/O- Late Mahabudar Rahman. According to the plaintiffs their father was an occupancy tenant of this land and he obtained Khatian No. 121 and was also possessing the land as tenant till the plaintiff purchased this land from Md. Umar Khursid and were possessing it in continuation of earlier possession held by their father.

15. Now, if we go through the sale deed marked as Exhibit-1 vide which the plaintiff has claimed to have purchased the land, it appears that the same is a certified copy. It is also revealed from the cross-examination of PW 2 that he did not take any permission from the court before filing of the certified copy. A brief perusal of the pleadings of the plaintiffs also reveals that they have not mentioned anywhere about the loss or whereabouts of the original sale deed. Hence, Ext-1 can not be taken up into consideration as the same is not admissible.

16. In this connection the learned counsel for the appellant has drawn my attention to a decision of the **Hon'ble Gauhati High Court cited in GLJ 2016 (6) 223** wherein it is held that “defendant claiming over the land on the basis of registered sale deed but failed to substantiate the claim by producing the documents of the title. Certified copy of the sale deed was sought to be introduced by the defendant, same was not considered by the court below on the ground that there was no explanation for non availability of the original deed. Incumbent upon the defendant to produce title document in support of their claim - 2nd appeal dismissed.”

17. In order to prove their title the plaintiff has also exhibited the Jamabandi of patta No. 124 which is marked as Exhibit-4. Though the names of the plaintiffs are seen mutated in the records of right. It is a settled law that mere mutation entries does not confer title. As the plaintiff failed to establish their title over the suit land, this issue is decided in the negative and in favour of the defendant/ appellant.

18. The next issue taken up for discussion is issue No. (v) which is contingent upon the question as to **"Whether the suit land has been all along in the possession of the defendant no.1 since 1944 ?"**

The plaintiffs have also alleged in their pleadings that the Managing Committee of the 'Nimna Buniadi Prathamik Vidyalaya' i.e. the defendant have installed a pucca wall covering about 1 katha 10 lechas land without any consent of the plaintiffs and now they have arranged to extend this wall further to cover other land. It is also alleged by the plaintiffs that during the second week of July, 2018 the defendant school illegally started construction of kitchen house as per publicity given by the school managing committee which was stopped by the Circle Officer, Ghagrapar vide order dated 9/07/08 as prayed for by the plaintiffs. Thereafter the defendant school again started construction of a wall in place of a kitchen and the plaintiffs then preferred the petition before the Addl. DC, Nalbari vide order dated 19/07/2010 wherein the C.O., Ghagrapar was directed to settle the matter amicably. But on 22/03/2012 the school by sending one Ratan Barman threatened the plaintiffs to occupy the suit land. As a result of this the Addl. D/C, Nalbari vide order dated 22/03/2012 in case No 36^M/12 prohibited the 2nd party from entering into the land.

19. On going through the prayer portion of the plaint we find that the plaintiff has made a prayer for recovery of Khas possession by erecting the defendant school and to restore possession. However, on perusal of the pleadings of the plaintiff it appears that they have nowhere mentioned any date of dispossession from the suit land by the defendants. At this point the learned counsel for the appellant has also drawn my attention to the dates of cause of action and it appears that the same are not the date of dispossession.

20. If we go through the cross-examination of PW-3, we find him stating that the defendant school has occupied some of Nabab Hussain's land and the committee has constructed latrine and bath room over the same. But

on perusal of the pleading we find that the plaintiffs has nowhere stated anything about the construction of latrine and bath room over the suit land. On the other hand PW 1 has stated in his cross-examination that the school committee tried to take over the possession of the suit land but could not take possession of the same. Hence, we find two contradictory statements in the evidence of PW 1 and PW 3. We also find PW 1 stating in his cross-examination that the school is very old and the school is on the same land where it was established. PW-3 also stated in his cross-examination that Ghagrapar Nimna Buniadi Prathamik Vidyalaya was established before the independence and was in the same place since then. Surprisingly we find PW 3 stating in his cross-examination that he does not know for which land the plaintiff has filed this case. Coming to the cross-examination of PW 2 who is the plaintiff in this case we find him also stating that Ghagrapar Primary School was established before independence and was there even before his birth. It is also revealed from the evidence of the PWs that there is a BEEO and Anganbadi Centre inside the school campus. PW 2 also stated that the building is in the land of the school. From the evidence of the PWs it appears that the school is in the land where it was established since long and has not encroached any land of the plaintiff.

21. Last but not the least the learned counsel for the appellant has drawn my attention to the schedule of the land in the plaint. It appears from the pleading that there are two parts in the schedule of the land given in the plaint. In one part the land which is claimed by the plaintiff to have been purchased measuring 4 katha 4 lechas under Dag No 594 is described and is shown to be bounded on the North by railway line, on the East by Rafiq Choudhury, on the South by PWD Road, on the West by Prathamik Vidyalaya which has occupied 1 katha 10 lechas of the plaintiff's land. In the 2nd part of the schedule the plaintiff has again described the suit land measuring 1 K 10 L on the western side of the land measuring 4 K 4 L and the same is shown to be bounded on the North by a Railway line, on the East by plaintiff, on the South by PWD road and on the West by plaintiff's land i.e. 1 K 10 L of land occupied by the defendants by erecting pucca land. From the two parts

mentioned in the schedule it appears that the schedule of the suit land is ambiguous as the plaintiff had mentioned another 1 katha 10 lechas of land as the suit land on the Western boundary of the suit land measuring 1 katha 10 lecha of land, as seen in the second part of the schedule. From this description of the suit land it is clear that the plaintiffs are not aware about area of the land claimed by them.

22. Hence, in view of the above discussion it appears that the learned court below wrongfully decided this issue in favour of the plaintiff and the same needs interference. Situated thus issue No (v) is decided in the affirmative and in favour of the defendant/ appellant.

23. **Issue No (vi) and (vii) are relating to the reliefs claimed by the parties.** It is already discussed in the previous issue that the plaintiff could not prove his right title interest over the suit land. Considering all aspects the plaintiff is not entitled to any relief as claimed for.

24. The learned trial court without going to the root of dispute between the parties and without making any effort to discern the truth superficially dealt with which resulted in decree of the suit. As such the judgment and decree passed in TS No. 68/13 dated 22/12/16 is perverted and the same is liable to be set aside.

O R D E R

25. In the result the present 1st Civil Appeal is partly allowed on contest with cost.

The judgment and decree dated 22/12/2016 passed by the learned Munsiff No.1, Nalbari in TS No. 68/13 is hereby set aside.

Prepare a decree accordingly.

Send down the original case record being Title Suit No. 68/13 to the Court of the first instance with a copy of the judgment forthwith.

Given under my hand and seal of this court on this the 26th day of
November/2018.

Civil Judge
Nalbari

Dictated & Corrected by me

Civil Judge
Nalbari