

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.

Wednesday, the 27th day of February, 2019

TITLE APPEAL No.02/16

From the Judgment & Decree dated 23-12-15 passed by Learned Munsiff No.1,
Nalbari in Title Suit No.56/10.

**i) Sri Arun Baishya and
ii) Sri Anil Baishya**

-----Appellants/Defendants

- VS -

**i) Sri Naba Kr. Baishya and
ii) Sri Minati Baishya**

-----Respondents/Plaintiffs

This appeal having been heard on 30-01-2019 in presence of :-

Advocate for the Appellants :- Md. Islam Gajiur Rahman

Advocate for the Respondents :- Mr. Manabendra Sarma

J U D G M E N T A N D O R D E R

1. The judgment and decree dated 23.12.15 passed by the Ld. Munsiff No.1, Nalbari i/c with T.S. No.56/10, 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.56/10 in which the case was decreed on contest with cost vide the Judgment and decree dated 23.12.15 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

- 1) That the order/judgment of the Ld. Munsiff No.1 is bad for law and facts.
- 2) That the order/judgment of the Ld. T.M. is highly improper, perverse and self contradictory. Hence liable to be set-aside.
- 3) That the Ld. Munsiff did not apply her judicious mind at the time of passing the order.
- 4) That the order/judgment of the Ld. T.M. is illegal and improper. Hence liable to be set-aside.
- 5) That the order/judgment of the Ld. T.M. is miscarriage of justice.
- 6) That at the time of issue discussion particularly Issue No.3 the Ld. T.M. has given wrong findings as because the Sale Deed NO.1525/83 was executed by the father of the Plaintiff No.1 during his lifetime on the

other hand the Plaintiff has instituted this suit in the year 2010 after 27 years. But Ld. T.M. did not apply her judicious mind and did not decide the said issue properly. Hence the impugned judgment of the Ld. T.M. is liable to be set-aside.

- 7) That the Ld. T.M. discussed the Issue No.4, 5, 6 & 7 jointly. The Ld. T.M. did not properly peruse and scrutinize the oral and documentary evidence of the parties at the time of passig the order/judgment.
- 8) That the Ld. T.M. only gave strength on the evidence of the scientific officer who is the handwriting expert. But Ld. T.M. did not pay any heed in respect of the objection petition of the defendant i/c with expert opinion. The Ld. T.M. did not given did not apply have judicious mind at the time of issue discussion in connection with the Issue No.6 as because expert opinion is not primary evidence it is always used as secondary evidence. Hence the order/judgment of the Ld. T.M. is liable to be set-aside.
- 9) That the improper and illegal order/judgment of the Ld. T.M. has caused great hardship and irreparable loss to the defendants/appellants.
- 10) That the impugned order/judgment T.M. is liable to be set aside by the above mentioned grounds amongst others.

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.56/10 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, cancellation of sale deed, precept, khas possession and other consequential relief.

5. The Plaintiffs case interalia is that the Plaintiff No.2 is the mother of the Plaintiff No.1. A plot of land measuring 2 katha 8 lecha covered by Dag No.974 Patta No.31 of village Moruwa is the suit land which was the property of Kanak Chandra Baishya, father of the plaintiff No.1. Plaintiff's father expired in the year 1983. The defendant No.1 used to cultivate in this land on adhi basis for few years between 1983 to 2007. In the years 2007, 2008 and 2009 also the defendant No.1 used to cultivate the land themselves, but the defendant No.1 ploughed the suit land, defying the resistance of the Plaintiffs. The defendant No.1 claimed the suit land to be his purchased land. The plaintiff instituted a case u/s 145/146 CrPC and the suit land was attached. Defendant No.1 appeared and filed written statement stating that he has purchased the suit land by executing Sale Deed No.1525/83. The Plaintiffs obtained certified copy of the Sale Deed and found that the signatures of Kanak Chandra Baishya were forged signatures in the Sale Deed. The defendants forcefully entered upon the suit land on 01.06.10. The defendants did not have mutation but after the institution of this suit they have applied for mutation.

6. On receiving notice the defendants stated in their written statement that there is no cause of action, that the suit is not maintainable, that the suit is barred by limitation. The defendants stated that the real fact is that the father of the plaintiff No.1 Kanak Chandra Baishya had sold 2 katha 4 lecha land to defendant No.1 was executing Sale Deed 1525/83 and handed over possession of the land. The defendants are in possession of the suit land since the date of purchase but the plaintiffs instituted 65^m/10 u/s 145/146 CrPC against the defendant. Later on the plaintiffs failed to adduce any evidence so the case was dropped. The defendants stated that the suit is liable to be dismissed. The defendants filed counter-claim stating that the case 65^m/10 was decided on merit and the plaintiffs tried to suppress the fact. The defendants have filed application before Circle Office for mutation. The defendants has prayed for confirmation of possession and for necessary precepts.

7. The plaintiffs filed written statement on counter-claim contending inter

alia that the plaintiff have all along been in possession of the suit land till they were dispossessed. According to the plaintiff the defendants were allowed to cultivate on the suit land on Adhjar basis. Hence the counter-claim 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 and the counter-claim?
- ii) Whether the suit is maintainable in its present form?
- iii) Whether the suit is barred by limitation?
- iv) Whether the plaintiffs have right, title and interest over the suit land?
- v) Whether the Sale Deed No.1525/83 is forged one and liable to be cancelled?
- vi) Whether the Defenants have right, title and interest over the suit land by means by purchase by Sale Deed No.1525/83?
- vii) To what other relief/reliefs the parties are entitled to ?

9. The plaintiff side had adduced the evidence of 5(Five) witnesses and exhibited 15(Fifteen) documents. The defendant side has also adduced the evidence of 4(Four) witnesses and has exhibited 7(Seven) documents.

The vital issue in the suit are issue No. (iv), (v) and (vi) and the result of the case is depended upon the discussion and findings in these three 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.

F I N D I N G S A N D R E A S O N S T H E R E O F

10. **Issue No.(i) is relating to the cause of action for the suit.** Cause of action means every fact which if traversed, it would be necessary for the plaintiff to prove in order to support of his right to a judgment of the court. In

the instant suit the plaintiffs has claimed the suit land to be their ancestral property. The plaintiffs also alleged that the defendants forcefully entered into the suit land on 01-06-10. The defendant, on the other hand, has stated that the father of the plaintiff no.1, Kanak Ch. Baishya had sold 2 katha 4 lechas land to defendant no.1 by executing Sale Deed No.1525/83 and handed over the possession of the land to him and since then the defendants are in possession of 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.

11. **Issue No.(ii) & (iii) is relating to the maintainability and limitation of the suit land.** There is no specific pleading as to why the suit is not maintainable in its present form or in the manner in which it should have been filed. The plaintiff has claimed for declaration, cancellation of Sale Deed, precept, Khas possession and other consequential relief. The plaintiff has also filed proper court fee i/c with the value of the suit.

12. The defendants has taken the plea in their pleading that the suit is barred by limitation as the sale deed was executed in their favor in the year 1983. But from the pleadings of the plaintiffs itself it is revealed that they came to know about the alleged sale deed executed in favor of the defendants in the year 2010 at the time of filing a case u/s 145/146 CrPC after they were dispossessed from the suit land by the defendant.

13. In my opinion the suit is filed within limitation and is maintainable in its present form.

14. For the sake of convenience Issue No (iv) and (vi) are taken up together for discussion Issue No.(iv) & (vi) are contingent upon the question as to:

“Whether the plaintiffs have right, title and interest over the suit land ?”

and

“Whether the defendants have right, title and interest over the

suit land by means by purchase by Sale Deed No.1525/83 ?”

In their pleadings, the plaintiffs has stated that the defendant No. 1 had cultivated on their land on Adhi basis in between 1983 to 2008 though not continuously and in lieu of that they were given half of the crops produced. In the year 2010, the plaintiffs prepared to cultivate their land themselves by hiring helper. But on 01/06/10 the defendant No 1 defying the resistance of the plaintiffs ploughed the suit land by claiming the same to be his own. The plaintiffs thereafter instituted a case u/s 145/146 CrPC vide Case No.65^M/10. On his appearance the defendant No 1 submitted Written Statement whereby he claimed that the suit land is purchased by him vide Sale Deed No.1525/83. According to the plaintiffs the Sale Deed No.1525/83 is a forged and fraudulent document.

15. The defendant No. 1 & 2 on the other hand has taken the plea in their written statement that they had purchased 2 Katha 4 Lechas land out of 2 Katha 8 lechas land in PP No. 974 of Dag No 31 from Kanak Ch. Baishya after execution of Regd. Sale Deed No.1525/83 and has been in the possession of the same till date.

16. During the course of argument the learned counsel for the plaintiff respondent has submitted that in the plaint itself the plaintiff stated that a document bearing signature of Late Kanak Ch. Baishya is preserved by the plaintiff as a "Memento" and the same will be produced in the case for comparing the signatures of the sale deed in Forensic Science laboratory. According to the learned counsel for the plaintiff/ respondent the defendant did not object this plea taken by the plaintiff in their written statement.

The learned counsel for the plaintiff further submitted that the FSL gave report that the signature of Kanak Ch. Baishya did not tally with the signature in Sale Deed No.1525/83 and the expert was also examined i/c with that.

17. In reply the learned counsel for the defendant submitted that the expert opinion is not always the conclusive proof. According to the learned

counsel Section 60, 61, 62 & 63 of the Indian Evidence Act alone speak that the first and foremost reliable evidence is valid documents. The learned counsel further submitted that the plaintiff had send one Samabay Samittee receipt and Sale Deed No.1525/83 before the hand writing expert. In this respect the defendant side vehemently objected the said documents. The learned counsel for the defendant also submitted that they were not present at the time of sending the Sale Deed No.1525/83 and the Samabay Samittee receipt to the Commissioner. The learned counsel for the defendant/appellant further submitted that the expert opinion in the present case is not at all admissible and reliable.

18. On perusal of the case record it transpires that a petition was filed by the plaintiff U/O 26 Rule 10 of CPC R/W Sec. 151 CPC on 06-04-11 for commission of hand writing expert. It is also revealed from the said petition that a copy of the same was received by the defendant on that day itself. While disposing of the petition vide order dated 9/5/11 the then learned Munsiff No. 2, Nalbari has clearly mentioned in the said order that the defendant side has no objection to the prayer for commission. It is also seen that the document purported to contain the signature of Kanak Ch. Baishya was also filed on the same day. The learned counsel for the defendant also submitted that though they had filed a petition under Order 26 Rule 12 r/w Sec. 151 CPC for examination of the specimen signature of Kanak Ch. Baishya and objected the expert opinion, their petition was rejected.

19. Record reveals that the defendant did not file any revision against the order dated 23-11-11 passed by the Ld. Munsiff No.2, Nalbari. If they were so much prejudiced with the opinion of the handwriting expert they were at liberty to file a revision against the order rejecting their prayer for re-examination of specimen signature of Kanak Ch. Baishya.

20. Regarding the genuineness of the receipt of Samabay Samittee containing the signature of Kanak Ch. Baishya, it appears that the defendants did not cross-examine the PWs on that point. Apart from that it is very clear

from the order dated 9.5.11 passed by the then Munsiff No. 2, Nalbari, that the said Samabay Samittee receipt was filed in presence of both the parties and at that time the defendants did not object the same.

21. Finally, if we go through the evidence of the expert who was examined as PW 1 we find him stating that the person who wrote the blue enclosed signatures stamped and marked as B1 to B 5, did not write the red enclosed signature stamped and marked as A 1. In his cross-examination also PW 1 stated that he found the fundamental differences between the two sets of signatures in both the documents.

22. Exhibit 1 which is the opinion of the handwriting experts reveals that the person who wrote the blue enclosed signatures stamped and marked as B1 to B5 did not write the red enclosed signature stamped and marked as A 1. Exhibit 3 which is the reasons for opinion reveals that the dissimilarities found in the signatures marked B1 to B5 and the signature marked A1 are significant and sufficient to prove their different authorship.

23. Another important aspect to which the learned counsel for the plaintiff respondent has brought my notice is the fact that the area of the suit land as mentioned in schedule A is 2 Katha 8 lechas and the sale deed as mentioned in schedule B of the suit land was for 2 Katha 4 Lechas. In para No. 7 of the original written statement the defendant did not deny the area of the suit land as mentioned in the schedule A of the plaint. But in para No. 17 of the said Written Statement the defendant stated that the area of the suit land is not 2 Katha 8 lechas but is 2 katha 4 Lechas. Again in para 'Ka' of the additional written statement the defendant has stated that they have purchased 2 katha 4 lechas land out of 2 Katha 8 lechas in the suit patta and dag by Sale Deed No. 1525/83. These two contradictory statements raises a doubt in our mind regarding the genuineness of the plea of the defendant.

24. Another important aspects which is to be looked into is that if the plaintiff sold 2 katha 4 lechas land out of 2 katha 8 Lechas land, the name of the plaintiff should have been found in at least one boundary. But if we go

through the schedule of the sale deed there is no mention of the plaintiff in any of the boundary. Hence, from the above discussion it is very clear that the Sale Deed No.1525/83 is a forged one and as such the same is liable to be cancelled and the defendant can not claim right title interest over the suit land by means of purchase vide Sale Deed No.1525/83.

25. From the above discussion it is very clear that the Sale Deed No. 1525/83 is a forged one. As the Sale Deed No.1525/83 through which the defendant has claimed to have purchased the suit land is forged and liable to be cancelled, it is not the defendant who they have no right title interest over the suit land, but the plaintiffs. In view of the above discussion it appears that the finding of the Ld. Trial Court in Issue No.(iv) and (vi) warrants no interference and the same is upheld. Situated thus, Issue No.(iv) and (vi) are decided in favor of the plaintiff.

26. Coming up next for discussion is Issue No. (v) which is contingent upon the question as to,

“Whether the Sale Deed No.1525/83 is forged one and liable to be cancelled?”

It is already discussed earlier that the plaintiff's has claimed the suit land by right of inheritance. According to plaintiffs the defendants used to cultivate on the suit land on Adhi basis and taking advantage of this, they dispossessed the plaintiffs from the suit land.

27. The learned counsel for the respondent has drawn my attention to the fact that though the defendant has taken the plea that they have purchased the suit land in the year 1983, they did not mutate their name in the suit land till the year 2010. This has been confirmed by DW 1 in his cross-examination while stating that since the date of submission of sale deed his name is not mutated in the suit patta. DW 1 also stated that he did not file any case for mutation of his name. DW 2 also stated that they did not mutate their name in the suit land. However, there is no any explanation as to why the defendants failed to mutate their name over the suit patta though they claimed to have

purchased the land in the year 1983.

28. Now if we go through the cross of PW 4 we find him stating that the land was given to Arun and Anil Baishya on the basis of Adhi for 3 years. PW 3 also clearly stated in his cross that he had seen the defendants taking over the possession of the suit land.

29. DW 3 who is the son-in-law of defendant No.1 stated in his cross examination that his house is situated near the house of the defendants. DW 3 also stated in his cross that after marriage he saw his father-in-law cultivating over the suit land. From this statement of DW 3 we can assume that though his house is situated near the suit land, he saw the defendant No.1 cultivating over the suit land only after his marriage. To our surprise we also find DW 3 stating in his cross that he does not know in what manner the defendant No 1 has been cultivating over the suit land.

30. If we carefully peruse the evidence of the witnesses we find that all of them are interested witnesses except PW 2. On going through the cross of PW 2 we find him clearly stating that he had seen Arun cultivating the suit land and that it is in his knowledge that Arun was an adhiar on the suit land.

31. I have gone through the Chitha Namjari marked as Exhibit-11. It appears that the name of the plaintiffs Naba Kumar Baishya and Minati Baishya are mutated in the Chitha in place of Kanak Baishya way back in the year 2000. PW-2 has also stated in his cross that the names of the plaintiffs were mutated in the year 2000.

32. Under the above circumstances it is clear that the Sale Deed No.1525/83 is a forced one and liable to be cancelled. Hence, the finding of the Ld. Trial Court in this issue warrants no interference and the same is upheld. Situated thus Issue No.(v) is decided in the affirmative and in favor of the plaintiff.

33. **Issue No.8 is relating to the relief claimed for by the parties.** In view of the above discussions the appellants/defendants are not entitled to any relief as prayed for. The Ld. Trial Court has rightly decided all the issues are in favor of the respondents/plaintiffs.

O R D E R

34. In the result, the present first Civil Appeal is bereft of merit and thus, the same stands dismissed on contest with cost.

The impugned Judgment and Decree dated 23-12-15 in T.S. No.56/10 passed by the Learned Munsiff No.1, Nalbari is hereby affirmed.

Draw up a decree accordingly.

Send down the original case record being T.S. No 56/10 to the court of the first instance with a copy of the Judgment forthwith.

Draw up a decree accordingly.

Given under my hand and seal of this court on this the 27th day of February/2019.

Civil Judge
Nalbari

Dictated & Corrected by me

Civil Judge
Nalbari