

IN THE COURT OF CIVIL JUDGE NO. 2, KAMRUP, GUWAHAI.

Present : ***Sri S.N. Sarma , LLM. AJS,***
Civil Judge No. 2,
Kamrup, Guwahati.

Reference : ***Title Suit No. 36/09***

Plaintiffs : 1. *On the death of Jogen Das,*
his legal representatives are -
a) *Smti. Alaka Das*
b) *Sri Haren Chandra Das*
c) *Sri Putul Das*

2. *Sri Giridhar Das*

vs

Defendants : ***Sri Manik Ch. Das & 11 others.***

For the plaintiffs : ***Sri G. Agarwal , Advocate***

For the defendants : ***Sri Kamal Barman , Advocate***

Date of hearing : ***22/8/12***

Date of Judgment : ***30/8/12***

JUDGEMENT

1. *This is a suit for declaration an injunction .*

The brief of the plaintiff's case is that the plaintiffs No. 1 and 2 are the sons of Late Saruram Das. The main defendant No. 1 and proforma defendants No. 5 to 8 are also the sons of Late Saruram Das. The proforma defendants No. 9 to 12 are the sons of Late Maheswar Das (Mali). An area of land measuring 8 bighas 1 katha was purchased by Sri Jogen Das (plaintiff No. 1) and late Maheswar Das from Sri Ramesh Chandra Sarma vide a registered sale deed dated 3/2/59 under Dag No. 430 and Patta No. 145 at village Mirzapur, Mouza Ramcharani, District Kamrup. The aforesaid Dag No. 430 and Patta No. 145 were converted to Dag No. 439 and 441, Patta No. 195 by the authority. The aforesaid portion of the land was divided equally between Sri Jogen Das and Late Maheswar Das , holding by each an area of land measuring 4 bigha 10 lechas. After the death of Maheswar Das, holding by each an area of land measuring 4 bigha 10 lechas belonging to plaintiff No. 1 was given away to plaintiff No. 2, main defendant No. 1 and proforma defendant Nos. 5 to 8. The aforesaid area of land was given by the plaintiff No. 1 to his brothers on sympathetic ground but there has been no proper division of the property as the plaintiff No. 1 never ever transferred any portion of the land belonging to him under the aforesaid dag and patta in a proper legal way. The plaintiff No. 1 had allowed plaintiff No. 2, main defendant No. 1 and proforma defendant Nos. 5 to 8, to use their respective portion of land. The area of land measuring 4 bighas 10 lechas belonging to Sri Jogen Das is under Dag no. 441 and 439 , Patta No. 195 as per record of revenue authority and there has been no official

partition of the said land till the date. The plaintiff No. 1 had allowed the defendant No. 1 and the proforma defendants No. 5 to 8 including the plaintiff No. 2 to use the land on good faith as they are from the same family. There was a family division among the plaintiffs and defendant No. 1 and proforma defendants No. 5 to 8 in respect of land measuring 4 bighas 10 lechas under dag No. 441 & 439 , patta no. 195 vide family Bibhag Nama dated 22/1/95 which is not a registered deed. But, in the said Bighag Nama, nothing has been mentioned in respect of the exact area of land under any specific dag no patta number. As there was no proper division of land measuring 4 bighas 10 lechas under Dag No. 441 and 439 Patta No. 195 none of the persons whose names are mutated in the Record of Rights in respect of the aforesaid land having absolute right to transfer any portion of the said land to outsider without prior consent from the plaintiff No. 1. Even though the names of plaintiff No. 2, defendant No. 1 and proforma defendant Nos. 5 to 8 are mutated in the record of rights, there is no division of particular area against which such names are mutated. As such, it is clear from the record of revenue authority that there is no proper partition of aforesaid land of plaintiff No. 1. A notice has been issued in M. Case No. 16/08-09 by Circle Officer in the name of plaintiffs with a direction to them to be present at the land mentioned in the schedule of said notice bearing Dag No. 441 and patta No. 195. In the said notice, the area of land has been mentioned as 3 kathas 7 lechas and it has been stated in the notice that defendant No. 1 has filed an application before the Circle officer praying for measurement of the schedule land. As per revenue record, there has been no partition in the aforesaid area of land mentioned at schedule – B till the date and the land measuring 4 bighas 10 lechas still belongs to plaintiff No. 1 who, out of sympathy and affection, had allowed the

defendant No. 1 and proforma defendants No. 5 to 8 to use some portion of the land mentioned at schedule B and C. As there is no specific area of land mentioned in the

record of rights under dag Nos. 439 and 441 , patta No. 195, the defendant No. 1 has no authority to go for measurement of boundary before proper partition is made officially by the competent authority. As per revenue record , the names of plaintiffs as well as defendant No. 1 and proforma defendant Nos. 5 to 12 are mutated against Dag No. 441 and Patta No. 195 whereas the revenue record of office of Deputy Commissioner , Kamrup(M), the names of aforesaid parties are mutated against Dag Nos. 441 and 439 under patta No. 195. In spite of objection raised by the plaintiffs as well as proforma defendants No. 5 to 8 for not to sell any portion of the land under Dag no. 439 and 441, patta No. 195 without prior consent of the plaintiffs, particularly plaintiff No. 1. But , the defendant No. 1 refused to take permission from them and has decided to sell the land to an outsider. The defendant No. 1 has executed a sale deed which has been registered as Sale Deed No. 1592 dated 10/2/09 in favour of defendant No. 2, without prior permission of the plaintiffs, as the plaintiff No. 1 is the owner of the disputed land and plaintiff No. 2 is a co-pattadar. As the disputed land is still under common dag and patta Nos. and the plaintiffs and proforma defendants 5 to 8 are co-pattadars, the defendant No. 1 has transferred the schedule C land to the defendant No. 2 without any authority. Hence, the registered sale deed No. 1592 dated 10/2/09 executed by defendant No. 2 is liable to be canceled and as such prays for declaring the land measuring 4 bighas 10 lechas under Dag nos. 441 and 439, Patta no. 195 as mentioned in the schedule B as an undivided property belonging to plaintiff no. 1, declaring the registered sale deed no. 1592 dated 10/2/09 as null and void as has been executed by the

defendant No. 1 in favour of the defendant No. 2 in violation of Revenue Rules and thereby canceling the same, mentioned in schedule D, directing the defendant No. 1, not to sell/transfer/mortgage any portion of schedule B and C property to anybody without prior consent of plaintiffs and also to give preference to plaintiff No. 1 in case of further sale and for grant of permanent injunction restraining the defendant No. 1 not to

transfer/sale/mortgage the schedule land to any outsider without prior permission from plaintiff No. 1 and for direction to defendant Nos. 3 and 4 not give permission to the defendant No. 1 in registering sale deed in the event of sale of the land mentioned at schedule B and C and also for issue of precept.

2. *Defendant No. 1 contested the suit by filing written statement. The suit proceeded ex-parte against the defendant No. 2. The names of defendant No. 3 and 4 were struck out vide order dated 15/12/10 . The case of the defendant No. 1 is that the suit is not maintainable in the present form. The Deputy Commissioner Kamrup and the Circle Officer, Azara, Kamrup having been impleaded as main defendant in the suit , the State Government is a necessary party in the suit and without impleading the Government of Assam, the suit cannot be proceeded and is liable to be rejected. The suit is hit by Section 80 of the Code of Civil Procedure in as much as the plaintiffs ought to have served two months notice on the State Government and the Govt. officers before filing the suit and that having not done and as such the suit is bad and is liable to be rejected. The suit is barred by limitation. As the plaintiffs have already amended the plaintiff and plaintiffs were very much aware about the transfer of the land and in fact the plaintiff No. 1 offered a negligible amount for the land which was not acceptable to the defendant and as such the*

defendant had to transfer the land lawfully due to urgent necessity to the defendant No. 2 by executing a sale deed dated 10/2/09 which are very much known to the plaintiffs and never objected at the time of execution of the sale deed. The true fact is that the plaintiff No. 1, 2 defendant No. 1 and the defendant No. 5 to 8 are the sons of late Saru Ram Das. Late Saru Ram Das i.e. the father of the answering defendant and plaintiff No. 1 and 2 at the time of his second marriage purchased the piece of land in the name of the plaintiff No. 1 jointly with Late Maheswar Das (uncle of the plaintiff No. 1 and

defendant No. 1) . The total area of land purchased jointly was 8 bighas 12 katha which was later on distributed between the families of late Maheswar Das and the plaintiff No. 1 equally. The defendant No. 1 was in occupation of 1 bigha 1 katha 13 lechas covered by Dag No. 441 and 439 of Kheraj Miyadi Patta No. 195 of village Mirzapur and accordingly his name was mutated along with the plaintiffs by an order dated 16/2/68 passed by S.D.C. In Mutation Case No. 42/1967-68. The defendant occupied his 1 bigha 1 katha 13 lechas of land from March, 1959 openly, adversely and notoriously against the plaintiff No. 1 in spite of repeated objection raised by the plaintiff No. 1. The plaintiff No. 1 ought to have filed the suit within 12 years when the possession of the defendant No. 1 became adverse to the plaintiff and as such the defendant has acquired title of the land by way of adverse possession and the plaintiff cannot put any condition and as such prays to dismiss the suit with cost.

3. *After going through the pleadings of the parties and hearing both sides , following issues were framed :*

- 1. Whether the defendant No. 1 was occupying the suit land on the basis of a family settlement called Bibhag Nama dtd. 22/1/95 ?*
- 2. Whether the sale executed through sale deed No. 1592 dated 10/2/09 is an illegal sale ?*
- 3. Whether the defendant No. 1 had acquired title over the suit land because of this possession over the same from March, 1959 ?*
- 4. Whether the plaintiff is entitled to a decree as prayed for ?*
- 5. Whether the suit is maintainable on the ground that the Govt. is not made party to the suit when the D.C. And Circle Officer are impleaded also when*

notice U/S 80 CPC was not served ?

6. Whether the defendant No. 1 has absolute right, title and interest over the suit land to transfer the same without taking consent from the plaintiff ?

4. In respect of the claim of the plaintiff, plaintiff side exhibited following documents :

- 1. Exhibit – 1 is the copy of sale deed dated 3/2/59*
- 2. Exhibit – 2 is the copy of Jamabandi*
- 3. Exhibit – 3 is the copy of notice*
- 4. Exhibit – 4 is the copy of Jamabandi*
- 5. Exhibit 5 is the copy of sale deed dated 10/2/09*
- 6. Exhibits- 6 and 7 are the revenue receipts*

5. Plaintiff adduced evidence of following witnesses :

- 1. P.W.1 – Naresh Das*
- 2. P.W.2 – Giridhar Das*
- 3. P.W.3. - Jiten Das (Mali)*
- 4. P.W.4 - Bhabesh Das (Mali)*
- 5. P.W.5. - Chabin Ram Das*

6. Defendant examined one witness namely D.W.1 Manik Das . He did not exhibit any document.

I have heard learned counsel for both sides.

7. *It is pleaded by the defendant No. 1 that the Deputy Commissioner Kamrup and the Circle Officer, Azara, Kamrup having been impleaded as main defendant in the suit , the State Government is a necessary party in the suit and without impleading the Government of Assam, the suit cannot be proceeded and is liable to be rejected. The suit is hit by Section 80 of the Code of Civil Procedure in as much as the plaintiffs ought to have served two months notice on the State Government and the Govt. officers before filing the suit and that having not done and as such the suit is bad and is liable to be rejected.*

8. *On scrutiny of the record it appears that on 15/12/10 in pursuance of an application filed by the plaintiff praying to strike out the names of defendant No. 3 and 4 this court was pleased to allow the prayer . Accordingly, names of defendant No. 3 and 4 were struck out from the plaint. As the names of defendant No. 3 and 4 has been struck out this issue has become redundant.*

ISSUE NO. 1

9. *Plaintiff in his pleadings stated that there was a family division among the plaintiffs and defendant No. 1 and proforma defendants No. 5 to 8 in respect of land measuring 4 bighas 10 lechas under dag No. 441 & 439 , patta no. 195 vide family Bibhag Nama dated 22/1/95 which is not a registered deed. But, in the said Bibhag Nama, nothing has been mentioned in respect of the exact area of land under any specific dag no and patta number. As there was no proper division of land measuring 4 bighas 10 lechas under Dag No. 441 and 439 Patta No. 195 none of the persons whose names are mutated in the Record of Rights in respect of the aforesaid land having absolute right to transfer any portion of the said land to outsider without prior consent*

from the plaintiff No. 1. Even though the names of plaintiff No. 2, defendant No. 1 and proforma defendant Nos. 5 to 8 are mutated in the record of rights, there is no division of particular area against which such names are mutated. As such, it is clear from the record of revenue authority that there is no proper partition of aforesaid land of plaintiff No. 1.

10. *The fact is that the plaintiff No. 1, 2 defendant No. 1 and the defendant No. 5 to 8 are the sons of late Saru Ram Das. Late Saru Ram Das i.e. the father of the answering defendant and plaintiff No. 1 and 2 at the time of his second marriage purchased the piece of land in the name of the plaintiff No. 1 jointly with Late Maheswar Das (uncle of the plaintiff No. 1 and defendant No. 1) . The total area of land purchased jointly was 8 bighas 12 katha which was later on distributed between the families of late Maheswar Das and the plaintiff No. 1 equally. The defendant No. 1 was in occupation of 1 bigha 1 katha 13 lechas covered*

by Dag No. 441 and 439 of Kheraj Miyadi Patta No. 195 of village Mirzapur and accordingly his name was mutated along with the plaintiffs by an order dated 16/2/68 passed by S.D.C. In Mutation Case No. 42/1967-68. The defendant occupied his 1 bigha 1 katha 13 lechas of land from March, 1959 openly, adversely and notoriously against the plaintiff No. 1 in spite of repeated objection raised by the plaintiff No. 1.

11. *It is said that defendant No. 1 was occupied the suit land on the basis of family settlement on called Bibhag Nama dated 22/1/95 . However, Bibhag Nama was not exhibited by defendant No. 1.*

12. *The plaintiff's case is that the said Bibhagnama is not a registered document and unregistered family settlement is held to be inadmissible in evidence as*

decided by Supreme Court reported in 2004 (11) SCC 393. Section 17 Clause 3 of the Registration Act says that -

“other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property”

13. The instrument of partition of immovable property requires registration as it declares an interest of immovable property provide. However, the value of the interest so declared is Rs. 100/- or upward. Under provisions of Section 17 of Registration Act, family partition has to be registered to confer absolute right, title and interest to transfer of

immovable property. In the instant case, there is no documentary evidence by the defendant No. 1 to show that 3 kathas 15 lechas lands was in his possession. It is also not mentioned in the W.S. Or in evidence that defendant No. 1 has been possessing 2 kathas of land under Dag No. 441 Patta No. 195. Defendant No. 1 further admitted the fact that the entire land had not been demarcated and he did not think it to be necessary to take permission from the co-pattadar.

In view of the above facts and circumstances and evidence on record this issue is decided against the defendant.

ISSUE NO. 2, 3 & 6

14. Issue No. 2, 3 and 6 are co-related , hence I have taken together for

discussion.

Section 7 of Transfer of Property Act says : -

“Persons competent to transfer – Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part , and either absolutely or conditionally, in the circumstances , to the extent and in the manner, allowed and prescribed by any law for the time being in force. ”

15. Plaintiff in his pleadings as well as evidence stated that The area of land measuring 4 bighas 10 lechas belonging to Sri Jogen Das is under Dag no. 441 and 439 , Patta No. 195 as per record of revenue

authority and there has been no official partition of the said land till the date. The plaintiff No. 1 had allowed the defendant No. 1 and the proforma defendants No. 5 to 8 including the plaintiff No. 2 to use the land on good faith as they are from the same family. There was a family division among the plaintiffs and defendant No. 1 and proforma defendants No. 5 to 8 in respect of land measuring 4 bighas 10 lechas under dag No. 441 & 439 , patta no. 195 vide family Bibhag Nama dated 22/1/95 which is not a registered deed. But, in the said Bibhag Nama, nothing has been mentioned in respect of the exact area of land under any specific dag no and patta number. As there was no proper division of land measuring 4 bighas 10 lechas under Dag No. 441 and 439 Patta No. 195 none of the persons whose names are mutated in the Record of Rights in respect of the aforesaid land have absolute right to transfer any portion of the said land to outsider without prior consent from the plaintiff No. 1. Even though the names of plaintiff No. 2, defendant No. 1 and proforma defendant Nos. 5 to 8 are mutated in the

record of rights, there is no division of particular area against which such names are mutated. As such, it is clear from the record of revenue authority that there is no proper partition of aforesaid land of plaintiff No. 1. As per revenue record, there has been no partition in the aforesaid area of land mentioned at schedule – B till the date and the land measuring 4 bighas 10 lechas still belongs to plaintiff No. 1 who, out of sympathy and affection, had allowed the defendant No. 1 and proforma defendants No. 5 to 8 to use some portion of the land mentioned at schedule B and C. As there is no specific area of land mentioned in the record of rights under dag Nos. 439 and 441 , patta No. 195, the defendant No. 1 has no authority to go for measurement of boundary before proper partition is made officially by the competent authority.

16. *Learned counsel for the defendant No. 1 has argued that defendant No. 1 was possessing the suit land as per family settlement and accordingly, his name was mutated in his name and as such he has rightly sold the suit land to defendant No. 1. In support of his claim he has relied upon the following decision -*

- 1. AIR 1972 Supreme Court 2069*
- 2. (1996) 1 Gauhati Law Report 212*

17. *From the record it appears that there was mutation in the name of defendant No. 1. However, there is no division of particular area against the defendant No. 1 and as such it is clear from the record of revenue authority there was no proper partition and as such plaintiff has no right, title and interest to sell the land . It is also the law that a person cannot transfer a land wherein he is not the owner of the land. In Harimati Das VS Jadav Chandra Deka - others reported in 1990 1 GLT 304 , the court held that mutation does not give absolute right to transfer the land and mutation decides possession. In the instant case there is no evidence that the defendant has title*

to transfer the suit land and as he is not the absolute owner of the suit property he has no right to transfer the same. Hence, Issue Nos. 2, 3 and 6 are decided against the defendant.

ISSUE NO. 4

18. *While discussing Issue No. 1, 2 3 and 6 it is proved that the defendant No. 1 had no right, title and interest over the suit land to transfer the same and accordingly, sale executed through sale deed No.*

1592 dated 10/2/09 was found illegal and as the plaintiffs are entitled for a relief of cancellation of sale deed No. 1592 dated 10/2/09. Hence this issue is decided accordingly.

ORDER

19. *In the result, the plaintiff's suit is decreed as follows without cost -*

- 1.** *Defendant No. 1 has no right to transfer any portion of schedule B and C property to anybody as the property mentioned in schedule B is belonged to plaintiffs.*
- 2.** *The sale deed executed on 10/2/09 vide sale deed no. 1592 is null and void and illegal and accordingly the same is cancelled.*

A copy of this judgment and order be sent to Deputy Commissioner , Kamrup, Guwahati , Registration Branch.

Given under my hand and seal of this court on this the 30th day of August,

2012 at Guwahati.

*Civil Judge No. 2,
Kamrup, Guwahati.*

Dictated & corrected by me

*Civil Judge No. 2,
Kamrup, Guwahati.*