

HIGH COURT FORM NO.(J) 2.

HEADING OF JUDGMENT ON ORIGINAL APPEAL

District : Sonitpur

IN THE COURT OF THE CIVIL JUDGE AT TEZPUR.

Present : **Sri M. Kalita ,
Civil Judge,
Sonitpur, Tezpur**

Tuesday, the 13th day of March, 2012

MISC. APPEAL NO. 1 of 2011

1. **Mustt. Ayesha Rahman (Begum)**

Widow of Late Ataur Rahman

2. **Mustt. Wahida Rahman**

Daughter of Late Ataur Rahman

3. **Mustt. Aleya Rahman**

Widow of Late Mukibur Rahman

4. **Md. Eltaf Rahman**

Son of Late Mukibur Rahman

5. **Md. Imtiaz Rahman**

Son of Late Mukibur Rahman

6. **Md. Mafijur Rahman**

Son of Late Habibur Rahman

All are

Residents of G.D. Road, Ward No.5

Tezpur Town, Mouza – Mahabhairab

PO & PS - Tezpur

District Sonitpur (Assam)

7. **Md. Najim Ahmed**

Son of Late Karim Ahmed

Resident of Ex-Police Line, Ward No.10

Tezpur Town, Mouza- Mahabhairab

PO & PS - Tezpur

District Sonitpur (Assam)

..... Appellants

- v e r s u s -

1. **Md. Elar Hussain**

2. **Md. Akhtar Hussain**

Both sons of Late Abdul Hamid

Resident of G.D. Road, Ward No.5

Tezpur Town, Mouza – Mahabhairab

PO & PS - Tezpur

District Sonitpur (Assam)

..... Respondents

respondents (petitioners of Misc. (J) Case No.82/11) stated in the said petition that one Seikh Ali Mian was owner and possessor of the Schedule C land which was specifically mentioned in the schedule of the petition and Anisa Bibi was the first wife and Jaynab Bibi was the second wife of Seikh Ali Mian. Seikh Ali Mian on 27-11-34 by executing a Registered Deed of Gift No. 1061 for the year 1934 of Tezpur Sub-Registry Office donated the land measuring 19 Lessas from eastern side half of the total land measuring 1 Katha 18 Lessas covered by PP No. 242 under Dag No. 925 of Tezpur Town, 3rd Part, Mouza – Mahabhairab, PS- Tezpur to his wife Must. Jaynab Bibi. Must. Jaynab Bibi accepted the gift because she had already been possessing the land donated to her by her husband. Seikh Ali Mian also verbally donated western side half i.e. 19 Lessas of land out of total land 1 Katha 18 Lessas covered by said Patta and Dag number to his grand son Habibur Rahman and Seikh Ali Mian divided the total land measuring 1 Katha 18 Lessas equally by erecting fencing in the middle of the land. So, Mustt. Jaynab Bibi, wife of Seikh Ali Mian, became the absolute owner and possessor of the 19 Lessas of land of PP No. 242 and Dag No. 925 and she had right, title and interest of the land. Mustt. Jaynab Bibi had three sons namely, Abdul Hamid, (2) Abdul Kadir and (3) Abdul Gani and after her death, her sons became the joint owner and possessor of the land of their mother and after death of Abdul Hamid and Abdul Goni, the petitioners and proforma Opposite Parties became joint owner and possessor of the suit land. The name of Jaynab Bibi was mutated in the land measuring 19 Lessas covered by PP No. 242, Dag No. 925. Then Must. Faziman Bibi and her son Habibur Rahman had filed Revenue Appeal No. 45 of 1956-57 before the Deputy Commissioner, Darrang District, now Sonitpur, for cancellation of mutation of Mustt. Jaynab Bibi and after hearing, the Deputy Commissioner in his order dated 29-12-58 held the right, title of Jaynab Bibi in 19 Lessas of land by striking out the name of Faziman Bibi from the Record of Rights. Must. Anisa Bibi, the first wife of Seikh Ali Mian had daughter namely, Mustt.

Faziman Bibi who got married with Jelal Rahman and she gave birth her son namely, Habibur Rahman. Habibur Rahman had 5 sons namely, (1) Ataur Rahman, (2) Mukibur Rahman, (3) Hanisur Rahman, (4) Abedur Rahman and (5) Md. Mafizur Rahman and one daughter Hasnara Begum. And except Hasnara Begum and Mafizur Rahman, all other sons Habibur Rahman died and Opposite Parties are the legal heirs and successors of Late Faziman Bibi, Late Habibur Rahman, Late Ataur Rahman, Late Mukibur Rahman and of Late Hasnara Begum. The petitioners / respondents has further stated in their petition that in the old PP No. 242 in Dag No. 925 contained land measuring 2 Katha and Dag No.926 contained land measuring 1 Katha 3 Lessa, the total land measuring 3 Katha 3 Lessa and after partition of PP No.242, only land measuring 1 Katha 18 Lessa remained in Dag No. 925 and rest of land bifurcated from the patta and comprised into PP No. 529 the land measuring 1 Katha 3 Lessa in Dag No. 926 and the land measuring 2 Lessa in Dag No. 2656, in total land measuring 1 Katha 5 Lessa. The petitioners after obtaining certified copy of Jamabandi and Chitha on 01-03-11, 07-03-11, 11-04-11 have come to know that the Opposite Parties by misleading the Revenue Officials mutated name of Opposite Parties in the land measuring 1 Katha 5 Lessa in Dag No. 1844, 7 Lessa in Dag No.1845 in total measuring 1 Katha 12 Lessa of PP No. 889 of Tezpur Town, 3rd Part, Mouza – Mahabhairab, PS – Tezpur. In the Jamabani of PP No. 889 Dag No. 1844, 1845 the name of the original pattadar shown as Habibur Rahman, S/O Jelal Rahman. As a matter of fact Habibur Rahman was owner of 19 Lessa of land only as verbally donated by his grand father Seikh Ali Mian out of total land measuring 1 Katha 18 Lessa. The Opposite Parties tactfully separated 6 Lessa of land from 1 Katha 18 Lessa and comprised into PP No. 748 Dag No. 1858. The petitioners, proforma Opposite Parties and their predecessor-in-interest from the life time of Mustt. Jaynab Bibi had been possessing the total land measuring 19 Lessa by constructing house and structures thereon being Holding No.

1425 of Ward No.5 and have been paying land revenue and Municipal Tax regularly. Out of 19 Lessa of land one plot of land measuring 13 Lessa is vacant land. The Opposite Parties and their associates on and from 18-04-2011 have been threatening to evict the petitioners and proforma Opposite Parties from the land to construct house and structures thereon and they have been denying right, title and interest of the petitioners and proforma Opposite Parties in respect of 19 Lessa of land. The petitioners on 18-04-2011 lodged FIR before the Tezpur Police Station for which one case bearing Tezpur PS Case No. 359/11 u/s 447/294/506/34 of IPC was registered. The petitioner respondent came to know that the Opposite Party Mustt. Ayesha Rahman illegally obtained permission for construction of house / structures on the land of petitioners and proforma Opposite Parties. So, the petitioners on 18-4-11 filed complaint before the Tezpur Development Authority to cancel the permission. The land mentioned in the schedule B land has been possessed by the petitioners out of the total land measuring 1 Katha 18 Lessas as described in Schedule A. The Opposite Parties have no right, title, interest in respect of the land measuring 19 Lessas as donated by Seikh Ali Mian to his wife Must. Jaynab Bibi on 27-11-1934 by executing Registered Deed of Gift No. 1061 for the year 1934 of Tezpur Sub-Registry Office. The mutation entries of name of Opposite Parties in 19 Lessas of land of Jaynab Bibi are illegal and liable to be cancelled. The original copy of the above stated Deed of Gift has been lost. Hence, the petitioners obtained the certified copy. The Opposite Parties / appellants denied the right, title, interest of the petitioners / respondents, proforma Opposite Parties in respect of the suit land i.e. Schedule B land.

So, the petitioners / respondents prayed for issuance of ad-interim injunction. And after considering the submission of learned counsel and also perusing the petition, learned Munsiff, No.2, Tezpur granted ex-parte ad-interim injunction under Order 39 of CPC in favour of the petitioners /

respondents thereby restraining and prohibiting the Opposite Parties and their men, servants, agents and associates from evicting the petitioners from Schedule B land and also constructing houses / structures in any portion of the Schedule B land.

3. Learned Munsiff , No.2, Tezpur before passing the impugned order, heard the learned counsel for the caveators because the caveat was earlier filed by caveator Mustt. Ayesha Rahman.

4. Being highly aggrieved and dissatisfied with the said impugned order, the present appellants have preferred this appeal on the following grounds :

(i) For that the learned Munsiff No.2 erred in law in entertaining the suit and granting temporary injunction.

(ii) For that the learned Munsiff No.2 failed to consider that the suit was misaid and the plaint was liable to be rejected in view of the fact that the suit was barred in so far as the injunctive remedy is concerned for what is contained in Clause (h) of Section 41 of the Specific Relief Act and in so far as the other relief is concerned the suit is had and barred in view of the proviso under Order 1 Rule 9 of Code of Civil Procedure and Section 47 and 63 of the Assam Town and Country Planning Act, 1959 inasmuch as the permission was granted bona-fide in exercise of powers contained in Section 13 of the said Act and unless the legality and validity of such permission is challenged by disputing the bona-fides and good faith of the Authority concerned granting permission.

(iii) For that the learned Munsiff No.2 failed to consider that unless the good faith and bona-fides of the Authority granting permission is challenged in a

competent suit therein impleading such Authority the legality and validity of the permission cannot be contested and challenged.

(iv) For that the learned Munsiff No.2 failed to consider that the substantive cause for the institution of the suit being founded on what is stated in paragraph 11 of the plaint unless the permission is cancelled by the Development Authority or otherwise unless the Development Authority is sued for the purpose of deciding the question of legality and / or validity of the permission for want of bona-fides and / or good faith of the Development Authority or officer thereof granting the permission no claim either for declaration or for any injunctive relief can be laid.

(v) For that the learned Munsiff No.2 failed to consider the provisions of law i.e. Assam Town and country Planning Act in Sections 29,30, 30 A, 30 B and 31 and combined effect thereof providing for a more efficacious remedy as referred to in Section 41 of the Specific Relief Act and that there could not be any cause of action for the suit and no cause could have been arisen on 01-03-2011, 07-03-2011 and 18-04-2011 as falsely alleged in paragraph 15 of the plaint without challenging the bona-fides of the permission for construction.

(vi) For that the learned Munsiff No.2 failed to consider that there is no prima-facie case for grant of any injunctive remedy whether permanent or temporary, ad-interim and /or final and in view of this no injunction could be granted or issued prejudicing the Defendant's / Appellants possession of the land as evidenced by the mutation entries in respect of land comprised in Dag Nos. 1844 and 1845 in the Jamabandi relating to PP No. 889 of

Tezpur Town, 3rd Part in respect of land measuring 1 Katha 12 Lessas.

(vii) For that the learned Munsiff No.2 erred in law and acted in a most unjust manner in not adjourning the hearing until Monday for enabling the Appellants / Defendants to have the benefit of representation of their case by Sri T. C. Khatri, Senior Advocate engaged in the manner even without making any order on the application for adjournment.

(viii) For that admittedly Jainab Bibi had in her possession only 6 Lessas of land comprised in dag No. 1858 of Tezpur Town 3rd Part covered by PP No. 748 and admittedly land revenue and municipal taxes relating to the 6 Lessas of land only was paid by heirs of Mustt. Jainab Bibi and admittedly Mustt. Jainab Bibi aforesaid being not in possession of 13 Lessas of land comprised in erstwhile land of Dag No. 925 and admittedly this portion (i.e. 13 Lessas) being in possession of Late Habibur Rahman, son of Jallal Rahman besides 19 Lessas of land gifted to him by his mother Mustt. Fajiman Bibi, widow of Late Jallal Rahman land measuring 1 Kathas 12 Lessas comprised in Dag Nos. 1844 and 1845 of Tezpur Town 3rd Part covered by PP No. 889 happened to be rightly recorded in the land records ;in the name of Late Habibur Rahman upon cancellation of name of Jainab Bibi as is evidenced from the chitha produced by the Respondent / Plaintiffs to support their cause for the suit.

(ix) For that learned Munsiff No.2 failed to consider that the Respondents / Plaintiffs are not entitled to claim any equitable relief of grant of decree of injunction ad / or temporary injunction as claimed by the Respondent / plaintiffs who intentionally withheld the chitha of Dag No.3820 and Jamabandi of old PP No. 738 which the

Respondents / plaintiffs intentionally concealed from the Court and claimed the relief without clean hands.

(x) For that in any view of the matter learned Munsiff No.2 ought to have either rejected the application for grant of temporary injunction or otherwise adjourned the matter of grant of temporary injunction as prayed on behalf of the Appellants / Defendants.

(xi) For that the impugned order being contrary to facts and law deserves to be reversed and or set aside for doing justice to the facts of the case.

5. During the course of hearing, the learned counsel for the appellant has vehemently submitted that injunction order was passed by Learned Munsiff simply reading the para No.11 of the petition and it was passed erroneously. The Tezpur Development Authority was not impleaded as party of the suit, though the permission was given by the Tezpur Development Authority for construction of house / structures. Moreover, the petitioners could have approached the proper authority under Sections 30, 30 (A), 30(B) of Town and Country Planning Act, 1959. The petitioners have no right to file any suit against the permission granted under Assam Town and Country Planning Act, 1959 as provided by Section 47 of the Act. Moreover, learned Munsiff has not complied with the provision of Section 41 of Specific Relief Act, 1963 while passing the injunction order. Learned counsel for the appellant has also relied on the following decisions during his submission :

(1) Vishwa Vijay Bharati, Appellant –VS- Fakhrul Hassan and others, Respondents ; AIR 1976 Supreme Court 1485

(2) M/s Tontemporary Target Pvt. Ltd. & Ors. –Vs- M/s M. B. Enterprises & ors. ; (1993) 2 GHC 11

(3) C. Seethaiah, Appellant –Vs- Govt. of Andhra Pradesh and others, Respondents ; AIR 1983 Andhra Pradesh 443

(4) Akmal Ali and others, Petitioners –Vs- State of Assam and others, Opposite Parties ; AIR 1984 Gauhati 86 Full Bench)

6. Countering the above submission of learned counsel of petitioners, the learned counsel for respondents has submitted that the duty of Appellate Court is only to decide whether the Trial Court granted the injunction capriciously and arbitrarily. Learned counsel has further submitted that the injunction order was passed by learned Munsiff, No.2 after hearing the learned counsel for caveator and the order has already been passed for issuance of notice to the Opposite parties under Order 39 Rule 3 of CPC. The learned counsel for respondent while submitting in regards to the justification of passing the injunction order by learned Munsiff, has relied on the following decisions :

(1) K. K. Puri and others, Appellants –Vs- A. K. Puri and others, Respondents ; AIR 1994 J & K 25

(2) Padmanava Choudhury –Vs- Debendra Kumar Mohanty ; AIR 2011 Orissa 155

(3) Karthiyayani Amma, Appellant –Vs- Govindan, Respondent ; AIR 1980 Kerela 224

- (4) Bijoy Kumar Chakraborty -Vs- State of Tripura & Others ; 1990 (2) GLR 145
- (5) Skyline Education Institute (Pvt) Ltd. -Vs- Vaswani & Anr ; AIR 2010 Supreme Court 3221
- (6) Smt. Vimla Devi, Petitioner -Vs- Jang Bahadur, Respondent ; AIR 1977 Rajasthan 196
- (7) The State of Assam & Anr. Appellant/ Petitioner -Vs- Shri B. D. Patowari, Opposite Party ; 1985 (1) GLR 66

7. On the above backdrop of factual position and also submission of learned counsel of both sides, I am to decide whether the learned Munsiff passed the injunction order capriciously and arbitrarily.

Finding and Reasons for findings

8. On perusal of impugned order passed by learned Munsiff, No.2 it is found that the learned Munsiff No.2 has rightly discussed in the order the submission forwarded by learned counsel for Caveator. I deem it fit to quote one part of discussion as :

" Heard both sides. The caveator is represented by Id. Jayanta Baruah, as revealed from the Vakalatname, and hence, In my view, consultation or presence of his Id. Senior counsel is not condition precedent for hearing on the petition. Further, considering the fact that hearing of this petition has been already delayed for a day, and that further delay of 3 days may not be in accordance with justice.

Nevertheless, the Id. Counsel for caveator has stated certain points against the prayer of the petitioner.

Thus considering all, the petition on behalf of the caveator is not allowed and the injunction petition is heard. "

Learned Munsiff No. 2, Tezpur has further discussed in the impugned order as follows in regards to the submission made by the learned counsel for Caveator, as:

" The learned counsel for the caveator has stated that name of the petitioner is not true in the Jamabandi. Countering this, the Id. Counsel for petitioners, has stated that the names were deleted due to same collusion and not legally."

9. It is pertinent to mention that though the appellant has filed the appeal mainly on the ground amongst others that the learned Munsiff erred in law and acted in a most unjust manner in not adjourning the hearing until Monday for enabling the appellant / defendant to have the benefit of representation of their case by Sri T.C. Khatri, Senior Advocate engaged in the matter even without making any order on the application for adjournment. But after going through the impugned order of learned Munsiff, it is found that the learned Munsiff made above discussion in regards to the petition filed for adjournment. It is also found that the learned Munsiff passed the order after hearing the learned advocate appeared for caveator. So, I find that the learned Munsiff has committed no any illegality in passing the injunction order in absence of learned Senior Counsel Sri T. C. Khatri. It is further discussed in the impugned order that in view of the Gift Deed No. 1061, the learned Munsiff held that there is a prima-facie case on behalf of petitioner and the petitioner may face eviction threat if injunction is not granted. So, there is every chance for causing irreparable loss to the petitioner. Moreover, it is held by the learned Munsiff that balance of convenience is in favour of the petitioner's side as the petitioner has the possession over the

plot of land measuring 19 Lessas as mentioned in the petition with affidavit. So, after going through the impugned order, I find that the learned Munsiff has passed the order after detailed discussion of three golden principles for granting the injunction. I find that no illegality has been committed by the learned Munsiff in passing the ex-parte ad-interim temporary injuciton order. So, the order passed by the learned Munsiff does not warrant for interference by this Court in view of above fact. I do not find any merit in the submission of appellants' side in this regard.

10. Now, so far the power of Appellant Court while deciding appeal against the order of injunction concerned, the Hon'ble Gauhati High Court observed in the case of **Bindreshwar Narayan Singh and Others Vs. Managing Committee, Sri Sundarmal Hindi High School and others reported in AIR 1982 GAUHATI**, at para No.16 :

“ The power of the appellate Court in the matter of injunction is rather circumscribed. The Appellate Court would be slow to interfere with the exercise of discretion and would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage, it may have come to a contrary conclusion. If it appears that the discretion has been exercised by the trial Court reasonably and in a judicial manner, the fact that the appellate Court would have taken a different view may not justify interference with the trial Court's exercise of discretion. If it appears to the appellate Court that the trial Court while exercising its discretion in the matter of injunction, has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate Court to interfere with the trial Court's exercise of jurisdiction (Para 16). ”

11. Now, taking the case in hand, it is found that learned Munsiff No.2 while passing the order of injunction has made detailed discussion about the reasons for granting the ex-parte ad-interim temporary injunction. Moreover, the learned Munsiff also issued notice to the Opposite Parties to show cause as to why the ex-parte ad-interim temporary injunction should not be made absolute. So, in view of the above observation made by Hon'ble Gauhati High Court regarding scope of Appellate Court to interfere the injunction order passed by lower Court, I find that there is no any justified ground to interfere the order of learned Munsiff because there is scope for the Opposite Parties / appellants to show sufficient cause for setting aside the ex-parte ad-interim temporary injunction. In this context I would like to mention the provision Rule 3 of Order 39 of CPC. The provision provides as :

3. " The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party :

Provided that, where it is proposed to grant an injunction without given notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant –

(a) to deliver to the opposite party, or to send him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with –

(i) a copy of the affidavit filed in support of the application ;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies, and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.

12. In view of above provision of law, I am of the considered opinion that the learned Munsiff has not committed illegality in passing the ex-parte injunction order before issuance of notice to the Opposite Parties. For the reasons recorded above, I am of the considered opinion that learned Munsiff has not passed the injunction order capriciously and arbitrarily. I also do not find the merit in the other grounds raised by the appellants in the Appeal because the learned Munsiff No.2 has passed the order as per law by citing sufficient reasons.

O R D E R

The result of the foregoing discussion is that there is no merit in this appeal. So, the appeal stands dismissed.

However, on the facts and in the circumstances of the case, I pass no order as to cost.

Send back the lower Court's case record with a copy of judgment immediately.

Given under my hand and seal of this Court on this day, the 13th day of March, 2012.

Dictated and corrected by me.
(**M. Kalita**)
Civil Judge
Sonitpur, Tezpur

(**M. Kalita**)
Civil Judge
Sonitpur, Tezpur

Dictation taken and
transcribed by me :
(J. K Muru), Steno.
