

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.**

Friday, the 21st day of September, 2012.

TITLE APPEAL NO. 06 of 2011.

1. Sri Naga Prasad Kanu

S/O Ram Badhar Kanu,
Vill- Kochgaon Haldiabari,
PO Biswanath Charali,
Mouza – Sakumatha,
Dist. Sonitpur (Assam) ... Appellant.

-versus -

1. Smti Banshi Devi,
W/O Sri Ram Awadh Kanu,
Vill- Kochgaon Haldiabari,
PO Biswanath Charali,
Mouza – Sakumatha,
Dist. Sonitpur (Assam) ... Respondent.

This appeal coming on for final hearing or having
been heard on 6th day of September, 2012.

Mr. Srilal Gupta,Advocate ... For the appellant.

Mr. K. K. Sarma,Advocate For the respondent.

And having stood for consideration this day, the 21st
September, 2012 the Court delivered the following Judgment : -

J U D G M E N T

1. This is the appeal preferred by appellant Sri Naga Prasad Kanu against the respondent Smti Banshi Devi on being highly aggrieved with the Judgment and Decree dated 20-06-2011 passed by the learned Munsiff, Biswanath Charali in connection with Title Suit No. 4 of 2007 by decreeing the suit partly with cost in favour of the plaintiff.

2. The factual background leading to this appeal is that, the respondent instituted the Title suit being TS No. 4/2007 as plaintiff against the appellant Sri Naga Prasad Kanu who was impleaded as defendant in the Title Suit with prayer for decree for declaration of right, title and interest of the plaintiff over the suit land and houses standing thereon as described in the schedules of the plaint. The plaintiff has stated in the plaint that the plaintiff purchased a plot of land measuring 10 lessas covered by Dag No. 103 and PP No. 138 situated at Charali Town 15th part under Biswanath Mouza within the district of Sonitpur from the owner Golap Chand Kanu and Chatelal Kanu with execution of registered Sale Deed No. 631/94 on 11-07-1995. The possession of the said land was handed over to the plaintiff. The plaintiff also purchased another plot of land measuring 5 lessas covered by same Dag number and Patta number from original owner Surendar Teli and Dina Teli on 12-08-1996 with execution of registered sale deed No. 852/96 and the possession of the said land was also transferred to the plaintiff. The said plot of land situated on the northern boundary of the said plot of land measuring 10 lessas purchased earlier by the plaintiff and the

description of the said land has been given in the Schedule A of the plaint. The plaintiff again purchased a plot of land measuring 4 kathas out of total 13 bighas 3

kathas 18 lessas covered by Old Das No. 116/134 and Old Patta No.119/ 205 situated at village Kochgaon within the Mouza Sakomatha, District Sonitpur from the owner Sri Gonesh Prasad Reunier with execution of Sale Deed No. 1967/82. The description of the said plot of land has been also given in the schedule "B" of the plaint.

3. The plaintiff's further case is that when the plaintiff was in peaceful possession of the said two plots of land as absolute owner by mutating his name in the record of right in the last part of the year 1996 the plaintiff with the help of her husband erected one ekchali tin house in the southern portion of the schedule "A" land. The proforma defendant who is the youngest son of the plaintiff has been using the said house as tenant. Another part of land in the northern side has been possessing by the eldest son of the plaintiff by constructing a dwelling house. The middle portion of the said land was lying vacant till to the month of September, 2005 which was under possession of the plaintiff. The plaintiff with the help of her husband constructed an Assam type house on the plot of land mentioned in the schedule "B" of the plaint in the year 1999 and thereafter the plaintiff shifted the residence to that Assam type house from the ekchali house constructed earlier by her on the land as mentioned in the schedule "A" of the plaint. The plaintiff also constructed one two chali tin roof house measuring 11 ft x 2 ft in size with 8 ft verandah on the eastern portion of schedule "B" land with the financial assistance of her husband. That house has been

used by proforma defendant as godown.

4. The plaintiff's further case is that the defendant with evil and malafide intention claimed the share of the 1/3rd share of the land mentioned in the schedule "A" and "B" and even he threatened the plaintiff to forcibly possess the 1/3rd share by ousting the plaintiff. On 01-04-04 the defendant came to the house of the plaintiff along with some unknown persons armed with deadly weapons and forcibly dragged out the plaintiff; her husband and proforma-defendant and her youngest son Manu Prasad Kanu along with his wife and daughter by falsely claiming that he constructed the said Assam Type House situated on the portion of the schedule "B" land. Since then the defendant has been illegal and forceful possession of the Assam Type House on the one portion of schedule "B" land. The defendant also took forcible possession of land measuring 5 lessas out of total 15 lessas of land mentioned in the schedule "B" in the month of September, 2005 which was earlier lying vacant and was in possession of the plaintiff. Since, then the defendant has been possessing the said land, the Assam Type house situated over the portion of land of schedule "B" has been specifically described in the schedule "B" of the plaint and the land measuring 5 lessas out of 15 lessas of land mentioned in the schedule "A" has been specifically mentioned in the schedule "C" of the plaint. Though the defendant has no right, title and interest over the portion of schedule "A" and "B" land so he is not entitled to remain in illegal possession of the schedule "C" and "D" land along with Assam type house. The defendant is only a tress-passer in the eye of law. So, the plaintiff has been compelled to file this suit for decree of

declaration of right, title and interest of the plaintiff over the land mentioned in the schedule "A" and "B" with consequential relief.

5. The cause of action arose on and from 01-04-2004 and thereafter within the jurisdiction of the Court of learned Munsiff, Biswanath Charali. So, the plaintiff has prayed for a decree for declaration of right, title and interest of the plaintiff over the suit land as described in the schedule "A" and "B" of the plaint with consequential relief of recovery of possession of the Assam type house and premises situated over land mentioned in the schedule "C" and "D". The plaintiff has also prayed for the decree of permanent injunction against the defendant along with the cost of the suit.

6. The defendant after receiving the summon contested the suit by filing written statement on the grounds that there is no cause of action for the suit, the suit is barred under law of limitation, the suit is bad for non-joinder and mis-joinder of necessary parties, the suit is bad for principles of waiver, estoppel and acquiescence, the suit is not maintainable and tenable in its present form, the suit is not properly valued and no proper court fees has been paid. The defendant has also denied the most of the allegations of the plaintiff in his written statement.

The defendant has further stated in the written statement that all the land mentioned in the schedule "A", "B", "C" and "D" were purchased at a considered value shared by proforma defendant, the defendant and eldest son of the plaintiff equally because all are the members of the same family. As the plaintiff had no any source of

income so, the money was contributed by the aforesaid persons equally. But to the upper surprise of the defendant and the elder brother namely Om Prakash Gupta @ Kanu the proforma-defendant got those sale registers in the name of the plaintiff in lieu of the name of the proforma defendant, the defendant and their eldest son/brother. The defendant only came to know about the misleading fact only after receipt of the summon of the suit. Though the sale Deeds were registered in the name of plaintiff but the consideration amount was shared equally by the defendant, her elder son and father. The defendant has further stated in the written statement that he has been using the southern portion of the land mentioned in the schedule "A" to store the battery and other electrical goods and southern portion measuring 5 lessas has been possessed by eldest brother of the defendant who has been living with the defendant by constructing the house. The defendant has been possessing the said land on the basis of arrangement that has been made as a result of execution of a written family partition in presence of witnesses on 09-01-2005. So, the plaintiff has no any right and authority over all parts of the land as mentioned in the schedule "A" land. Because, the plaintiff and proforma defendant estopped from claiming any right on the portion or portions of the land occupied by the defendant and eldest brother at any time. The plaintiff has not impleaded all his sons except defendant. So the suit is bad for non-joinder of necessary parties because all the sons of the plaintiff are necessary parties in the suit and their presence is necessary for proper adjudication of the suit. The Assam type house situated in the schedule "B" land was constructed by the defendant in the year 2000 by collecting building materials

from different source. Though the plaintiff procured all the land documents in her name illegally but the defendant could not know about the fact till to the receipt of the summon of the suit. The defendant has got his share of land by way of family partition that took place on 09-01-05 and he was also ready to vacate the Assam Type House as per terms of family partition as and when the expense value of Rs. 1,00,000/- was given to him. As the proforma defendant has not clear the cost/value of the Assam type house, so the defendant has not vacated the same even after expiry of the time fixed in the written partition document. The defendant has further stated in the written statement that he has right, title and interest over all those lands as described in the schedule "C" and "D" of the plaint as a result of amicable family partition. So, the defendant has prayed for dismissal of the suit with a compensatory cost as per provision of 35 of CPC.

The Proforma defendant has also submitted the written statement by supporting the contentions of the plaintiff.

7. Upon perusal of the plaint and written statement and upon hearing of both sides, following issues have been framed by the learned Munsiff, Biswanath Charali : -

- 1.** Whether there is any cause of action for the suit?
- 2.** Whether the suit is maintainable ?
- 3.** Whether the suit is not properly valued and liable Court fee?
- 4.** Whether the suit is bad for non-joinder of necessary parties?

- 5.** Whether the plaintiff has right, title and interest over the suit land as described in schedule "A", "B", "C" and "D" land?
- 6.** Whether the defendant has forcefully occupied the land described in schedule "C" and land along with house standing thereon as described in schedule "D" to the plaintiff ?
- 7.** Whether there was family partition on 09-01-05 between the parties ?
- 8.** Whether the plaintiff is entitled for a decree as prayed for ?
- 9.** To what relief/reliefs parties entitled to ?

8. During the course of hearing, the plaintiff has examined as many as 4 PWs including herself and exhibited 21 numbers of documents in support of her case. On the other hand, the defendant has examined as many as 4 DWs including himself and proved 6 numbers of documents in support of his case.

And after close of hearing, the learned Munsiff, Biswanath Charali has delivered the Judgment by partially decreeing the suit with cost in favour of the plaintiff.

9. On being highly aggrieved with the said decision of the learned court below, the appellant has preferred this appeal on the following grounds: -

- i)** for that the learned court below committed both error of facts and law at the time of passing the impugned judgment and decree;
- ii)** for that the learned court below did not apply his

mind judiciously at the time of passing the judgment and decree specially at the time of deciding the issue Nos. 1,2,4,5,6,7,8 and 9, hence, the judgment and decree appealed against is bad in the eye of law;

iii) for that the learned Court below committed great mistake and gross error in fact and law at the time of deciding the Issue Nos. 1,2,4,5,6,7,8 and 9;

iv) for that due to non framing of proper issues the learned court below wrongly passed the impugned judgment and decree;

v) for that the learned court below misread and misapplied the law and fact while deciding the Issue Nos. 1,2,4,5,6,7,8 and 9;

vi) for that the learned court below has not properly discuss the evidence on record and laws while deciding the Issue Nos. 1,2,4,5,6,7,8 and 9 ;

vii) for that the learned court below misread and misapplied laws involved in the suit and misapplied evidence on record at the time of passing the impugned judgment and decree challenged in this appeal;

viii) for that the learned court below passed the impugned judgment and decree wrongly without properly discussing oral and documentary evidence on record and without justly and lawfully applying the same mainly on surmise and conjecture for which the court below has committed wrong in deciding the suit ; and

ix) for that the judgment and decree challenged sufferer from illegality, material irregularity and being wrong, unjust and inequitable and without jurisdiction causing miscarriage of justice and is against all cannons of law, hence need to

be set aside and reverse.

10. During the course of appeal hearing, both the parties submitted their argument on the facts and laws on which they have placed the reliance. I have given anxious consideration to the submission of learned counsels while deciding the appeal.

So, on the backdrop of aforesaid material on record and also the submission of learned counsel, I deem it necessary to discuss the justification of grounds raised by appellant in this appeal at the time of discussing the issues one by one.

DISCUSSIONS AND FINDINGS

Issue No. 1.

11. Whether there is any cause of action for the suit?

Regarding this issue, the learned Munsiff, Biswanath Charali has decided this issue in affirmative by holding the view that there is the cause of action for the suit as there is a bonafide dispute between the parties. After meticulous examination of materials on record, it is also found that the plaintiff has contended that the suit land mentioned in the schedule 'A' and 'B' was purchased by her with the financial assistance of her husband who is the proforma-defendant of the suit and the ekchali tin house and Assam type building standing on the respective suit lands were constructed by her with the assistance of her husband. On the other hand, the defendant denied the said allegations of the plaintiff. He has further alleged that actually lands were purchased by the money shared by proforma defendant, the defendant and the eldest son of the plaintiff. The sale Deeds were registered in the name of

the plaintiff on good faith only. The Assam Type house was also constructed by him in the year 2000 by collecting building materials from various sources. So, considering the contention raised in the pleadings, it is found that there is some dispute regarding the right, title and interest of the suit lands and also regarding the ownership of the houses standing on the suit lands.

So, considering such materials, I am of the opinion that there is the cause of action for the suit. Though the defendant/appellant has raised the plea in the appeal that the learned court below has decided this issue wrongly without discussing the evidence on record, but such ground raised by the appellant is not found reliable. Moreover, I do not find any ground to interfere with the decision of learned court below in this issue. The learned court below has decided this issue in right perspective by giving sufficient reasons.

Issue No. 2.

12. Whether the suit is maintainable ?

Regarding this issue, the learned Court below has decided this issue in affirmative by holding the view that the suit is found maintainable in the present form. On meticulous examination of materials on record, it is found that though the defendant has raised the contention in the written statement that the suit is not maintainable but he has not specifically stated the grounds for raising such contention. Moreover, it is found that the plaintiff has instituted the suit for declaration of right, title and interest over the suit land by alleging the fact of dispossession of suit land mentioned in schedule "C" and "D" of the plaint by the defendant. So, in view of above fact, I am of the

considered opinion that the suit is found maintainable. I do not find any justified ground to interfere the decision of learned Munsiff in this regard. Though the appellant has raised the contention in this appeal that this issue has been decided by the learned court below by committing great mistake and error in fact and law without applying judicial mind, but such contention raised by the appellant is not reliable and acceptable because, the learned Munsiff has decided the issue in affirmative by giving sufficient reasons.

Issue No. 3.

13. Whether the suit is not properly valued and liable to be rejected for not paying proper court fee ?

Regarding this issue, the learned Court below decided this issue in negative by holding the view that the suit is not properly valued. In the appeal, the appellant has raised the ground that the learned lower court has decided the issue wrongly by committing error in law and fact.

But on bare reading of the plaint of the plaintiff, it is found that the plaintiff has valued the suit at Rs. 200/- for the relief sought for the declaration and Rs. 100/- for the relief sought for the permanent injunction. It is also found that the plaintiff has prayed for recovery of possession of the land mentioned in schedule "C" and "D" along with the Assam Type house standing on the lands mentioned in the schedule 'C'. So, considering such fact regarding the nature of relief sought for, it is found that the suit is not properly valued. The plaintiff has prayed for declaration of right, title and interest as well as for recovery of possession of the suit land and the standing structures. So, I do not find any ground to interfere the decision of learned lower court in this regard as the appellant has not raised any ground against the decision of learned lower

court in this issue. So, I do not find no need to discuss this issue in details as the findings of learned court below is found justified and based on appropriate reasons.

Issue No. 4.

14. Whether the suit is bad for non-joinder of necessary parties?

Regarding this issue, the learned Munsiff, Biswanath Charali has decided this issue in affirmative by holding the view that the suit is bad for non-joinder of necessary parties.

On meticulous examination of materials on record, it is found that the defendant has raised the contention in the written statement that the plaintiff has not impleaded the other sons who are the brothers of the defendant as necessary parties of the suit and their presence is very much essential for adjudication of the matter. On the other hand, the plaintiff has alleged in the plaint that the defendant who is one of the son of the plaintiff dispossessed the plaintiff from the suit land mentioned in the schedule 'C' and 'D' which are part of the lands mentioned in the schedule 'A' and 'B' respectively. The defendant has contended in the written statement that though one part of the suit land mentioned in the schedule 'A' was allowed to be used by the eldest son of the plaintiff as per family partition but the right of the defendant to possess 1/3rd of the said land is denied by the plaintiff. The defendant has also admitted in his written statement as well as in the evidence that the youngest son of the plaintiff is still living with the plaintiff. So, the defendant has contended that the eldest son is one of the necessary party of the suit. Because, the suit land mentioned in the

schedule 'A' of the plaintiff was partitioned among the 3 sons as per family partition made on 09-01-2005. On appreciation of evidence of PWs and DWs, it is found that though the plaintiff has denied the fact regarding the existence of family partition document but her husband, the PW 4 has admitted such fact in his cross-examination. The defendant has claimed his right, title and interest over the land in the schedule 'D' on the basis of such family partition. The DW 2 and 3 has substantiated such fact regarding the fact of family partition made among the family members of the plaintiff. The DW 4 who is the Govt. Gaonburha has also admitted the fact regarding the existence of family partition document made on 09-01-2005. The DW 4 has further revealed that as per family partition it was also agreed that the defendant would vacate the Assam Type house along with the land mentioned in the schedule "D" as and when the husband of the plaintiff would pay Rs. 1,00,000/- to the defendant. So, considering the materials on record in its entirety, it is found that the dispute completely occurred among the family members and the suit has been instituted even after resolving the matter among the family members with arrangement of amicable partition document dated 09-01-05 in presence of village Panchayat and local Lat Gaonburha.

15. So, considering the above position of fact, I find that the eldest son of the plaintiff is also necessary party because, the defendant has placed reliance on the deed of family partition for asserting his right, title and interest over the suit land mentioned in the schedule 'C' and 'D'. After appreciation of evidence of PW 4 who is the husband of plaintiff and also on scrutiny of Ext. "F" proved by DW 4 it is

found that the right, title and interest of defendant over the land mentioned in schedule "C" was granted by virtue of said document and thus the defendant had acquired the right, title and interest on the said land. The eldest son of plaintiff also acquired some right on one part of the land mentioned in schedule "A" of the plaint by virtue of said partition documents. So, the contention raised by the defendant is that though the plaintiff has admitted the right of her eldest son but the right of defendant has been denied. As the eldest son of the plaintiff is also one of the beneficiaries for the partition deed so he is the necessary party for the suit for which the suit can not be adjudicated in his absence. And for the reasons stated above, this issue is decided in affirmative and the findings of learned Munsiff, Biswanath Charali is hereby reversed in this issue.

Issue No. 5.

16. Whether the plaintiff has right, title and interest over the suit land as described in schedule "A", "B", "C" and "D" land?

Regarding this issue, the learned Munsiff, Biswanath Charali decided this issue in affirmative by holding the view that the plaintiff has right, title and interest over the land mentioned in schedule "A", "B", "C" and "D" of land of the plaint.

On meticulous examination of materials on record, it is found that the plaintiff has contended in her plaint as well as in her evidence that the suit land mentioned in schedule "A" and "B" was purchased by her by taking financial assistance from her husband, the proforma-defendant. Thereafter one Assam Type house was constructed over the plot of land mentioned in the schedule "B" and she shifted the residence to the said Assam Type

house. But in the year 2004, the defendant dispossessed her by throwing her out from the house. In support of her contention, she has exhibited the Registered Sale Deeds as Ext. 1 and Ext. 2 by which she had purchased the lands. The plaintiff has also exhibited the Jamabandi of the land as Ext. 4 and Ext. 5. She has further exhibited some revenue paying receipts in support of her contention. But after going through the entire evidence of PWs and DWs it is found that one portion of the suit land mentioned in the schedule "B" was allowed to the eldest son of the plaintiff for the residential purpose and one portion of the land has been under use and possession of the youngest son of the plaintiff. On the other hand, the plaintiff has alleged that the portion of land of schedule "A" which was lying vacant was dispossessed by the defendant. But the defendant has claimed his right, title and interest on the said plot of land on the basis of family partition made among the family members of the plaintiff in presence of local Gaonburha on 09-01-05. So, considering the above position of fact, I am of the considered opinion that though the plaintiff is possessing some title deeds regarding the ownership of the suit lands but as the defendant got the right and interest of the suit land mentioned in the schedule "C" of the plaint on the basis of family partition, his right was admitted. He acquired the right, title and interest after arrangement of family partition document. So his right can not be waived out by the plaintiff. It has been further revealed by the PW 4, the husband of the plaintiff that it was agreed during the family partition that the defendant would vacate the Assam Type house situated on the land mentioned in the schedule "D" as and when he would pay Rs. 1,00,000/- to the defendant but the plaintiff has not stated the fact regarding

the payment of such amount. So, sums and substance of above discussion is that the defendant enquired the right, title and interest on the land mentioned in the schedule "C" by virtue of family partition and he is bound to relinquish the Assam type house which is on the land mentioned in the schedule "D" after payment of Rs. 1,00,000/- by the husband of the plaintiff.

So, for the reasons stated above, this issue is also decided in negative. Hence, the decision of learned Munsiff is also reversed.

Issue No. 6.

17. Whether the defendant has forcefully occupied the land described in schedule "C" and land along with house standing thereon as described in schedule "D" to the plaintiff ?

Regarding this issue, the learned Munsiff, Biswanath Charali decided this issue in negative by holding the view that the plaintiff has failed to prove the fact regarding the forceful occupation by the defendant on the suit land. It has been already decided in the Issue No. 5 that the defendant has claimed his right, title and interest over the land mentioned in schedule "C" and "D" on the basis of family partition. So, in view of that fact it can not be said that the defendant forcefully occupied the lands mentioned in the schedule "C" and "D". Hence, the decision of learned Munsiff in this issue is found correct and justified. Hence, I do not find any ground to interfere the decision of learned Munsiff.

Issue No. 7.

18. Whether there was family partition on 09-01-05 between the parties ?

Regarding this issue, the learned Munsiff, has decided the issue in negative and in favour of the plaintiff. But after considering the evidence of PW 4 who is the husband of the plaintiff it is found that the PW 4 has himself admitted the fact of family partition made among the sons of the plaintiff on 09-01-05 in presence of village Panchayat including the local Gaonburha. The DW 4, the local Gaonburha has also deposed that one family partition was made amongst the family members of the plaintiff on 09-01-05 and all the sons of the plaintiff have signed in the family partition in presence of plaintiff. DW 4 has also proved the said partition deed as Ext. "F". He was a signatory of the said document. So, the contents of said document has been proved by sufficient and reliable evidence of DW 4. So, after going through the Ext. "F" and also after appreciating the evidence of DW 4 (Lat Ganburha), it is found that the partition was made among the family members of the plaintiff. Though the plaintiff did not sign the document but her husband admitted the fact in his evidence. So, in view of such admission by the husband of the plaintiff, it can not be stated that the said partition document was illegal due to lack of signature of plaintiff. I do not find any material to hold the opinion otherwise.

So, taking the note of above discussion, I am of the considered opinion that there was a family partition made on 09-01-05 among the family members of the plaintiff. Hence, I find that this issue is deserves to be decided in affirmative. Accordingly, the decision of learned Munsiff is hereby reversed.

Issue Nos. 8 & 9.

19. Whether the plaintiff is entitled for a decree as prayed for and to what relief/reliefs parties entitled to ?

I deem it necessary to discuss these two issues jointly as both the issues are inter-related.

From the above discussion of different issues, it is found that the proper court fee has not been paid, the suit is found bad for non-joinder of necessary party, the plaintiff has failed to prove absolute right, title and interest over the suit land mentioned in schedule "C" and "D", the plaintiff has also failed to prove the fact regarding forceful occupation of said land by the defendant and it has been brought to light that the family partition was made on 09-01-05 among the family members of the plaintiff. So, in view of above findings, the plaintiff is not entitled to the decree as prayed by her. The Judgment and decree passed by learned Munsiff, Biswanath Charali is hereby deserved to be set aside by allowing the appeal.

Considering the facts and circumstances of the case, I pass no order as to the cost. So, parties are bear their own cost.

O R D E R.

20. In the result, the appeal is allowed. The Judgment and Decree passed by the learned Munsiff, Biswanath Charali is hereby set aside. The parties are to bear their own cost.

Prepare the decree accordingly.

Send back the LCR along with a copy of this Judgment.

Judgment is given under my hand and seal of this Court on this 21st September, 2012.

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

Dictated and corrected by me.

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

Transcribed by me.

(R. Hazarika)
Steno.