

Assam Schedule VII Form No. 132

HIGH COURT FORM NO. (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT / CASE

DISTRICT : SONITPUR

IN THE COURT OF THE MUNSIFF NO. 1, TEZPUR, SONITPUR

PRESENT : MRS. CHITRA RANI SAIKIA, AJS

Friday, the 22nd November , 2013

TITLE SUIT NO. 49 / 2007

Sri Niranjan Khodal & others **Plaintiffs**

-Versus-

Sri Sukra Khodal & others **Defendants**

The suit coming on for final hearing on 11-11-2013 in the presence of

:-

Sri A. K. Paul **Advocate for the Plaintiffs**

Sri A. K. Sarmah **Advocate for the defendants**

And having stood for consideration to this day the court delivers the following judgment.

J U D G M E N T

1. This is a suit for declaration and recovery of khas possession and consequential relief of injunction and cancellation of mutation.

2. The case of the plaintiffs as unfolded in the plaint in brief is that Late Baisan Khodal alias Late Baishnab Khodal, the predecessor in interest of the

plaintiff, defendants and pro-forma defendants, was the original owner of the suit land as described in the schedules of the plaint. That said Late Baishan Khodal @ Late Baishnab Khodal also owned and possessed another plot of land measuring 9 Bighas 1 Katha out of 13 bighas 1 Katha covered by Dag No 221 of P.P. No 132 of Village Alisinga under Borsola Mouza in the district of Sonitpur. That the said Baisan @ Baishnab Khodal during his life time on 25-02-1976 made a settlement of his immovable properties amongst his three sons namely Panchu Khodal, Bharat Khodal and Sukra Khodal. That as per the said settlement the father of the plaintiffs and the father of the pro-forma defendants were given share in respect of landed properties of Baishan Khodal situated by the North side of National Highway at Alisinga village. It was further decided vide that settlement that the plot of land measuring 9 Bighas 1 Katha covered by Dag No 221 of P.P. No 132 of village Alisinga as owned by Baishnab Khodal will be sold and a plot of land measuring 8 Bighas will be purchased out of that sale proceed at village Nanke Majuli under Harisinga Mouza in the district of Darrang (presently Odalguri district) in the name of Sukra Khodal and Baishnab Khodal shall bear all the cost for constructing residential houses there for Sukra Khodal. That after the said settlement Baishnab Khodal sold 9 Bighas 1 Katha of land covered by Dag No 221 under P.P. No 132 of village Alisinga under Borsola Mouza and Baishnab Khodal purchased a plot of land measuring 8 Bighas at village No 2 Pub Khairabari under Harisinga Mouza in the name of his son Sukra Khodal and then Baishnab Khodal with his wife and the present defendant Sukra Khodal settled at village Majuli under Harisinga Mouza. That while the defendant started to live at village Nanke Majuli permanently, father of the plaintiffs took possession of schedule A and B land and father of the pro-forma defendants took possession of schedule C and D land. That in the year 1984 Baishnab Khodal and his wife came back to village Alisinga and started to live with the father of the pro-forma defendants. That thereafter the defendant also came back to Alisinga village and he also started to live with the father of the pro-forma defendants at schedule C suit land. That after the death of his parents the defendant sold the plot of land purchased by his father at No 2 Pub Khairabari and started to live with the father of the pro-forma defendants at schedule C land. The story of the plaintiffs runs further that in the month of October 2006 pro-forma defendant No 1 with due consent from the other pro-forma defendants relinquished the share of the pro-forma defendants in respect of the schedule A, B and C land in

favour of the plaintiffs and the plaintiffs relinquished their right, title and interest over schedule D land in favour of the pro-forma defendant No 1. That while the plaintiffs in the month of October 2006 wanted to take possession of the schedule C land , the defendant resisted the plaintiffs from taking possession in the schedule C land. That apart, the defendant without having right, title , interest and possession over the suit schedule A land wanted to sell 2 Bighas of land out of 4 Bighas 7 Lessas of land as described in schedule A of the plaint. These are the facts which lead to the institution of this instant suit.

3. This suit was ordered to be heard ex-parte against the pro-forma defendants vide its order dated 27-08-2007 consequent to their non-appearance after receipt of the summons. The sole defendant contested the suit by filing written statement and challenged the maintainability of the suit on the ground that there is no cause of action for the suit. The defendant has pleaded that the suit is bad for non-joinder of necessary parties and mis-joinder of unnecessary parties. The defendant has admitted that fact that his deceased father divided his movable and immovable properties amongst his sons during his life time but denied the fact that the deceased father of the plaintiffs and deceased father of the pro-forma defendants decided to stay forever at village Alisinga by getting their equal shares in the landed property of deceased Baishnab Khodal situated at Alisinga. The defendant has stated that the landed property situated at Alisinga was also equally divided amongst the three sons of Baishnab Khodal. The defendant has denied any such settlement by which it was decided to sell a plot of land measuring 9 Bighas 1 Katha covered by Dag No 221 under P.P. No 132 situated at Alisinga and to purchase a plot of land measuring 8 Bighas at village Nanke Majuli under Harisinga Mouza in the district of Darrang (presently Odalguri) in the name of the defendant as the defendant decided not to settle at Alisinga. The defendant has pleaded that he has all along been staying at village Alisinga and he had no occasion to settle at Nanke Majuli as alleged by the plaintiffs. The defendant has indeed denied the material part of the plaintiffs's case and has prayed for dismissing the suit with cost.

4. Upon consideration of the pleadings of both sides my learned predecessor in office framed the following issues in this suit :

- (1) Whether the suit is maintainable in its present form?
- (2) Whether the suit is bad for non-joinder of necessary parties?
- (3) Whether the plaintiffs have right, title and interest over Schedule A, B and C land as mentioned in the plaint?
- (4) Whether the defendant is liable to be evicted from Schedule C mentioned land of the plaint?
- (5) Whether the plaintiffs are entitled to a decree as prayed for?
- (6) To what other relief/reliefs the parties are entitled to?

5. The plaintiff side adduced the evidence of six witnesses and exhibited certain documents in support of its case. Defendant side adduced the evidence of two witnesses in its defence. Defendant side has not exhibited any document. Learned counsels of both sides argued their respective case. The materials on record and submissions made on behalf of both sides have received due consideration of this court.

DISCUSSION OF EVIDENCE, DECISION AND REASONS THEREOF

Issue No (1) : Whether the suit is maintainable in its present form?

6. Maintainability of a civil suit depends upon the facts averred in the pleadings and not upon evidence. After perusal of the pleadings of both sides I do not find any procedural defect in the form of the suit. The pleadings do not reveal any express bar in the maintainability of the instant suit by this court as per provision of section 9 of the Civil Procedure Code, 1908. Accordingly this issue is decided in positive in favour of the plaintiff.

Issue No (2) : Whether the suit is bad for non-joinder of necessary parties?

7. It is pleaded by the defendant that the suit is bad for non-joinder of necessary parties. Learned counsel for the defendant arguing on this issue contended that the plaintiffs have not impleaded the daughters of Late Baishnab Khodal as parties in this suit. According to the learned counsel for the defendant as this is a suit regarding ancestral property, the daughters are to be impleaded as

parties and the suit is liable to be dismissed for the non-impleadment of the daughters of Baishnab Khodal.

8. Necessary party in a suit means the person whose presence is necessary for the proper adjudication of the matter. In fact, that party is necessary party in a suit in whose absence the disputed fact can not be decided. In this instant suit the dispute centres round a family settlement regarding the partition of the property of Late Baishnab Khodal among his sons. The suit is not for partition of ancestral property. As such this court is of the considered opinion that the vital issue of this suit can be decided effectively in absence of the daughters of Late Baishnab Khodal. Therefore, it can not be said that this suit is bad for non-joinder of necessary parties.

Hence this issue is decided is decided in negative against the defendants.

Issue No. (3) : Whether the plaintiffs have right, title and interest over Schedule A, B and C land as mentioned in the plaint?

AND

Issue No. (4) : Whether the defendant is liable to be evicted from Schedule C mentioned land of the plaint?

9. Both of these issues are taken up together for discussion as they are inter-related.

From the averment of the pleadings of both sides the admitted position is that the plaintiffs, the defendant and the pro-forma defendants are the legal heirs of deceased Baishnab @ Baisan Khodal, who was admittedly the owner of the suit land. Father of the plaintiffs, father of the pro-forma defendnats and the defendant are the sons of the said Baishnab Khodal. The crux of this suit lies in the fact that the plaintiffs have denied any right of the defendant over Schedule C land on the ground that during his life time Baishnab Khodal divided his landed property among his three sons vide a family settlement and according to that family settlement the defendant was allowed to settle at village Nanke Majuli under

Harisinga Mouza under Odalguri district (previously Darrang district). The plaintiffs have further pleaded that the defendant sold his share of land at Nanke Majuli and came back to village Alisinga and began to reside at Schedule C land along with his brother. The defendant, on the other hand, though admitted the fact that his father divided his property orally during his lifetime, denied any such family settlement as pleaded by the plaintiffs and has pleaded that he has been possessing the schedule C land ever since the lifetime of his father.

10. In view of such facts pleaded by both sides, the moot point that remains to be decided is whether Baishnab Khodal made a family arrangement in 1976 vide which the defendant was given his share at village Nanke Majuli instead of his share at Alisinga. The plaintiff side places reliance upon Exhibit 2 family settlement to prove its case. In his pleading as well as in his evidence on affidavit the plaintiff / PW 1 stated that on 25-02-1976 Baisnab Khodal called a meeting for dividing his property among his sons and the meeting took place in the front yard of Kshetra Mohan Khodal under his presidentship. According to PW 1, many persons including the then gaonburha Benudhar Das attended the meeting and twenty nine persons signed on the written settlement of the partition. PW 1 deposed that Exhibit 2 is the said family settlement. Exhibit 2 has been perused carefully by this court. Exhibit 2 does not bear the signatures of Baishnab Khodal and his sons. In absence of signature of the executant exhibit 2 does not have any force in the eye of law. The villagers can not execute the family settlement in absence of the head of the family whose property is proposed to be divided among his sons. PW 2 Ravi Khodal, who is projected by the plaintiff side as one of the witnesses to the said family settlement, stated in his cross examination that in Exhibit 2 there is no mention regarding the fact of empowering the villagers to make the partition. PW 2 further clarified in his cross examination that there is no signature of Baishnab Khodal or his sons Panchu Khodal, Bharat Khodal or Sukra Khodal in exhibit 2. The age old practice and law of family settlement implies the settlement within the family. It is the head of the family who has the complete authority to make such family settlement. For the sake of convenience and to make it more transparent and effective, during the family settlement the executant may invite the villagers or the public of the locality to witness the settlement. But in no case the family settlement

can take place in absence of the executant. Therefore, I find no force in exhibit 2 and hence exhibit 2 can not be relied upon to gather support for the plaintiff's case.

11. In his cross examination the defendant being DW 1 admitted that in 1976 his father called a meeting to divide his property among his sons . It is in the evidence of DW 1 that he did not attend that meeting. DW 1 further stated in his cross examination that in 1976 his father orally divided his property among his sons. At this point it would be appropriate to consider the contention raised by Sri A. K. Paul, learned counsel for the plaintiff. Sri Paul has contended that in his written statement and in his evidence the defendant has admitted the family arrangement and in view of such admission the defendant can not deny the fact that he was given share in purchased property at Nanke Majuli vide that family arrangement. In support of this contention learned counsel refers to the decision reported in AIR 1966 SC 405. I have carefully gone through this decision. With utmost respect to the contention raised on behalf of the plaintiff I am unhesitant to hold that the said decision can not be relied upon in this instant case because the facts of both the cases are quite dissimilar. In his evidence the defendant being DW 1 reiterated that his father orally divided his property among his sons during his life time. But DW 1 categorically denied that his father constructed residential house for him at Nanke Majuli as he declined to settle at Alisinga. The defendant has stated in his pleading as well as in his evidence that his father orally divided his property among his sons; but nowhere the defendant has stated that there was written family settlement as claimed by the plaintiff. In view of such categorical denial on the part of the defendant about his alleged settlement at Nanke and in view of his clear evidence that there was oral partition in the life time of his father, it can not be held that he admitted the plaintiff's plea about the family settlement.

12. Drawing the attention of this court to the evidence of DW 1 in his cross examination where he stated that he stayed at Nanke Majuli for about an year and his parents also stayed there with him, learned counsel for the plaintiff has contended that as it is evident from the evidence of the defendant himself that he stayed at Nanke Majuli, it is clear that the family settlement was acted upon and therefore the said family settlement has legal force. To fortify its case upon the family settlement learned counsel for the plaintiff refers to the decision reported in

AIR 1965 S.C. 825. I have perused that decision. What is laid down in that decision is that for enforcing a family settlement in the court of law it must be shown that there was an occasion for entering into a family arrangement and it was acted upon. In this instant case though the defendant has stated in his cross examination that he stayed at Nanke Majuli for about an year, there is absolutely nothing in the evidence on record to show that the defendant possessed a separate plot of land at Nanke as purchased by his father as per family settlement. Plaintiffs have not produced any land document in support of its pleading that at Nanke Majuli land was purchased in the name of the defendant. Nothing is indeed brought forth on the record to show that the family arrangement as claimed by the plaintiff is acted upon. Therefore, I find no merit in the contention raised by learned counsel for the plaintiff in this regard and I respectfully reject the contention on this point.

13. From the foregoing discussion of evidence and the reasons it transpires that the plaintiff side has failed to prove its pleading that there was an written family settlement regarding the property of Baishnab Khodal. Plaintiff side has failed to prove Exhibit 2. While plaintiffs have failed to prove exhibit 2, the vital part of its story remains unproved. As plaintiffs are not able to prove the written family settlement as claimed by them, they can not claim that they are the owners and possessors of Schedule A, B and C land. As stated above, the defendant has pleaded in his pleading and deposed in his evidence that there was an oral partition of his father's property during the life time of his father and as per that partition he has been possessing the schedule C land ever since the days of his father. As the plaintiffs have failed to prove the written family settlement, the story of the defendant seems to be more probable.

14. That apart, the land documents as submitted by the plaintiffs reveal that name of the defendant is duly mutated in the records of right in respect of the suit property as legal heir of Late Baishnab Khodal. Exhibit 3, Exhibit 5, Exhibit 6 clearly reveal that name of the defendant is duly mutated in respect of the portion of the suit land. Contents of Exhibit 3 and Exhibit 5 are duly proved by PW 6, Lat Mandal under Dhekiajuli Revenue Circle. In his evidence PW 6 clarifies that in the land record of village Alisinga in P.P.No 126 and P.P. No 127 there is mention of the name of Sukra Khodal along with the plaintiffs and the pro-forma defendants. The

plaintiffs have pleaded that the defendant has mutated his name in respect of the suit land without any knowledge of the plaintiffs and the pro-forma defendants in the year 1988. There is nothing in the entire evidence of the plaintiff side to show that the said mutation of the defendant is illegal. Even if we assume for the sake of argument that the defendant got his name mutated illegally, the plaintiffs and the pro-forma defendants could have approached the appropriate authority in time as prescribed by law for cancellation of the said mutation. But as transpires from the record no such step was taken for cancellation of the mutation of the defendant earlier. It leads to the inference that plaintiffs did not have any objection regarding the said mutation. Therefore, there is no merit in the pleading of the plaintiffs that the defendant got his name mutated in respect of the suit land behind their back.

In the net result of what is discussed above this court is of the considered opinion that the claim of the plaintiffs over the Schedule land is not believable. Hence, issue No (3) and issue No (4) are decided in negative against the plaintiff.

Issue No (5) : Whether the plaintiffs are entitled to a decree as prayed for?

AND

Issue No (6) To what other relief/reliefs the parties are entitled to?

15. For convenience both these issues are taken up together for discussion. In this instant suit the plaintiffs have claimed their right, title, interest and possession over Schedule A, B and C land and also claimed for recovery of khas possession of Schedule C land by evicting the defendant therefrom. The plaintiffs have further prayed for cancellation of mutation of the defendant in respect of entire suit land. The plaintiffs have also prayed for permanent prohibitory injunction. In view of the decision in issue Nos (3) and (4) as discussed above the plaintiffs are not entitled to get any relief as claimed in this suit. Therefore, issue No (5) is decided in negative against the plaintiffs.

The defendant is entitled to get the cost of this suit. Issue No(6) is decided accordingly.

ORDER

16. This suit is dismissed on contest with cost. The plaintiffs are not entitled to get any relief in this suit. The defendant shall get the cost of the suit.

Prepare the decree accordingly.

The judgment is delivered in the open court and the operative part of the judgment is pronounced in the open court today, the 22nd day of November, 2013 and it is given under my hand and seal.

(**Chitra Rani Saikia**)
Munsiff No. 1,
Tezpur :: Sonitpur

ANNEXURE

1. Plaintiff's witness :

- PW 1 : Sri Niranjan Khodal (the plaintiff)
PW 2 : Sri Rabi Khodal
PW 3 : Expunged
PW 4 : Rabindra Das
PW 5 : Sri Jadab Khodal
PW 6 : Jimi Kakati (official witness)

2. Plaintiff's exhibits :

- Exhibit 1 : Certified copy of Jamabandi of P.P. No 132
Exhibit 2 : Written description of partition in Raj Mel
Exhibit 3 : Certified copy of Jamabandi of P.P. No. 127
Exhibit 4 : P.P. No. 127
Exhibit 5 : Jamabandi of 126 No. P.P.
Exhibit 6 : Certificate given by Circle Officer, Dhekiajuli Revenue Circle
Exhibit 7 : P.P. No. 132
Exhibit 9 : Myadi Jamabandi of Alisinga gaon under Barsola Mouza
Exhibit 10 : Chitha Bahi of the said village

3. Defendants's witness :

- DW 1 : Sri Sukra Khodal
DW 2 : Sri Mahadeb Das

4. Defendants's exhibits : Nil

(**Chitra Rani Saikia**)
Munsiff No. 1,
Tezpur :: Sonitpur