CASE NO.:
Appeal (civil) 4813 of 2000

PETITIONER:
Lankeshwar Malakar and Ors.

RESPONDENT:
R. Deka and Ors.

DATE OF JUDGMENT: 30/11/2006

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
JUDGMENT

O R D E R

The plaintiffs are before us questioning the correctness or otherwise of the judgment and order dated 21.8.1998 passed by a learned Single Judge of the High Court of Assam, whereby and whereunder the second appeal preferred by the appellant against a judgment and order dated 23.5.1988 passed by the Assistant District Judge, Barpeta, in Title Appeal No. 46/1986, was dismissed. The basic fact of the matter is not in dispute.

The lands in suit and other lands belong to one Durga Malakar. He is the paternal uncle of the plaintiffs' father Nareswar Malakar. The exact date of death of Durga Malakar is not known. He left behind his widow, namely, Gandhari. The dispute between the parties revolves on the execution of a will by Durga Malakar in favour of the plaintiffs on 8.10.1958 and execution of a purported Deed of Gift dated 5.5.1958, which was in the name of his wife Gandhari.

Before we advert to the questions raised before us we may notice that Gandhari by reason of a Sale Deed dated 21.1.1960 conveyed her right, title and interest in the properties in question purported to be based on the said Deed of Gift dated 25.5.1959 in favour of Hamchandra Malakar. Arvinda Sarma allegedly entered into a deed of exchange of land with the said Hemchandra, grandfather of the respondent herein; pursuant whereto the grandfather allegedly came in possession of the lands in question. The names of the respondents were entered into the revenue records of rights. The plaintiffs therefore filed a suit in the Court of Munsif, Barpeta, which was registered as title suit No. 111/1966. We may at this juncture notice that the plaintiffs filed an application for grant of probate in their favour which was allowed by order dated 20th November, 1973.

The learned Trial Judge having regard to the pleadings of the parties inter alia framed the following issues:

1. Whether the Court has got pecuniary jurisdiction to try this suit?

2. Whether proper Court fees have been paid?

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

4. Whether the plaintiff has got right, title and interest over the suit land?

5. Whether Gandhari, wife of Durga Malakar has saleable interest over the suit land to sell it to one Hem Kanta Malakar?

6. Whether the defendants have acquired valid title over the suit land by means of 'exchange' as alleged in the written statement?

7. To what relief, if any, the parties are entitled?

8. Whether the suit is barred by limitation?"

In the said suit the following prayers were made:

(i) "That the plaintiffs' possession of the land in schedule 'Ka' be confirmed on declaration of their title thereto and on declaration of the principal defendant's unlawful possession null and void;

(ii) that necessary precept be issued to the S.D.C., Bajali Circle, for effecting mutation of the land in Schedule 'Ka' in favour of the plaintiffs on the basis of the probate and their long term possession;

(iii) That a perpetual prohibitory injunction be issued, restraining the principal defendants from causing hindrance to the possession of the land in Schedule 'Ka'."

Schedule 'Ka' of the plaint was described as under:

SCHEDULE - "Ka"

Land measuring 1 Bigha 2 katha with a revenue of Rs. 2.24 paise in dag 1628 (new)/548(old) of K.P. Patta No. 254(new)/91(old) and 4 Katha 6 lechas (revenue Rs. 1.12) in dag 1660 (new)/476 (old) of the same patta within following boundaries:-
North - Hari Prasad;
South - Nripen Sarma;
East - Andhu Kalita;
West - Arabinda Sarma/
Dag No. 1660/476.
North - Ram Nareesh Sarma;
South - Tularam Talukdar;
East - Road;
West - Kiron Sarma.

(2) Land measuring 2 Katha 16 lechas (revenue Rs. 1.12 Paise) in dage 883 of K.P. Patta No. 57 Old/368 (new) of Pathsala town, Mauza Uttar bajali, within the following boundaries:-

North - Kiron Sarma;
South - Kiron Sarma;
East - Andhu Kalita;
West - Road.

Total land measuring 2 Bigha 4 Katha 2 lecha in the two pattas in the suit land.

The learned Trial judge decreed the suit inter alia on the premise that Gandhari did not have any legal right to convey the suit land in favour of the said Hemchandra Malakar and consequently the defendants-respondents did not derive any right, title and interest pursuant to and in furtherance of the said Deed of Sale or the Deed of Exchange executed in the year 1960. Learned First Appellate Court however reversed the said judgment, principally holding that the suit land and the lands described in the Will could not be co-related by the plaintiffs but came to he conclusion that the Deed of Gift was not proved. The defendants-respondents did not prefer any appeal against the said findings before the High Court. The plaintiffs-appellants did. The High Court formulated the following substantial question of law:

"Whether the findings of the lower Appellate Court are vitiated by erroneous interpreting and misleading of the exhibits?"

Before the High Court, the contentions which inter alia had been raised that the findings of the first Appellate Court was contrary to records as it proceeded on the basis that the plaintiffs-appellants in the plaint did not mention in regtard to old Patta No. 57 in Schedule ‘Ka’ of plaint.

The properties mentioned in the will inter alia refers to Patta No. 91 (old), which is equivalent to Patta No. 254 (new), consisting of Dag No. 1628 (new), 548 (old) measuring an area of 1 Bigha 2 Katha as also Patta No. 57 (old), (368 new) being Dag No. 83, measuring 2 Kathas and 16 lechas.

The learned first Appellate Court, therefore, in our opinion, was not correct in ignoring the said fact.

Furthermore, if the plaintiffs had given full description of the properties in the plaint vis-a-vis the properties which were the subject matter of the Will, we are of the view that the first Appellate Court should have recorded a findings on the basis of the materials on records. It only refers to the deposition of one of the witnesses examined on behalf of the plaintiff and on the basis thereof, came to the conclusion that the suit lands as described in Schedule ‘Ka’ did not tally with the lands which were the subject matter or the Will. In our opinion, the High Court should have considered this question from the correct perspective.

Although we are not satisfied with the purported substantial question formulated by the High Court, having regard to the fact that the High Court failed to determine the question in the proper perspective, it is necessary that the second appeal be directed to be considered afresh on merit. We, therefore, set aside the impugned judgment passed by the High Court and remit the matter back to it for consideration thereof afresh. It will be open to the High Court to formulate fresh question/questions of law.

The appeal is allowed accordingly. No costs.