

HIGH COURT FORM NO. J (2)**HEADING OF JUDGMENT IN ORIGINAL SUIT**

District : Baksa

IN THE COURT OF MUNSIFF, BAKSA, MUSHALPUR

PRESENT : - Smt. Dikshya Rani Dutta LL.M, AJS.

Munsiff , Baksa, Mushalpur

On this 05th March, 2022

Title Suit No- 33 of 2018

1. Sri Haren Talukdar
S/o Lt. Tilak Talukdar
Vill & P.O.- Kalakuchi,
Mouza- Pub-Baska
P.S- Tamulpur
Dist.: Baksa, Assam.

.....Plaintiff

Versus.

1. Sri Karuna Talukdar
S/o Lt. Tilak Talukdar
Vill/P.O- Kalakuchi,
Mouza- Pub-Baska
P.S- Tamulpur

.....Principal Defendant

2. Sri Tarun Talukdar
3. Sri Barun Talukdar
4. Sri Kamini Talukdar

5. Basanta Tauldar
6. Hemanta Talukdar
All are sons of S/o Lt. Tilak Talukdar
Vill & P.O- Kalakuchi,
Mouza- Pub-Baska
P.S- Tamulpur
Dist.: Baksa, Assam.
7. Smt. Sabitri Talukdar
W/O Sri Deben Das
Vill- Galbill,P.S- Barama
Dist- Baksa, Assam
8. Smt. Phuleswari Talukdar (Das)
W/o Lt. Soneswar Das
Vill- Kalakuchi, P.S- Tamulpur
Dist- Baksa, Assam
9. Smt. Chitra Talukdar
W/O- Shimbhu Ram Das
Vill- Panimaj Kuchi,P.S- Ghograpar
Dist- Nalbari, Assam
10. Smt. Pramila Talukdar
W/O- Harmohan Das
Vill- Kalakuchi,P.S- Tamulpur
Dist- Baksa, Assam
11. Smt. Lakshi Talukdar (Barman)
W/O- Dulal Barman
Vill- Barama Kaya Chowk
P.S- Barama,Dist- Baksa, Assam
12. Smt. Bidyamati Talukdar

W/O- Anil Rajbongshi

Vill- Namati, P.S- Nalbari

Dist- Nalbari, Assam

13. Manju Talukdar (Barman)

W/O- Bishnu Barman

Vill- Barkhopa,11 miles,

P.S- Tamulpur, Dist- Baksa

.....Proforma defendants

This suit/case coming on for final hearing on 24.02.2022 in the presence of :

Sri T. Sarma, Advocate for the Plaintiff; and

Sri G.C. Nath, Advocate for the Defendants

And having stood for consideration to this day, the Court delivered the following Judgment:-

JUDGMENT

Suit for redemption of mortgage, declaration of right, title, interest, recovery of possession and also for permanent injunction.

Plaintiff's Case in brief :

1. Plaintiff's case, in brief, is that the Tilak Talukdar, the father of the plaintiff, defendant no. 1 and proforma defendant Nos. 2,3,4,5,6 died in the year 1993 leaving behind some ancestral properties, to be inherited by the legal heirs. In 1994 the said ancestral properties, after the death of Tilak Talukdar were partitioned among his sons. His daughters, though, abandoned their rights to their

share in the ancestral properties. The suit schedule land more precisely described in the plaint as schedule 'A' land measuring 5 Bighas 2 kathas 10 Lechas including a pond situated in south eastern corner in K.P Patta No. 22, Dag No. 225 situated at village Amayapur under Pub-Baska mouza forming a part of share of the ancestral property, has fallen to the share of the plaintiff and is enjoyed by the plaintiff in accordance with the partition. The plaintiff has been in peaceful possession of his share of land that is Schedule A land and the same had been mutated in the land records in the name of the plaintiff. On 29.12.2006 land measuring 4 ½ Bighas which is described as Schedule B in the land and forming a part of the Schedule A land was orally mortgaged to the principal defendant by the the plaintiff being the owner and in possession for a sum of Rs. 55,000/- under a oral usufructuary mortgage. It was agreed between the parties that the defendant would cultivate in the land and rear fish in the pond and the produce from the land and pond would adjusted to the interest of the mortgage debt and the defendant would reconvey vacant possession at the time when the principal amount is repaid.

2. It is alleged in the plaint that the plaintiff had approached the defendant No. 1 with the mortgage amount of Rs. 55,000/- and requested him to receive the said amount and to redeem and deliver the possession of the suit properties to him. Despite the same the defendant No.1 declined to receive the amount of Rs. 55,000/ instead he

demanded Rs.1,00,000/- per Bigha from the plaintiff for redemption of the mortgage.

3. With the intervention of the village headman and other villagers although the defendant No. 1 had finally agreed to receive Rs. 60,000/- per bigha for redemption of the mortgage but on account of the adamant nature of the defendant no. 1 the matter could not be settled.
4. Presently the defendant no. 1 is planning to dig ponds in the entire Schedule A land. Hence the plaintiff has instituted this suit for redemption of the suit land in Schedule B and for declaration of his right, title and interest over the suit schedule land, recovery of khas possession and also for permanent injunction.

Defendant's Case

5. The Defendant No. 1,2 & 3 contested the suit by filing written statement and the suit proceeded ex parte against proforma defendant Nos. 4,6,8,9,10,11,12 and the suit against proforma defendant No. 13 was dismissed.

Written statement of defendant Nos.1,2,&3:

6. The Defendant Nos. 1,2 & 3 contested the suit by filing written statement and denied all the allegation of the plaintiff in the plaint except the fact of death of their father. The defendants contended that his father Late Tilak Talukdar had two wives namely Bimala Talukdar and Late Basanti Talukdar. From the first wife he had four sons namely Haren, Kamini, Basanta, Hemanta and from the second wife he had three sons namely Karuna, Barun,

Tarun. Their father late had residential land of 7 bigha 4 Katha. After the death of the father, the seven sons had amicably partitioned their ancestral property orally .The said residential plot was equally divided among 6 brothers as one of the son namely Basanta Talukdar received his share in an another residential plot of their father. Further Late Tilak Talukdar had cultivable land measuring total 29 bigha 2 katha 1 lessa i.e. 23 bigha 4 katha 14 lessa in K.P.Patta No.24 of village Kahibari and 5 bigha 2 katha 7 lessa of land in K.P. Patta No. 22 of village Amayapur. The elder son of Late Tilak Talukdar namely Tarun Talukdar had abandoned his share in the cultivable land. Accordingly, during the oral partition five brothers except the defendant no. 1 received their share in Patta No. 24 and the share of the defendant No. 1 fall in K.P. Patta No. 22 of village Amayapur. The defendant side has denied the execution of the oral mortgage by the plaintiff in favour of the defendant No. 1. The defendants also denied the partition as claimed by the plaintiff. The defendants contended that the suit land belongs to the share of the defendant no. 1, the plaintiff has no right, title over the suit land. Therefore the defendant No. 1,2,3 have prayed to dismiss the suit of the plaintiff.

7. On the above pleadings, my Learned Predecessor-in-office has framed the issues. Having regard to the pleadings and material on record, this Court vide order dated 24.02.2022 has recasted the issues as follows:

ISSUES

1. Whether there was a mortgage in respect of the suit land described in Schedule B which was entered into by the plaintiff with the defendant No. 1 and if there was a mortgage, whether the plaintiff is entitled to a decree for redemption of the same?
2. Whether the plaintiff has right, title, interest over the suit land described in Schedule B of the plaint?
3. Whether the plaintiffs are entitled to a decree as prayed for?
4. To what other relief (s) the parties are entitled to?
8. During trial, both the sides adduced evidence in support of their respective cases. Plaintiff side examined Sri Haren Talukdar as P.W1, Hemanta Talukdar P.W2, Basanta Talukdar PW3, and Jogesh Talukdar P.W4 .They were duly cross-examined and discharged. Defendant's side examined Sri Karuna Talukdar, as D.W. 1, Tarun Talukdar as D.W.2,Sri Madhura Rajbongshi as D.W.3. Both the sides produced some documents.
9. I have heard the oral arguments of the Learned Counsels for both the sides and gone through the case record. I have given my concerned consideration to the submission of the learned counsels of both sides.
10. My decision on the issues so framed along with reason is given herein under.

**DISCUSSION, DECISION AND REASONS
THEREOF:-**

Decision on issue No.1:

11. As alleged by the plaintiff in the suit in hand concerns to an oral mortgage agreement entered on 29.12.2006 by the plaintiff, for a part in suit Schedule A land measuring 4 ^{1/2} which is described as Schedule B with Defendant No. 1, for a mortgage amount of Rs. 55,000/-. In this case, it is stated in the plaint that the borrowed a sum of Rs.55,000/- from the defendant No. 1 and defendant No. 1 was allowed to have possession and enjoy the property, until the principal amount is repaid. Hence, the alleged mortgage by the plaintiff is of the nature of a usufructuary mortgage.
12. That on basis of the above stated mortgage, plaintiff has claimed for the relief of redemption mortgage of the same, hence it is cardinal to examine whether there was a valid mortgage in respect Suit schedule land. Thus in the line of the same it is to be examined the relevant legal provisions concerning mortgage to arrive at a conclusive decision.
13. As per Section 58 of The Transfer of Property Act, 1882, mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance

of an engagement which may give rise to a pecuniary liability. Where a mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, as per Section 58 (d) of The Transfer of Property Act, it is known as usufructuary mortgage.

14. Sub-section (d) of Section 58 of the Transfer of Property Act, 1882, reads as follows:- □ (d) Usufructuary mortgage - Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

15. In the case on hand, keeping in mind the above definition of usufructuary mortgage if the pleadings are looked into, there can be no doubt that the transaction by which the possession of the property was delivered to defendant No. 1 by the plaintiff is an oral usufructuary mortgage.

16. It is worthwhile now to examine to what extent the oral mortgage agreement in this suit is valid and

enforceable in the eyes of law. In this context Section 9 of the Transfer of Property Act, 1882 may be referred as hereunder:

Oral transfer:— A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

17. If the transaction is a transfer of property and there is no express provisions of law requiring it to be in writing, section 9 will enable it to be made without writing.

18. Section 59 of The Transfer of Property Act, 1882, stipulates as to how a mortgage [other than a mortgage by deposit of title deeds] can be effected when the money secured is one hundred rupees or upwards. Section 59 of the Transfer of Property Act may also be quoted hereunder in reference to an oral mortgage:

59. Oral mortgage is not permissible by virtue of the provisions of Section 59 of the Transfer of Property Act. Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

19. A reading of the above provision would make it ipso facto clear that if the money secured is less than one hundred rupees, mortgage can be effected by any

means even without a registered instrument and in case of usufructuary mortgage, delivery of the property would be suffice. If the money secured is one hundred rupees or upwards, a mortgage [other than a mortgage by deposit of title deeds] can be effected only by way of registered instrument.

20. The suit in hand concerns to an oral mortgage agreement entered on 29.12.2006 by the plaintiff, for a part in suit Schedule A land measuring 4 ^{1/2} which is described as Schedule B with Defendant No. 1, for a mortgage amount of Rs. 55,000/-. In the mortgage agreement entered by the Plaintiff the individual value of each mortgage agreement exceeded Rs.100, hence complying with Section 59 of the Transfer of Property Act, 1882 the mortgage agreement was required to be in writing and mere oral agreements are not maintainable in the eyes of law. Since money secured was Rs.55,000/- by delivery of possession of the property by plaintiff to defendant No.1, the intended mortgage had not come to be effected since there was no registered instrument signed by mortgagor and attested by at least two witnesses. Thus, in the instance case, though it is alleged that the possession of the property was also delivered by the plaintiff to defendant No. 1, there can not be any legal relationship of mortgagor and mortgagee between them by virtue of the said oral transaction. Since the legal mandates alleged mortgage of the Suit land by the plaintiff have

not been complied with, therefore the same is not considered valid in the eyes of law.

21. The word redemption means to make free or get back the mortgage property by paying mortgage debt. Section 60 of Transfer of Property Act conferred the right to redeem. As there was no valid mortgage; the plaintiff has no right to redeem. Therefore, the right to redeem the mortgaged property by the plaintiff is not available.
22. Accordingly, the Issue No. 2 is decided in negative and against the Plaintiff.

Decision on Issue Nos. 2, 3 & 4:

23. For convenient of discussion and also for brevity these three issues will be decided together. Issue No. 2 & 3 relate to whether the plaintiff has right, title and interest over the suit land and whether the plaintiff is entitled to get decree for recovery khas possession of the suit land.
24. Plaintiff has alleged that the suit land (Schedule B) forming part of the Schedule A land, the plaintiff had received the same during partition of the ancestral properties in the year 1994. Hence, it is necessary to examine whether the plaintiff has been able to prove the partition.
25. It is settled proposition of law that oral partition amongst members of Joint Hindu Family is not barred, the co-owners can partition the immovable properties

orally. But, however where a document is employed to effectuate a partition or any of the transactions specified in [Section 17](#) of the Registration Act such document must be registered, notwithstanding with the transaction is one which the law does not require to be put into writing. Such unregistered document cannot be looked into to prove the terms of the partition.

26. In the present case, it is stated in the plaint that the partition was reduced into writing subsequently. Hence, the plaintiff is allowed to prove the partition only by proving the partition deed. As alleged by the plaintiff the partition was reduced into writing, the same requires to be registered as per Sec. 17(b) of the Registration Act. It appears from the pleadings of the plaintiff that the partition not registered. A document which is required to be registered and has not been registered shall not have any effect on the immovable property comprised in it.

27. While examining the evidence adduced by the plaintiff it has come up that the said partition deed was not produced in evidence. Secondary evidence of the factum of partition will not be admissible by reason of Section 91 of the Evidence Act, 1872. Section 91 of Evidence Act enacts, that when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a property, have been reduced to the form of a document, no evidence shall given in proof of the terms of such contract, grant

or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of the Evidence Act. Oral evidence alone adduced by the plaintiff side cannot be accepted to prove the partition between the plaintiff and the defendants.

28. Admittedly the partition of entire joint family property has not been reflected in the revenue record till date. The revenue record continues to show the property as joint amongst all the co sharers. The entries in the Record of Rights regarding the factum of partition is a relevant piece of documentary evidence.
29. Further, it is submitted by the learned counsel for the defendants that there is difference between the certified copy of chitha pertaining to land measuring 5 Bighas 2 Kathas 10 Lechas in Dag No. 225, K.P. Patta No. 22 which is exhibited as Exhibit 1 by the plaintiff side and certified copy Jamabandi in respect of K.P patta no. 22, Dag no. 225 as exhibited by the defendant side as exhibit-A. Although both the copies were purportedly certified true copies but there are material discrepancies in the said certified copies of chitha and Jamabandi respectively. In the certified copy of chitha in Exbt no. 1 shows that vide order dated 19.05.2015 the name of Barun Talukdar, Kamini, Haren, Basanta, Hemanta, Barun, Tarun, all are son's of Tilak have been mutated through inheritance in

place of Tilak, whereas it reflects in the certified copy of jamabandi exhibited by the defendant side in Ext-A that vide order dated 19.05.2016 the names of Barun Talukdar, Kamini, Haren, Basanta, Hemanta, Karuna and Tarun Talukdar, all being son's of Tilak, have been mutated in place of Tilak. Hence it appears to be clear that there is discrepancies regarding the date of the order reflected in exhibit-1 and in exhibit-A. Further it reflects in the certified copy of chitha(exhibit-1) that vide order dated 29.08.2015 the name of Sri Haren Talukdar i.e. plaintiff has been mutated in the chitha in respect of land situated in Dag No. 225.K.P. Patta no 22 of village Amayapur in place of the names of Barun, Kamini, Basanta, Hemanta, Karuna (Brothers of the plaintiff and coshareres) .But no such order has been reflected in the certified jamabandi of the same land (Exhibit A) pertaining to the mutation of the name of the plaintiff.

30. Although the Court shall presume to be genuine every documents purporting to be a certified copies of the public documents, yet the presence of such suspicious discrepancies between the certified copy of chitha and jamabandi pertaining to the same suit land naturally tend to make the initial onus very heavy on the plaintiff, and unless it is satisfactorily discharge, the Court would be reluctant to treat the Exhibit-1 i.e. the certified copy of chitta in respect of Dag no 225, K.P patta 22 as genuine. Mere production and marking of

certified documents as exhibit cannot be held to be due proof of its contents. The plaintiff ought to have proved the genuineness of the certified copy of chitha by producing the evidence of those persons who came vouchsafe for the truth of the facts. But the plaintiff has not taken any step for calling any official witness i.e. the concern circle officer/lat mandal/office assistant to proof the certified copy of chitha in Exhibit-1 as genuine. Hence the authenticity of Exhibit-1 has not been proved.

31. It is a well settled law that the plaintiff has to prove his own case and would have to stand on his own legs. The plaintiff had to establish to the preponderance of probability, plaintiff cannot take advantage of the weaknesses of the case of defendants, if any. Hence, since there is absolutely no documentary evidence to support the theory of partition in the year 1994 propounded by the plaintiff, hence the oral testimony of PW's qua partition is not required to be examined. Accordingly it has to be concluded that the plaintiff has failed to prove that partition of property took place in the year 1994.

32. The relief of declaration of plaintiff's exclusive right, title and interest in the suit property in Schedule B is not maintainable as the plaintiff has failed to prove the alleged partition and the defendants being co sharers in the suit schedule land, plaintiff does not have exclusive title over the suit land. From the above noted

discussion it is also apparent that plaintiff is also not entitled to recover the khas possession of the suit land in Schedule B and as well for the remedy of permanent injunction. Accordingly the plaintiff is also not entitled for any relief as prayed for.

33. Accordingly, this issue Nos. 2, 3 & 4 are decided against the plaintiff.

ORDER

The suit of the plaintiff is dismissed on contest with costs.

Prepare decree accordingly.

Given under my hand and the seal of this Court on this the 5th day of March, 2022 , at Baksa.

Dikshya Rani Dutta
Munsiff, Baksa

Typed and corrected by me :

Dikshya Rani Dutta

Munsiff, Baksa

APPENDIX

A. PLAINTIFFS' WITNESSES

- 1.Sri Haren Talukdar as P.W1,
- 2.Hemanta Talukdar P.W2,
- 3..Basanta Talukdar PW3, and
4. Jogesh Talukdar P.W4

B. PLAINTIFFS' EXHIBITS

Exhibit--1 – Certified copy Chitha of Amayapur village, Mouza- Pub-Baska

Exhibit – 2 – Certified copy of Kalakuchi village,
Mouza- Pub-Baska

Exhibit – 3(1) 3(2) Land revenue payment receipt.

C. DEFENDANTS' WITNESSES

1. Sri Karuna Talukdar, as D.W. 1,
2. Tarun Talukdar as D.W.2 ,
3. Sri Madhuram Rajbongshi as D.W.3,

D. DEFENDANTS' EXHIBITS

Exhibit- A – Certified copy of Jamabandhi of K.P Patta
22 of village Amayapur.

Exhibit-B- Certified copy of Chitha in Dag No. 85, of
Patta No. 127