IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

RSA 111/2006

Sri Jitendra Lal Roy
S/o Late J.M. Roy of village Barjalanga Part X, Ph. Chatla Haor,
P.S. Silchar, District – Cachar,
Assam.

- **Appellant/Defendant No. 1**

- **Versus** –

1. M/s Derby Tea and Industries
   having its Registered Office at 16 Hair Street Calcutta-1.

   - **Respondent/Plaintiff**

2. Smti Sita Rani Roy
   W/o Late Haridas Ray
3. Miss Sikha Rani Roy
4. Miss Habee Roy

   Daughters of Late Haridas Roy

5. Smti Sushama Roy,
   W/o Late Surendra Chandra Roy,

   All of Borjalanga Part X, Ph. Chatla Haor,
   P.S. Silchar, District – Cachar,
   Assam.

   - Pro forma Respondents/Defendants

Advocate:

For the appellant	:	Mr. D. Mazumdar, Senior Advocate Mr. R. Sarma, Advocate
For the respondent No.1	:	Mr. S. Dutta, Senior Advocate Mr. S. K. Kejriwal, Advocate Mrs. S. Kejriwal, Advocate
For the pro forma respondents	:	None appears
Dates of hearing	:	25.08.2015, 02.09.2015 and 10.09.2015.
Date of judgment	:	16.10.2015

BEFORE
HON'BLE MR. JUSTICE A.K. GOSWAMI

JUDGMENT AND ORDER

Heard Mr. D. Mazumdar, learned Senior counsel, appearing for the appellant. Also heard Mr. S. Dutta, learned Senior counsel, appearing for the respondent No. 1.

2. This Second appeal is preferred by the defendant No. 1 against the judgment and decree dated 08.06.2006, passed by the learned District Judge, Cachar, Silchar, in Title Appeal No. 3/2002, affirming the judgment and decree dated 21.05.2002, passed by the learned Civil Judge, Senior Division No. 2, Cachar, Silchar, in Title Suit No. 15/1979, whereby the suit of the plaintiff was decreed.

3. The Second appeal was admitted by an order dated 10.01.2007 to be heard on the following substantial questions of law:

> "1. Whether the finding of the lower Appellate court that the defendants are not tenants as defined in Section 3(17) of the Assam Temporarily Settled Areas Tenancy Act, 1971, is sustainable inasmuch as the said finding was arrived at on misconstruction of the said provision of law and without consideration of the evidence adduced by the defendants.
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> 2. Whether the learned appellate court below acted illegally in decreeing the suit without setting aside the Khatian issued by the competent authority, and there being no pleading nor any issue framed in this regard.
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> 3. Whether the judgment and decree passed by the lower appellate court are perverse in view of the fact that the said court did not consider the evidence of DWs 1, 2 and 3 and the documentary evidence particularly Ext-C adduced by the defendants."

4. The plaintiff is a tea estate by the name of Derby Tea Estate, in the District of Cachar, and is engaged in special cultivation of tea. The pleaded stand of the plaintiff is that the defendants belong to one family and they are refugees from erstwhile East Pakistan and they were provided accommodation in a colony established by the State Government under a scheme for rehabilitation of refugees. The defendants have dwelling houses at Silchar and defendant No. 1 is a businessman. The defendants, without knowledge of the plaintiff, in collusion with Land Record staff, got their names entered in the Khatian as tenants under the Assam (Temporarily Settled Areas) Tenancy Act, 1971 (for short, 'Tenancy Act') in respect of the land described in the schedule to the plaint, comprising of

Schedule-1 totaling 8 Bigha 12 Katha 2 Chhatak in Mouza Barjalanga, and 21 Bigha 18 Katha 15 Chhatak in Mouza Cleverhouse in various dags. The plaintiff was not aware of the surreptitious conduct of the defendants and coming to learn about the activities of the defendants sometime in the first week of 1977, the plaintiff, through its Manager, lodged objection but, despite lodging of the objection, final Khatians were issued in the names of the defendants and this came to the knowledge of the plaintiff in the first week of January, 1978. In respect of the Schedule-1 land, Khatian was issued in the name of defendant No. 1 and, in respect of Schedule-2 land, Khatian was issued in the names of the defendants, who are not agriculturists but traders. The defendants never held land under the plaintiff as tenants and at no point of time rent was paid by the defendants. It is further alleged that fraudulently and by misrepresentation of fact, Khatians were obtained in plain area in the midst of *tillas* and highlands claiming tenancy right, and enquiries revealed that the defendants and some other displaced persons, in the vicinity of Barjalanga Part-X, along with some ex-tea estate labourers of Derby Tea Estate joined hands together to grab land of the tea estate secretly and managed to prepare a good number of Khatians of land within the tea estate, which was kept by the plaintiff for their future plantation and other development works. For 4/5 years, jungles on plain areas at the foot of *tillas* and highlands were cleared but not much importance was attached by the plaintiff to such activity of the tea estate labourers as they usually cut trees for collection of firewood, house-construction materials, etc. and it was not realized that such activities were undertaken at the instance of the defendants. The defendants, taking advantage of the illiteracy and docile character of the tea labourers, had fabricated false documents from some labourers, who had no right, title, interest and possession on the land and, on the basis of the Khatians, are attempting to dispossess the plaintiff. Accordingly, the suit was filed for declaration of plaintiff's right, title and interest in respect of the land mentioned in the schedules of the plaint; for confirmation of possession of the suit land and, in the alternative, for recovery of possession in case the plaintiff loses possession in the meantime; permanent injunction; for declaration that the defendants are not tenants under the plaintiff in respect of Schedule-III(a) and

Schedule-III(b) land and for cancellation of the two Khatians in Schedule-III. Schedule-III(a) refers to Khatian No.99 in the name of defendant No. 1 in respect of 21 Bigha 12 Katha 9 Chhatak and Schedule-III(b) is in respect of Khatian No. 30 issued in the name of Haridas Roy, defendant No. 2 in respect of 6 Katha 6 Chhatak.

5. The defendants filed a written statement denying the allegation that they had obtained the Khatians collusively and asserted that the Khatians had been issued to the defendants as they had possession as tenants. While denying that they are not businessmen, it was pleaded that they are cultivators. It was further pleaded that the plaintiff was aware all along that the defendants had possession over the suit land as tenants and the plaintiff did not raise any objection within the stipulated period from 01.07.1977 to 01.08.1977 in respect of the notice issued by the Settlement Officer on 29.06.1977 inviting objections, if any, within the said period and, therefore, Khatians were issued in favour of the defendants. It was pleaded that the defendants tendered the rent through money order but the plaintiff refused to accept the same and returned it and the defendants became tenants of the plaintiff by purchasing jote right from the tenants of the plaintiff. It was asserted that the suit land was never in possession of the plaintiff and the suit land was purchased from the tenants at different point of time and, therefore, the Government issued final Khatians to the defendants. However, the defendants did not deny the ownership of the plaintiff.

6. An additional written statement was filed on behalf of the defendant Nos. 1, 2 and 3 stating that the prayer made by the plaintiff by way of amendment of the plaint challenging the Khatians is barred by estoppel, waiver and acquiescence.

7. On the basis of the pleadings, the learned trial court had initially framed three issues. The three issues are as follows:

> "(1) Whether the defendants are tenants under the plaintiff?
>
> (2) Whether the plaintiff has right, title, interest and possession over the suit land?
>
> (3) To what relief, if any, is the plaintiff entitled?"

8. Later on, four additional issues were also framed and these are follows:

"(4) Whether there is any cause of action for the suit?

(5) Whether the suit is barred by limitation?

(6) Whether the suit is maintainable in its present form?

(7) To what relief the parties are entitled to?"

9. During trial, plaintiff examined two witnesses and the defendants examined three witnesses. Both sides exhibited certain documents. The plaintiffs exhibited the final Khatians challenged in the suit as Ext.-1 and Ext.-2.

10. The learned trial court recorded that Katcha Khatians, namely, Exts.-BB, DD, EE, FF, GG, HH, II, JJ, KK (all under objection) were issued on the basis of possession and that no notice was served upon the landlord and permission was also not obtained from the Government while the sale deeds, namely, Exts. M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA and CC were executed in favour of the defendants. The defendants also did not adduce any evidence of payment of rent or refusal of the landlord to receive rent. It was also held that the defendants failed to comply with the provisions of Section 3(3) of the Tenancy Act by adducing evidence that they are agriculturists and are cultivating the suit land by engaging labourers or by themselves or in any other way and, therefore, they do not fulfill the definition of tenant under Section 3(17) of the Tenancy Act. Referring to Section 55 of the Tenancy Act, which lays down the procedure for preparation of Khatians, i.e., record of rights, for tenants, the learned trial court held that presumption of correctness of entries made in the revenue record applies only to genuine entries, and not fraudulent entries, and the entries made in the record of rights in favour of the defendants were in violation of provision of Section 8 of the Tenancy Act and, therefore, leads to an inference that keeping the plaintiff in the dark, the Khatians were issued in favour of the defendants fraudulently by the settlement authority.

11. In view of the above findings, the learned trial court held that the defendants had not acquired the status of tenants under the plaintiff.

12. Other issues were also decided in favour of the plaintiff and, accordingly, learned trial court decreed the suit of the plaintiff declaring that the plaintiff has right, title and interest over the suit land mentioned in the Schedules to the plaint. While declaring confirmation of possession, the defendants were directed to handover khas possession of the schedule land to the plaintiff within six months from the date of passing of the judgment failing which the plaintiff would be entitled to execute the decree. Declaration was also made that the defendants were not tenants under the plaintiff and a writ was issued to the settlement authority for cancellation of the final Khatians of the defendants as indicated in the plaint.

13. The learned lower Appellate court also upheld the findings of the learned trial court. It was held that defendants were not agriculturists and there is no evidence that they held land for agricultural purpose through other persons. It was also held that as the defendants were not tenants, they were not entitled to have Rayati Khatian, which had been issued without following the procedure laid down in the Tenancy Act. Accordingly, the appeal was dismissed.

14. Mr. D. Mazumdar, learned counsel for the appellant submits that violation of Section 8 of the Tenancy Act, on which much reliance was placed by the learned trial court, is not even the pleaded case of the plaintiff and, therefore, decreeing the suit of the plaintiff on the basis of such infraction without going into the question as to whether the defendants were tenants of the tea estate is not sustainable in law. Mr. Mazumdar submits that the plaintiff cannot succeed in the suit for declaration on the ground that such sales are not in terms of Section 8 of the Tenancy Act when the plaintiff did not challenge the validity of the sale deeds. He has submitted that in absence of any plea that the names of the tenants mentioned in the Katcha Khatians are not Rayats in respect of the suit land and the fact that the sale deeds, executed by such Rayats in favour of the defendants having not been challenged, the plaintiff cannot argue that the transfer is in violation of the provisions of the Tenancy Act. By way of an example, he has drawn the attention of the Court to Ext.-C, which also finds mention in substantial question of law No. 3. It is submitted by him that

initially Draft Khatian, being Draft Khatian No. 154 in respect of dag No. 64/67, Ext.-C, was issued in the name of one Subhas Ree, who sold land measuring 1 Bigha 14 Katha to the defendant No. 1 and, thereafter, final Khatian No. 99, Ext.-1 (certified copy of which was also exhibited by the defendants as Ext.-LL), was issued. It is submitted that Ext.-1 also included land similarly purchased from other persons, whose names were recorded in the Draft Khatians. He submits that the vendors of the defendants had Katcha Khatians issued in their names and the defendants having purchased land from such tenants, the learned courts below committed manifest illegality in holding that the defendants did not acquire the status of tenants. It is also submitted by the learned Senior counsel for the appellant that the evidence of the witnesses examined by the defendants would demonstrate that the Khatians had been issued in accordance with law and the plaintiff could not dislodge the rebuttal presumption associated with the entries made in the Khatians. Records were prepared in terms of a Notification issued in the year 1965 and subsequently, under the Tenancy Act enacted in the year 1971. He submits that the learned trial court proceeded on a wrong premise that the plaintiff had challenged the sale deeds and the learned lower Appellate court merely affirmed the findings of the learned trial court. As neither in the pleading nor in the evidence has it been stated by the plaintiff that there were no tenants earlier in the land in question, he submits that the same assumes importance in the context of the case. It is also submitted by Mr. Mazumdar that the appellant is an agriculturist and the finding of the learned lower Appellate court that the defendants are not tenants under Section 3(17) of the Tenancy Act is palpably illegal as it is not even necessary that a tenant has to do cultivation himself and, in the instant case, the appellant was doing cultivation by himself and that his son was also doing cultivation. He submits that it is the burden of the plaintiff to prove the case and the plaintiff having failed to prove its case, the learned Courts below committed error in law in decreeing the suit of the plaintiff. Mr. Mazumdar relies upon the judgment rendered by the Hon'ble Supreme Court in the cases of ***Md. Noorul Hoda v. Bibi Raifunnisa and others,*** reported in ***(1996) 7 SCC 767*** *(para 6)* and ***Abdul***

Rahim and others v. Sheikh Abdul Zabbar and others, reported in ***(2009) 6 SCC 160*** *(para 29).*

15. Per contra, Mr. S. Dutta, learned Senior counsel for the respondent No.1/plaintiff has submitted that the materials on record is conspicuous by lack of any evidence of payment of rent to the tea estate, which would, otherwise, have conclusively determined the relationship of landlord and tenant. The entries in Exts.-1 and 2 did not mention that the appellant was a tenant and he was shown to be having possessory right only and, therefore, presumption under Section 58 of the Tenancy Act clearly stands rebutted. This is also fortified by the evidence of DW2, who stated in his evidence that the Khatians were issued on the basis of possessory right only and not as a tenant and, in view of such evidence, the claim of the appellant that he was a tenant falls flat to the ground. Referring to the Sale Deed, Ext.-N, learned Senior counsel points out that the appellant was a service holder and not an agriculturist and, therefore, Section 3(17) of the Tenancy Act comes into play and the appellant cannot acquire the status of a tenant. There is no corroborating evidence that the defendants were agriculturists. It is submitted by Mr. Dutta that though there is no relationship of landlord and tenant in between the plaintiff and the defendants, the defendants in collusion with the Land Record staff managed to obtain Khatians. Although a large number of documents had been exhibited by the defendants, the same did not, per se, demonstrate tenancy in between the tea estate and the vendors of the defendants in view of the allegations made by the plaintiff regarding collusion and, more particularly, because the defendants failed to prove that the vendors were tenants by adducing any evidence other than the Katcha Khatians issued in some cases showing that they were tenants of the tea estate. He has also submitted that the written statement is absolutely vague inasmuch as no particulars had been given mentioning names of the tenants who allegedly sold the land to the defendants. No reference to any sale deed and no reference to any Khatians were given and, therefore, when, on the face of it, Exts.-1 and 2 were issued without following the procedure prescribed under Section 8 of the Tenancy Act, the suit of the plaintiff is liable to be decreed. In the Khatians, the particulars to be mentioned, as

indicated in Section 56 of the Tenancy Act, is also not reflected, as enjoined, and there is all round violation of the provisions of the Tenancy Act. Mr. Dutta submits that the transactions being sham transactions, no presumption arises in the instant case as the presumption attached to the record of rights can be drawn only when the procedure prescribed under the Tenancy Act is validly and scrupulously followed. He concludes his arguments by submitting that this Court may not interfere with the findings of fact recorded by the courts below that the defendants were not tenants or agriculturists. In support of his submissions, Mr. Dutta has placed reliance on the judgments of the Apex Court in the cases of ***Mattulal vs. Radhe Lal***, reported in ***(1974) 2 SCC 365*** *(para 10),* ***Vishwa Vijay Bharati vs. Fakhrul Hassan and others***, reported in ***(1976) 3 SCC 642*** *(para 14),* ***Mustt. Mira Khumbi and others vs. Usha Ranjan Bhadra and others,*** reported in ***AIR 1966 A & N 118*** *(para 10)* and ***Mustt. Sunaban Bewa and others vs. Shri Manehab Ali Sekh,*** reported in ***(1990) 1 GLR 190*** *(paras 4 and 6)*.

16. I have considered the submissions of the learned counsel for the parties and have perused the materials on record.

17. Before attempting to answer the substantial questions of law, it will be appropriate to have a look at some provisions the Tenancy Act, which are relevant for the purpose of the appeal. At first, it will be useful to take note of some definitions which are reproduced below:

> "**Section 3(3)** – 'agriculturist' means a person who cultivates land personally;
>
> **Section 3(7)** – 'landlord' means a person immediately under whom a tenant holds but does not include any Government;
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> **Section 3(10)** – 'personal cultivation' means cultivation by the person himself, or by member of his family or by hired labourers on fixed remuneration payable in cash or kind but not in crop share, under personal supervision of the person himself or any member of his family, provided it is accompanied by the bearing of the risks of cultivation by the owner and by residence in the village in which the land is

situated or nearby village or town within a distance of 5 miles during the greater part of the agricultural season;

Section 3(17) – 'tenant' means a person who cultivates or holds the land of another person, and is, or but for a special contract (express or implied) would be liable to pay rent for that land to that other person, and includes a person who under system generally known as 'Adhi' (whether Guchiadhi or Gutiadhi), 'barga', 'chukti', 'bhag' or 'chukani' cultivates the land of another person on condition of delivering a share or quantity of the produce of such land to that person.

18. Chapter II of the Tenancy Act deals with Classes of Tenants. Section 4 reads as follows:

"**Section 4** – Classes of Tenants: (1) There shall be, for the purpose of this Act, only the following classes of tenants, namely,

(i) Occupancy tenant, that is to say, a tenant holding immediately under a proprietor, land-holder or settlement-holder other than land-holder, and having a right of occupancy in the lands held by him.

(ii) Non-occupancy tenant, that is to say, a tenant holding immediately under a proprietor, land-holder or settlement holder other than land-holder but not having a right of occupancy in the land held by him, and

(2) From the date of commencement of this Act, any person who was recorded in the record-of-rights as a privileged tenant under the provisions of the Assam (Temporarily Settled District) Tenancy Act, 1935 (Assam Act III of 1935) shall hence forth be recorded as an Occupancy Tenant.

Provided that he shall, subject to the provisions of Section 28 of this Act, continue to pay the rent at the same rate as before the commencement of this Act.

(3) From the date of commencement of this Act there shall be no new under-tenant."

19. Heading of Chapter III reads as Occupancy Tenant. Section 5 reads as follows:

"**Section 5** – Acquisition of occupancy rights. –

(1) A person who for a period of not less than 3 years has continuously held land as a tenant shall have a right of occupancy in that land.

(2) The period of 3 years may be wholly or partly before or after the commencement of this Act.

(3) A person shall be deemed, for the purposes of this Section to have continuously held land under a landlord notwithstanding that the particular landlord under whom he held the land was different at different times, provided the land held by him was the same.

(4) A person shall be deemed, for the purpose of this Section, to have held as a tenant any land held as a tenant by a person whose heir he is.

(5) If a tenant recovers possession of his holding under any law in force, any period during which he might have been out of possession, shall count towards the period specified in sub-section(1)."

20. Section 8, on which considerable argument was advanced, reads as follows:

"**Section 8** – Right of transfer: - An occupancy tenant shall have a right of transfer in respect of his holding with prior permission of the Government in the manner prescribed. A notice of such transfer shall be served on the land-lord in the manner prescribed:

Provided that an occupancy tenant shall not transfer his land to a non-agriculturist."

21. Forfeiture of tenancy on subletting and transfer is delineated in Section 50. The Section reads thus:

"**Section 50** – Forfeiture of tenancy on subletting and transfer. – If a tenant sublets or transfers the whole or any part of his holding otherwise than in accordance with the provision of this Act, then the tenant's interest thereon shall be forfeited; and

(a) if the transferee is an agriculturist, he shall be deemed to have become a tenant under the landlord under the same terms and conditions as the transferor;

(b) if the transferee is a non-agriculturist then such transfer shall be void and the Deputy Commissioner may, after such enquiry as may be prescribed, and after ejecting any person in possession, place any landless agriculturist as a non-occupancy tenant of the landlord."

22. Chapter X of the Tenancy Act deals with the matter of preparation and maintenance of record of rights of tenants. Section 58, which is relevant for this appeal, is reproduced below:

> **Section 58** – Certificate of and presumption as to final publication and presumption as to correctness of record-of-rights. – (1) Where a record-of-rights has been finally published under Section 57, the Settlement Officer shall, within such time as the State Government may by general order, require, make a certificate stating the fact of such final publication and the date thereof, and shall date and subscribe the same with his name and official title.
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> (2) The certificate of final publication, or in the absence of such certificate a certificate signed by the Deputy Commissioner of a district in which the estate, or part thereof to which the record-of-rights relates is situate, stating that a record-of-rights has been finally published on a specified date shall be conclusive proof of such publication and of the date thereof.
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> (3) The State Government may, by notification, declare with regard to any estate, that a record-of-rights has been finally published in the village in which the estate is situated and such notification shall be conclusive proof of such publication.
>
> (4) In any suit or other proceeding in which a record-of-rights prepared and published under this Chapter or duly certified copy thereof, or extract therefrom, is produced, such record-of-rights shall be presumed to have been finally published unless the contrary is proved.
>
> (5) Every entry in a record-of-rights finally published shall be conclusive evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect.

23. It will also be relevant to take notice of Section 37 of the Tenancy Act which provides that every tenant who pays his rent shall be entitled to obtain forthwith from his landlord a written receipt signed by the landlord or his authorized agent and that the receipt shall contain description of the land, amount of rent due and paid, etc. and when a landlord or his agent, without reasonable cause fails to deliver to the tenant a receipt of payment of rent, the landlord shall be liable to pay as compensation to the tenant a sum not exceeding two hundred rupees for each default. Section 38 of the Act provides a mechanism in case of refusal by the landlord to accept rent.

24. From a conjoint reading of Section 3(3) and 3(10) of the Tenancy Act, it is manifest that an agriculturist is a person who cultivates land personally or by a member of his family or by hired labourers on fixed remuneration payable in cash or kind but not in crop share, under personal supervision of the person himself or any member of his family. In other words, definition of agriculturist does not include only those who cultivate by themselves. Section 3(17) provides that a tenant is a person who cultivates or holds the land of another person and liable to pay rent unless excluded by an express or implied contract and includes an Adhiar. A tenant can be a person who cultivates through others including hired labourers. It is also noticeable that in Chapter III two expressions in connection with the word "occupancy" have been used: occupancy tenant and occupancy right. A tenant holding land for a period of not less than three years continuously acquires occupancy rights and such a tenant is called an occupancy tenant. In essence, there is no difference between the two expressions and both mean one and the same thing, namely, the tenant is having right of occupancy.

25. The defendants admit the ownership of the plaintiff in the suit land. The learned trial court correctly appreciated that to be an agriculturist one does not need to do cultivation by himself. However, it was opined that defendants failed to establish that the land was being cultivated by engaging some labourers or by any other way and, accordingly, held that they were not agriculturists. The learned lower appellate court also observed that the defendants

were not agriculturists and there is also no evidence that they held the land for agricultural purpose through hired labourers.

26. Though the pleaded case of the plaintiff was that the defendants are traders and doing various businesses and have a shop and they were not cultivators, the plaintiffs did not adduce any evidence to show that the defendants are primarily engaged in trading or business activities. PW-1, the Manager, in his evidence, did not say that the defendants are not agriculturists. He also stated that he did not have any personal knowledge about the allegations made in the plaint. He had stated that workers were allowed to cultivate the paddy land of the tea estate orally. He also denied the suggestion that land covered under the Khatian issued in favour of the defendants were in possession of the defendants. PW-2 stated that defendants had not cultivated the suit land. Though he stated that defendant No.1 has a shop, he did not produce any documentary evidence relating to shop. It is also not mentioned what kind of a shop the defendant No.1 has. It came out from his evidence that within the tea estate there are agricultural lands. It is for the plaintiffs, and more so, in view of presumption attached under Section 58 of the Tenancy Act, to prove that defendants were not agriculturists. DW-3, in his evidence, had stated that defendants are agriculturists and he himself does cultivation along with his children. He also deposed that he or defendant No.2 was never employed anywhere and he has some cultivable land. He had denied the suggestion that he was an employee of Ramkrishna Bastralaya and stated that in Ext.-N he was wrongly shown as service holder. Even in the cross-examination of DW-3, no suggestion was given to him that he was a trader or businessman, a stand taken in the plaint. The learned Trial Court took note of a decision of this Court in the case of ***Ram Prasad Gowala vs. Jogesh Goswami,*** reported in ***(1991) 2 GLR 136*** wherein it was held that a person having a tailoring shop can be an agriculturist. However, the learned trial Court held that defendants failed to fulfill the provision of Section 3(3) as the "defendant had not brought his case by stating that he is cultivating the same for himself or by any other way." Such observation of the learned Trial Court is not correct. In paragraph 9 of the written statement, categorical statements were made by the defendants that they

are agriculturists and agriculture is their only means of livelihood. It was also averred that they were not businessmen or traders. It may also be recorded herein that in the translated version of the written statement annexed to the memo of appeal, in paragraph 12, it is reproduced to the effect that "Defendants did not cultivate the suit land with help of the labourers with the purpose of misappropriation." What was stated in the vernacular written statement was that the defendants had not taken the assistance of the labourers to misappropriate land belonging to the Garden by cultivating jungle land. In the considered opinion of the Court, both the courts below without referring to evidence of any of the witnesses on the aforesaid issue, recorded the finding that defendants are not agriculturists.

27. The decisions in ***Mattulal*** and ***Vishwa Vijay Bharati*** go to show that lower appellate court is final so far as findings of facts are concerned and the High Court in second appeal cannot re-appreciate the evidence and interfere with findings of fact reached by the lower appellate court. Limited ground on which the High Court can interfere in a second appeal is that the decision of the lower appellate court is contrary to law. If the finding recorded by the lower appellate court is one of law or of mixed law and fact, the High Court can certainly examine its correctness, but if it is purely one of fact, the jurisdiction of the High Court would be barred and it would be beyond the ken of the High Court unless it can be shown that there was an error of law in arriving at it or that it was based on no evidence at all or was arbitrary, unreasonable or perverse.

28. As the courts below had recorded a perverse finding, it is permissible for this Court to interfere with such finding of fact and it is held that defendants are agriculturists.

29. Ext.-1 Khatian relates to Khatian No. 99 issued in the name defendant No. 1 and Ext.-2 is Khatian No. 22 issued in the name of defendant Nos. 1, 2 and 3. Ext.-2 was also exhibited by the defendants as Ext.-MM. In the plaint, challenge was made to Khatian No.30 issued in favour of defendant No.2. There was no challenge to Khatian No.22 but the same has been exhibited by the plaintiff. Khatian No.30, surprisingly, has not been exhibited. There is also another exhibit, Ext.-L, which is final Khatian No. 30, issued in favour of defendant No. 2. Ext.-C is also a Khatian issued in favour of defendant No. 1/appellant, but

the number of dags and the area of land vary in both the exhibits, namely, Ext.-1 and Ext.-C. There is also Ext.-OO, Khatian No. 11, issued in favour of one Surendra Chandra Ray and Khatian No. 30, Ext.-L, in favour of defendant No.2. All the exhibits exhibited by the defendants were under objection. These Khatians are not called into question as PW-2 had stated that no other case was filed with regard to Khatians issued except the defendants. Even in respect of defendants, not all the Khatians have been challenged.

30. There was no categorical statement in the plaint that the plaintiff did not have any tenants. PW-2, however, had stated that the plaintiff had no tenants. Evidence on record goes to show Katcha Khatians, namely, Exts.-BB, DD, EE, FF, GG, HH, II, JJ, KK (all under objection) were issued. The defendants had purchased vide Exts. M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA and CC, tenancy right from katcha Khatian holders. It is the plaintiff's own case that final Khatians were also issued. Section 58(5) of the Tenancy Act provides that every entry in a record-of-rights finally published shall be conclusive evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect. Therefore, the burden is upon him who alleges that the entries made therein are not correct. In the first instance, the court has to presume that the entries are correct and by virtue of such entries, the defendants are tenants under the plaintiff. The question is whether the plaintiff had been able to dislodge the burden. Merely objecting to katcha Khatians being taken into evidence will not shift the burden to the defendants to prove that Khatians were not fraudulently obtained when the plaintiff seeks a declaration for setting aside of final Khatians issued in favour of the defendants.

31. In the instant case, the defendants had not entered into any agreement with the plaintiff regarding tenancy and they claim tenancy under the plaintiff on the strength of transfers made by erstwhile tenants. Khatians issued showing the persons named therein as the tenants of the plaintiff were never challenged by the plaintiff although there are averments in the plaint that others had also obtained Khatians. Plaintiff did not examine any official witness to demonstrate that katcha Khatians were never issued showing the plaintiff as a landlord and that katcha Khatians were fabricated. Katcha Khatians were also not

challenged and without any challenge to such katcha Khatians and in absence of tenants, whose names were recorded in those katcha Khatians and from whom the defendants had purchased their holdings, status of such persons as tenants cannot be nullified.

32. It is sought to be argued by Mr. Dutta that violation of Section 8 of the Act is an admitted position as no notice was issued to the landlord and transfer was made without permission from the Government. I am not inclined to accept the submission of Mr. Mazumdar that no foundation was laid in the plaint to lead an argument pertaining to Section 8 of the Tenancy Act as though it is correct that nothing was mentioned in the plaint regarding any transfer, the case projected was that the plaintiff was kept in the dark and defendants got their names recorded as tenants without its knowledge.

33. The argument of Mr. Dutta pre-supposes that plaintiff was entitled to a notice. Right of occupancy tenant to transfer his holding is not in dispute but under no circumstances an occupancy tenant can transfer his land to a non-agriculturist. Section 50 provides that if a tenant sub-lets or transfers the whole or any part of his holding otherwise than in accordance with the provisions of the Tenancy Act, the tenant will forfeit his interest thereon. If any transfer is made to an agriculturist otherwise than in accordance with the provisions of the Tenancy Act, the deeming provision in Section 50(a) makes the transferee a tenant under the landlord under the same terms and conditions as the transferor; if the transfer is to a non-agriculturist, the transfer shall be void and person in possession shall be ejected by the Deputy Commissioner and he shall place any landless person thereon as a non-occupancy tenant of the landlord. In the instant case, transfers being made to agriculturists, the transactions are not void on the ground that transfers were made otherwise than in accordance with provision of Section 8. Transfers made otherwise than in accordance with provision of Section 8 do not lead to the conclusion that record of right was made fraudulently, as held by the courts below. It also does not lead to the conclusion that entries are not genuine entries.

34. Mr. Dutta had also submitted that presumption under Section 58 of the Tenancy Act stands rebutted on the face of Exts.-1 and 2 as the appellant and others were not referred

to therein as tenants but they were shown to have possessory right, which is different from tenancy right. He had in this connection also drawn the attention to the evidence of DW-2. DW-2 in his cross-examination had stated that the final Khatian in respect of Jitendra Lal Roy (Defendant No.1) was issued as "*Dakholio Moton*".

35. Exts.-1 and 2, under column 10, had endorsements to the effect "*Dakholio Swatta Sampanna Raiyat*". Except column Nos.11 and 14, prescribing for any special terms and conditions and comments, respectively, all other columns are duly filled up. Section 56 of the Tenancy Act mandates that particulars are to be recorded in the Khatian in terms of the order passed under Section 55 and it may include some or all or any of the particulars mentioned in Section 56. No material has been placed by the plaintiff demonstrating how the Khatian issued is not in conformity with the order passed under Section 55 and therefore, contention of Mr. Dutta that Khatians were issued without necessary particulars as enjoined under the Act is without any merit.

36. Meaning of the word, "occupancy" and "occupancy right" in Assamese is given as "*Dakhol*" and "*Dakholi Swatta*", respectively, in the Administrative Glossaries. "*Dakholio*" is a Bengali word. "*Dakholi*" and "*Dakholio*" mean one of the same thing, which is occupancy right. In Exts.-1 and 2, land in occupation of the tenants was shown as more than three years. In katcha Khatians also the expression used is "*Dakholi Swatta*". "Raiyat", an Assamese word, means a tenant. In Ext.-C also the same expression is used. Therefore, the argument of Mr. Dutta that final Khatians were wrongly issued in the names of the defendants though they were only shown to be having possessory right is entirely misplaced. The courts below had also wrongly recorded that the defendants acquired the Khatians not by way of tenancy but by way of possession which is in contravention of the Tenancy Act. The courts below also had proceeded on a wrong notion that the katcha Khatians were issued only on the basis of possession. The final Khatians recognized the defendants as tenants having occupancy right. It has already been held that occupancy tenant and occupancy right carry the same meaning. The ratio of ***Mira Khumbi*** (supra), wherein a Division Bench of this Court had rejected a plea made by the defendants that

they had acquired occupancy right under the Tenancy Act for being in possession of the land for over forty years on the ground that there was no averment by the defendants that they ever took the land on tenancy for agricultural purposes, is not attracted to the facts and circumstances of the case.

37. The learned courts below noted that the defendants failed to prove that they paid any rent. It was also held that the defendants failed to prove that their vendors were tenants under the plaintiff. Non-payment of rent or failure to produce rent receipt will not wipe out the status of the tenant. The approach of the courts below was as if it was the burden of the defendants to prove that Khatians were rightly issued to them. Plaintiff failed to bring on record any evidence to suggest that katcha Khatians or for that matter final Khatians were issued fraudulently.

38. Though no issue was framed regarding validity of the Khatians, I am of the opinion that non-framing of an issue in that regard had not prejudiced the case of either of the parties. By way of amendment, the plaintiff had challenged two Khatians. Sufficient pleadings were placed on record by both the parties to enable the court to record a finding on the validity of the Khatians. Both the parties knew their respective cases and had led evidence accordingly.

39. ***Mustt. Sunaban Bewa*** (supra) is not very relevant for the purpose of this case as no substantial question of law with regard to ouster of jurisdiction of the civil court in view of Section 66 of the Tenancy Act is formulated. Suffice is to say that it was held in that case that question of relationship of landlord and tenant between the parties can be decided by a civil court and a suit for declaration of right, title and interest, recovery of possession is not barred under Section 66 of the Tenancy Act.

40. In ***Md. Noorul Hoda*** and ***Abdul Rahim*** (supra), it is laid down that when the plaintiff seeks to establish his title to the property which cannot be established without avoiding a decree of a court or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek

a declaration and have the decree, instrument or contract cancelled or set aside or rescinded. It is also held that Article 59 would be applicable to set aside a decree either on the ground of fraud or on any other ground and also to set aside an instrument, decree or contract between the inter se parties. The aforesaid authorities were relied upon by Mr. Mazumdar to contend that without challenging the sale deeds, no decree could have been granted to the plaintiff. It is to be noted that the defendants have not disputed the ownership of the plaintiff in the land in question. By the sale deeds, only tenancy right had been transferred and therefore, title of the plaintiff is not affected. In that view of the matter, authorities cited are not applicable to the facts of the case.

41. From the evidence of the defendants, it appears that the defendants, and prior to them, their vendors, who were issued katcha Khatians, were in possession of the suit land. Suit was filed by the plaintiff praying for a declaration of confirmation with an alternative prayer of recovery of possession in case of dispossession during the pendency of the suit. There is no evidence that the defendants dispossessed the plaintiff during the pendency of the suit. The learned courts below decreed the suit for confirmation of possession. At the same time, decree was also passed directing the 'defendant' to hand over khas possession of the schedule land to the plaintiff. When the suit was filed for confirmation of possession, in absence of any evidence of dispossession during pendency of the suit, decree for recovery of possession, in any view of the matter, is not sustainable in law.

42. In view of the discussions above, while answering substantial questions of law Nos.1 and 3 in favour of the appellant, substantial questions of law No.2 is answered against the appellant. In the result, the appeal is allowed. Impugned judgments of the learned courts below are set aside. Suit of the plaintiff is dismissed. No cost.

43. Registry will send back the records.

JUDGE

RK