

GAHC010224782014



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

**Case No. : RSA/46/2014**

SUFIA KHATUN  
W/ONOR HOSSAIN, VILL. KUKARPAR, MOUZA SARUKHETRI, P.S.  
SARTHEBARI, DIST. BARPETA, ASSAM.

VERSUS

JAHANARA BEGUM and 8 ORS.  
W/O ABDUL ROUF

2:ABDUL ROUF

S/O LT. OHUFAR ALI  
BOTH ARE RESIDENTS OF VILL. CHENGA MUSOLMANPARA  
MOUZA-CHENGA  
P.S. TARABARI  
DIST. BARPETA  
ASSAM.

3:HAZARAT ALI  
S/O LT. MOKBUL SHEIKH

4:MALEK ALI

S/O AHMED ALI

5:SAHED ALI  
S/O TONSER ALI

6:HALIM ALI  
S/O -DO-

7:MASAD ALI

S/O OHED BOXA

8:MOTIOR RAHMAN

S/O OMAR ALI

9:MOKSHED ALI

S/O -DO-

10:MUSLEM ALI

S/O -DO-

11:SAMARUDDIN

S/O -DO-

12:HAYAT BOXA

S/O JOHAN BOXA

ALL ARE RESIDENTS OF VILL. KUKARPAR

MOUZA-SARUKHETRI

P.S.SARTHEBARI

DIST. BARPETA

ASSAM

**Advocate for the Petitioner** : MR. M A SHEIKH

**Advocate for the Respondent** : MR.A K AZADR-2

**BEFORE  
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

**JUDGMENT**

**Date : 30-11-2021**

Heard Mr. MA Sheikh, the learned counsel for the appellant and Mr. A.C. Sarma, the learned senior counsel assisted by Mr. B.Haldar for the respondents.

2. This Court vide order dated 8/8/2014 had framed the following two substantial questions of law :-

1. Whether the finding recorded in Issue No. 3 that proforma defendant No. 1

did not have right, title and interest with the possession of the suit land to sell the suit land is perverse to the evidence on record ?

2. Whether the defendant No. 2 can claim any right over the suit land taking a plea that he had purchased the suit land *benami* in favour of proforma defendant No. 1 ?
3. For the purpose of answering as to whether there is a substantial question of law for adjudication of the disputes involved in the instant proceeding which shall affect the lis, it is necessary to bring on record the brief facts of the instant case.
4. The appellant herein had filed the suit seeking declaration of her right, title and interest over the Schedule-B land for a decree of khas possession in respect to the Schedule C land by evicting the defendant Nos. 1 & 2; for permanent injunction ; for partition etc. The case of the appellant as plaintiff in the suit is that the appellant has purchased a plot of land specifically described in the Schedule B to the plaint from the Proforma Defendant No. 1 for a valuable consideration on the basis of a registered Deed of Sale bearing Deed No. 1902/2002 dated 5/8/2002 and thereafter delivered possession on 6/8/2002. The appellant thereupon was enjoying the said Schedule B land by getting her mutation done in respect to the said land. But on 7/1/2003 the appellant's mutation was cancelled on objection being filed by the defendant No. 2 in the suit who happens to be the father of the Proforma Defendant No. 1. Thereupon the principal defendants dispossessed the plaintiffs from a part of the said Schedule B land which is most specifically described in Schedule C on 1/9/1992 and had erected a tent. It is under this circumstances the said suit was filed seeking the reliefs as aforementioned.
5. The defendant Nos. 1 and 2 jointly filed a written statement wherein the defendants

alleged that vide registered Deed of Sale bearing Deed No. 2499/2000 dated 8/11/2000 the defendant No. 2 who is the father of the Proforma Defendant No. 1 purchased the Schedule B land (hereinafter referred to as the suit land) in the name of the Proforma Defendant No. 1 for a valuable consideration of Rs. 18,000/- and consequently the said Proforma Defendant No. 1 had no right, title and interest for the purpose of executing the Deed of Sale in favour of the plaintiff/the appellant herein. It was also alleged in the said written statement that it was the Defendant No. 2 who was in possession of the suit land pursuant to the purchase vide registered Deed of Sale bearing Deed No.2499/2000 made on 8/11/2000 and the Proforma Defendant No. 1 was never in possession of the suit land. At this stage it may be relevant herein to mention that in paragraph 5 of the written statement the defendant No. 1 & 2 have categorically stated "it is not certain whether the Proforma Defendant No. 1 has at all transferred the land with the plaintiff". Thus from the said statement one can make up that there was no specific denial as regards the execution of the Deed of Sale made by the proforma defendant No.1 in favour of the plaintiff. None of the Proforma Defendant filed any written statement.

6. Pursuant to the exchange of pleadings, the Trial Court framed as many as 6 issues which for the sake of convenience are quoted herein below :

1. Whether the suit land was purchased by defendant No. 2 from proforma defendant No. 3 Malek Ali in the name of proforma defendant No. 1 who is the son of defendant No. 2 ?
2. Whether the defendant No. 2 or proforma defendant No. 1 was in possession of the suit land ?
3. Whether the proforma defendant No. 1 has right, title and interest with possession of the suit land to sell the suit land to

plaintiff ?

4. Whether the proforma defendant No. 1 delivered possession of the suit land to plaintiff after selling the suit land ?
5. Whether the defendants put a tent in the land of Schedule C on 1.9.92 by dispossessing plaintiff from the suit land ?
6. Whether the plaintiff is entitled for the decree as prayed for ?

7. After the issues have been framed, the plaintiffs adduced as many as 4 witnesses and exhibited 4 documents which were marked as Exhibits 1 to 4. The defendant adduced the evidence of 4 witnesses and exhibited Exhibits marked as 'Ka' 'Kha', 'Ga' and 'Gha'. It is relevant herein to mention that Ext. -2 of the plaintiff (the Deed of Sale dated 05/08/2002) was proved from the volume book maintained by the office of the sale Registrar which was brought by the PW-2 and the said Ext.2 was also exhibited and marked as Ext. 'Kha" by the defendant. The Trial Court vide a Judgment and Decree dated 20/01/2006 dismissed the suit holding inter alia that the transaction of sale made by the Proforma Defendant No. 3 in favour of the Proforma Defendant No. 1 vide the Deed of Sale bearing Deed No. 2449/2000 dated 8/11/2000 is a benami transaction and consequently the Proforma Defendant No. 1 did not have any right to transfer the land in favour of the plaintiff vide the registered Deed of Sale bearing Deed No. 1902/2002 dated 5/8/2002. Apart from that, the Trial Court had also dismissed, the suit on the ground that the original deed of sale was not produced which was the primary evidence.

8. Feeling aggrieved by the said judgment and decree passed by the Trial Court the appellant preferred an appeal before the Court of District Judge, Barpeta and the First Appellate Court also dismissed the appeal thereby confirming the judgment and decree passed by the Trial Court. It is against this, the appellant is before this Court in exercise of

the power under Section 100 of the Code of Civil Procedure, 1908 on the two substantial questions of law as mentioned herein above.

9. I have heard Mr. MA Sheikh, the learned counsel for the appellant, who submits that though the judgments passed by the Courts below are concurrent findings of fact, but both the Courts below failed to take into consideration that the defendant No. 2 could not have alleged that there was a benami transaction made by him in favour of the Proforma Defendant No. 1 and reap the benefit thereby to nullify a valid Deed of Sale executed by the Proforma Defendant No. 1 in favour of the plaintiff, that too without a challenge to the said Deed of Sale. He further submitted that the substantial question of law which therefore arises as has already been formulated by this Court is whether the defendant No. 2 can claim any right over the suit land by taking a plea that he had purchased the suit land benami in favour of the Proforma Respondent No. 1. He further submits that both the Court below failed to take into consideration that there was no specific denial to the execution of the Deed of Sale No.1902/2002 dated 05/08/2002 in favour of the plaintiff by the proforma defendant No. 1 and thereupon the certified copy of the Deed of Sale had been duly exhibited upon being proved from the volume book as could be very well seen from the endorsement made in Ext.-2 itself and further to that the PW-2 had also given evidence in support of the said Deed of Sale. He further submits that very Deed of Sale had also been exhibited as Ext.'Kha' and as such the Courts below ought not to have non-suited the plaintiff on the ground that the registered Deed of Sale No. 1902/2002 dated 05/08/2002 has not been proved in accordance with law.

10. On the other hand, Mr. A.C. Sarma, the learned senior counsel submits that it is the duty of the plaintiff to prove his case. It is also the requirement that he should proved it in

accordance with law and to do so the plaintiff ought to have produced the primary evidence in respect to the Deed of Sale, which is the original Deed of Sale. He further submits that the said Deed of Sale has also to be proved in compliance with Section 67 of the Evidence Act and consequently the Courts below have rightly non-suited the plaintiff on the ground of not proving the said Deed of Sale executed in its favour. He further submits that the plaintiff did not acquire any right over the suit land in as much as the Proforma Defendant No. 1 did not have any right, title and interest as the purchase money for the purpose of the Deed of Sale dated 8/11/2020 (Ext.'Ka') was paid by the defendant No. 2 and as such the Courts below had rightly dismissed the suit and the appeal of the appellant herein.

11. I have given my anxious consideration to the arguments placed by the learned counsel for both the parties. I have also perused the records which includes the pleadings and the evidence led by the parties.

12. The Transfer of Property Act, 1882 (hereinafter referred to as the Act of 1882) deals with transfer of property-- both movable or immovable. Section 5 of the said Act of 1882 defines "transfer of property" as an act by which a living person conveys property in present or in future to one or more other living persons or to himself and one or more other living persons and to "transfer property" means to perform such act. Sale is one of the modes by which a transfer of property takes place. Section 54 of the said Act of 1882 defines "sale" and for the sake of convenience the said provision is quoted herein below :-

“54.“Sale” defined.—“Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.— Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.—A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.”

13. From the above quoted provisions, it reveals that the sale is transfer of ownership in exchange of price paid or promised or part paid and part promised. The said definition of sale as contained in Section 54 also stipulates how sale is made. In the case of tangible immovable property of a value above Rs. 100/- or in the case of reversion or other intangible property sale can be made only by way of registered instrument. However, in case of a tangible immovable property of a value of Rs. 100/- as below, such transfer can be made either by way of a registered instrument or by delivery of property and it is only in respect to such tangible immovable property the delivery of possession becomes relevant.

14. Section 17 of the Registration Act, 1908 stipulates that documents of which registration is compulsory and a Deed of Sale comes within the ambit of Section 17(1)(b) of the said Act. Section 48 of the Registration Act, 1908 stipulates that all non-



testamentary document duly registered under the said Act relating to any property whether movable or immovable shall take effect against any order, agreement or declaration relating to such property and the same constitutes a valid transfer under law for the time being in force. Section 49 of the Registration Act, 1908 stipulates the consequences of non-registration of a document.

15. In view of the above and taking into consideration that the Deed of Sale bearing Deed No. 2449/2000 dated 8/11/2000 was executed by the Proforma Defendant No. 3 in favour of the Proforma Defendant No. 1 by way of registered instrument the rights in respect to the Schedule B land stood duly transferred in favour of the Proforma Defendant No. 1. The defendant No. 2, who claims to have made payment on behalf of the Proforma Defendant No. 1 and further claims the rights in respect to the suit land on the basis of the said Registered Deed of Sale bearing Deed No. 2449/2000 dated 8/11/2000 cannot, in my opinion, deny the transfer of title made in favour of the Proforma Defendant No. 1 and accordingly, it is the Proforma Defendant No. 1, who was the owner of the Suit land and the Proforma Defendant No. 1 had the right to transfer vide the Deed of Sale dated 05.08.2002 in favour of the plaintiff. Both the Courts below did not take into consideration the impact of the Deed of Sale bearing No. 2449/2000 dated 8/11/2000 on the basis of the Act of 1882 as well as Section 48 of the Registration Act, 1908 and consequently erred in law in holding that the defendant No. 2 was the owner of the suit land. Under such circumstances, the substantial question of law as to whether the defendant No. 2 can claim right over the suit land taking a plea that he purchased the suit land benami in favour of the proforma defendant No. 1 is answered in favour of the appellant thereby holding that the Proforma Defendant No. 1 had due title to execute the registered Deed of Sale bearing

Deed No. 1902/2002 dated 5/8/2002 in favour of the appellant.

16. The next question which arises in view of the submissions made and the substantial question of law framed as to whether the findings as recorded in issue No. 3 that the Proforma Defendant No. 1 did not have right, title and interest and possession over the suit land to sell the suit land is perverse to the evidence on record and coupled with the submission made by the learned counsel appearing for the respondents to the effect that the plaintiff had failed to prove the registered Deed of Sale bearing Deed No. 1902/2002 dated 5/8/2002 in accordance with Section 67 of the Evidence Act, it would be relevant to take note of that the defendants did not specifically deny as regards the execution of the Deed of Sale made by the Proforma Defendant No. 1 in favour of the plaintiff. Apart from that, the evidence on record would clearly go to show that Ext.2 is the certified copy of the registered Deed of Sale, which was proved on the basis of the volume book as could be seen from the endorsement made in Ext.2 itself and this aspect of the matter was also proved by PW-2 in his evidence. In that regard, it may be relevant to take note of that Ext. 4 is the sale receipt which was also proved. Not only that, the defendants themselves had exhibited the Ext. 'Kha' which is the Sale Deed dated No. 1902 dated 5/8/2002. Apart from that, it is also relevant to take note of that the Trial Court had duly admitted Ext.-2 as evidence in the suit with the initial of the Presiding Judge of the Trial Court as regards the admissibility of the document in evidence. The records also do not show in any manner that there was any objection raised as regards the admissibility of Ext. 2 at that relevant point of time. Admitting and marking the certified copy of the Deed of Sale dated 05.05.2002 amounts to permitting the Plaintiff/Appellant to adduce secondary evidence of the Deed of Sale dated 05.08.2002. In this regard the judgment of the Supreme Court

rendered in the case of **R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple & Anr.** reported in **(2003) 8 SCC 752**, more particularly paragraph 19, 20, 21, ,22 and 23 being relevant is quoted herein above :-

“19. Order 13 Rule 4 of the CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the Court, which endorsement signed or initialed by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document should be raised before such endorsement is made and the Court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the Court to the person from whose custody it was produced.

20. The learned counsel for the defendant-respondent has relied on *The Roman Catholic Mission Vs. The State of Madras & Anr.* AIR 1966 SC 1457 in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is

sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.

21. Privy Council in [Padman and Others vs. Hanwanta and Others](#) [AIR 1915 PC 111] did not permit the appellant to take objection to the admissibility of a registered copy of a will in appeal for the first time. It was held that this objection should have been taken in the trial court. It was observed:

“The defendants have now appeal to the Majesty in Council, and the case has been argued on their behalf in great detail. It was urged in the course of the argument that a registered copy of the will of 1898 was admitted in evidence without sufficient foundation being led for its admission. No objection, however, appears to have been taken in the first court against the copy obtained from the Registrar’s office being put in evidence. Had such objection being made at the time, the District Judge, who tried the case in the first instance, would probably have seen that the deficiency was supplied. Their lordships think that there is no substance in the present contention.”

22. Similar is the view expressed by this Court in [P.C.Purushothama Reddiar vs. S.Perumal](#) [1972 (2) SCR 646]. In this case the police reports were admitted in evidence without any objection and the objection was sought to be taken in appeal regarding the admissibility of the reports. Rejecting the contention it was observed:

"Before leaving this case it is necessary to refer to one of the contention taken by Mr. Ramamurthi, learned counsel for the respondent. He contended that the police reports referred to earlier are inadmissible in evidence as the Head-constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the respondent now to object to their admissibility – see [Bhagat Ram V. Khetu Ram and Anr.](#) [AIR 1929 PC 110]."

23. Since documents A30 and A34 were admitted in evidence without any objection, the High Court erred in holding that these documents were inadmissible being photo copies, the originals of which were not produced.”

17. In view of the judicial pronouncement by the Apex Court and taking into consideration that Ext. 2 was proved from the volume book through the PW-2 coupled with the fact that Ext. 2 was also exhibited by the defendants marked as Ext. 'Kha', in my opinion, the Courts below had erred in law in mis-reading the evidence on record thereby non-suiting the plaintiff.

18. From the above discussions, it would be apparent that the Proforma Defendant No. 1 duly have right, title and interest to transfer the land to the plaintiff and the findings so arrived at by misreading the evidence is nothing but a perversity committed by the Courts below.

19. In view of the above, as both the substantial questions of law are decided in favour of the plaintiff/appellant, the instant appeal stands allowed, thereby granting the reliefs as prayed for in the suit. The Registry is directed to draw up a decree in terms with the above observations.

20. Send the LCR.

**JUDGE**

**Comparing Assistant**