

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

Assam Schedule VII, Form No.132.

HIGH COURT FORM NO.(J)2

HEADING OF JUDGMENT OF APPEAL/ CASE

DISTRICT : DHUBRI.

In the Court of the Civil Judge, Dhubri

Present : Yusuf Azaz, AJS.

Civil Judge, Dhubri.

TITLE APPEAL No: 34/ 2010

Saturday, the 21st January, 2017

1) SHRI DHIRENDRA ROY

..... APPELLANT (s).

- versus-

1) SHRI SAMSUL HAQUE

2) SHRI SANOWAR ALI

3) SHRI MOZIBAR RAHMAN

4) SHRI ABUL HUSSAIN

5) ON DEATH OF JOGENDRA PRASAD SINGH HIS LEGAL HEIRS

5a) SHRI ASHOK SINGH

~~5b) SHRI MAHESH SINGH (SUIT DISMISSED AS AGAINST HIM)~~

~~5c) SMTI MANJU SINGH (SUIT DISMISSED AS AGAINST HER)~~

~~5d) SHRI RANJU SINGH (SUIT DISMISSED AS AGAINST HIM)~~

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

~~5e) SMTI SHOVA SINGH (SUIT DISMISSED AS AGAINST HER)~~
.....RESPONDENT

This suit coming on this day (or having been heard on) 13/12/2016
presence of:

SHRI A. ISLAM, Advocate..... for the appellant(s).

SHRI K.M HUSSAIN, Advocatefor the respondent.

And having stood for consideration to this day, the court
delivered the following judgment :

JUDGMENT

1. This first appeal has been preferred by the plaintiff/appellant on being dissatisfied with the judgment & decree dated 21/5/2010 passed by the learned Munsiff No.1, Dhubri in Title Suit No: 149/ 2001 whereby the learned trial court dismissed the suit on contest with cost.
2. Upon admission of the appeal for hearing, the notices were issued to the respondents and the original case record of Title Suit no: 149/ 2001 was called for and received. The respondent no:1 to 4 appeared and contested the appeal. The appeal proceeded ex-parte against the respondent no:5(a). It would further be pertinent to mention herein that the appeal was dismissed as against the respondent no:5(b) to 5(e) for non taking of steps.

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

3. In order to decide the appeal, let me narrate, in brief, the facts leading to this appeal:
4. The plaintiff, Shri Dharendra Roy has pleaded that he was the owner and possessor of the suit land measuring about 3 Bighas covered by Dag no:16 (old)/ 59 (new) of Patta no:1(old)/ 275(new) situated at village-Jhagra Part IV (more particularly described in schedule A of the plaint). According to the plaintiff, the defendant no:5, Jogendra Prasad Singh (since deceased) is a medical doctor and he had treated the plaintiff and his family members, but the plaintiff could not pay the fees of the defendant no:5 due to his financial crisis as such the plaintiff proposed to the defendant no:5 to mortgage the schedule A land for the accumulated fees of Rs.900/- and accordingly the plaintiff executed sale deed on 24/9/1977 in respect of the suit land in favour of the defendant no:5. The plaintiff has submitted that there was a prevailing custom to execute a sale deed in lieu of mortgage deed, as such he executed a sale deed even though the transaction was mortgage. The plaintiff had further pleaded that even though he had executed the sale deed in favour of the defendant no:5, but the possession of the schedule A land was not delivered to the defendant no:5 and that the possession remained with him and he cultivated the schedule A land. The plaintiff thereafter repaid the entire mortgage money on 9/1/1979 and the defendant no:5 acknowledged the same by writing about the receipt on the backside of the sale deed and returned the original deed to the plaintiff thus the defendant no:5 had relinquished his right, title and interest over the schedule A land. It is alleged by the plaintiff that the defendant no:5 in collusion with the defendant no:1 to 4 had however got his name mutated in the revenue records in respect of the schedule

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

A land and obtained Kutcha patta in his name, but the plaintiff objected and then the Revenue Official assured the plaintiff that in the final Miyadi patta, the name of defendant no:5 would be struck out; as such the plaintiff did not take further interest in the matter. The plaintiff had further alleged that thereafter the defendant no:5 illegally executed a sale deed in favour of the defendant no:1 to 4 in respect of the schedule A land even though he had no right, title, interest or possession over the same, though the defendant no:5 mentioned a wrong boundary of the schedule A land. The plaintiff stated that in the sale deed executed by the defendant no:4, a wrong boundary showing another land of the plaintiff in Dag no:8(old)/ 36(new) was included and as such the defendant no:1 to 4 are trying to dispossess the plaintiff from the said land of Dag no:8(old)/ 36(new) on the strength of the sale deed. The plaintiff has more particularly described his land covered by Dag no:8(old)/ 36(new) in schedule B of the plaint. The plaintiff had pleaded that the defendants are trying to dispossess him from the schedule B land sometime in December, 2000 but could not succeed; hence this suit praying for the declaration of the right, title, interest and possession of the plaintiff over the schedule A and B land and other reliefs.

5. It would be pertinent to mention herein that the plaintiff/ appellant had prayed for amendment of the plaint during the pendency of this appeal on the ground that he had been dispossessed from a portion of the schedule A land during the pendency of the appeal and the said prayer was allowed; as such the plaint was amended to include the pleading that the defendants had dispossessed the plaintiff from the schedule C land, which is a part of the schedule A land.

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

6. The defendant no:1 to 4 filed their joint written statement stating therein that the suit is not maintainable and that the suit is bad for non joinder of necessary parties. The abovenamed defendants denied the pleading of the plaintiff and submitted that the plaintiff had sold the schedule A land to the defendant no:5 vide registered sale deed no: 5840 dated 24/9/1977 and that the suit land was not mortgaged as alleged by the plaintiff. The defendants further pleaded that the possession of the suit land was delivered to the defendant no:5 and he possessed the same since the date of his purchase and accordingly the name of defendant no:5 was mutated in the revenue records. The defendants further submitted that no relinquishment was made in favour of the plaintiff by the defendant no:5 as alleged and even if any such relinquishment was made then also the same would have no effect upon the suit land because such relinquishment may be made only by way of registered deed and not otherwise. The defendants further pleaded that the defendant no:5 permitted the father of the defendant no:1 to cultivate the suit land and later on the defendant no:1 to 4 purchased the suit land from the defendant no:5 vide registered sale deed no: 239 dated 3/1/2000 and as such the defendant no:1 to 4 became the owner of the suit land having the right, title and interest over the suit land. The defendants further pleaded that after purchasing the suit land they had constructed boundary wall around the suit land and had also constructed a house on a part of the suit land and is cultivating the remaining part of the suit land; hence prayed for dismissal of the suit.

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

7. It would be pertinent to mention herein that the defendant no:5 died during the pendency of the suit and his legal heirs were not substituted.
8. Upon the pleadings of the parties, the learned trial court framed the following issues:

(1) Is this suit maintainable?

(2) Is there any cause of action for this suit?

(3) Is this suit bad for mis joinder and non joinder of necessary and proper parties?

(4) Is this suit barred by law of estoppel?

(5) Is this suit under- valued?

(6) Whether this suit is beyond the pecuniary jurisdiction of this Court?

(7) Is this suit barred under the Specific Relief Act?

(8) Whether the sale deed dated 24/9/77 became inoperative and infructuous and is liable to be cancelled?

(9) Whether the plaintiff has got right, title, interest and possession over the suit land?

(10) Whether the suit is barred by limitation?

(11) Whether the plaintiff is entitled to get the decree as prayed for?

(12) To what relief, if any, the plaintiff may be entitled to?

9. After hearing both sides, the learned trial court vide the impugned judgment dated 21/5/2010 dismissed the suit. On being aggrieved by

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

and dissatisfied with the impugned judgment, the plaintiff/appellant preferred the present appeal, amongst others, on the following grounds:

(i) That the learned lower trial Court has erred in law and facts in deciding the suit;

(ii) That the court below failed to appreciate the evidence on record in its proper perspective;

(iii) That the learned trial Court ought to have held that the plaintiff had mortgaged the suit land and did not sell the same;

(iv) That the learned trial Court ought to have held that the defendant no:5 received the mortgage money and thereafter returned the original sale deed which shows that he relinquished his right, title and interest in favour of the plaintiff;

(v) That the learned trial Court ought to have held that the possession of the suit land was all along with the plaintiff and that the defendants never possessed the same;

(vi) That the learned lower trial court ought to have decreed the suit.

DISCUSSION, DECISION & REASONS FOR THE DECISION

10. I have perused the evidence and materials available in the case record. I have heard the arguments. Now, let me examine the evidence and other materials available in the case record to decide the case at hand.

POINTS FOR DETERMINATION:

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

Point for determination no:1:Whether the learned trial Court had rightly decided the issue no:8 and 9 wherein the learned trial Court had held that the plaintiff had sold the suit land to the defendant no:5 and that the plaintiff does not have the right, title and interest over the suit land?

11. The learned counsel for the appellant/ plaintiff, Shri A. Islam had filed his written argument and submitted that the learned trial Court had erred in holding that the exhibit 1 is a sale deed because the said transaction is mortgage even though it is written in the form of a sale deed. The learned counsel for the appellant/ plaintiff had further contended that the possession of the suit land was not given to the defendant no:5 and that the possession of the suit land was all along with him; hence he is entitled to the declaration of his right, title and interest over the suit land because he repaid the mortgage money to the defendant no:5.
12. The learned counsel for the respondents/appellants, Shri K. M Hussain had contended that the learned trial Court had rightly decided the above issues and the same are not liable to be interfered with.
13. I have perused the impugned judgment and the case record. Let me now discuss the materials on record and try to arrive at a definite finding in respect of the above issues.
14. At the outset I would like to state that it is an admitted fact that the suit land originally belonged to the plaintiff/ appellant. It is also an admitted fact that the plaintiff had executed the exhibit 1 (sale deed no:5840) in

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

favour of the defendant no:5 in respect of the suit land, but the plaintiff had contended that even though the exhibit 1 is worded as a sale deed but the same is in fact mortgage but is written in the form of a sale deed in view of the prevailing custom at that time. The plaintiff further pleaded that he had repaid the entire mortgage money; as such the said mortgage was redeemed; hence he has the right, title, interest and possession over the suit land. The defendants on the contrary had contended that the plaintiff sold the suit land as such there is no question of mortgage and the possession was also delivered to the defendant no:5 and from the defendant no:5 they, i.e the defendant no:1 to 4 had purchased the suit land and are possessing the same. It is seen from the above that the burden lie upon the plaintiff to prove that the exhibit 1 is not a sale deed but the same is a mortgage deed and that he had redeemed the said mortgage.

15. The plaintiff (PW4) had examined himself in support of his case and he had deposed that the defendant no:5 is a medical doctor and he treated the plaintiff and his family members but the plaintiff could not afford the fees as such the plaintiff mortgaged the suit land for Rs.900/- which was the accumulated fee and later on he repaid the said mortgage amount. The plaintiff had produced the sale deed no:5840/ 1977 (exhibit 1). I have perused the exhibit 1 and it appears that the same is a registered document and it is an outright sale. The exhibit 1 does not contain any conditions of mortgage or resale or conditional sale. The exhibit 1 specifically states that the plaintiff was in need of money and so he sold the suit land to the defendant no:5 upon receipt of the sale consideration of Rs.900/-. The exhibit 1 also states that henceforth the

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

possession of the suit land is delivered to the defendant no:5 and that he (plaintiff) would henceforth have no right, title or interest over the suit land. The bare contents of the exhibit 1 reveal that the same is a sale deed and not mortgage deed as stated by the plaintiff. The exhibit 1 does not contain any ingredients of a mortgage; as such it is held that the exhibit 1 is a sale deed by which the suit land was sold absolutely to the defendant no:5 by the plaintiff and the same validly transferred the right, title and interest over the suit land in favour of the defendant no:5.

16. The learned counsel for the appellant had contended by way of written argument that there was a prevailing custom that mortgages were written in the form of a sale deed at that time. In this regard I would like to state that the plaintiff had failed to bring on record any material to show that there was such a custom of writing sale deed in lieu of mortgage. In order to constitute a custom, the person pleading the same has to show that the said custom was prevalent and continuing since time immemorial, but no such evidence is placed on record. The Transfer of Property Act, 1882 specifically provides for mortgages as well as transfer by way of sale; as such I do not think that there would be any custom which prohibits writing mortgages and permits writing sale deeds as mortgage.

17. In addition to the above, the oral evidence of the plaintiff and his witnesses regarding the fact that the exhibit 1 is not a sale but mortgage cannot be taken into consideration because the same is held inadmissible under section 91 and 92 of the Indian Evidence Act, 1872.

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

The section 91 specifically provides that any disposition of property which is required to be done in writing shall be proved by producing that writing only and not by oral evidence of its contents or terms. In the instant case at hand, the exhibit 1 is produced; as such no oral evidence of its terms or conditions may be given as the same is expressly excluded. Moreover, the section 92 of the Indian Evidence Act, 1872 specifically provides that when a disposition is required by law to be in writing, then no separate oral agreement varying, adding or subtracting from its terms may be admitted in evidence. In the instant case at hand, both the sale as well as mortgage is compulsorily required by law to be in writing as such any oral agreement varying its terms cannot be permitted and hence it is not admissible in evidence. In the instant case at hand the exhibit 1 is specifically produced as such any oral evidence varying or subtracting from its terms cannot be permitted.

18. In addition to the above, the mortgage is compulsorily required by law to be registered under the Registration Act, 1908; as such no oral evidence of mortgage can be permitted; as such it is held that the exhibit 1 is not a mortgage but it is an outright sale and that the exhibit 1 transfers the right, title and interest of the plaintiff over the suit land absolutely in favour of the defendant no:5.

19. The learned counsel for the appellant had relied upon the judgment of the Hon'ble Apex Court in the case of **Indira Kaur Vs Sheo Lal Kapoor [AIR 1988 SC 1074]** and in the case of **Vishwanath Dadoba Karale Vs Prisa Shantappa Uladhya [AIR 2008 SC 2510]** to show that the contents of the deed and the real intentions of

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

the parties are to be looked into and that even if a mortgage deed is modeled in the form of a sale, the same may be considered as mortgage. I have perused the above referred judgments, but in my considered opinion, the ratio laid down in the above referred two judgments is not applicable in the facts and circumstances of this case. In the case of *Indira Kaur (supra)* the plaintiff therein had executed a sale deed in favour of the defendant therein and there was a separate agreement of sale which was executed on the same day whereby the defendant agreed to sell back the suit land to the plaintiff within ten years if the plaintiff could pay him back the Rs.7000/- of sale consideration by which he had initially purchased the land. The plaintiff therein before the expiry of ten years tendered Rs.7000/- to the defendant but the defendant neglected to execute the formal sale deed in favour of the plaintiff; as such the plaintiff therein instituted a suit for specific performance. The trial Court and the Hon'ble High Court dismissed the suit, but the Hon'ble Supreme Court of India had held that the first sale was in the nature of ostensible sale and that there was separate agreement of sale executed by the defendant and the plaintiff on the same date which showed that the intention of the parties was that if the plaintiff could repay the loan of Rs.7000/- within ten years then the defendant would sell back the suit land and therefore the Hon'ble Supreme Court of India had decreed the suit of the plaintiff for specific performance of sale. However, when we revert back to the facts of this case it is seen that the exhibit 1 is an out and out sale and the same does not contain any separate agreement of re-sale of the suit land in favour of the plaintiff and it also does not contain any condition of repayment of the consideration amount; as such it is held that the

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

ratio laid down in the case of *Indira Kaur (supra)* is not applicable to the facts of this case.

20. Similarly the ratio laid down *in the case of Vishwanath Dadoba Karale (supra)* is also not applicable in the facts and circumstances of this case because in the said case the sale deed was titled as "Conditional sale deed" but the contents of the said deed showed that the same was in the nature of mortgage because it fulfilled all the conditions of mortgage. In the said case the Conditional sale deed stated that the sale of the suit land was made for a limited period of five years for consideration of Rs.500/- and if within the period of five years the consideration amount of Rs.500/- was repaid then the purchaser would receive the said amount and thereafter execute a separate sale deed in favour of the original vendor reconveying the said property. The Hon'ble Supreme Court had held in the instant case that the nomenclature given by the parties to the deed is not important but the contents and the terms and conditions of the transaction is important and held that even though the parties referred to the deed as sale, but the same was in effect a mortgage because the said transaction was limited for a period of only five years; whereas a sale cannot be limited for a specific period. The Hon'ble Apex Court further observed that the said deed contained a condition of repayment of the consideration amount within a fixed period of time and the title conveyed was for a limited period and the vendor had the right to redeem the same; as such the transaction was a mortgage and not sale and therefore held that a suit for redemption was maintainable. When I revert back to the fact of this case, it is seen that the exhibit 1 does not contain any such

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

condition that the title was conveyed for a limited period and further no right of redemption was reserved in favour of the plaintiff; as such it is held that the exhibit 1 is not in the nature of mortgage, but the same is an absolute sale. The perusal of the exhibit 1 reveals that the title to the suit land was conveyed absolutely and was not limited to a definite period and it also did not contain any condition for repayment of the consideration amount, as such it is held that the exhibit 1 is not a mortgage as alleged and reliance placed upon the above referred judgments of the Hon'ble Apex Court is misplaced.

21. In addition to the above, the plaintiff had pleaded that the defendant no:5 is a medical doctor and he treated the plaintiff and his family members and that the accumulated fee amounted to Rs.900/- and in order to repay the same he had executed the exhibit 1. In this regard I would like to submit that the plaintiff (PW4) was cross examined in respect of his deposition regarding his medical examination and accumulation of fee and in his cross examination he had specifically stated that the defendant no:5 used to give him medical prescriptions during his treatment and he had those medical prescriptions in his possession but he did not produce any of those prescription. In my considered opinion the plaintiff ought to have produced those medical prescriptions to prove the fact that defendant no:5 in fact medically examined the plaintiff so as to prove that there might be accumulation of fee, but the non production of those medical prescriptions leads me to draw adverse inference against the case set up by the plaintiff. Moreover, the plaintiff had failed to bring on record any register or statement of account maintained by the defendant no:5 showing the

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

accounts between them to prove that consultation fees accumulated to Rs.900/-. In addition to the above, the plaintiff had pleaded that the consultation fee of the defendant no:5 accumulated to Rs.900/- and as such he had mortgaged the suit land, but the perusal of the exhibit 1 reveals that the plaintiff had received Rs.900/- at the time of execution of the exhibit 1. The perusal of the sale deed (Exhibit 1) specifically reveals that the plaintiff had acknowledged the receipt of Rs.900/- from the defendant no:5 and thereafter executed the sale deed. If the sale deed (Exhibit 1) was really executed for the accumulated fee, then the same ought to have mentioned that the sale consideration is adjusted towards the accumulated consultation fees of the defendant no:5, but the exhibit 1 does not contain any such terms; as such it is held that there is absolutely no evidence on record to show that the plaintiff had executed the exhibit 1 for the accumulated fees of the defendant no:5.

22. The learned counsel for the plaintiff had contended that the defendant no:5 had received the mortgage money and thereafter made an endorsement upon the exhibit 1 whereby he acknowledged the receipt of the mortgage money and thereafter returned the sale deed and thus he relinquished the suit land. The above contention of the plaintiff is not sustainable because it is already held that the exhibit 1 is a sale deed and that the right, title and interest of the suit land was transferred vide the said sale deed; as such there cannot be any relinquishment of the suit land in favour of the plaintiff without a registered sale deed transferring the suit land back to the plaintiff.

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

23. The endorsement upon the exhibit 1 which is marked as exhibit 1(1) cannot convey any right, title and interest in respect of the suit land in favour of the plaintiff, because the title over the suit land was absolutely conveyed in favour of the defendant no:5 and as such any reconveyance ought to have been by way of registered document and not otherwise.
24. The learned counsel for the appellant had contended that the defendant no:5 had relinquished the suit land and as such no registered document is required because relinquishment is not a sale. The learned counsel for the appellant has relied upon the judgment of the Hon'ble Gauhati High Court in the case of **Ratna Kanta Das Vs Kamala Kanta Das [2015 (5) GLJ 107]** to prove that relinquishment is not a transfer of property by one person to another and as such the same is not required to be compulsorily registered. I have perused the above referred judgment, but in my considered opinion, the reliance placed by the appellant in the above referred judgment is misplaced. In the above referred case, the plaintiffs therein claimed right, title and interest over the suit land, but the defendant which is a Namghar had taken the plea that the original owners of the suit land had relinquished the suit land in favour of the Namghar and as such prayed for dismissal of the claim of the plaintiff. The Hon'ble High Court had, on the facts of the said case, that relinquishment is not a transfer and as such held that no right can accrue in favour of the defendant, Namghar. It is seen from the above that the Hon'ble High Court did not state that "**relinquishment**" is not "**transfer of property**" and thus registration is not compulsory, but it held that relinquishment is not transfer of property and thus a party claiming relinquishment has no right, title or interest over the

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

immovable property, or in other words no title to any immovable property of the value of more than Rs.100/- can be conveyed by way of relinquishment.

25. The learned counsel for the appellant had further contended that the endorsement upon the sale deed (Exhibit 1) which is marked as exhibit 1(1) and which is sufficiently proved by the plaintiffs by leading cogent evidence shows that the title to the suit was reconveyed in favour of the plaintiff. The learned counsel for the appellant had further contended that an unregistered document may be looked into for collateral purpose and had placed reliance upon the judgment of the Hon'ble Patna High Court in the case of **Harbans Singh Vs Smt Tekamani Devi [AFAD no:81/ 1984 decided on 23/5/1989]**. The learned counsel for the appellant had submitted that in the above referred judgment the Hon'ble Patna High Court had relied upon another judgment of the Hon'ble Patna High Court in the case of **Rameshwar Lal Sharma Vs Sardar Amrik Singh [AIR 1974 Patna 195]** to held that a document which is compulsorily required to be registered but is not registered may be looked into for collateral purpose. In my considered opinion there is no dispute as regards the position of law incorporated under section 49 of the Registration Act, 1908 which provides that unregistered documents, of which registration is compulsory cannot be looked and is inadmissible in evidence, but it may be looked into for proving collateral purpose for which the said document may be used, but when I revert back to this case it is seen that the plaintiff is claiming reconveyance of his title over the suit land on the basis of the exhibit 1(1) as such the same cannot be looked into and is inadmissible in

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

evidence because the same is not a collateral purpose, but it is sought to be used for the principal purpose of conveyance of title.

26. The learned counsel for the appellant had further contended that the exhibit 1(1), i.e the endorsement made by the defendant no:5 is material to show that the defendant no:5 had relinquished the suit land in favour of the plaintiff and that the original transaction between the parties was in the nature of mortgage and not sale. The above contention of the appellant is not sustainable because the exhibit 1(1), as already held above, does not confer any right, title or interest over the suit land in favour of the plaintiff and as such the plaintiff cannot claim right, title and interest over the suit land on the basis of the exhibit 1(1), i.e the endorsement in the exhibit 1.

27. The learned counsel for the appellant had contended that the writer of the exhibit 1(1) has sufficiently proved that he had written the exhibit 1(1) and the defendant no:5 had signed upon the same and that he could identify the signature of the defendant no:5. I have perused the exhibit 1(1) which is marked in a photocopy of the exhibit 1 and initialled by the Presiding Officer of the trial Court. It appears that the note marked as exhibit 1(1) in the photocopy of the Exhibit 1 which is on record is different from the endorsement written in the original sale deed (Exhibit 1). The original sale deed as well as its photocopy is both on record and the PW5, Shri Khagendra Roy had identified the endorsement written by him in the photocopy of the exhibit 1, but it is seen that the endorsement in the photocopy as well as the original sale deed is different. In the original sale deed (Exhibit 1) it is seen that the

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

endorsement on the back side of the said deed starts with the name of Jogendra Prasad (defendant no:5) and it states the description of the sale deed no:5840/ 1977 and further states that the said deed is in fact not a sale deed and thereafter states about receiving some money, but in the exhibit 1(1) the first three lines are missing, which clearly shows that the endorsement marked as exhibit 1(1) is tampered with in the original and forgery cannot be ruled out. There is absolutely no explanation as to why the first three lines are missing from the back side of the Exhibit 1(1) (photocopy of the sale deed), which leads me to infer that the endorsement is forged and hence no reliance could be placed upon the same. It further reveals that the first three lines as well as the first word of the fourth line of the endorsement made in the original exhibit 1 that it is written by separate ink whereas the remaining endorsement is written in separate ink and there is no explanation as regards the change of ink. If the first three lines were really written at the same time as the remaining endorsement was written, then there is no explanation for the use of separate ink. The use of separate ink for the first three lines and also the smaller spaces used in writing those three lines specifically indicate that those first three lines were written at a later point of time and this also explains the fact that the photocopy of the exhibit 1, which is already on record does not contain the first three lines as well as the first word of the fourth line. In view of the above discussions, it is held that the evidence of the PW5 as well as the evidence of the plaintiff and his other witnesses as regards the receipt of mortgage money and as regards the endorsement (exhibit 1(1)) cannot be believed and relied upon.

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

28. In view of the above discussions it is held that the plaintiff had absolutely sold the suit land to the defendant no:5 and that the exhibit 1 is an out and out sale deed and that the transaction which took place between the plaintiff and the defendant no:5 is in the nature of absolute sale and not mortgage, as alleged by the plaintiff; as such it is held that the plaintiff does not have the right, title and interest over the suit land.

29. The perusal of the impugned judgment reveals that the learned trial Court had held that the defendants are in possession of the suit land and that the plaintiff is not in possession of the suit land as alleged by him. The learned counsel for the appellant had contended that the learned trial Court had erred in holding that the defendants are in possession of the suit land because according to the appellant the plaintiff was all along in possession of the suit land.

30. The perusal of the evidence led by the plaintiff shows that he had specifically admitted that the defendants are in possession of the suit land and that he is not in possession of the suit land. The plaintiff (PW4) had specifically admitted in his cross examination that the defendants are in possession of the suit land. The specific words, as stated by the plaintiff in his cross examination is reproduced herein:

"The land under possession of the defendants belonged to Dr. Jogendra Prasad to whom I gave the land vide the exhibit 1. When I broke down the house of Samsul on the SL, he filed police case against me and I was in Jail Hazot for 29 days".

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

31. It is seen from the above statement made by the plaintiff (PW4) in his cross examination that he had admitted that the defendants are in possession of the suit land, i.e the land which he had sold to the defendant no:5 vide the sale deed (Exhibit 1). There is absolutely no room for doubt that the plaintiff had admitted that the defendants are still in possession of the suit land because he stated the above sentence in present continuous tense which is evident from the words **"The land under possession of the defendants"** because if the plaintiff would have meant that the defendants were in possession but at present the possession is with the plaintiff then he would have used the word **"the land which was in possession of the defendants"** and not the words **"the land under possession of the defendants"**. The learned counsel for the appellant had contended that the defendants possessed the suit land for only one night and thereafter the plaintiff evicted them and since then he is in possession of the suit land. The above contention of the learned counsel for the appellant is not sustainable because the plaintiff nowhere stated, either in his pleading or evidence, about possession of the defendants for one night only, but the plaintiff had maintained in his plaint that the defendants were never in possession of the suit land. Moreover, the arguments made by the learned counsel for the appellant cannot take the place of evidence on record; and the evidence on record shows that the plaintiff admitted that the defendants are still in possession of the suit land and that he had "broken" the house of the defendants standing over the suit land for which he was arrested and the above admissions clearly prove that the defendants were in possession of the suit land and the plaintiff tried to dispossess them, but still the defendants are in possession of the suit land.

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

32. The admission made by the plaintiff (PW4) as reproduced above further proves that the defendants are in possession of the schedule A land, i.e the land sold by the plaintiff to the defendant no:5 and no other land because the plaintiff (PW4) had specifically admitted that the land under the possession of the defendants belonged to Jogendra Prasad to whom he (plaintiff) had sold the land vide exhibit 1. In view of the above admission made by the plaintiff, it is evident that the plaintiff had falsely alleged that the defendants are trying to dispossess him from the schedule B land, which is a different land, in the garb of the purchasing the land of schedule A.

33. Not only the plaintiff, but his other witnesses have also specifically admitted that the defendants are in possession of the suit land. The PW1, Shri Khagen Roy had specifically admitted in his cross examination that about 5/7 years ago there was a house of the defendants standing over the suit land and the plaintiff damaged that house for which he was arrested. The PW1 further stated that the defendant, Samsul entered the suit land about 5 years ago and possessed the same. It is evident from the above statements made by the PW1 that the defendants are in possession of the suit land and that they had a house over the suit land. In view of the specific admissions made by the PW1 regarding the possession of the defendants over the suit land, it is held that his evidence regarding the possession of the plaintiff over the suit land cannot be relied upon and believed because the plaintiff and the defendants cannot together possess the suit land.

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

34. Similarly the PW2, Shri Upendra Roy had also admitted in his cross examination that the plaintiff damaged the house of the defendants over the suit land for which he was arrested. The PW2 further stated as "**There is a house in the SL wherein one Nazrul is residing. And Samsul has inducted Nazrul in the said house**". The above statement also proves the fact that the defendant, Samsul is possessing the suit land and he still has a house over the suit land wherein he had inducted one Nazrul to reside. The fact that the PW2 had stated "**There is a house in the SL**" shows that the house still exists and that the defendants are still in possession of the suit land.

35. Similarly the PW3, Shri Togen Roy had stated in his cross examination that the suit land is vacant land and the defendants are filling earth for the last four years. It is seen from the above statement made by the PW3 that the defendants are in possession of the suit land and that they are filling earth over the suit land for the last four years, which shows that the possession of the defendants is not for one night as alleged by the learned counsel for the appellant in his written argument.

36. It is specifically proved from the evidence of the plaintiff as well as his witnesses that the defendants were in possession of the suit land and are still in possession of the suit land; as such it is held that the plaintiff is not in possession of the suit land.

37. It is further pertinent to mention herein that the suit land is admittedly recorded in the name of the defendants and Patta has also been issued in their names which is prima facie proof of possession of the suit land.

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

38. It would further be pertinent to mention herein that the plaintiff/appellant had during the pendency of the appeal amended the plaint to incorporate the pleading that on 1/8/2016 the defendants had dispossessed him from a portion of schedule A land, but it is already held that the defendants were all along in possession of the suit land prior to the institution of the suit; as such it is held that there is no question of dispossessing the plaintiff from the suit land during the pendency of the appeal; hence it is held that the defendants had not dispossessed the plaintiff from the suit land on 1/8/2016. It is, therefore, held that the defendants were and are in possession of the suit land prior to the institution of this suit.

39. In view of the above discussions it is held that the learned trial Court had rightly discussed the materials on record and had arrived at the correct finding that the plaintiff had sold the suit land to the defendant no:5 and as such the plaintiff does not have any right, title, interest and possession over the suit land, but the defendants are in possession of the suit land; as such the decision of the learned trial Court in the issue no:8 and 9 are affirmed.

40. DECISION: The decision of the learned trial Court in the issue no:8 and 9 are affirmed.

41. I have perused the decision of the learned trial Court in the remaining issues and it appears that the learned trial Court had rightly decided the said issues as such the decisions in the said issues are affirmed.

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

TITLE APPEAL NO:34 OF 2010
APPELLANT: SHRI DHIRENDRA ROY Vs
RESPONDENT: SHRI SAMSUL HAQUE & ORS

42. It is, therefore, held that the plaintiff/ appellant is not entitled to any relief.

ORDER

43. In view of the above discussions, the appeal is dismissed and the impugned judgment and decree passed in Title Suit no:149/ 2001 by the learned Munsiff No:1, Dhubri is hereby affirmed.

44. Prepare decree accordingly.

45. The appeal is dismissed on contest with cost.

46. Send back the LCR alongwith a copy of the judgment to the learned trial Court.

Given under my hand and the seal of this Court on this the 21st day of Jauary, 2017 at Dhubri.

YusufAzaz,
Civil Judge, Dhubri

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.