TITLE APPEAL NO:71 OF 2013
APPELLANT: SMTI OBEIDA BIBI Vs
RESPONDENT: SHRI FIRDOUS ZAMAN SARKAR & ORS

Assam Schedule VII, Form No.13(2)

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: 71/ 2013

Friday, the 20th January, 2017

1) SMTI OBEIDA BIBI

..... APPELLANT (s).

- versus-

1) LEGAL HEIRS OF ABDUL JABBAR SK

1a) SHRI FIRDOUS ZAMAN SARKAR

1b) SHRI FARUQUE ZAMAN SARKAR

1c) SHRI FARHAT ZAMAN SARKAR

1d) SHRI FAZLUL ZAMAN SARKAR

1e) SMTI BEGUM ZULUFA SARKAR

1f) SMTI BEGUM FARZUMA SARKAR

.....RESPONDENT

1) SHRI KACHIR UDDIN SK

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

2) LEGAL HEIRS OF JAHIRUDDIN SK

2a) SHRI BASIR UDDIN SK

2b) SMTI ANOWARA BIBI

2c) SMTI SHETA BEWA

3) SMTI FOZIRAN BEWA

4) LEGAL HEIRS OF JOBEDA BEWA

4a) SHRI JAMSHER ALI

4b) SHRI ABU BAKKAR SIDDIQUE

4c) SHRI AWAL MOZID

4d) SHRI ALI HOSEN

4e) SHRI NOWSHAD ALI

4f) SHRI HAZRAT ALI

4g) SHRI BELLAL HUSSAIN

4h) SHRI ASHRAFUL HOQUE

4i) SHRI SAHINUR HOQUE

4j) SMTI JELEKHA BEWA

This suit coming on this day (or having been heard on) 7/12/2016

presence of:

SHRI A.K FAZLUL HOQUE, Advocate..... for the appellant(s).

SHRI A.R AHMED, Advocate .....for the respondent.

And having stood for consideration to this day, the court

delivered the following judgment :

JUDGMENT

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

1. This first appeal has been preferred by the plaintiff no:2/appellant, Smti Obeida Bibi on being dissatisfied with the judgment & decree dated 19/7/2013 passed by the learned Munsiff No.1, Dhubri in Title Suit No:411/ 2008 whereby the learned trial court dismissed the suit on contest.

2. Upon admission of the appeal for hearing, the notices were issued to the respondents and the original case record of Title Suit no:411/ 2008 was called for and received. The principal respondents appeared and contested the appeal; whereas the proforma respondents remained absent as such the appeal proceeded ex-parte against them.

3. In order to decide the appeal, let me narrate, in brief, the facts leading to this appeal:

4. The plaintiffs have pleaded that their predecessor, Fuljan Bewa (since deceased) and Jahiruddin Sk and Kachiruddin Sk (proforma defendants) were the joint Khatiandars in respect of a plot of land measuring about 47 Bighas 1 Katha 2 Lessas covered by Khatian no:57 situated at village-Kachuarkhas Part II (more particularly described in schedule A of the plaint). The plaintiffs pleaded that Fuljan Bewa had one sister namely, Dukhati Bewa and she also got equal shares in the schedule A land; as such Fuljan Bewa had land measuring 23 Bigha 3 Katha 1 Lessas in the schedule A land. The plaintiffs pleaded that Dukhati Bewa sold her share of land to Jahiruddin Sk and Kachiruddin Sk (proforma defendants) prior to the year 1960-61 and as such after the settlement operation of the year 1961-62, the names of Fuljan Bewa, Jahiruddin Sk and Kachiruddi Sk were recorded in the schedule A land. According to the plaintiffs, during the recent ongoing settlement operation, the land belonging to

Fuljan Bewa was recorded in separate Patta and the land belonging to Jahiruddin Sk and Kachiruddin Sk got recorded in separate Pattas and as such the land measuring 19 Bighas 0 Katha 3 Lessas of Patta no:160(new) and land measuring 4 Bighas 0 Katha 19 Lessas of Patta no:157, i.e total land measuring 23 Bigha 1 Katha 2 Lessas was recorded in the name of Fuljan Bewa and this land is more particularly described in schedule B of the plaint. The plaintiffs pleaded that Fuljan Bewa originally had land measuring 23 Bighas 3 Kathas 1 Lessas, but after settlement land measuring only 23 Bigha 1 Katha 2 Lessas fell in her share because some portion of her land got included in the Panchayat road.

5. The plaintiffs pleaded that Fuljan Bewa had only one son namely, Farazuddin and no daughters as such after her death, the entire schedule B land fell in the share of Farazuddin. However, Farazuddin had two wives namely, Kariman Bibi (predeceased Farazuddin) and Parijan Bibi and from Kariman Bibi, Farazuddin had one son namely, Abdul Jabbar Sarkar (father of principal defendants) and two daughters namely, Faziran Bewa (plaintiff no:1) and Lt Jobeda Bewa [mother of plaintiff no:3(a) to 3(j)] and from Parijan Bibi, Farazuddin had only one daughter namely, Obeida Bibi (plaintiff no:2 and present appellant); as such the schedule A land was inherited by the above named legal heirs and successors of Farazuddin after his death, and thus the principal defendants would be entitled to only land measuring 8 Bighas 0 Katha 12 7/10 Lessas; and the plaintiff no:1 and 3(a) to (j) would be entitled to land measuring 4 Bigha 0 Katha 6 7/20 Lessas each; and the plaintiff no:2/ appellant would be entitled to land measuring about 6 Bighas 4

Kathas 16 3/5 Lessas out of the schedule B land, and the plaintiffs accordingly asked the defendants to partition the schedule B land, but the defendants refused; hence this suit praying for partition of the schedule B land and separate possession.

6. The principal defendant no:1(a), 1(b), 1(c), 1(e) and 1(f) filed their joint written statement stating therein that the suit is not maintainable and that the same is bad for non joinder of the wife of Abdul Jobbar namely, Firoza Bewa who is a necessary party. The abovenamed defendants admitted that the schedule B land originally belonged to Fuljan Bewa, but according to the defendants, the said Fuljan Bewa had settled the schedule B land to her grandson, Abdul Jobbar Sk (father of abovenamed defendants) as tenant and on the basis of the same the name of Abdul Jobbar Sk was recorded in the land covered by Patta no:160, 82 and 157. The abovenamed defendants further pleaded that Abdul Jobbar Sk possessed land measuring 2 Bigha 3 Katha 8 Lessas in Patta no:157 and after his death the above land is possessed by the defendants alongwith their mother, Firoza Bewa. According to the defendants, the entire land of Patta no: 82 and 160 and the portion of land covered by Patta no:157 is being possessed by the defendants and they have the right, title and interest over the same; hence prayed for dismissal of the suit. The abovenamed defendants further pleaded that their names are rightly mutated in the revenue records in respect of the suit land in Mutation case no:DM(Ps) 472/ 2006. In the year 1994, the plaintiffs Faziran Bewa and Jobeda Bibi objected to the mutation of the name of Abdul Jobbar but the said objection was rightly rejected. Thereafter the plaintiffs filed mutation case no:DM(Misc) 28/ 2007

wherein mutation was granted, but the order granting mutation was set aside by the Settlement Officer in Mutation Appeal no:7/ 2008; hence prayed for dismissal of the suit.

7. The principal defendant no:1(d) was a minor and he had filed the written statement though his mother and natural guardian, Firoza Bewa supporting the pleadings of the other principal defendants.

8. The proforma defendants did not contest the suit.

9. Upon the pleadings of the parties, the learned trial court framed the following issues:

(1) Whether the suit is maintainable?
(2) Is there a cause of action for the suit?
(3) Whether the suit is bad for non joinder of necessary parties?
(4) Whether the suit is under valued?
(5) Whether the plaintiffs have right, title, interest over the suit land?
(6) Whether Parijan is entitled to 1/8th share, and defendants together entitled to 2/5th share and Faziran, Jobeda and Obeida are each entitled to 1/5th share in the suit land as alleged?
(7) Whether plaintiffs are entitled to the reliefs as prayed for?

10. After hearing both sides, the learned trial court vide the impugned judgment dated 19/7/2013 dismissed the suit. On being aggrieved by

and dissatisfied with the impugned judgment, the plaintiff no:2/appellant, Smti Obeida Bibi 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 had erred in holding that the plaintiffs do not have the joint right, title and interest over the suit land;
(iv) That the learned trial Court ought to have held that mere mutation of the name of defendants would not confer any title on them and would not deprive the plaintiffs from their lawful share over the suit land;
(v) That the learned trial Court had wrongly held that Abdul Jobbar Sk was the occupancy tenant in respect of the suit land;
(vi)That the learned lower trial court ought to have decreed the suit.

DISCUSSION, DECISION & REASONS FOR THE DECISION

11. 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:

Point for determination no:1:Whether the learned trial Court had rightly decided the issue no:5 wherein it held that the plaintiffs have failed to prove that they have the joint right, title and interest over the suit land?

12. The learned counsel for the appellant, Shri A.K Fazlul Hoque had contended that the defendants are claiming that their predecessor, Abdul Jobbar Sk was the raiyot (occupancy tenant) under Fuljan Bewa and as such the defendants have the right, title and interest over the suit land, but the defendants had failed to bring on record any Khatian issued in the name of Abdul Jobbar Sk in respect of the suit land as such it cannot be held that Abdul Jobbar Sk was the raiyot in respect of the suit land. He has further contended that Fuljan Bewa was a widow as such there cannot be a raiyot or tenant under her in view of section 3(1) of the Assam (Temporarily Settled Areas) Tenancy Act, 1971. The learned counsel for the appellant had further contended that the defendants had failed to prove the Pattanama allegedly executed by Fuljan Bewa; as such the said Pattanama (Exhibit B) cannot be taken into consideration.

13. The learned counsel for the respondents, Shri A. R Ahmed had contended that the learned trial Court had rightly decided that the plaintiffs do not have the right, title and interest over the suit land and as such the decision of the learned trial Court is not liable to be interfered with.

14. 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.

15. At the outset I would like to state that it is an admitted fact that the suit land originally belonged to Fuljan Bewa, i.e the predecessor of both the plaintiffs and the principal defendants. The plaintiffs are claiming the suit land through Fuljan Bewa on the ground that they are her legal heirs and successors; whereas the principal defendants are also claiming that their predecessor, Abdul Jobbar Sk was the raiyot under Fuljan Bewa; as such it is seen that there is absolutely no dispute as regards the original ownership of the suit land.

16. The perusal of the plaint reveals that the land originally owned by Fuljan Bewa measured about 23 Bighas 3 Kathas 1 Lessas, i.e approximately 23 ½ Bighas, but according to the plaintiffs after settlement only land measuring 23 Bighas 1 Katha 2 Lessas was recorded in the name of Fuljan Bewa because the remaining land was included in Panchayat Road; whereas the defendants contended that the original Khatian contained land measuring about 80 Bighas 2 Kathas 2 Lessas, however they had also admitted that Fuljan Bewa had land measuring about 23 ½ Bighas; as such it is seen that there is absolutely no dispute as regards the original ownership, description or quantum of the suit land.

17. The plaintiffs have claimed that Fuljan Bewa had only one son namely, Farazuddin and as such the entire land was inherited by him and after his death, the plaintiffs, being the successors and legal heirs of

Farazuddin were entitled to a share in the suit land; whereas the defendants contended that Fuljan Bewa had during her lifetime settled the suit land in favour of her grandson, Abdul Jobbar Sk, i.e the predecessor of the principal defendants and that Abdul Jobbar became the raiyot (occupancy tenant); hence he (Abdul Jobbar) became raiyot and after his death, the defendants became the owner of the suit land and further pleaded that the Patta is also issued in their names.

18. It would further be pertinent to mention herein that the defendants had admitted that Fuljan Bewa died leaving behind her only son, Farazuddin and also admitted that Farazuddin had two wives namely, Kariman Bibi (predeceased Farazuddin) and Parijan Bibi and from Kariman Bibi, Farazuddin had one son namely, Abdul Jabbar Sarkar (father of principal defendants) and two daughters namely, Faziran Bewa (plaintiff no:1) and Lt Jobeda Bewa (mother of plaintiff no:3(a) to 3(j) and from Parijan Bibi, Farazuddin had only one daughter namely, Obeida Bibi (plaintiff no:2 and present appellant).

19. It is seen from the admissions made by the plaintiffs as well as the defendants that Fuljan Bewa was the original owner of the suit land and as such after her death her only son, Farazuddin would inherit her properties and after the death of Farazuddin, his legal heirs and successors, i.e the plaintiffs and the principal defendants would jointly inherit the suit land and thus it is held that the plaintiffs have discharged their burden of proving that they are the joint owners of the suit land.

20. In view of the fact that the plaintiffs have discharged their burden of proving that they have the joint right, title and interest over the suit land, the onus now shifts upon the defendants to prove that the suit land was settled in favour of their predecessor, Abdul Jobbar by Fuljan Bewa and that Abdul Jobbar was a occupancy tenant (raiyot) in respect of the suit land. The burden to prove that Abdul Jobbar was the occupancy tenant (raiyot) in respect of the suit land lies with the defendants because they had alleged the said fact and if they fail to prove the same, then they would not be entitled to get the reliefs.

21. Let me now discuss the evidence of the defendants in this regard. The defendants had examined two witnesses namely, Shri Firdous Jaman Sarkar (DW1) and Shri Hasen Ali (DW2) and produced certain documents in evidence. The DW1, Shri Firdous Jaman Sarkar had deposed that his father, Lt Abdul Jobbar Sk was settled with the suit land by Fuljan Bewa by executing a Pattannama (Exhibit B) and as such Abdul Jobbar Sk became the occupancy tenant (raiyot) in respect of the suit land. The DW1, Shri Firdous Jaman Sarkar was cross examined and during his cross examination he had specifically stated that he was born after the death of Fuljan Bewa as such it is seen that it is an admitted fact that the DW1, Shri Firdous Jaman Sarkar was not present at the time of the execution of the exhibit B (pattannama). The DW1 had further specifically admitted that he was not present at the time of execution of the Exhibit B; as such the evidence of the DW1 as regards the execution of the Exhibit B cannot be believed and relied upon because he was not at all present at the relevant time. The defendants had further examined one Shri Hasen Ali (DW2) and he had deposed

that Fuljan Bewa had executed the exhibit B (Pattannama) and he had also identified the signatures of one Tasaruddin and Kachiruddin, who allegedly witnessed the execution of the exhibit B. The DW2, Shri Hasen Ali was cross examined in this regard and during cross examination he had specifically admitted that he was not present at the time of the execution of the exhibit B; as such in my considered opinion his evidence regarding the execution of the exhibit B cannot be believed and relied upon because he had not witnessed the execution of the same. The DW2, Shri Hasen Ali had further deposed that he cannot read the exhibit B. The DW2, Shri Hasen Ali had also failed to depose as to how he could identify the signature of Tasaruddin and Kachiruddin; as such it is held that the statement of the DW2, Shri Hasen Ali regarding the identification of the signatures of Tasaruddin and Kachiruddin cannot be believed and relied upon. In view of the above discussions it is seen that neither the DW1 nor the DW2 were present at the time of execution of the exhibit B and further they could not sufficiently identify the signature or thumb impression of the executor or the witnesses of exhibit B; as such it is held that the defendants had failed to prove that exhibit B was executed by Fuljan Bewa.

22. The perusal of exhibit B reveals that Kachiruddin Sk (proforma defendant no:1) allegedly signed therein as witness, but strangely enough the defendants did not examine him as witness in this case to prove the exhibit B without any reasonable cause; as such it is seen that the defendants had failed to examine material witness.

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YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

23. The learned counsel for the defendants/ respondents had contended that the exhibit B is a document which is more than 30 years old; as such its execution can be presumed under section 90 of the Indian Evidence Act, 1872. There is absolutely no doubt as regards the fact that under section 90 of the Indian Evidence Act, 1872, presumptions as regards execution of a document which is more than 30 years old can be taken, but the said presumption is not to be mandatorily taken. It is open to the Court to not take presumption in such a case if there are other attending circumstances justifying the same. In the instant case at hand, it is seen that the exhibit B allegedly contained the signatures or thumb impressions of Fuljan Bewa, Farazuddin Sk, Kachiruddin and Tasarudidn of whom it is admitted fact that Fuljan Bewa and Farazuddin are dead, but there is absolutely no material to show that Tasaruddin and Kachiruddin are dead. In fact Kachiruddin is the proforma defendant no:1 in this case and is alive; as such he could have been examined by the defendants to prove the execution of the exhibit B, but the defendants failed to examine him which shows that the evidence regarding the execution of the exhibit B was available but the defendants choose not to examine him; as such I find there are sufficient grounds not to presume the due execution of the exhibit B even though the same is allegedly more than 30 years old.

24. Additionally there is absolutely no evidence on record to show that the Exhibit B is more than 30 years old, because the defendants had examined only two witnesses named above but none of them were allegedly present at the time of the execution of the exhibit B and moreover none of them had any personal knowledge as regards the

date of execution of the exhibit B; as such it cannot be held that the exhibit B is thirty years old merely because the same contains the date as "10/8/1375" (Bengali year corresponding to the year 1966-67). As because the execution of the exhibit B is not proved by leading cogent evidence and also because of the fact that the date of its execution is also not proved, it cannot be held that the exhibit B is more than 30 years old; as such in my considered opinion, the presumption under section 90 of the Indian Evidence Act, 1872 cannot be taken on this ground also. The contents of the exhibit B is not proved as such the date of its execution recorded as "10/8/1375" cannot be taken into consideration, because the defendants ought to have proved the date of execution of the exhibit B separately and by independent witnesses.

25. In addition to the above, the exhibit B (Pattannama) is not a document of title and the same does not confer any right, title or interest over the suit land or for that matter the same does not create any right of occupancy tenant (raiyot) over the suit land because the execution of Pattannama (Exhibit B) is not an essential requirement under the Goalpara Tenancy Act, 1929 or the Assam (Temporarily Settled Areas) Tenancy Act, 1971 for creation of right of occupancy tenant. The rights of an occupancy tenant is created and recognized by the Goalpara Tenancy Act, 1929 and after its repealment by the Assam (Temporarily Settled Areas) Tenancy Act, 1971 and the same is recognized by preparation of records of rights and final publication of the same, but in the instant case at hand, the defendants have failed to bring on record any tenancy Khatian in favour of Abdul Jobbar; as such it is held that the defendants have failed to prove that Abdul Jobbar was a occupancy

tenant in respect of the suit land. In fact the DW1, Shri Firdous Jaman Sarkar had specifically admitted in his cross examination that no raiyoti khatian was issued in the name of Abdul Jobbar; as such it is held that Abdul Jobbar was not the occupancy tenant (raiyot) in respect of the suit land and as such Abdul Jobbar or his legal heirs and successors cannot claim any permanent and heritable right over the suit land.

26. In order for the defendants to prove that Abdul Jobbar was an occupancy tenant (raiyot) in respect of the suit land, the defendants ought to have produced the raiyoti khatian, but in the instant case at hand, admittedly no raiyoti khatian was issued in the name of Abdul Jobbar; as such it is held that Abdul Jobbar was not a occupancy tenant (raiyot) in respect of the suit land.

27. Even otherwise, if the exhibit B is taken into consideration and its due execution by Fuljan Bewa is presumed under section 90 of the Indian Evidence Act, 1872, then also in my considered opinion the same does not create any right of occupancy tenant under the Goalpara Tenacy act, 1929 or the Assam (Temporarily Settled Areas) Tenancy Act, 1971. The perusal of the exhibit B reveals that the same is not a registered document and as such no permanent tenancy for immovable property for a term exceeding one year can be created. The section 17 (1) (d) of the Registration Act, 1908 specifically provides that any lease of immovable property for a period of more than one year has to be compulsorily registered; as such even if the due execution of the exhibit B is proved, then also the same is not admissible in evidence because the exhibit B is not a registered document.

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YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

28. Additionally even if it is held that the exhibit B is not required to be compulsorily registered and it is taken into consideration and read in evidence, then also it is seen that the same does not create any tenancy in favour of Abdul Jobbar. The defendants had contended that the exhibit B is a Pattannama, i.e document of tenancy settlement, but its content does not disclose that the same is a tenancy document. The nomenclature given to a particular document is not material, but its content is material to understand the nature of such document. The perusal of the exhibit B reveals that by way of the above document, Fuljan Bewa had stated that she was in need of money and as such she took Rs.2000/- (two thousand) and gave the suit land in "pattan" and henceforth Abdul Jobbar would be able to possess the suit land and sell the same and would be able to possess the same for indefinite period and the legal heirs and successors of Fuljan Bewa would have no right over the suit land. It is seen from the above that though it is written in exhibit B as "pattan" but actually no tenancy (raiyot) was created by the same because one of the essential conditions of tenancy is payment of rent, whether in cash or kind. Moreover, if the aforesaid suit land was given to Abdul Jobbar for cultivation as tenant, then the same ought to have mentioned the said fact, but the exhibit B strangely enough does not mention anything about cultivation of the land by Abdul Jobbar and payment of rent to Fuljan Bewa. On the contrary, the contents of exhibit B reveal that the same is a "transfer by way of sale" of the suit land and not lease (tenancy). The exhibit B mentions that Fuljan Bewa was in need of money and so she received Rs.2000/- from Abdul Jobbar and gave the land to Abdul Jobbar and thereafter Abdul Jobbar was allowed

to possess the same and also sell the same to any other person without payment of any rent; as such it is seen that the same is an outright sale and not lease (tenancy) because all the essential conditions of sale is present. Strangely enough there is no mention in the exhibit B for the return or repayment of the amount of Rs.2000/- allegedly taken by Fuljan Bewa from Abdul Jobbar as such it is seen that the aforesaid amount is nothing but sale consideration or else there would have been conditions for its repayment or adjustment towards payment of rent or otherwise. In view of the above, even though the word "pattan" is used in exhibit B, the same cannot be termed as "Pattannama" or "tenancy settlement deed" and as such the same ought to have been compulsorily registered under the Registration Act, 1908 and without registration, the same would not effect transfer of the suit land. Further, the section 4(20) of the Goalpara Tenancy Act, 1929 as well as section 3 (17) of the Assam (Temporarily Settled Areas) Tenancy Act, 1971 specifically defines who is a "tenant" and it prescribes that a tenant is a person who cultivates or holds 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. In the instant case at hand, it is seen that exhibit B does not contain any condition of payment of rent and also does not contain that Abdul Jobbar would hold or cultivate the land of Fuljan Bewa upon payment of rent; as such Abdul Jobbar cannot be termed as "tenant" under the Goalpara Tenancy Act, 1929 or the Assam (Temporarily Settled Areas) Tenancy Act, 1971 and similarly the exhibit B cannot be termed as lease deed or tenancy settlement deed (pattannama).

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YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

29. The learned counsel for the defendants/ respondents had contended that the provisions of the Assam (Temporarily Settled Areas) Tenancy Act, 1971 would not be applicable in this case because the tenancy in this case was allegedly created sometime during the year 1966-67 and at that time Goalpara Tenancy Act, 1929 was applicable. It is correct that prior to the coming in force of Assam (Temporarily Settled Areas) Tenancy Act, 1971, the tenancy rights (raiyot) were governed in the erstwhile District of Goalpara under the Goalpara Tenancy Act, 1929, but the definition of "tenant" as provided under the Goalpara Tenancy Act, 1929 is similarly worded, as already discussed above, and it also provides for cultivation of the land upon payment of rent; as such it is held that the Exhibit B cannot be termed as lease deed/ tenancy deed in light of the provisions of Goalpara Tenancy Act, 1929 also.

30. In view of the above discussions, it is held that the defendants had failed to prove that Exhibit B is a tenancy settlement deed; and it is further held that the defendants have failed to prove that Abdul Jobbar was an occupancy tenant in respect of the suit land.

31. The learned counsel for the appellant had contended that Fuljan Bewa was a widow as such proviso to section 3(10) of the Assam (Temporarily Settled Areas) Tenancy Act, 1971 provides that a widow cannot settle her land to a tenant. The above contention of the appellant is not sustainable because the proviso to section 3(10) of the Assam (Temporarily Settled Areas) Tenancy Act, 1971 provides that if a land belongs to widow or minor or such other persons stated therein, the land shall be deemed to be under her personal cultivation even in the

absence of her personal supervision, but the same does not state that there cannot be tenant under a widow.

32. The learned counsel for the defendants/ respondents had contended that the defendants had produced the rent payment receipt in respect of the suit land which is marked as exhibit C and the same proves that Abdul Jobbar was a tenant. I have perused the exhibit C, but in my considered opinion the defendants had failed to prove the execution of the exhibit C; as such the same is not admissible in evidence and cannot be taken into consideration. The DW1, Shri Firdous Jaman Sarkar had produced the exhibit C and stated that the same is a revenue receipt for the suit land and he had also identified the signature of the writer of the said exhibit C and the said signature of Shri Mukunda Baishnab is marked as exhibit C(1). The DW1, Shri Firdous Jaman Sarkar had specifically admitted in his cross examination that he was not at all born till the time Fuljan Bewa was alive or the tenancy was created; as such his evidence to the effect that exhibit C is a rent payment receipt and exhibit C(1) is the signature of the writer Shri Mukunda Baishnab cannot be believed and relied upon because he was admittedly not present at the time of execution of the exhibit C and as such he had no personal knowledge about the execution of the exhibit C. The defendants had further failed to examine the writer of the exhibit C namely, Shri Mukunda Basihnab without any explanation for the same; as such it is held that the exhibit C cannot be taken into consideration because its execution is not proved. Moreover, the exhibit C contains the alleged thumb impression of Fuljan Bewa, but there is absolutely no material on record to show that Fuljan Bewa had put her thumb impression thereon.

The defendants had failed to examine any person who had seen Fuljan Bewa putting her thumb impression on the exhibit C. The defendants had also failed to bring on record any material to show that exhibit C was issued under the authority of Fuljan Bewa; as such it is held that the exhibit C is not admissible in evidence because its due execution is not proved by leading cogent evidence. The DW1, Shri Firdous Jaman Sarkar had stated that Shri Mukunda Basihnab took the thumb impression of Fuljan Bewa upon the exhibit C, but he had failed to state as to how and from whom he came to know about this fact; as such the evidence of the DW1 in this regard is not believable and cannot be relied upon because he was admittedly not present at the time of execution of the exhibit C. Further, the DW2, Shri Hasen Ali had not deposed anything as regards the exhibit C.

33. The defendants had further produced the Kutcha Patta in respect of the suit land and the same is marked as exhibit D, E, and F, the perusal of which reveals that the suit land is recorded in the name of Abdul Jobbar and based upon these Kutcha Pattas, the defendants had argued that the suit land was owned by Abdul Jobbar and as such the defendants have the right, title and interest over the suit land. In view of the discussions made above, it is apparent that the defendants have failed to prove that Abdul Jobbar was the raiyot (occupancy tenant) in respect of the suit land; as such the recording of name of Abdul Jobbar in the revenue records in respect of the suit land or the issuance of Kutcha Patta in the name of Abdul Jobbar is erroneous and the same cannot confer any right, title or interest over the suit land in favour of Abdul Jobbar in the absence of any clear title. Further, only Kutcha Patta is

issued in the name of Abdul Jobbar and no final Patta is issued, i.e records of rights is not finally prepared and published, which shows that the suit land is not finally settled in favour of Abdul Jobbar; as such the defendants cannot claim title over the suit land on the basis of the exhibit D, E and F because the defendants had failed to trace the sole title of their predecessor, Abdul Jobbar to the exclusion of all the other legal heirs and successors of Fuljan Bewa.

34. The learned counsel for the defendants/ respondents had contended that the exhibit D, E and F are Patta and as such they are documents of title and hence this Court has to declare the right, title and interest of Abdul Jobbar over the suit land. The facts and circumstances of this case specifically shows that it is an admitted fact that the suit land originally belonged to Fuljan Bewa; as such the defendants ought to specifically show by leading cogent evidence that the title of Fuljan Bewa got extinguished and the same was conferred upon Abdul Jobbar, but it is already discussed and held above that the defendants had failed to prove that Abdul Jobbar was occupancy tenant (raiyot) in respect of the suit land; as such it is held that the defendants had failed to prove that any permanent and heritable right accrued in favour of Abdul Jobbar; as such the issuance of Kutcha Patta in his favour based upon his alleged status as raiyot (occupancy tenant) is erroneous and not sustainable in law.

35. It is further contended on behalf of the defendants/ respondents that issuance of Patta is the domain of the revenue authorities and the jurisdiction of Civil Court is barred. The above contention of the

defendants/ respondents is not sustainable because the issuance of Patta in this case has not become final as only Kutcha Patta is issued and the settlement is not yet finally made. Moreover, the settlement of land in this case is governed by section 39 of the Assam Land and Revenue Regulation, 1886 which specifically protects the rights of any other person claiming right over the land given in settlement to any other person. The section 39 of the Assam Land and Revenue Regulation, 1886 provides that the settlement offered by the Settlement Officer would be binding on all persons from time to time interested in the estate, however, it (section 39) further provides that merely on the ground that a settlement has been made in favour of any persons, the said persons cannot be deemed to have acquired any right to or over the estate as against any other person claiming his rights to or over that estate. It is evident from the section 39 of the Assam Land and Revenue Regulation, 1886 that the settlement under section 39 is not final and binding upon all persons, but the same is subject to the rights claimed by any other person and moreover in the instant case at hand, the settlement is not yet final, because only Kutcha Patta is issued and no final publication of the records of rights had taken place. In fact the Hon'ble Gauhati High Court had already clarified the law relating to the jurisdiction of the Civil Court in this regard and in the case of **Dharmeswar Sarma Vs Lakhyadhar Borgohain [AIR 1950 Gau 107(E)]** it held that the section 154 of the Assam Land and Revenue Regulation, 1886 which bars the jurisdiction of the Civil Court in certain revenue matters relating to settlement and otherwise is subject to section 39 of the Assam Land and Revenue Regulation, 1886 and the Civil Court can decide question as regards civil rights of parties to the

disputed property. The Hon'ble Gauhati High Court had further reiterated the law in this regard and in the case of **Sitaram Nunia Vs Prabha Bala Das [2009 (4) GLT 487]** had held that section 39 of the Assam Land and Revenue Regulation, 1886 deals with a situation where settlement is made wrongly in favour of persons in the settlement operation having no semblance of right upon such person. It is seen from the above that the Civil Court has jurisdiction if the settlement is made wrongly on a person without having a clear title as against persons claiming title over the said property. In fact the section 41 of the Assam Land and Revenue Regulation, 1886 further clarifies the position in such matters wherein it is specifically provided that entries in records of rights may be made on the basis of possession and if any person who is not in possession claims rights over the said land, then the said party shall be referred to the proper Court by the Settlement Officer, which shows that in case of a dispute as regards title of the land proposed to be settled, the proper procedure to be applied is to refer the parties to the Court.

36. The defendants/ respondents had further contended that vide the exhibit G and H, the Revenue Authorities had upheld the mutation of the names of the respondents in the suit land in Mutation Appeal no: 7/ 2008; as such it is seen that the question as regards the right, title and interest of the parties is already decided. The above contention of the respondents/ defendants is not sustainable because the order of the Settlement Officer in Exhibit H is not binding upon this Court and this Court has the jurisdiction to decide the question of title of the parties and it is already held above that the jurisdiction of this Court is

protected under section 39 of the Assam Land and Revenue Regulation, 1886. Moreover, mutation does not confer any right, title and interest over any person who has none; as such the mutation entries are not proof of title.

37. The learned counsel for the respondents/ defendants had further contended that the plaintiffs' witness namely, Smti Obeida Bibi (PW1) had admitted in her cross examination that the defendants used to pay the revenue of the suit land. In my considered opinion, the payment of land revenue by any person does not confer any title upon such person and merely because the defendants had paid land revenue the same would not mean that they have the right, title and interest over the suit land.

38. In view of the above discussions it is held that the plaintiffs have proved that the suit land originally belonged to Fuljan Bewa and after her death, they being the legal heirs and successors alongwith the principal defendants are the joint owners/ co-sharers of the suit land. It is further held that the defendants had failed to prove that Abdul Jobbar was the raiyot (occupancy tenant) over the suit land and they had also failed to prove that they have the sole right, title and interest over the suit land to the exclusion of the plaintiffs, but on the contrary it is held that the plaintiffs are the joint owners of the suit land.

39. In view of the above discussions, the decision of the learned trial Court in the issue no:5 is hereby set aside and reversed and it is held

that the plaintiffs have the joint right, title and interest over the suit land alongwith the principal defendants.

40. DECISION: The decision of the learned trial Court in the issue no:5 is hereby set aside and reversed and it is held that the plaintiffs have the joint right, title and interest over the suit land alongwith the principal defendants.

Point for determination no:2:Whether the learned trial Court had rightly decided the issue no:1, 3 and 6?

41. The perusal of the impugned judgment reveals that the learned trial Court had held in the issue no:6 that the plaintiffs are not entitled to any share in the suit land.

42. In my considered opinion, in view of the fact that the decision of the learned trial Court in the issue no:5 is set aside and reversed, the decision of the learned trial Court in the issue no:6 is also liable to be interfered with because the decision in the issue no:6 was based by the learned trial Court upon its decision in the issue no:5.

43. In view of the fact that the plaintiffs have the joint right, title and interest over the suit land alongwith the principal defendants, it is held that the plaintiffs are entitled to the declaration of their separate shares over the suit land; as such let me now determine the shares of each of the co-sharers.

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YUSUF AZAZ, CIVIL JUDGE, DHUBRI.

44. It is already held above that the suit land originally belonged to Fuljan Bewa; as such after her death, the suit land devolved upon her only son Farazuddin Sk. It is also an admitted fact that Farazuddin Sk had two wives namely, Kariman Bibi and Parijan Bibi out of whom Kariman Bibi predeceased Farazuddin as such she is not entitled to any share in the suit land. It is also an admitted fact that Farazuddin had one son namely, Abdul Jobbar and two daughters namely, Faziran Bewa (plaintiff no:1) and Jobeda Bewa (mother of plaintiff no:3(a) to 3(j)) through his first wife, Kabiran Bibi and he (Farazuddin Sk) had one daughter namely, Obeida Bibi (plaintiff no:2) through his second wife, Parijan Bibi; as such it is seen that Farazuddin's second wife, Parijan Bibi would be entitled to a share of $1/8^{th}$ over the suit land, i.e 2 Bigha 4 Katha 10 1/4 Lessas; and similarly Abdul Jobbar Sk (son of Farazuddin and father of principal defendants) would be entitled to $2/5^{th}$ share in the suit land, i.e 8 Bigha 12 7/10 Lessas; and similarly each of the daughters, i.e Faziran Bibi, Obieda Bibi and Lt Jobeda Bibi (plaintiffs) would be entitled to $1/5^{th}$ share in the suit land, i.e 4 Bigha 6 7/10 Lessas each. It is further seen that Parijan Bewa, the mother of the plaintiff no:2, Obeida Bibi is already dead as such her share of 2 Bigha 4 Katha 10 1/4 Lessas would be inherited by her only daughter, Obeida Bibi and thus the share of Smti Obeida Bibi would be 6 Bigha 4 Kathas 16 5/3 Lessas.

45. The learned counsel for the respondents/ defendants had contended that the wife of Abdul Jobbar namely, Firoza Bewa is not made a party in this suit and as because she is a necessary party, this suit for partition is not maintainable in her absence. It is true and correct that in a suit for partition all the co-sharers are necessary parties, but in the instant

case at hand, it is seen that all the sons and daughters of Abdul Jobbar are made parties and they have sufficiently represented the estate and interest of the deceased. In fact the wife of Abdul Jobbar namely, Firoza Bewa, who is admittedly not made a party in this suit had represented her minor son namely, Shri Fazlul Zaman Sarkar (defendant no:1(d) in her capacity as the mother and natural guardian of the said minor and had also filed written statement on his behalf; as such it is seen that she had also participated in the trial, though in different capacity. Moreover, the interest of Firoza Bewa is akin to the interest of her sons and daughters, i.e the defendant no:1(a) to 1(f) and they had sufficiently represented and defended this case; as such it is held that merely because Firoza Bewa is not made party in this suit, the same would not render this suit as not maintainable. In fact the Hon'ble Apex Court had in the case of **Mohd. Hussain Vs Occhavlal [(2008) 3 SCC 233]** had held in a similar case that even if all the legal heirs are not made parties, but if it is held that the estate of the deceased was properly represented and there is no fraud practiced, then the suit would not be held maintainable only on the ground that all the legal heirs are not made parties.

46. In view of the above discussions it is held that the suit is maintainable and the same is not bad for non joinder of necessary parties; as such the decision of the learned trial Court in the issue no: 1 and 3 is also affirmed.

47. It is further held that the plaintiffs are entitled to the declaration of their share in the suit land and accordingly it is held that the plaintiffs and the

principal defendants are entitled to the share in the suit land as already discussed and held above.

48. DECISION: The decision of the learned trial Court in the issue no:1 and 3 are hereby affirmed and the decision of the learned trial Court in the issue no:6 is hereby set aside and reversed.

49. The appellant had not challenged the decision of the learned trial Court in the issue nos.2 and 4 and further I do not find any infirmity in the decision of the above issues; as such the decision of the learned trial Court in the issue no.2 and 4 are affirmed.

50. In view of the above discussions, and more particularly the decisions reached in the issue no:5 and 6 it is held that the learned trial Court erred in deciding the issue no:7 wherein it held that the plaintiffs are not entitled to any relief. It is, therefore, held that the plaintiffs are entitled to the declaration that they have the joint right, title and interest over the suit land and are entitled to the partition of the suit land and also entitled to the declaration of their separate shares over the suit land.

ORDER

51. In view of the above discussions, the appeal is allowed and the impugned judgment and decree passed in Title Suit no:411/ 2008 by the learned Munsiff No:1, Dhubri is hereby set aside and reversed. The suit of the plaintiffs is hereby decreed and it is held that the plaintiffs have the joint right, title and interest over the suit land alongwith the principal defendants and they are co-sharers of the suit land. It is

hereby held that the plaintiff no:1, Smti Faziran Bewa would be entitled to total land measuring 4 Bigha 0 Katha 6 7/10 Lessas; and the plaintiff no:2, Smti Obeida Bibi would be entitled to total land measuring 6 Bigha 4 Katha 10 1/4 Lessas; and the plaintiff no:3(a) to 3(j) would be together entitled to a share of 4 Bigha 0 Katha 4 7/10 Lessas; and the principal defendant no:1(a) to 1(f) alongwith Firoza Bewa would together be entitled to a total share of 8 Bigha 12 7/10 Lessas out of the suit land. A precept may be issued to the learned Deputy Commissioner to partition the suit land according to the shares determined above.

52. Prepare preliminary decree accordingly.

53. The appeal is allowed on contest with cost.

54. 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 20th day of January, 2017 at Dhubri.

Yusuf Azaz,
Civil Judge, Dhubri

TYPED BY ME

YUSUF AZAZ, CIVIL JUDGE, DHUBRI.