

Heard Ms. B Sarkar, the learned counsel appearing on behalf of the appellants. Also heard Mr. U Das, learned counsel appearing on behalf of the private respondent and Mr. P J Barman, learned counsel appearing on behalf of respondent Nos. 15 to 17.

2. The appellants before this Court are the plaintiffs in Title Suit No.36/1990 in the court of Civil Judge, Junior Division No.1, Karimganj.

3. The plaintiffs/appellants' case in brief is that they are the owners and predecessors of the suit land described in the schedule of the plaint measuring 2 Kedars 3 Poas 2 jattis 6 pons relating to Dag Nos. 43, 65 and 66 and the Southern part of Dag No.57 of Khatian No.142. The homestead of the plaintiffs/appellants is also situated over the suit land which they have been possessing by constructing dwelling houses, a tank since the time of their forefathers. Plaintiff/appellants also constructed a portion of boundary wall on the South-Western portion of their suit land. The defendant/respondent Nos. 1, 2 and 3 in collusion with 4, 5 and 6 attempted to demolish the said wall in existence by force thereby disturbing their possession over the suit land. Under such circumstances, the plaintiff/appellants filed the suit for declaration of their right, title and interest and confirmation of possession over the suit land.

4. The defendant/respondent Nos. 1 to 3, some of whom were substituted by their respective legal heirs on their death pleaded their defence that they have no claim over the land covered by Dag Nos. 65, 63 and 43 but so far Dag No.57 is concerned, the same is a public path which they have been using since time immemorial. The said path runs North-South wise direction and connects a public path on the East. It is also pleaded by the defendant/respondent Nos. 1 to 3 that during settlement operation the said North-South wise path was recorded under Dag No. 57 and the East-West path Dag No.67 and also the final khatian was issued in that respect.

5. The defendant/respondents No.15, 16 and 17 in the present appeal, who were the defendant Nos. 4, 5 and 6 in the Title Suit also submitted in their written statement that the suit land described in the Schedule of the plaint covered by Dag No.57 of Khatian No.142 is classified as Patit (path). They further stated that the disputed land mentioned in schedule of the plaint has been shown recorded in the name of 4 khatians during preparation of the record. However, during the current settlement operation the disputed land has been recorded as residential (iv) and path being enjoyed and possessed by the plaintiff/appellants. As such they also prayed for dismissal of the suit.

6. Upon the pleadings the following issues were framed:

- i. Whether there is cause of action for the suit?
- ii. Whether the suit is barred U/S 10 CPC?
- iii. Whether the plaintiffs have right, title and interest over the suit land?
- iv. Whether the plaintiffs are entitled to a decree as prayed for?
- v. To what reliefs are the plaintiffs entitled?

7. Both the sides adduced oral and documentary evidence and the trial court after hearing both the sides dismissed the suit. The trial court while deciding issue No.3, took note of the cross-examination of the PW-1, who is the plaintiff/appellant No.1, who deposed that the suit land is covered by Dag No.67 and it is a public path and it was also deposed that the said PW-1 has no claim over Da

g No.57. The defendant/respondent produced the final khatian, exhibit-B and the vendik map, exhibit-A. The trial Court, accordingly, examined exhibit-B and came to the conclusion that Dag No.57 is recorded in the names of four persons which is classified as Patit path. Finally, the trial court came to the conclusion that land covered by Dag Nos. 65, 66 and 43 are not claimed by the defendant/respondent and as the plaintiff claims the land covered by Dag No.57 along with the aforesaid dags accordingly held that the plaintiff/appellants has no right, title and interest over the suit land. The trial court dismissed the suit of the plaintiff/appellants.

8. Being aggrieved, the present plaintiff/appellants preferred Title Appeal No.22/2000 in the court of Civil Judge, Senior Division, Karimgang, impugning the judgment and decree dated 05.05.2000 passed by the learned trial court in Title Suit No.36/1990. The learned first appellate court after hearing the parties decreed the appeal partially by holding that the plaintiff/appellants have right, title and interest over land covered by Dag No.43, 65 and 66.

On the basis of deposition of PW-1 with respect to land covered by Dag No.57, the learned first appellate court held that the same is a public path and the plaintiff/appellants have/had no right, title over it. The said judgment and decree dated 12.02.2004 passed in Title Appeal No.22/2000 has been challenged in the present second appeal which was admitted on 05.08.2004 by this court by formulating the following substantial questions of law:

1. Whether the learned First Appellate Court committed error in rejecting the admission made by the State Government in para-12 of the written statement that the part of the disputed land pertains to Dag No.57 is the homestead land of the appellant contrary to the provisions of Section 58 of the Indian Evidence Act?

2. Whether the judgment rendered by the learned First Appellate Court is perverse for non-consideration of the material documentary evidence of title i.c. Exts. 2 and 3?

For the convenience both the substantial questions of law are taken up together for giving a decision by this Court.

9. Ms. B Sarkar, learned counsel appearing on behalf of the appellants submits that the first appellate court failed to appreciate the materials on record in the proper perspective. The learned counsel submits that in the written statement of the respondent State (defendant Nos. 4, 5 and 6) clearly it is admitted in para 12 that the land described in Schedule of the plaint including part of Dag No.57 (i.e 0.21 acres) are recorded in the name of the plaintiff/appellants in the current settlement and the said path is enjoyed and possessed by the plaintiff/appellants and on the face of the said admission, the finding of the first appellate court that the path enjoyed and possessed by the plaintiff/appellants cannot be considered to be admitted as the same is mere pleadings and not evidence which is wrong. Further, the learned counsel submits that non-consideration of exhibit-3 has vitiated the finding of the first appellate court. Further, it is submitted that the first appellate court ought to have taken into consideration the khatian patta No.184 issued by creating a new Dag No.57 (ka) in the name of khatian holder and merely the same was produced at the conclusion of hearing that cannot be a ground for non-consideration of document inasmuch as in order to do substantial justice the first appellate court ought to have considered the same and remanded the matter for fresh trial and having not considered the said admission made by the State Government in para 12 of the written statement the same has vitiated the judgment challenged in this second appeal and also non-consideration of the material evidence of title i.e. exhibits 2 and 3 also amounted to perversity in the finding of the first appellate court. For the same, the judgment and decree passed by the first appellate court is liable to be set aside and the same be remanded.

10. On the other hand, Mr. Das, learned counsel appearing on behalf of the private respondent Nos. 1 to 14 submits that the PW-1 has clearly deposed in his cross-examination that he had no claim over the land covered by Dag No.57 and under such circumstances, the plea of admission by the respondent Nos. 15 to 17 in their written statement has no bearing in the adjudication of the disputes betw

een the parties. Regarding exhibit-3, Mr. Das submits that the same was not exhibited in the evidence led by the plaintiff side but the same was exhibited in Misc(J) case No.8/1990 i.e. the injunction petition filed by the plaintiff/appellant at the time of filing the main suit. The said document cannot be taken into consideration by the courts below and also cannot be taken for the judicial notice inasmuch as if the same is considered now the same would cause adverse effect on the respondents and further Mr. Das submits that the same was not mentioned even in the pleadings of the plaintiff/appellants. Under such circumstances, evidence even if it is led but without any pleadings the same cannot be considered for adjudicating the main issues between the parties.

11. Mr. Barman, learned counsel appearing on behalf of the State respondent and its officials, submits that in view of the deposition of the PW-1 that he has no claim over land of Dag No.57 the same cannot be an admitted fact rather it was by the deposition of the PW-1, the plaintiff side has denied the pleadings of the Government and as such there should not be any interference of the judgment passed by the appellate court.

12. Perused the case record, considered the submissions of the learned counsel and the judgment passed by the First appellate court. On the perusal of the evidence of the PW-1 it transpires that only two documents were exhibited which are exhibits 1 and 2 and the same are the sale deeds compared with the original one on the basis of which the forefathers of the plaintiff/appellant had purchased the suit land. The PW-1 in his cross-examination on his own, deposed that he is unable to read the said exhibits 1 and 2 and deposed that he cannot say if any path surrounded the said land. Except the said two documents no other documents have been exhibited by the plaintiff side. PW-1 in his cross-examination has deposed that the suit land is covered by Dag No.67 and the said Dag No.67 is the public path. In the next breathe the PW-1 deposed that he had no claim over Dag No.57, it is also observed that the PW-1 in his cross-examination has deposed that he had not submitted khatian in the suit. The Dag No.57 as deposed by the PW-1 is mutated in the names of Binod Bihari Dey, Barindra Chandra Dey, Abani Kumar Dhar and Monoranjan Dhar and the said land covered by Dag No.57 is a patit on e and a path. He admitted the existence of houses of various neighbors on both sides of the path covered by Dag No.57. On perusal of the evidence of the private defendant, the DW-1, who is the defendant No.2 it is seen that exhibit-A is the vendik map showing Dag No.57 and exhibit A(1) is the Dag No.57 which is shown as a public path. Exhibit-B is the certified copy of the final khatian relating to land covered by Dag No.57 recorded as patit path. In his cross-examination, he had deposed that there is a path on the Eastern side of the plaintiff homestead land and the path starts from North and finally taking turn towards East again proceeded towards South then towards the Western side of the land of the plaintiff and finally ends at the main Bipin Paul road. The said DW-1 also exhibited few sale deeds of the residents nearby the land covered by Dag No.57 wherein the said Dag No.57 has been mentioned as path. In the cross-examination, the DW-1 stood by the evidence led in his chief. From the exhibits of both the parties it transpires that the exhibit-B, which is the khatian covering land of Dag No.57 is standing in the name of four persons including the predecessor of the plaintiff/appellant. However, the said khatians were not made party to the suit. The case of the plaintiff/appellants is that a part of the land covered by Dag No.57 has been claimed by the private respondents to be a path which they are using for publicly and as such he needs a declaration of right, title and interest of the suit land consisting the said land covered by Dag No.57 and confirmation of possession. On the face of the said pleadings and evidence of both the parties the exhibit-A the vendik map shows the path covered by Dag No.57 which touches the path covered by Dag No.67 on the Northern side. Considering the said map, exhibit-A and the various sale deeds it can very well be prepondered that the path which is mentioned in the said sale deeds is a public path inasmuch as the same can be concluded by putting reliance on the exhibit-A. Also on perusal of exhibit-B, the khatian, it can very well be concluded that the land covered by Dag No.57 has b

been specifically classified as road immediately after the land was acquired by the Government under the Assam State Acquisition of Zamindari Act, 1951 i.e. in the year 1964. On the part of the respondents/defendant Nos.15 to 17 none of the officials had come and deposed during the trial. Under such circumstances, considering that PW-1 has no claim over land covered by Dag No.57 as deposed in his cross-examination and considering the documents exhibited by the private defendant side it can very well be prepondered that the plaintiffs/appellants are fully aware and conscious that the land covered by Dag No.57 is a path which is in use by the defendant/respondent. The submission of the learned counsel appearing on behalf of the appellants with regard to the admission made on the part of the respondent State in their written statement, the same cannot be treated to be an admission when one of the plaintiff/appellants had in his cross-examination deposed that he has no claim on the land covered by Dag No.57.

13. Regarding exhibit-3, as referred in the substantial question of law No.2 this is a document wherein the old Dag No.57 has been shown to be Patit and a new Dag No.57 (Ka) has been shown to be curved out consisting of land measuring 0.21 acres as the patit path land. The said exhibit-3 was not exhibited at the time of deposition by the plaintiff side nor there is any pleading to that effect in the plaint by way of introducing amendments in the plaint. Under such circumstances the exhibit-3, Khatian cannot be taken into consideration by this Court inasmuch as if there is no pleading, under such circumstances, the evidence even if it is on record the same cannot be considered. The question of taking judicial notice of the said exhibit-3 which was exhibited in Misc(J) case No.8/90 cannot be considered at this stage inasmuch as in the event of taking judicial notice of the said document, for the persons so aggrieved, it would amount to denial of their valuable right of cross-examining the plaintiffs in order to test its genuineness and the veracity of the contents of the said document.

14. Ms. B Sarkar has relied upon Sri Nanua Goala Vs Shri Pravati Barai and others reported in 1991 1 GLR 298 and submits before the court that facts admitted need not be proved but the said decision has no bearing in the present facts and circumstances of the case as the PW-1 in his cross-examination had deposed that he has no claim over the land covered by Dag No.57. She also relied Deo Chand and others vs Shiv Ram and others reported in (1969) 3 SCC 330 wherein the apex court defined the ambit and scope under Section 100 CPC of the High Court. It was held that if any vital evidence is left out on wrong appreciation of the legal decision, the High court has the power to interfere with the findings of fact.

In the present case in hand, the ratio so laid by the Apex court cannot be pressed as it is not the case that the first appellate court has failed to take into consideration any vital evidence on the wrong appreciation of legal decision. She also relied upon Sundra Naicka vadiyar -Vs- Ramaswami Ayyar reported in 1995 Supp (4) SCC 534. The submission that the defendant State (the respondent No. 15 to 17) in their written statement stated that Dag No.57 was recorded as patit path vide exhibit-B and subsequently the same was corrected and in that reference the plaintiff/appellant filed a zerox copy of khatian patta to which the first appellate court wrongly discarded the same, this court finds that the first appellate court perused the same and came to the conclusion that the old Dag No.57 was in existence and there after a separate Dag bearing No.57(ka) was created and the same has been shown as the homestead land in the name of four joint khatian holders. The first appellate court rejected the same on the following grounds:

- i. that the said document was submitted on the conclusion of hearing and the same cannot be treated fairly as a part of evidence;
- ii. that Dag No. 57 has already been shown as path in vendik map, exhibit-A and the same is also recorded in exhibit-B, khatian so the first appellate court giving its reason that there is no evidence as to why a separate partitioned Dag was curved out as 57(ka) more so when the respondent State never led any evidence through its officials during the trial to that effect.

Thus, the rejection of the said alleged exhibit-3 (as the same was not exhibited in the main suit) is proper and that cannot be termed to be perverse.

15. Finally, it can be concluded that the ratio of the aforesaid cases are not applicable in the case in hand.
16. Considering the discussions made hereinabove, this court answers the said two substantial question of law in the negative and accordingly this second appeal is dismissed.
17. Send back the case record.
19. No Costs.
20. Interim order passed earlier stands vacated.