

Form No. (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT

District: Jorhat

IN THE COURT OF MUNSIFF NO.1, JORHAT*Present:* Shri Jaspal Singh, AJS.Thursday, the 29th day of September, 2011.**Title Suit No. 10 of 2008**Md. Sultan Ahmed alias Tipu Sultan.....*Plaintiff*
*versus*1. Smti. Chiraji Begum
2. Md. Haider Hussain
3. Md. Riajur Hussain
4. Md. Hasna Begum
5. Mrs. Jahanara Begum.....*Defendants*This suit coming on for final hearing on 5.8.11, 10.8.11
and 9.9.11 in presence of:-Advocate for the Plaintiff: Shri O. M. Mahesree (Senior
Advocate)

Advocate for the Defendants: Shri Rintu Goswami

And having stood for consideration to this day, the Court
delivered the following judgment:--**J U D G M E N T***Plaintiff's case*1. Late Md. Hussain was the sole owner of the lands
measuring 11B-1K-7L (covered by three different Dags)
under P.P. No.237 of Titabor Mouza, Bebejia Gaon in the
district of Jorhat, Assam. The land measuring 1B out of

the total land measuring 2B-0K-19L as covered by Dag No.290 under P.P. No.237 and the entire land measuring 3K-13L as covered by Dag No.291 under P.P. No.237 of the same Mouza, Gaon, district, etc. is the subject-matter of the instant suit and is referred to hereinafter as “suit land”. Late Md. Hussain left behind him only one son, namely, Ahmed Hussain, since deceased, at the time of his death. Ahmed Hussain also died and left behind him his wife and two sons, the defendants herein.

2. The plaintiff, from his very childhood, has been living under the sole care and custody of Md. Hussain during the latter’s lifetime at his place of abode at Bebejia Gaon, Titabor, and while living as such the plaintiff had been discharging all those basic day to day requirements of said Md. Hussain during his lifetime as his only son late Ahmed Hussain was a man of desperate character and did not discharge his obligations as a son towards said Md. Hussain as expected during his lifetime.

3. In return to the services so rendered to him by the plaintiff, Md. Hussain had also discharged his obligation to the plaintiff in respect of his establishment for future livelihood, coupled with arranged marriage, etc. Out of love and affection, Md. Hussain had verbally gifted away the suit land to the plaintiff since long back and thereby Md. Hussain had divested himself from his right or claim over the suit land during his life time. Md. Hussain died in the year 1969. Pursuant to the verbal gift, the plaintiff had got his name mutated in the Record of Rights over the suit land vide orders dated 14.07.66 and 30.01.69 respectively as passed by the S.D.C. (since designated as C.O.) as passed in the Chitha, and since then the plaintiff

has/had been occupying and possessing the suit land as of his own by regularly paying the land revenue to the Govt.

4. Since the date of verbal gift of the suit land the plaintiff had/has been occupying and possessing the suit land peacefully till 1990. But after lapse of about 23/20 years respectively of the mutation of the name of the plaintiff in the Record of Rights, Ahmed Hussain, the son of late Md. Hussain, started disturbing the plaintiff in enjoying the gifted land for which the plaintiff had to initiate proceedings under Section 145, Cr.P.C., being Misc. Case No.198/90. The case was finally disposed of in favour of the plaintiff on 26.4.95. A revision was filed by Ahmed Hussain against the said order and the same was dismissed on 20.2.96.

5. Thereafter, said Ahmed Hussain again made disturbances in possession of gifted land covered by Dag No.290 for which the plaintiff had to file a Misc. Case, being Misc. Case No.120/99 under Section 145, Cr.P.C., for restoration of his possession over the suit land. The same was disposed of on 12.12.06 by the learned Addl. District Magistrate, Jorhat. The said Magistrate observed that the plaintiff's claim pertaining to the suit land was of a civil nature and accordingly directed him to agitate his claim in proper forum. The above observation was confirmed by the Hon'ble High Court vide order dated 6.8.07 passed in Rev. Pet. 106/07.

6. The plaintiff has, therefore, instituted the instant suit for partition and for delivery of separate khas

possession of the plaintiff's share of land on declaration of his right, title and interest thereon.

Defendants' case

7. The defendants no.1 to 3 contested this suit by filing a common written statement. The case proceeded *ex parte* against the defendants no.4 and 5. Besides averring that the suit is not maintainable, the suit is barred by limitation and the suit is bad for non-joinder of necessary parties, the defendants no.1 to 3 have averred *inter alia* that after the death of Md. Hussain, his only son Ahmed Hussain (father of defendants) had inherited the entire land covered by P.P. No.237. The grandmother of the defendants namely Dalmuri Musalmani and the father of the defendants and the defendant no.1 used to take all the care of Md. Hussain till his death. Md. Hussain died on 26.2.1961 and not in 1969. He had never gifted out any property to the plaintiff as alleged. Rather in the last stage of his life he was completely bed-ridden and under medical treatment.

8. The defendants have challenged the mutation orders 14.07.66 and 30.01.69 passed in favour of the plaintiff and the matter is pending for disposal in case No.TR/Rev/7/04-05/280/1382 before the A.D.C., Revenue, Jorhat.

ISSUES

9. On the basis of the pleadings of both the parties, following issues were framed in this suit:

Issue No.1: Whether there is a cause of action for the suit?

Issue No.2: Whether the suit is maintainable?

Issue No.3: Whether the suit is barred by law of limitation?

Issue No.4: Whether the suit is bad for non-joinder of necessary parties?

Issue No.5: Whether Md. Hussain verbally gifted the suit land to the plaintiff?

Issue No.6: Whether the plaintiff is in possession of the suit land?

Issue No.7: Whether the plaintiff is entitled to get a preliminary decree of partition of the suit land (Schedule B land) from Schedule A land?

Issue No.8: Whether the plaintiff is entitled to get a decree of right, title, interest and possession over the suit land?

Issue No.9: To what other relief(s) are the parties entitled?

10. The plaintiff examined as many as three witnesses including himself in support of his case. The defendants examined two witnesses (defendants no.2 and 3) in support of their case.

DISCUSSION, DECISION AND REASONS THEREFOR

11. I have gone through the evidence tendered on record and heard the arguments at length of the learned counsel for both the sides.

Decision on Issue No.1 with reasons

12. The averments made in the plaint *prima facie* disclose that there is cause of action in the suit. It may be

stated here that cause of action is nothing but a bundle of facts which a party has to prove to get judgment in his favour. It is a different aspect altogether as to whether or not he succeeds in proving those facts. This issue is, accordingly, decided in the affirmative.

Decision on Issues No.2, 3 and 4 with reasons

13. All these three issues are taken up for discussion together as because the reason for my decision on these issues is the same. These issues are as to whether the suit is maintainable, the suit is barred by limitation and the suit is bad for non-joinder of necessary parties. The defendants no. 1 to 3 have averred in their written statement that the suit is not maintainable, the suit is barred by the law of limitation and the suit is bad for non-joinder of necessary parties. But they have not averred as to how the suit is non-maintainable or barred by limitation or bad for non-joinder of necessary parties. They have not stated the names of parties who ought to have been joined by the plaintiff in this suit. It may be stated here that the defendant is enjoined under Order 8, Rule 2, CPC, to raise by his pleading all matters or facts which show that the suit is not maintainable as well as all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise. In the premises, all these three issues are answered in the negative.

Decision on Issue No.5 with reasons

14. In his evidence on affidavit, the plaintiff (PW1) has deposed *inter alia* that late Md. Hussain brought him (PW1) to his home from Dholi Muslim Gaon, Titabor, while he was about 1½ years of age and reared him up in

his home. He used to help late Md. Hussain in his domestic work and also used to take care of him and his wife. On the other hand, late Md. Ahmed Hussain, the son of late Md. Hussain, was of quarrelsome nature and was a man of peculiar habits and did not do any work nor did he take care of his parents.

15. When PW1 was about 25, late Md. Hussain told him that he would get him married. Late Md. Hussain, out of love and affection towards PW1 and to make a provision for his living and to run his family, gave him by way of an oral gift 1 Bigha of land from out of Dag No.290 of P.P. No.237 of Bebejia Gaon, Titabor Mouza, and delivered possession to him before a few days of his proposed marriage. PW1 accepted the gift by taking delivery of possession of the same. Late Md. Hussain made declaration on the land in presence of late Shamsul Hussain that he was giving 1 Bigha of land by way of gift to PW1 in the *southern side* of Dag No.290 and showed PW1 the boundary. He called the Mandal and measured 1 Bigha of land. Late Md. Hussain thereafter went to the S.D.C.'s office at Titabor and made necessary endorsement in Chitha with respect to his oral gift of the said 1 Bigha of land to PW1.

16. PW1 got married in 1966. After about 2 years therefrom, late Md. Hussain made another oral gift of 3K-13L of land of Dag no.291 of P.P. No.237 and gave delivery of possession of the said land to him. This gift was also made in the same manner as in the earlier occasion. PW1 accepted the gift by taking over possession of the same. Late Md. Hussain thereafter also made necessary endorsement in the Chitha Book in respect of

the gift. The said late Shamsul Hussain was a witness to this gift also.

17. In support of his testimony, PW1 has exhibited, among other things, the certified copy of the Jamabandi (Ext.1) of Dag Nos.290, 291 and 299 of P.P. No.237 of Bebejia Gaon, Mouza Titabor, Jorhat. In the said Jamabandi, the name of PW1 has been shown as pattadar No.2. In the Jamabandi note [Ext.1(1)], it is mentioned that as per order dated 14.07.1966 of the S.D.C. the name of Md. Sultan Ahmed has been mutated with pattadar no.1 over 1 Bigha of land under Dag No.290 by reason of gift. In the Jamabandi note [Ext.1(2)], it is mentioned that as per order dated 30.01.1969 of the S.D.C. the name of Md. Sultan Ahmed has been mutated in place of pattadar no.1 over the entire 3K-13L of land under Dag No.291 by reason of gift. In his evidence, PW1 has also exhibited the revenue paying receipts (Exts.2 to 33). The revenue paying receipts relating to Patta No.237, and in the name of the plaintiff, are of the years 1986-1987, 1987-1988, 1988-1989, 1989-1990, 1990-1991, 1991-1992, 1992-1993, 1993-1994, 1994-1995, 1995-1996, 1996-1997, 1997-1998, 1998-1999, 2004-2005, 2005-2006.

18. In the cross-examination of PW1, learned counsel for the defendants put some suggestions to him in a way denying and refusing to accept the factum of oral gift. The suggestions, in second person of PW1, are thus: (1) You have not mentioned on which date and at what time and in whose presence Md. Hussain had verbally gifted the land to you; (2) You have not mentioned in your plaint and in your affidavit that a year before your marriage the

land was gifted to you; (3) No gift was given to you by Md. Hussain; (4) You have deposed about the factum of gift falsely; (5) You have falsely deposed about the factum of delivery of possession of the land to you. All these suggestions were stoutly denied by PW1. Learned counsel for the defendants contradicted PW1 regarding the facts stated by the latter in his deposition on affidavit with respect to the facts stated by him in the plaint. It is admitted that the plaintiff did not mention all minute details of the facts of his case in his plaint, but mentioned all minute details during his evidence instead. I do not think anything is wrong on the part of the plaintiff in not mentioning all factual details in his plaint. It is provided in Order 6, Rule 2 of the CPC that a pleading should contain only a statement in a *concise form* of the material facts on which the party pleading relies for his claim or defence. The word "*concise*" literally means expressing much in a few words.

19. Besides these suggestions and contradictions, there are certain statements of PW1 made during his cross-examination which tend to affirm, and, thereby, strengthen, what he has deposed in his evidence on affidavit. These statements, in first person of PW1, are thus: (1) My name is there in Ext.1 (Jamabandi); (2) There is mutation in my name in Dag No.290; (3) There is 2B-19L land in Dag No.290 and out of that there is mutation in my name in respect of 1 Bigha land; (4) In the S.D.C. office, late Md. Hussain had written that he had gifted the land to me; (5) Md. Hussain had written in the Chitha. It is important to note that land revenue paying receipts are reasonably strong evidence of possession, though not

necessarily of ownership, and, in the case at hand, the plaintiff has exhibited a series of land revenue paying receipts from the year 1986 onwards showing payments of land revenue in his name. PW1 has not been cross-examined in relation to the land revenue paying receipts exhibited by him in his deposition on affidavit.

20. The plaintiff has examined one Chakreswar Saikia (PW2) in support of his case. PW2 has deposed *inter alia* that in his childhood he used to stay with his *mohadeo* Demthai Kachari who had agricultural land near the land of the plaintiff. The plaintiff has been staying in the suit land since he first came to know him. After about two years of his (PW2's) passing matriculation examination (i.e. in 1966), plaintiff's marriage was performed by late Md. Hussain. Late Md. Hussain had given the plaintiff a few days before his marriage 1 Bigha of land by way of gift. After about 2 years of the plaintiff's marriage, another 3K-13L of land was given by late Md. Hussain to the plaintiff by way of gift.

21. In his cross-examination, PW2 has supported the case of the plaintiff by deposing *inter alia* that total 1B-3K-13L of land is mutated in the name of the plaintiff. He has also deposed that the death of Md. Hussain took place in the year 1969; and this fact is relevant to the case of the plaintiff as because according to the plaintiff late Md. Hussain had made oral gifts to the plaintiff on two instances – first, before the year 1966 in which the plaintiff got married, and subsequently two years after the year 1966, that is, before the death of Md. Hussain (in the year 1969). PW2 has also stated about the four boundaries of the suit land. He has stated that the land is

bounded on east by Na Ali, on west by Bhai's land and his land, on north by land of Ahmed Hussain (father of defendants no. 2 and 3) and on south by the land of Mukut Saikia. Be it stated that the four boundaries stated by PW2 are identical with the four boundaries of the suit land shown in Schedule B to the plaint.

22. Discussing further about the year of death of Md. Hussain, let me try to find out what the defendants have stated about it. The defendants have averred in their written statement that Md. Hussain died on 26.02.1961. Thus they have stated the exact date on which the death of Md. Hussain took place. However, in their depositions on affidavit, DW1 (defendant no.2) and DW2 (defendant no.3) have not stated the said exact date on which the death of Md. Hussain allegedly took place. They have, instead, deposed that Md. Hussain, their grandfather, died in the year 1961. But, again, both have stated in their cross-examination that Md. Hussain died in the year 1963. Apparently, there is discrepancy between the examination-in-chief and cross-examination of both the DWs as regards the year of death of Md. Hussain. It will be pertinent to state here what late Ahmed Hussain and Md. Haider Hussain (DW1) had stated in their written statement submitted in connection with Misc. Case No.198/1990 under Section 145, Cr.P.C., as regards the year of death of Md. Hussain. They had stated therein that Md. Hussain died in the year 1968. But, again, late Ahmed Hussain had stated in his evidence in connection with that case that Md. Hussain died in the year 1964. In view of the said discrepancies, I am not at all inclined to believe the testimonies of DW1 and DW2 insofar as the

year in which death of their grandfather, Md. Hussain, had taken place.

23. The plaintiff has also examined Sri Prabhat Sarma (PW3), the Lat Mandal, in support of his case. PW3 has deposed *inter alia* that in the Chitha Book brought by him there is mention that “I have gifted 1 Bigha land of this Dag (No.290) to my *nati* Md. Sultan Ahmed, and I have no objection if the name of Md. Sultan Ahmed is entered”. Md. Hussain had put his signature on 11.07.1966 after mentioning the said fact in the Chitha. There is also mention in the Chitha in respect of this Dag No.291 that “I have gifted the entire 3K-13L land of this Dag to Md. Sultan Ahmed, and I have no objection if separate Patta is issued in the name of Md. Sultan Ahmed”. Md. Hussain had put his signature on 08.05.1968 after mentioning the said fact in the Chitha. PW3 has further deposed that as per Chitha, the S.D.C. had authorized mutation of the name of Md. Sultan Ahmed with the name of Md. Hussain in Dag No.290 in respect of 1 Bigha land of Dag No.290 by reason of gift. The Mandal had put his signature on 11th July, 1966 and the S.D.C. had put his signature on 14th July. There is mention in Dag No.291 that the S.D.C. had authorized mutation of the name of Md. Sultan Ahmed in place of Md. Hussain by reason of gift. The Mandal had put his signature there on 08.05.1968. The S.D.C. had also put his signature there.

24. In his cross-examination, PW3 has deposed that there is no mention in the Chitha as to whether the gift was made orally or in writing, but fact remains that there is mention about the making of gift. There is no mention in the Chitha on which date and in which place the gift

was made. There is no mention of any witness in the Chitha. The mutation was Chitha mutation. No mutation case was registered. Mutation in Dag No.290 took place in 1966 and mutation in Dag No.291 took place in 1969. In the Chitha, in Dag Nos. 290 and 291, there is no mention that Sultan Ahmed had accepted the gifts. It is apparent that the credibility of PW3 could not be brought down by the learned counsel for the defendants during his cross-examination. It is needless to state that the said entries in the Chitha cannot be ignored or overlooked merely because there is no mention in the Chitha as to whether the gift was made orally or in writing, on which date and in which place the gift was made, or as to whether or not any witness was present.

25. Learned senior advocate for the plaintiff has submitted in course of his arguments that the said entries in the Chitha book, being more than thirty years old, should be presumed, in view of Section 90 of the Indian Evidence Act, 1872, to be genuine, and the signatures purporting to be of late Md. Hussain therein should be presumed to be in the handwriting of late Md. Hussain. Section 90 of the Indian Evidence Act, 1872, provides that where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting. In the case at hand, it is needless to state that the Chitha book, which PW3 brought to the Court, was produced before this Court by PW3 from the custody

of the Revenue Authority, which, unquestionably, is the proper custody.

26. To reiterate, as deposed by the Lat Mandal (PW3), there are two relevant entries in the Chitha in respect of Dag Nos. 290 and 291 of P.P. No.237. In Dag No.290, there is an entry that **I have gifted 1 Bigha land of this Dag to my nati Md. Sultan Ahmed, and I have no objection if the name of Md. Sultan Ahmed is entered,** and Md. Hussain had purportedly put his signature on 11.07.1966 after mentioning the said fact in the Chitha. In Dag No.291, there is an entry that **I have gifted the entire 3K-13L land of this Dag to Md. Sultan Ahmed, and I have no objection if separate Patta is issued in the name of Md. Sultan Ahmed,** and Md. Hussain had purportedly put his signature on 08.05.1968 after mentioning the said fact in the Chitha.

27. The said relevant entries made in Dag Nos. 290 and 291 in the Chitha relate back to the years 1966 and 1968 which shows that those entries are more than thirty years old. Therefore, there is a statutory presumption under Section 90 of the Indian Evidence Act that the signatures therein purporting to be in the handwriting of Md. Hussain are in the handwriting of late Md. Hussain. The defendants have not been able to rebut this presumption in this case.

28. It will not be out of place to state here that otherwise also entries in the Record of Rights raise a strong presumption of their correctness unless rebutted. As held by the Hon'ble Gauhati High Court in **Paramesh Sarmah and ors. v. Islam Ali and ors., 2000 (3) GLT 453,**

entries in the Record of Rights raise a valid presumption of their correctness unless rebutted. It was actually for the defendants to prove that the aforesaid entries in the Chitha are not correct or have not been duly made. But the defendants have failed so to do in this case.

29. Coming to the testimonies of DWs, the defendant no.2 (DW1) and the defendant no.3 (DW2) have deposed in their depositions on affidavit *inter alia* that after the death of their grandfather, Md. Hussain, their father Ahmed Hussain inherited the entire land covered by P.P. No.237. They along with their grandmother Dalmuri Musalmani and their father used to take all care of their grandfather till his death. Their grandfather died in 1961, not in 1969 as alleged by the plaintiff. He never gifted out any property to the plaintiff as alleged.

30. Before I go to the cross-examination part of the DWs, let me briefly touch on the ages of the DW1 and DW2 which I find a bit doubtful. DW1 has mentioned his age as on the date of his cross-examination as 57. He has stated in his cross-examination that at the time of death of his grandfather in the year 1963 he was 13 years old. If this statement of DW1 is believed, his present age would be about 61 years, not 57. Similarly, DW2, who has mentioned his age as on the date of filing of evidence on affidavit as 45 and as on the date of his cross-examination as 52, has stated in his cross-examination that at the time of death of his grandfather in the year 1963 he was about 8 or 9 years. If this statement of DW2 is believed, his present age would be about 56 or 57 years.

31. In his cross-examination, DW1 has deposed *inter alia* that he has been seeing the plaintiff since the time he can remember things. The plaintiff used to live in their old house and used to do their cultivation works and domestic works. The plaintiff is originally of Dholi Musalman Gaon. Their grandfather performed the marriage of the plaintiff in their house. DW2 has deposed in his cross-examination *inter alia* that he has been seeing the plaintiff in their house since childhood. The plaintiff is originally of Dholi Musalman Gaon. Their grandfather had brought the plaintiff from there. The plaintiff used to do their household cultivation and other works. Their grandfather even performed the marriage of the plaintiff. It is hardly required to state that all these facts deposed by DW1 and DW2 in their cross-examination are those which are, in fact, averred by the plaintiff in this case. The defendants have thereby supported the case of the plaintiff so far as the above facts are concerned.

32. Further, on going through the cross-examination of DW1 and DW2, I can find out the undermentioned facts which are relevant to the question as to whether or not late Md. Hussain had gifted the suit lands to the plaintiff.

33. First, DW1 has deposed *inter alia* that he has no knowledge if his grandfather, Md. Hussain, had made verbal gifts of the suit lands to the plaintiff. He does not know if his grandfather had made endorsement in the Chitha book as regards the making of verbal gifts. He does not know if late Md. Hussain had written in the Chitha book that he would have no objection if the plaintiff will have separate Patta in respect of the gifted

land. It may be stated here that *denying a fact* and *showing ignorance about a fact* are two different things. It can, therefore, be said without any faltering that DW1 has not specifically denied the facts that verbal gifts of the suit lands were made by late Md. Hussain to the plaintiff and relevant endorsements were thereafter made by Md. Hussain in the Chitha book.

34. Secondly, DW1 has deposed that the land revenue in respect of their lands was sometimes paid by the plaintiff and sometimes by their father late Ahmed Hussain. He has also deposed that he has deposited the land revenue paying receipts in the Court. DW2 has deposed that he pays the land revenue and the land revenue paying receipts have been filed in this case. Well, in this case, only the plaintiff has deposited the land revenue paying receipts in this case, not the defendants. The admission by DW1 that the land revenue in respect of their lands was sometimes paid by the plaintiff goes to indicate that the defendants indirectly endorse or support the claim of the plaintiff in respect of the lands in question. Otherwise, why should have the plaintiff paid or why should have late Ahmed Hussain allowed the plaintiff to pay the land revenue?

35. Lastly, DW1 and DW2 have deposed in his cross-examination that their father Ahmed Hussain had filed objections before the S.D.C. office against the entries in the Jamabandi of P.P. No.237 to the effect that by reason of gift the name of the plaintiff is mutated over 1 Bigha of land under Dag No.290 and 3K-13L of land under Dag No.291. But the defendants have not exhibited any such record or document in this case in support of that.

Therefore, it can be assumed in absence of such record or document that the father of the defendants no.2 and 3 had not filed any such objection against the said entries.

36. In **Manmatha Ranjan Trivedi v. Gopal Krishna T.E. Co. (P) Ltd. and ors., 2006 (Supp.) GLT 718**, it was observed in Paras 14 and 15 as under:

“14.A chitha mutation can be passed by following the procedure under the Assam Land and Regulation. If any person having better right or title objects such chitha mutation such person is entitled to challenge it before the competent revenue authority and in that event the authority is required to decide the matter on the basis of the rival claim between the respective claimants.

15. In the instant case, there is no evidence on record that the Chitha mutation effected in favour of the appellant/plaintiff has been objected to before the competent authority. In fact the exhibit Ga and Kha which are copies of the Chitha prepared by the authority disclose the names of both the plaintiff and defendants. Such Chitha is prepared on the basis of actual physical possession by the revenue authority. In the absence of any contrary evidence on record, the order of mutation in favour of the appellant/plaintiff *prima facie* leans in his favour of having a *prima facie* title over the land in question, though by itself title is not established.”

37. In view of the above decision, as there is no evidence on record that the defendants had filed any objection before the revenue authorities against the said entries in the Chitha, the Chitha mutation in favour of the plaintiff inclines in favour of the plaintiff of his having a *prima facie* title over the suit land.

38. Having discussed the evidence of both the sides at length, let me now briefly dwell upon the essentials of Mohammedan gift. As per Mohammedan law, there are basically three essentials of gift – *declaration* by the donor, *acceptance* by the donee and *delivery of possession*

of the subject of gift to the donee. A gift, according to Mohammedan law, may even be made orally. Writing is not necessary and even an oral gift is sufficient if possession is delivered.

39. In the case at hand, it is the case of the plaintiff that the gift of the suit land was made to him by Late Md. Hussain orally and declaration was made to that effect on two instances by Late Md. Hussain in presence of Late Shamsul Hussain. The donor, late Md. Hussain, and the witness, late Shamsul Hussain, are no more alive to depose about the oral gift. It is impossible on the part of the plaintiff to bring the donor and the witness before the Court to establish that the declaration as to the said gift in his favour was made orally by the donor. But it would be totally unjust and unfair to hold that the said oral gift cannot be established merely because the donor and the witness are not available any more to depose about the making of oral gift. Justice demands that the donee must have to bring the best *available evidence* to establish his case that declaration of the oral gift was made by the donor. The plaintiff has, by examining the Lat Mandal (PW3), proved the entries in the Chitha which contain the declarations made by late Md. Hussain along with his purported signatures therein. The said writings in the Chitha indicate the intention of the donor, late Md. Hussain, of his making of gifts of the suit lands in favour of the plaintiff. The said endorsements in the Chitha indicate the declaration of late Md. Hussain as to his making of gifts. Moreover, the said entries in the Chitha are not just entries simplicitor made by the S.D.C. merely on the basis of possession and nothing else; these entries

are rather entries made in the first person of late Md. Hussain manifesting his making of the gifts and beginning with the words "*I have gifted...*" and containing his purported signatures therein.

40. Let me now come to the other two essentials of Mohammedan gift, namely acceptance by the donee and delivery of possession. It is in the evidence tendered on record that – (a) the plaintiff and the defendants (DW1 and DW2) have their respective dwelling houses in the suit land and this fact has been deposed by the defendants in their cross-examination; (b) the plaintiff has been paying land revenue in respect of the suit land and the defendant DW1 has himself deposed in his cross-examination that the land revenue in respect of their lands was sometimes paid by the plaintiff (and sometimes by their father late Ahmed Hussain); (c) the defendants (DW1 and DW2) have deposed that they have been seeing the plaintiff since his childhood and he used to live in their old house; (d) as per order dated 26.04.95, passed in Misc. Case No.198/90, the learned Executive Magistrate had observed that the first party (i.e. the plaintiff) was in possession over the disputed land and the second party (i.e. Ahmed Hussain, Haider Hussain and one Bubuti Hussain) had disturbed the first party in his peaceful possession. All these facts tend to indicate that the plaintiff has/had been in possession of the suit land since long back. The alleged gift of the suit land was certainly made by late Md. Hussain to the plaintiff and that is the reason why the plaintiff has/had been in possession over the suit land and even has his dwelling house in the suit land and has been paying the land revenue since long

back (as the exhibited land revenue receipts indicate). The lengthy possession of the plaintiff over the suit land coupled with the said endorsements in the Chitha indicate that there was certainly implied acceptance of the gift on his part and there was delivery of possession to him by late Md. Hussain. Had there not been delivery of possession to the plaintiff, the plaintiff would not have been allowed by the defendants to stay in the suit land after the death of late Md. Hussain in the late sixties. Had the mutation in the name of the plaintiff on the strength of oral gift been fraudulently effected by the plaintiff, the defendants should have and would have challenged the same before the appropriate revenue authority.

41. In view of the foregoing discussion, I have no hesitation in arriving at the conclusion that late Md. Hussain had verbally gifted, to the plaintiff, the land measuring 1 Bigha towards the southern side out of total land measuring 2B-0K-19L covered by Dag No.290 under P.P. No.237 of Titabor Mouza, Bebejia Gaon, in the district of Jorhat, Assam, and the entire land measuring 3K-13L covered by Dag No.291 under P.P. No.237 of the same Mouza, Gaon and District. In the result, I conclude that late Md. Hussain had verbally gifted the suit land described in Schedule B to the plaintiff. The issue in question is, accordingly, answered in the affirmative.

Decision on Issue No.6 with reasons

42. The issue in question is as to whether the plaintiff is in possession of the suit land. The plaintiff has averred in the plaint that since the date(s) of the making of the verbal gifts of the suit land the plaintiff had/has been

occupying the suit land peacefully till the year 1990 when late Ahmed Hussain, the father of defendants no.2 and 3, started disturbing the plaintiff in his peaceful enjoyment of the gifted lands covered by Dag Nos.290 and 291. The plaintiff initiated proceedings under Section 145, Cr.P.C., being Misc. Case No.198/90, in the Court of the Executive Magistrate, Jorhat. The case was finally disposed of in favour of the plaintiff on 26.04.95 and a revision was filed by the said Ahmed Hussain which was eventually dismissed. The said Ahmed Hussain again made disturbances in plaintiff's possession of the gifted lands due to which the plaintiff filed a proceeding under Section 145, Cr.P.C., being Misc. Case No.120/99, in the Court of the Additional District Magistrate, Jorhat, which was disposed of on 12.12.06 wherein the learned Magistrate observed that the plaintiff's claim to the suit land was of a civil nature and accordingly directed the plaintiff to agitate his claim in the proper forum. The above observation of the learned Additional District Magistrate was confirmed by the Hon'ble Gauhati High Court in Rev. Pet. No.106/07.

43. On going through the order dated 26.04.95, passed in Misc. Case No.198/90, I find that the learned Executive Magistrate had observed that the first party (i.e. the plaintiff) was in possession over the disputed land and the second party (i.e. Ahmed Hussain, Haider Hussain and one Bubuti Hussain) had disturbed the first party in his peaceful possession. So, the learned Executive Magistrate had directed the police to hand over the disputed land to the first party. On perusal of the Judgment dated 20.02.96, passed in Criminal Revision

No.11 of 1995, I find that Hon'ble Sessions Judge, Jorhat, had observed that the learned Executive Magistrate rightly held that the first party was in possession of the disputed land.

44. Misc. Case No.120/99 was registered upon a petition filed by the first party before the Additional District Magistrate on 05.05.99 complaining dispossession of the first party by the second party on 01.05.1999 from the former's long and rightful possession of 1 Bigha of land covered by Dag No.290 of P.P. No.237. It appears from the order dated 12.12.06, passed by the Sub-Divisional Magistrate, Jorhat, that as the disputed land was without any demarcation it was not possible for him to determine as to which party was in possession. The first party was, accordingly, advised to approach the appropriate Court to get his land well demarcated. The first party approached the Hon'ble Gauhati High Court by way of Criminal Revision, but the same was dismissed vide order dated 06.08.2007.

45. Therefore, on going through the relevant orders passed in the said Misc. Cases and judgments passed by the Revisional Courts, it can be said that the plaintiff had been in possession of the suit land. In Misc. Case No.198/90 and also in Criminal Revision No.11 of 1995, categorical findings were given as to the possession of the plaintiff over the disputed land. Further, it is there in the evidence (cross-examination) of the defendants' side that both plaintiff as well as defendants (no.2 and 3) have their respective dwelling houses in the suit land. So, it can be said that at present both plaintiff and defendants are in

possession of the suit land. This issue is answered accordingly.

Decision on Issue No.8 with reasons

46. The issue is as to whether the plaintiff is entitled to get a decree of right, title, interest and possession over the suit land. I have concluded in my discussion on Issue No.5 that late Md. Hussain had verbally gifted, to the plaintiff, the land measuring 1 Bigha towards the southern side out of total land measuring 2B-0K-19L covered by Dag No.290 under P.P. No.237 of Titabor Mouza, Bebejia Gaon, in the district of Jorhat, Assam, and the entire land measuring 3K-13L covered by Dag No.291 under P.P. No.237 of the same Mouza, Gaon and district. In view of that finding, the plaintiff is unquestionably entitled to get a decree for declaration of his right, title, interest and possession in respect of the gifted land i.e. the land measuring 1 Bigha towards the southern side out of total land measuring 2B-0K-19L covered by Dag No.290 under P.P. No.237, and the entire land measuring 3K-13L covered by Dag No.291 under P.P. No.237. In other words, the plaintiff is entitled to get a decree for declaration of right, title, interest and possession in respect of the suit land i.e. the land described in Schedule B. This issue is decided accordingly.

Decision on Issue No.7 with reasons

47. The issue is as to whether the plaintiff is entitled to get a preliminary decree of partition of the suit land (Schedule B land) from the Schedule A land. Before I get

into the discussion on this issue, let me first of all try to find out what partition is all about.

48. *Black's Law Dictionary, Fifth Edition*, defines **partition** as “the dividing of lands held by joint tenants, coparceners, or tenants in common, into distinct portions, so that they may hold them in severalty. And, in a less technical sense, any division of real or personal property between co-owners, resulting in individual ownership of the interest of each. Division between several persons of property which belongs to the co-owners; it may be compulsory (judicial) or voluntary.”

49. According to the *Oxford Dictionary of Law, 5th Edition, 2003*, **partition of chattels** means the division between co-owners of chattels held in undivided shares, so that each takes his part of the goods solely and absolutely. If chattels are partible (i.e. capable of being divided), the court may order partition under the Law of Property Act 1925 on the application of a co-owner.

50. Partition, as it is generally understood, means division of an undivided property in which the co-owners or tenants in common have joint interest. Partition is division of a joint property among several persons, so that each person gets a share and becomes the owner of the share allotted to him. The co-owners of a property can partition it by *metes and bounds*. The partition can be in an agreed ratio or as per the law of inheritance applicable to them. Partition is generally effected by dividing the property according to the shares to which each of the parties is entitled. Each divided property gets a new title and each sharer gives up his interest in the property in

favour of other sharers. Therefore, partition is a combination of surrender and transfer of certain rights in the estate, except those which are easementary in nature.

51. In view of my decisions on Issues No.5 and 8, the plaintiff has got right, title and interest in respect of the land described in Schedule B to the plaint, that is, the land measuring 1 Bigha towards the southern side out of total land measuring 2B-0K-19L covered by Dag No.290 under P.P. No.237, and the entire land measuring 3K-13L covered by Dag No.291 under P.P. No.237.. Therefore, he is, of course, entitled to exclusive possession of the same. But partition, as I have mentioned in the preceding paragraph, is a different concept. For partition, the plaintiff is required to have a joint interest in the undivided property which is sought to be partitioned. But, in view of my decision on Issues No.5 and 8, only the plaintiff has the interest in the land described in the Schedule B land, as late Md. Hussain had verbally gifted the same to him. The defendants do not have any joint interest in the Schedule B land. They only have a joint interest in all the remaining lands of P.P. No.237. The plaintiff, on the other hand, does not have any interest in the remaining lands covered by P.P. No. 237. He only has an individual interest in the land described in Schedule B to the plaint. The provision of Order 20, Rule 18(1), CPC, which deals with *decree in partition suits*, specifically requires that the decree shall *declare the rights of the several parties interested in the property* and shall direct such partition or separation to be made by the Collector. Therefore, the several parties whose rights are to be declared by the decree in a suit for partition *must be*

interested in the property sought to be partitioned. The defendants in the instant suit do not have any interest in Schedule B land and the plaintiff does not have any interest in the remaining lands of the said Patta, as I have already stated.

52. In view of the above discussion, there is no scope for passing any preliminary decree for partition in this suit in favour the plaintiff. This issue is, accordingly, decided in the negative.

Decision on Issue No.9 with reasons

53. In view of my decisions on Issues No.5 and 8, the plaintiff is unquestionably entitled to *khas* possession of the land described in Schedule B to the plaint by evicting the defendants therefrom. This issue is answered accordingly.

ORDER

The suit is partly decreed on contest. Considering the totality of facts, parties shall bear their own costs.

The right, title, interest and possession of the plaintiff over the suit land, that is, the land described in Schedule B to the plaint, is hereby declared. The plaintiff is entitled to *khas* possession of the land described in Schedule B to the plaint by evicting the defendants therefrom.

A Decree be prepared accordingly. Case Record be consigned to the Record Room.

Given under my hand and the seal of this Court on this the 29th day of September, 2011, at Jorhat.

APPENDIX

Witnesses examined by the Plaintiff:

1. Md. Sultan Ahmed alias Tipu Sultan (PW1)
2. Sri Chakreswar Saikia (PW2)
3. Sri Prabhat Sarma (PW3)

Documents exhibited by the Plaintiff:

1. Certified copy of Jamabandi (Ext.1)
2. Endorsements [Exts.1(1) and 1(2)]
3. Revenue Receipts (Exts. 2 to 33)
4. Certified copy of Judgment in Misc. Case No.198/90 (Ext.34)
5. Certified copy of Judgment in Crl. Revision No.11/95 (Ext.35)
6. Certified copy of Judgment in Misc. Case No.120/99 (Ext.36)
7. Certified copy of Judgment in Crl. Revision No.106/07 (Ext.37)

Witnesses examined by the Defendants:

1. Md. Haider Hussain (DW1)
2. Md. Riazul Hussain (DW2)

Documents exhibited by the Defendants:

None

(SHRI JASPAL SINGH)

Munsiff No.1:: Jorhat