

GAHC010176052009



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

Case No. : RSA/52/2009

SAROJU BALA PURKAYASTHA and ORS
W/O- LATE KRIRESH RANJAN PURKAYASTHA, R/O- KOKRAJHAR TOWN,
W/NO. 10, P.S. and DIST.- KOKRAJHAR, ASSAM.

2: SRI BABUL CHANDRA PURKAYASTHA
S/O- LATE KRIRESH CHANDRA PURKAYASTHA
R/O- KOKRAJHAR TOWN
P.S. and DIST.- KOKRAJHAR
ASSAM.

3: SRI BADAL CHANDRA PURKAYASTHA
S/O- LATE KRIRESH RANJAN PURKAYASTHA
R/O- KOKRAJHAR TOWN
P.S. and DIST.- KOKRAJHAR
ASSAM.

4: SRI BIMAL CHANDRA PURKAYASTHA
S/O- LATE KRIRESH RANJAN PURKAYASTHA
R/O- KOKRAJHAR TOWN
P.S. and DIST.- KOKRAJHAR
ASSAM.

5: SMTI. SUJATA PURKAYASTHA
D/O- LATE KRIRESH RANJAN PURKAYASTHA
R/O- KOKRAJHAR TOWN
P.S. and DIST.- KOKRAJHAR
ASSAM

VERSUS

ARUP KR. PURKAYASTHA and ORS
S/O- SRI ASWINI KR. PURKAYASTHA, R/O- KOKRAJHAR TOWN, W/NO. 10,
P.O. and DIST.- KOKRAJHAR, ASSAM.

2:SRI DINESH CHANDRA PURKAYASTHA
S/O- LATE JANJESWAR PURKAYASTHA
R/O- SAPATGRAM TOWN
WARD NO.3
P.S.- BAGRIBARI
DIST.- DHUBRI
ASSAM.

3:SRI ASIT PURKAYASTHA
S/O- LATE AKSHAY PURKAYASTHA
R/O- KOKRAJHAR TOWN
WARD NO.10
P.S. and DIST.- KOKRAJHAR
ASSAM.

4:SRI LOHIT PURKAYASTHA
S/O- LATE AKSHAY PURKAYASTHA
R/O- KOKRAJHAR TOWN
PS. and DIST.- KOKRAJHAR
ASSAM

Advocate for the Petitioner : MR. S. K. GHOSH

Advocate for the Respondent : MR. R. SARMA

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Date : 19-01-2023

Heard Mr. S. K. Ghosh, the learned counsel appearing on behalf of the appellants and Mr. R. Sarma, the learned counsel appearing on behalf of the respondents.

2. The instant appeal was admitted vide an order dated 11.05.2009 by formulating a substantial question of law which is reproduced hereinunder:

“Whether the learned Court below is right in holding that the suit of the

plaintiff is barred by Article 65 of the Limitation Act, in view of the averments made by the defendants in the written statement that they are not possessing any land covered by Schedule-C to the plaint.?"

3. For ascertaining as to whether the said substantial question of law arises in the instant appeal, this Court deems it proper to deal with the facts in brief which led to the filing of the instant appeal. For the purpose of convenience, the parties herein are referred to in the same status as they stood before the Trial Court.

4. The appellants herein as plaintiffs had instituted the suit being Title Suit No.27/1991 before the Court of the Munsiff No.1, Kokrajhar. The case of the plaintiffs in the said suit was that one Late Kripesh Ranjan Purkayastha (since deceased) was the owner of two plots of land. One plot being 3 Kathas under Dag No.672/841 covered by Khatian No.1062 and the other plot of land being 1 Katha 4 Lechas under Dag No.672 covered by Khatian No.207. Both the lands fall within Kokrajhar Town, Chitt. It is the further case of the plaintiffs that out of the 3 Kathas of land of Dag No.672/841 covered by Khatian No.1062, Late Kripesh Ranjan Purkayastha had sold 1 Katha 8 ¼ Lechas to one Shri Rathindra Das on the Western side and there remained 1 Katha 11 ¼ Lechas in the said Dag. The said land has been most specifically described in Schedule-A. It is the further case of the plaintiffs that Late Kripesh Ranjan Purkayastha on 11.05.1971 vide various deeds had sold the land measuring 1 Katha 4 Lechas under Dag No.672 covered by Khatian No.207 which have been most specifically described in Schedule-B to the plaint. It is the case of the plaintiffs that the defendant No.1 has encroached upon 17 Lechas of land which is a part of the Schedule-A land for which the suit was filed. The said 17 Lechas of land has been most specifically described in Schedule-C to the plaint. In the said suit, the

plaintiffs prayed for declaration of their right, title and interest over the Schedule-C land; for a declaration that the Schedule-C land is a part of the Schedule-A land; for a declaration that an area measuring 10 Lechas expunged from Khatian No.1062 and its inclusion in Dag No.672 in Khatian No.207 in Misc. Case No.1425 is not binding upon the plaintiffs and that the defendant No.1 had not acquired any title by the said wrong entry; for recovery of khas possession of Schedule-C land by evicting the defendant No.1 therefrom and by removing the house i.e. standing thereupon; cost of the suit etc.

5. All the defendants have filed their written statements. In the written statement filed by the defendant No.1, he had taken various grounds of preliminary objections. It was the specific case of the defendant No.1 in his written statement that the entire land of Khatian No.207, Dag No.672 measuring 1 Katha 4 Lechas as in records were given physical possession to the defendants against some advance payments made on good faith in the year 1964 and the sale deeds were executed in 1971 (on 11.05.1971) and the boundary demarcation between the lands of Khatian No.1062 and the Khatian No.207 consist of 1 Katha 4 Lechas was given by the transferee in 1964 by erecting some wooden posts and planting trees and betel nut plants in the year 1964 itself. In paragraph No.20 of the said written statement, it was the specific stand taken by the defendant No.1 that he had not encroached the plaintiffs' land as described in Schedule-C to the plaint.

6. It further appears that there was an additional written statement which was filed by the defendants pursuant to an amendment made to the original plaint whereby paragraph 8(a) was inserted to the original plaint and relief b(i) was inserted. In terms with the amended written statement, it was mentioned

that the original owner of the land sold the land measuring 1 Katha 5 Lechas + $\frac{3}{4}$ - 1 Katha 8 $\frac{1}{4}$ Lechas (eight and one-fourth) from Dag No.841 to Rathindra Kumar Das and 980 Sq. ft. (7 lechas) and 1 Katha 10 Lechas of suit land was possessed by the plaintiffs. It was further mentioned that the plaintiffs were illegally and wrongfully held land of Dag No.672. It was also mentioned that the plaintiffs and their transferees, Rathindra Kumar Das were physically in possession of 3 Kathas. Thus the land of Dag No.841 is exhausted.

7. Upon the pleadings, the Trial Court framed as many as 9 issues which are as hereinafter:

- (1) Whether there is cause of action for this suit?
- (2) Whether Late Kripesh Ranjan Purkayastha, the predecessor-in-interest of the plaintiffs owned and possessed the lands of Schedule-A and B of the plaint?
- (3) Whether the Schedule-C land is a part and parcel of Schedule-A land?
- (4) Whether the plaintiffs have got right, title and interest over the Schedule-C land?
- (5) Whether defendant No.1 is liable to be evicted from the Schedule-C land and whether khas possession of the same be given to the plaintiffs?
- (6) To what other relief/reliefs the plaintiffs are entitled to?
- (7) Whether the suit is maintainable in its present form, nature and character?
- (8) Whether this suit is barred by limitation due to continuous uninterrupted, free, open and adverse possession of the alleged suit land by the defendants for period more than 30 years?
- (9) Whether the plaintiffs have any locus-standing to file this suit?

8. The plaintiffs adduced 4 witnesses and the defendant No.1 adduced 3

witnesses. It may be relevant to take note of that during the trial, a commission was appointed by the Court to determine the boundary of Dag No.841 of Khatian No.1062. The ASO Kokrajhar as Commissioner had submitted his report and he was cross-examined by both the parties. The Trial Court vide a judgment and decree dated 30.03.2006 dismissed the suit on contest. At this stage, it is relevant to take note of that the Trial Court while dismissing the suit have decided the Issue Nos. 1, 8 and 9, primarily deciding that the title of the plaintiffs over the land stood extinguished on the basis of the adverse possession. It is also relevant to take note of that the Issue No.4 which pertains to as to whether the plaintiffs have got right, title and interest over the Schedule-C land was decided against the plaintiffs on the basis of the decision arrived at in respect to Issue Nos. 8, 9 and 1 and further held that due to continuous, uninterrupted, free, open and adverse possession of the suit land by the defendant No.1, he had acquired ownership.

9. The plaintiffs being aggrieved, preferred an appeal against the judgment and decree dated 30.03.2006 passed in Title Suit No.27/1991 before the Court of the Civil Judge, Kokrajhar. The said Title Appeal was registered and numbered as Title Appeal No.4/2006. The First Appellate Court instead of framing any points of determination as required under Order XLI Rule 31 of the Code of Civil Procedure (for short the "Code") decided the said appeal issue wise. The Issue No.1 which pertains to as to whether the plaintiffs have a cause of action was decided in favour of the plaintiffs thereby overturning the decision of the Trial Court as regards Issue No.1. As regards the Issue No.3, which was as to whether Schedule-C land is a part of the Schedule-A land, the First Appellate Court also had come to a categorical finding that the Schedule-C land is a part of the Schedule-A land and decided the same in favour of the plaintiffs. The

Issue No.4 which was pertinent for decision of the case as to whether the plaintiffs have got right, title and interest over the Schedule-C land, the First Appellate Court came to a finding that due to continuous, uninterrupted, free, open and adverse possession of the alleged suit land by the defendant No.1, he had acquired the ownership and accordingly held that the plaintiff have got no right, title and interest over the Schedule-C land and accordingly the same was decided in negative against the plaintiffs. It further appears that Issue Nos. 8 and 9 were also decided against the plaintiffs on the ground that the defendant No.1 had acquired ownership of the land on the basis of the adverse possession. Consequently, on the basis of the said findings, the said appeal was dismissed.

10. Being aggrieved, the instant appeal has been preferred by the appellants and this Court vide the order dated 11.05.2009 have admitted the instant appeal by formulating a substantial question of law which has already been reproduced hereinabove.

11. This Court has heard the learned counsels for the parties. A perusal of the said substantial question of law as reproduced hereinabove, pertains to as to whether the Courts below were justified in holding the suit of the plaintiff as barred under Article 65 of the Limitation Act, 1963, in view of the averments made by the defendants in the written statement that they are not possessing any land covered by Schedule-C to the plaint. At this stage, it may also be relevant to take note of that there is no cross objection filed by the defendants challenging the decision as regards the Issue No.3 whereby the Court had categorically come to a finding that the Schedule-C land is a part of the Schedule-A land.

12. This Court finds it necessary to take into account the concept of adverse possession. The concept of adverse possession has not been defined in Limitation Act of 1963. It is a common law concept, the period of which has been prescribed statutorily under the law of Limitation in Article 65 to be 12 years from the date the possession become adverse. In terms with Section 27 of the Limitation Act, 1963, it provides conferment of a right by way of adverse possession upon extinguishment of right on the lapse of limitation fixed to institute a suit for possession of any property. It is well settled that adverse possession requires all the three classic requirements to co-exist at the same time namely *nec vi* i.e. adequate in continuity, *nec clam* i.e. adequate in publicity and *nec precario* i.e. adverse to a competitor in denial of the title and his knowledge. Visible, notorious and peaceful so that if the owner does take care to know the notorious facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. It is also well settled that adverse possession cannot be decreed without any pleadings. *Animus possidendi* under hostile colour of title is required. A trespasser's long possession is not synonymous with adverse possession and the trespasser's possession is construed to be on behalf of the owner and the casual user does not constitute adverse possession. The owner can take possession from a trespasser at any point of time.

13. In the backdrop of the above, let this Court therefore take into consideration the facts involved in the instant case as to whether it would constitute any form of adverse possession. First and foremost, if this Court peruses the written statement as well as the additional written statement of the defendant No.1, it would be seen that there is no pleadings as regards adverse possession. On the other hand, it is the specific case of the defendant No.1 that

in the year 1964, the entire land of Khatian No.207, Dag No. 672 measuring 1 Katha 4 Lechas was given physical possession to the defendants by the original owner against some advance payment made on good faith. Thereupon, the sale deeds were executed on 11.05.1971 meaning thereby that the defendants have duly admitted and acknowledged the title of the predecessor-in-interest of the plaintiffs and claimed to remain in possession on the basis of the said title. The initial entry into the disputed land as per the own statements of the defendants was permissive. Under such circumstances, the question of the possession of the defendant No.1 being hostile or notorious to the title of the plaintiffs or their predecessor does not arise. This aspect of the matter can further be looked into from the fact that it is the specific case of the defendants that they are not in possession of Schedule-C land as stated in paragraph No.20 of the written statement. Under such circumstances, both the Courts below could not have come to a finding that on the ground of the adverse possession, the defendant No.1 has acquired title over the Schedule-C land that too when it is the specific case of the defendants that they have title over the land measuring 1 Katha 4 Lechas of Dag No.672 covered by Khatian No.207. Under such circumstances, this Court is of the opinion that the decision rendered by the First Appellate Court in deciding the Issue Nos. 4, 8 and 9 are de hors the concept of adverse possession. Accordingly, the said substantial question of law so framed is a substantial question of law involved in the instant appeal.

14. Now, the next question which arises is as to whether this Court can decide the Issue No.4 on the basis of the materials on record which pertains to as to whether the plaintiffs have got right, title and interest over the Schedule-C land. This Court is of the opinion that as both the Courts below have decided the entire suit only on the basis that there has been an extinguishment of right on

the basis of adverse possession of the defendants and therefore not decided the Issue No.4 in the proper perspective, it would be in the interest of justice that the matter be remanded back to the First Appellate Court in terms with Order XLI Rule 23(A) to decide afresh the Issue Nos. 4 and 5 by taking note of the fact that the suit is not barred under Article 65 of the First Schedule to the Limitation Act, 1963. Further for deciding the said Issue Nos. 4 and 5, it would require appreciation of evidence afresh which this Court sitting as the Second Appellate Court cannot do so.

15. Consequently, this Court therefore sets aside the judgment and decree dated 31.07.2008 passed in Title Appeal No.4/2006 in terms with the direction and observations made hereinabove and remands the matter back to the Court of the Civil Judge, Kokrajhar to decide the appeal afresh in terms with the observations made hereinabove.

16. The Registry is therefore directed to immediately return the LCR alongwith a copy of the instant judgment to the Court below so that, the First Appellate Court is in a position to take up the appeal for further consideration on the next date as fixed by this Court.

17. Taking into account that the parties are duly represented before this Court, this Court fixes the matter before the First Appellate Court on 13.03.2023 on which date the parties shall duly appear before the First Appellate Court and the First Appellate Court shall then proceed and dispose of the appeal as expeditiously as possible taking into account that the suit was filed in the year 1991 and preferably within a period of 6 months from the date of the appearance of the parties.

18. With above observations and directions and instant appeal stands disposed of.

JUDGE

Comparing Assistant