

GAHC010197662005



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

Case No. : RSA/7/2005

PONARAM BARUAH AND ORS

VERSUS

ON THE DEATH OF ABDUL HAKIM HIS LEGAL HEIRS ARE (a) NASIM
AHMED
BISWANATH GHAT ROAD
NEAR DAILY MARKET
BISWANATH CHARIALI
PO BISWANATH CHARIALI-784176
BISWANATH

1:(d) SAYERA BEGUM
BISWANATH GHAT ROAD
NEAR DAILY MARKET
BISWANATH CHARIALI
PO BISWANATH CHARIALI-784176
BISWANATH

1:(b) Syeda Begum
BISWANATH GHAT ROAD
NEAR DAILY MARKET
BISWANATH CHARIALI
PO BISWANATH CHARIALI-784176
BISWANATH

1:(c) SAJIDA BEGUM
BISWANATH GHAT ROAD
NEAR DAILY MARKET
BISWANATH CHARIALI
PO BISWANATH CHARIALI-784176

BISWANATH

2:ON THE DEATH OF ABDUL RAHMAN HIS LRGAL HEIRS
2A MD. ATAUL RAHMAN 2B MD. SUNU RAHMAN 2C MD. NANNUA
RAHMAN 2D MD. BABLU RAHMAN 2E MD. PAPU RAHMA

Advocate for the Petitioner : MR N RAJKHOWA

Advocate for the Respondent : N SARKAR

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the appellatant	: Mr. P. K. Roy, Senior Advocate. Mr. S. K. Chakraborty, Advocate
For the Respondents	: Mr. D. Mazumdar, Senior Advocate. Mr. S. Sahu, Advocate
Date of Hearing & Date of Order	: 27.04.2023

JUDGEMENT AND ORDER(CAV/ ORAL)

1. Heard Mr. P. K. Roy, learned Senior Counsel assisted by Mr. S. K. Chakraborty learned counsel for the appellatant. Also heard Mr. D. Mazumdar, learned Senior Counsel assisted by Mr S. Sahu, learned counsel for the petitioner.
2. The present appeal is directed against the judgement and decree dated 29.9.2004 passed by the learned Civil Judge (Senior Division), Sonitpur in Title Appeal No. 3/2000 whereby the judgement and decree dated 22.12.1999 dismissing the Title Suit No. 30/1989 filed by the present respondent was reversed. This Second Appeal was admitted by this court under its order dated 12.1.2005 by framing following substantial questions of law:-

“(1) Whether the learned lower appellate Court committed error of law in not determining the bar of limitation under Article 64 of the Limitation Act independent of the question of adverse possession despite categorical finding that the predecessor of the appellants/ defendants has been in possession of the suit land continuously since 1960 ?

(2) Whether the learned lower appellate Court committed illegality in reversing the judgement and decree passed by the learned trial court without setting aside the findings recorded by the learned trial Court?”

3. Before determination on the aforesaid substantial question of law, let this court summarise the facts in a nutshell, in the following manner:

4. The plaintiffs case:

I. The predecessor-in-interest of respondents herein filed a suit for declaration of the plaintiff's right, title and interest over the suit land and for recovery of khas possession and for permanent injunction.

II. It was the case of the plaintiff that the predecessor-in-interest of defendant/ appellant was permissive occupier over the suit land being a driver of the predecessor-in-interest of the plaintiffs/respondents. Such possession was given in the year 1980 with a condition that the defendant will construct a temporary thatched house over the suit land and as and when the plaintiff demands, he will vacate the premises.

III. However on 1.8.1988 without consent of the plaintiffs, the defendant collected certain construction materials over the suit land to construct a pucca house over the land, which was objected by the plaintiffs. On such objection, the defendant claimed the land to be his own and abused the plaintiffs. Accordingly, the suit was filed.

5. The defendant's case:

I. The defendant contested the suit by filling the written statement. The plea taken by the defendant was that the plaintiffs have no right, title and interest over the suit land and they have no right to sue.

II. It was a stand taken by the defendant that the defendant was serving as a driver with the father and uncle of both the plaintiffs in their bus since 1955 and used to reside with them in a part of their home and in the month of *Shravan*, 1960, the land was given to him and he constructed a thatched house by filling earth upon the same and started residing there with his family against the interest of the owners and later on constructed two more thatched house with the knowledge of the plaintiffs father and uncle and in the meantime, completed 36 years on the suit land.

III. It was a specific claim of the defendant that the possession over the suit land had ripened to adverse possession under Article 64 of the Limitation Act, 1963 and right, title and interest of the plaintiff had extinguished in the meantime.

IV. Subsequently the defendants filed a counterclaim claiming right, title and interest over the suit land on the basis of adverse possession.

6. The issues:

The learned Trial Court below, on the basis of pleadings framed as many as 6 issues to the following effect:

1. *Whether there is any cause of action for the suit?*
2. *Whether the suit is bad for non-joinder of necessary parties*

particularly Md. Habibulla?

- 3. Whether both the plaintiffs have right, title, interest over the suit land and said right, title etc. have been extinguished U/Art. 65 of the Limitation Act by adverse possession of the defendant since 1960.*
- 4. Whether the counterclaim of the defendants as against Abul Seikh not being a party is maintainable?*
- 5. Whether the plaintiffs are entitled to the decree prayed for?*
- 6. To what reliefs the parties are entitled to under law and equity?*

7. The evidence:

- I. The plaintiffs adduced evidence both oral and documentary and exhibited certain land documents and the defendant adduced only oral evidence.
- II. During the course of the trial on the application of both the parties, Commissioners were appointed for determining the possession of the land and two reports were submitted by two Commissioners.

8. Findings of the Trial Court:

After discussing the evidence of plaintiff witnesses as well as the witnesses of defendants i.e. DW 1, DW 2 and DW 3 came to the following determination

- I.** That the plaintiff No. 2 through Ext.1 to 7 proved their right title and interest over the suit land which remained undisputed.
- II.** The DW 1 ascertained the claim of his deceased father's right of adverse possession over the suit land.
- III.** Two witnesses i.e. DW 2 and DW 3 supported such claims of adverse possession.

IV. As the schedule of the plaint were amended by correcting the Dag numbers and Patta Numbers, it is clear that the plaintiffs do not know the actual revenue particulars of their own land.

V. The Three survey Commissioners conducted on the prayer of the plaintiff through the Circle Officer of Biswanath Circle twice and by Circle Officer Naduwar Circle once, it was reflected that the land was possessed by the deceased plaintiff for a long 24-30 years. Such a report fully supported the claim of the defendant that he has been possessing the suit land since 1960.

VI. Therefore the right, title and interest of the plaintiff over the suit land have been extinguished under Article 65 of Limitation Act and possession of the suit land against the owners /plaintiff have ripened . Accordingly, the suit was dismissed.

9. The Findings of the First Appellate Court:

On appeal, the learned First Appellate Court reversed the judgement of the trial Court and came to the following findings:

I. As the defendants in paragraph 9 of the written statement pleaded that the defendant has been occupying the suit land since 1960 when the defendant Moheswar Barua used to reside along with the plaintiffs in a part of their house serving as driver of their bus since 1955. Therefore the relationship between the parties is important to decide the issue of adverse possession.

II. After discussing the evidence of DW 1 and PW-1 and their cross examinations, the appellate court came to a finding that though the defendant claimed to have got their holding numbers, they have not filed any document in support of such holding

numbers and payment of taxes.

III. The learned appellate Court taking note of the pleading in the written statement filed by the defendants, came to a finding that the defendants have failed to make out any case of acquisition of title by adverse possession.

IV. After going through the report of three survey Commissioners, the learned appellate court came to a finding that the three reports reflect long possession of Moheswar Barua (defendant) over the suit land for 25-30 years without any right over the same. However, mere possession whatsoever long does not mean that it would be adverse against the true owner, concluded the Appellate Court.

V. The permissive occupation cannot be converted into adverse possession. Accordingly, issue No. 4 was reversed and the suit was decreed.

10. **Argument Advanced on behalf of the Appellant/defendant:**

Mr. P.K. Roy, Learned Senior Counsel advances the following arguments

I. The necessary pleadings required in a case of adverse possession has been pleaded and reflected in paragraph 12 of the written statement inasmuch as in the evidence of DW 1, it was specifically stated that the defendant entered into the suit premises forcefully on the 10th day of *Sravana*, 1960 and it is also pleaded that such possession was adverse and open

against the true owner.

II. Claim of such adverse possession has duly been proved through DW 1, DW 2 and DW 3.

III. The DW 2 and DW 3 are the neighbours who clearly deposed regarding the adverse possession of the defendants.

IV. Three Survey Commissioners report clearly reflect in the 'chitha' that the name of the deceased defendant Maheswar Barua is reflected as the possessor of the land. Therefore the defendant has proved that such possession is adverse and there is no dispute regarding the possession since the year 1960.

V. The defendant has clearly proved that they are possessing the land openly, notoriously and without permission from the true owners of the plaintiffs. In support of such contention Mr. Roy learned Senior counsel relies on the decision of Hon'ble Apex Court in the case of ***Ram Nagina Rai and ors. Vs. Deo Kumar Rai*** reported in ***(2019) 13 SCC 324.***

11. Arguments advanced on behalf of the plaintiffs/respondents:

Mr. D. Mazumdar, Learned Senior Counsel Advanced the following arguments:

I. Though the plaintiff has pleaded that they have entered into the suit land forcefully however no specific plea has been made when such possession became adverse. Therefore, on this count alone such pleas of adverse possession cannot be entertained.

II. Though the defendant DW 1 in his evidence in chief stated a date and year of the adverse possession, however such incorporation is not permissible under the law without there being any pleading. Such statements in evidence on affidavit are liable to be ignored.

III. Relying on para 18 and 19 of the judgement of the Hon'ble Apex Court in ***Hemaji Waghaji Jat Vs. Bhikhabhai Khengarbhai Harijan and others*** reported in ***(2009) 16 SCC 517*** and the judgement of Hon'ble Apex Court in the case of ***Rabinder Kar Grewal Vs Manjit Kaur*** reported in ***AIR ONLINE 2019 SC 804***, it is contended that in absence of any plea and proof, on what date the plaintiff came into possession, the claim of adverse possession has rightly been dismissed by the learned appellate court.

IV. The defendant has failed to prove any of the prerequisites of the adverse possession.

V. As the counter claim filed by the defendant seeking right, title and interest on the basis of such adverse possession has been dismissed and no appeal being preferred, the claim of the defendant's right, title and interest on the basis of adverse possession itself has extinguished. Therefore the appellant is having no scope to advance any argument regarding their adverse possession in view of the dismissal of their counterclaim which has attained finality.

12. Determination made by this Court:

I. This Court has given anxious consideration to the

submissions advanced by the learned counsel for the parties. Also perused the materials available on record.

II. In the case in hand, the ownership of the plaintiffs over the suit land has not been disputed by the appellant/defendant. What the defendant/appellant claims is maturity of their right over the suit land by virtue of the adverse possession of the defendant/appellant.

III. Adverse possession is a possession against the true owner and such possession includes actual possession with an intention to keep solely for the adverse possession. Such possession to be adverse must be open, notorious and hostile. The owner must have the knowledge of such adverse possession inasmuch as such hostile and notorious possession gives notice to the owner. The continuity of such possession is also must to mature the same into title. Thus, by action of the adverse possessor which is continuous, hostile, notorious against the true owner, it is a dispossession of the true owner.

IV. It is also well settled that a permissive possession neither can be treated as dispossession or that the same can be treated as adverse possession howsoever long. However, if the person in permissive possession changes his animus and starts to hold such possession against the interest of the true owner openly, notoriously, the same may become adverse possession in given facts of a case.

V. By adverse possession, one can oust a true owner but gets a premium by virtue of possessing the land which is

hostile to such true owner. Therefore, the Courts have time and again insisted on the requirement of certain specific pleadings and proof of adverse possession. This Court can gainfully rely on the judgement of the Hon'ble Apex Court in ***Karnataka Wakf Board –Vs- Union of India*** reported in ***2004 10 SCC 779*** in this regard. The Hon'ble Apex Court in ***Wakf Board*** (supra) held that plea of adverse possession is not a pure question of law but a blended one of fact or law and therefore, it was held that a person who claims adverse possession should show, on what date he came into possession, what was nature of his possession, whether the factum of possession was known to the true owner, how long his possession has continued and that his possession was open and undisturbed.

VI. The Hon'ble Apex Court in ***Wakf Board*** (Supra) further held that a person pleading adverse possession has no equities in his favour since he is trying to defeat the rights of true owner inasmuch as it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

VII. In the case in hand, the defendant had pleaded and denied in one or two paragraphs the ownership of the plaintiffs over the suit land and claims to be the owner of the suit land. However, it is also pleaded that the defendant used to work as a handyman under the predecessor-in-interest of the plaintiffs and later on, he became driver from the year 1955 and

thereafter, the plaintiff allowed the defendant to reside on one portion of the plaintiff's house, however, subsequently the defendant with the knowledge and against the interest of the predecessor-in-interest of the plaintiffs erected thatched houses over the suit land by placing boundary fencing from 1960. Subsequently, two other thatched houses were constructed and a well was dug and continuously possessing the suit land without any disturbance and it was claimed that as the defendant was in continuous possession, the interest of the owner and pattadar of the suit land has been waived as per Article 27 of the Limitation Act, 1963 and he has refused to vacate the suit land even after demands made by the plaintiffs. It was also pleaded that such possession was hostile to the true owner. Though, aforesaid pleading was made however, no specific pleading was made from which date he has entered into the possession and it has become adverse.

VIII. Now coming to the first substantial question of law, the Article 64 of the Limitation Act, 1963 provides that a suit relating to possession of immovable property is required to be filed within a period of 12 years from such dispossession, when such suit for possession is based on previous possession and not based on title. In the case in hand, the suit was filed for declaration of right, title, interest and recovery of possession from the defendant, alleging that the defendant was an employee (driver) under the plaintiff and was a permissive occupier and refused to vacate the suit land on

demand and started certain construction. Thus, the suit was filed for possession of immovable property on the basis of title and not on the basis of only previous possession. Therefore, Article 64 of the Limitation Act '1963 was not applicable so far the same relates to suit filed by the plaintiff.

IX. Coming to the possession of the defendant, if the defendant had filed a suit for possession of immovable property on the basis of their previous possession, not based on title, the provision of Article 64 of the Limitation Act would have been made applicable. The fact also remains that though the defendant filed a counterclaim, claiming right, title, interest over the suit land on the basis of adverse possession, however, such counter claim was dismissed, though not on merit but for certain technical reason, such decision remain unassailed and attained finality. Therefore, this Court is of the opinion that even though it was found that defendant was in continuous possession over the suit land, the suit of the plaintiff could not have been dismissed for the reason that suit was barred under the provision of Article 64 of the Limitation Act.

X. Now coming to the second substantial question of law, the learned first appellate Court considered the finding of the learned trial Court and re-appreciated the evidence. Considering the relationship between the defendant and the predecessor-in-interest of the plaintiffs that the defendant entered into possession as an employee and the pleading of

the defendant in their written statement, the learned appellate Court came to a conclusion that the defendant had failed to make out any case of acquiring title by adverse possession. The learned appellate Court also considered that though the defendant claimed to have got their holding number in respect of the property in question but failed to produce any evidence in support of such contention. Regarding the Survey Commissioner's Report, the learned appellate Court came to a conclusion that the said report only reflects the possession of the defendant and mere possession whatsoever long does not mean that it would be adverse to the true owner. Such finding of fact cannot be said to be perverse or based on no evidence or result of misreading of evidence inasmuch as though in evidence-in-chief it was deposed regarding a date of forcefully raising fencing however, no such pleading is available in the written statement rather it was pleaded in the written statement that the defendant was a driver under the predecessor-in-interest of the plaintiff and he was allowed to reside in the suit premises. The Survey Commissioner's Report that the defendant has been in possession was based on land record which reflects that the defendant is in possession and at the same time the same land record reflects the plaintiffs to be owner of the land. Therefore, the finding of the learned appellate Court that only on the basis of such possession it cannot be concluded that the possession is adverse, also cannot be faulted within the second appellate stage. The

learned trial Court relied on the evidence of DW-2 and DW-3 while deciding the claim of adverse possession in favour of the defendant, however, said evidence discloses that DW2 and DW3 have only asserted the possession of the defendant and nothing is discernible from their evidence that the possession was adverse and hostile. Therefore, reversal of such findings of fact by the appellate court also can not be termed as perverse. The learned trial Court also placed heavy reliance on the fact that the plaintiff amended the plaintiff by correcting the dag numbers and patta numbers and concluded that the plaintiffs are not even aware of actual dag numbers and patta numbers. Such consideration has been rightly reversed by the Appellate Court in as much as such considerations and evidence cannot lead to a conclusion that the plaintiffs right over the suit land has been extinguished in terms of Article 65 of the Limitation Act, 1963. Therefore, even if, no specific expression has been used by the learned appellate Court setting aside the judgement of the learned trial Court, however, every issue determined by the learned trial Court were separately dealt with and were answered and it was ordered that the plaintiffs appellants are entitled for the decree of their right, title and interest over the suit land and for khas possession thereof by evicting the defendant, in men and materials and by removing their houses structures etc. Accordingly, a decree was directed to be prepared. Therefore, this Court is of the view that such decision cannot be

interfered in a second appellate stage for the reason that the learned appellate Court has committed illegality by reversing the judgement and decree of the learned trial Court without setting aside the findings recorded by the trial Court. Thus, the second substantial question of law is answered accordingly.

XI. In the Judgment of the Hon'ble Apex Court in ***Ram Nagina Rai*** (supra), relied on by the learned counsel for the appellant, the Hon'ble Apex Court clearly laid down that in so far as Article 64 and 65 of the Limitation Act, 1963 are concerned, once a party proves its title, the onus of proof would be on the other party to prove the claim of title by adverse possession. Such ratio shall not help the appellant inasmuch as the title of the plaintiffs over the suit land not only be admitted but also been affirmed by both the Courts below and as discussed hereinabove, the first appellate Court has rightly held that the defendant had failed to prove adverse possession against the plaintiff. Therefore, such a decision is of no avail for the determination of the substantial question of law framed.

XII. In view of the aforesaid discussion, reason and determination, this Court finds no merit in this second appeal and accordingly the same stands dismissed. Parties to bear their own cost. Prepare a decree accordingly. LCRs be sent back.

JUDGE