

GAHC010231772023



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

Case No. : RSA/190/2023

MANASH CHANGMAI
S/O LATE KHAGESWAR CHANGMAI,
RESIDENT OF BETBARI, CHANGMAI GAON, PS AND DIST SIVASAGAR,
ASSAM
ALSO AT HOSPITAL ROAD, SIVASAGAR TOWN, SIVASAGAR, ASSAM

VERSUS

JAY MADHAB BARUAH AND 7 ORS.
S/O LATE SATYA RAM BARUAH
RESIDENT OF KAKOTY GAON, PO SUKAN PUKHURI, DIST. SIVASAGAR,
ASSAM 785697

2:PUTULI SINGHA
W/O LATE JATIN SINGHA

HOSPITAL ROAD
SIVASAGAR TOWN
SIVASAGAR
ASSAM
785640

3:NAMRATA DEVI
D/O LATE JATIN SINGHA

HOSPITAL ROAD
SIVASAGAR TOWN
SIVASAGAR
ASSAM
785640

4:MAMOTA DEVI

D/O LATE JATIN SINGHA

HOSPITAL ROAD
SIVASAGAR TOWN
SIVASAGAR
ASSAM
785640

5:PANKAJ SINGHA
S/O LATE JATIN SINGHA

HOSPITAL ROAD
SIVASAGAR TOWN
SIVASAGAR
ASSAM
785640

6:PRANJAL PRATIM SINGHA
S/O LATE JATIN SINGHA

HOSPITAL ROAD
SIVASAGAR TOWN
SIVASAGAR
ASSAM
785640

7:NILUTPOL SINGHA
S/O LATE TARUN SINHA

HOSPITAL ROAD
SIVASAGAR TOWN
SIVASAGAR
ASSAM
785640

8:ALPHOOL SINGHA
D/O LATE TARUN SINGHA

HOSPITAL ROAD
SIVASAGAR TOWN
SIVASAGAR
ASSAM
78564

Advocate for the Petitioner : MR. D MOZUMDER

Advocate for the Respondent : MR. B C DAS

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

JUDGMENT

Date : 10.10.2023

Heard Mr. D. Mozumder, learned senior counsel, assisted by Mr. R. Sensua, learned counsel for the appellant and Mr. B.C. Das, learned senior counsel, assisted by Mr. D.N. Bhattacharya, learned counsel for the respondent no. 1/ caveator.

2) The appellant is a third party in the proceedings of Title Execution Case No. 02/2018.

3) The copy of plaint has not been annexed to the memo of appeal, and therefore, a photocopy of the amended plaint purportedly filed on 09.04.1999 has been produced by the learned senior counsel for the respondent no.1. As per the said copy, one Satya Baruah was the plaintiff in T.S. No. 46/1989, which was filed against Mrs. Putali Singh (at some places spelt as Putali Sing) and 23 others for recovery of *khas* possession by evicting the defendants, for recovery of arrear rent, future rent and cost of the suit. In the amended plaint, it has been mentioned that the total land of the plaintiff measuring *2 katha- 0 bigha- 2 lessa*, covered by *Dag* no. 2125 and 2126 of K.P. Patta No. 2196 of Sivasagar Town is described in Schedule-A of the plaint, which was allegedly purchased by the plaintiff, and out of the said land, the subject matter of the suit was *1 bigha- 0 katha- 1 lessa* land, which has been described in Schedule-B of the plaint. The eviction of the defendants is sought for from the Schedule-B land.

4) During the pendency of the suit, the sole plaintiff had died and

the present respondent no. 1 was substituted as legal representative of the deceased plaintiff.

5) It appears from the copy of appellate judgment and decree dated 05.06.2009, passed by the learned Civil Judge, Sivasagar in Title Appeal No. 14/2006 that the suit was dismissed by the trial Court, i.e. Court of Munsif No. 1, Sivasagar and thus, the substituted plaintiff had filed the appeal. It may be mentioned that under the Bengal, Agra and Assam Civil Courts Act, 1887, the nomenclature of the Court was "MUNSIF" prior to 05.05.1997, which was also commonly called "Munsiff". However, the nomenclature of the Court is now "Civil Judge (Junior Division)".

6) By the first appellate judgment, the decree of dismissal of the suit was set aside and the appeal was allowed by passing a decree for recovery of *khas* possession of the suit land.

7) From the contents of the impugned order, it appears that against the first appellate judgment, the aggrieved parties had filed second appeal before this Court and that this Court had dismissed the RSA No. 140/2009 (*Smt. Putali Singh & 2 others v. Joy Madhab Baruah & 4 Ors.*). It appears from the Supreme Court of India "case status" printout, annexed to the petition filed in CRP 78/2023 (*Manash Changmai @ Manash Jyoti Changmai v. Jay Madhab Baruah & Ors.*) that SLP(C) 014768 (bearing Diary No. 15955/2018 filed on 25.04.2018 (*Putali Singh v. Joy Madhab Baruah*)) was dismissed on 30.05.2018.

8) The respondent no. 1 herein i.e. the decree holder had filed an execution case, that was registered as Title Execution Case No. 02/2018, which is pending for disposal before the Court of Munsif No.1, Sivasagar [now Civil Judge (Junior Division) No.1, Sivasagar].

9) From the record of CRP 78/2023, it appears that during the pendency of the said execution proceeding, third parties, namely, Parikhith Pathak and Debajit Pathak laid claim over the suit land by filing a petition under Order XXI, Rule 97 and 101 read with Section 151 CPC, which was registered as Misc. (J) Case No. 64/2018, which was dismissed by the learned Munsif No.1, Sivasagar by order dated 07.03.2019 by holding that there was no basis for them to claim adverse possession in respect of the suit land and that the predecessor-in-interest had no right or title over the suit land. The said party preferred Title Appeal No. 13/2019, and on rejection of the prayer made for stay of the execution proceeding, the said third parties filed CRP(I/O) 106/2019, which was dismissed by judgment dated 28.05.2019. The said third parties preferred a second appeal against dismissal of the appeal, which was registered before this Court as RSA 199/2019, which was also dismissed by judgment and order dated 19.12.2019. As per record of the aforesaid CRP 78/2023, SLP(C) No. 000356/2020 filed by the said third parties before the Supreme Court of India was also dismissed by order dated 17.01.2020. Review Petition (Civil) D. No. 5017/2020 was also dismissed.

10) Thereafter, one Manuranjan Pal, as another third party had filed TS 27/2020 before the Court of Munsif No. 1, Sivasagar, claiming that he was running a jewellery shop on the decreetal land and the decree should not be executed.

11) From the documents annexed to herein before referred CRP 78/2023, it appears that the appellant had filed Title Suit No. 17/2023 before the Court of Civil Judge (Senior Division), Sivasagar against Joy Madhab Baruah (decree holder) and 22 others, for declaration that he had acquired right, title, interest over Schedule-B and by adverse possession, declaration that judgment

and decree passed on 05.06.2009 by Civil Judge (Senior Division), Sivasagar in TA 14/2006 and all subsequent proceeding is not binding on the plaintiff, declaring that the Lat Mandal's report dated 03.01.2023 was illegal and liable to be set aside, for permanent injunction, issuance of precept, mandatory injunction and cost of the suit. The date of filing of the suit is not mentioned, but it appears that the suit was filed in the month of April, 2023. There is no explanation in this appeal as to why the copy of the said plaint is not annexed to this memo of appeal.

12) It may be relevant to mention that out of 23 defendants in TS 17/2023, specific statement is made in respect of Late Satya Ram Baruah (predecessor-in-interest of respondent no.1 and defendant nos. 2 to 10), Jay Madhab Baruah (respondent no. 1 herein) and Late Jatin Singha (predecessor-in-interest of respondent nos. 2 to 8). The learned senior counsel for the appellant had failed to explain, how the appellant was claiming adverse possession against the respondent nos. 2 to 8, when it is admitted that their predecessor-in-interest was allegedly allowed to occupy 1 katha-1 lessa land.

13) In view of the pendency of the suit, the appellant filed Misc. (J) Case No. 46/2023 in the Court of Munsif No.1, Sivasagar in connection with T.Ex. Case No. 2/2018 for stay of the execution proceeding during the pendency of TS No. 17/2023. Another petition under Section 151 CPC, registered as Misc. (J) Case No. 46/2023 was also filed for staying the execution proceeding. The said Misc. (J) Case No. 46/2023 was rejected by the learned executing Court by order dated 13.06.2023.

14) The appellant assailed the said order before this Court by filing CRP No. 78/2023 under Section 115 read with Section 151 CPC read with Article 227 of the Constitution of India. On submissions made by the learned counsel

for the appellant that the appellant would be well advised to file an application under Order XXI, Rules 97, 98, 99, 100 and 101 CPC before the Executing Court, this Court by order dated 19.06.2023, closed the said revision on withdrawal with liberty to the appellant to approach the executing Court in accordance with law.

15) It appears that the substituted plaintiff- decree holder, after crossing all the herein before referred hurdles, pursued the execution proceedings. This time, the appellant herein, namely, Manash Jyoti Changmai appeared in the execution proceeding by filing an application under Order XXI, Rules 97, 98, 99, 100 and 101 read with Section 151 CPC and by impleaded the respondents herein as opposite parties. In the said petition, the appellant claimed that his father Late Khageswar Changmai, was in adverse possession of 1 bigha- 0 katha- 1 lessa part of the suit land, described in Schedule-A since the year 1930 and since then they were in possession of the said part of suit land since 90 years. It was claimed that the predecessor-in-interest of the judgment debtors were given 1 katha- 1 lessa land to reside therein and that he was occupying 4 katha land, described in Schedule-B. It was claimed that the respondent no. 1 herein, by concealing the facts had obtained a decree in TA 14/2006, which is being executed in T.Ex. No. 2/2018. The same was registered as Misc. (J) Case No. 77/2023 before the Court of Munsif No.1, Sivasagar [now Civil Judge (Junior Division) No.1], Sivasagar]. The said petition was filed on 20.06.2023.

16) The learned Munsif No.1, Sivasagar considered the said Misc. (J) Case No. 77/2023 and by order dated 22.06.2023, the said misc. case was rejected. Consequently, Misc. (J) Case No. 78/2023 was also dismissed.

17) The appellants preferred an appeal under Order XXI, Rule 103

read with Section 151 CPC, which was registered as Misc. Appeal No. 6/2023. The learned Civil Judge (Senior Division), Sivasagar, by judgment and order dated 26.09.2023, dismissed the said appeal.

18) Hence, aggrieved by the concurrent judgment of the learned Executing Court and the learned First Appellate Court, the present appeal has been preferred under Section 100 CPC.

19) The learned senior counsel for the appellant has submitted that the proceedings of Misc. (J) Case No. 77/2023 under Order XXI, Rules 97, 98, 99, 100 and 101 read with Section 151 CPC ought to be adjudicated as a suit by deciding all the issues between the parties. In support of his contention, reliance has been placed on the following cases, viz., (1) *Jini Dhanrajgir & Anr. v. Shibu Mathew & Anr*, (2023) 0 Supreme(SC) 527, (2) *Silverline Forum Pvt. Ltd. v. Rajiv Trust & Anr.*, (1998) 3 SCC 723, (3) *Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal*, (1997) 3 SCC 694, and (4) *Oshiyar Singh v. Krishna Singh & Ors.*, (2022) 0 Supreme(Pat) 320. It was submitted that as no opportunity was given to the appellant to lead evidence and to prove their objection to execution proceeding and to participate in hearing, it amounted to denial of natural justice and the appellant had been condemned unheard.

20) Per contra, the learned senior counsel for the respondent no. 1 had submitted that TS 17/2023 was instituted prior to filing of Misc.(J) Case No. 77/2023 and therefore, the provision of Rule 104 of Order XXI CPC would have no application because the previous suit was also filed by the appellant. It was also submitted that the foundational facts of adverse possession was not pleaded such as the date on which the appellant had come to be in possession of the suit land and the date on and from which he was claiming independent, hostile and adverse possession against the true owner of the land, i.e. the

respondent no. 1.

21) Under the facts as emerge from the discussions above, TS No. 17/2023 was filed first in point of time before the Court of Civil Judge (Senior Division), Sivasagar. This Court, by order dated 19.06.2023, passed in CRP 78/2023, merely granted liberty to the appellant to approach the learned Executing Court Order XXI, Rules 97, 98, 99, 100 and 101 CPC. Be that as it may, from the said order, it does not appear that this Court had an occasion to examine the records to see if previously instituted TS No. 17/2023 filed by the appellant is pending for adjudication, when prayer for withdrawal of revision is being made.

22) Thus, when the provision of Order XXI, Rule 103 CPC provides that the order passed in adjudication under Rule 98 or Rule 100 of Order XXI would be treated as decree, by implication, such a decree would be outside the scope of Rule 104 of Order XXI CPC because in TS 17/2023, it is the appellant who is trying to establish his right and not any other party. The said provision, which is quoted below is self explanatory:-

O.21 R.104.

Orders under rule 101 or rule 103 to be subject to the result or pending suit.- Every order made under rule 101 or rule 103 shall subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order is made, if in such suit the party against whom the order under rule 101 or rule 103 is made has sought to establish a right which he claims to the present possession of the property. (emphasis supplied by the Court)

23) Thus, in the opinion of the Court, the provision of Rule 104 of Order XXI CPC does not envisage existence of parallel decrees, one in suit and other in execution proceeding, even when both are filed by the same party.

24) The submissions made by the learned senior counsel for the

respondent no. 1 that there was no pleading by the appellant regarding foundational facts of adverse possession in Misc. (J) Case 77/2023, such as the date on which the appellant or his predecessor-in-interest had come in possession of the suit land and the date on and from which they were claiming independent, hostile and adverse possession against the true owner of the land, i.e. the respondent no. 1. Therefore, in the considered opinion of the Court, in the absence of pleadings of foundational facts, no substantial question of law would arise for adjudication in this case.

25) The other point submitted by the learned senior counsel for the appellant was the denial of opportunity of hearing. In this regard, the Court finds that the predecessor-in-interest of the respondent no.1 had filed TS 46/1989 on 09.04.1999 and the defendant nos. 1 to 6 had been contested the said suit till today, i.e. for a long about 34 years upto Supreme Court of India and therefore, it cannot be accepted that the suit was a collusive one. It is unpalatable that the appellant resides in the same suit land and would not know about the said TS 46/1989 in these 34 years although he claims in Misc. (J) Case 77/2023 that the predecessor-in-interest of the respondent nos. 2 to 8 was permissive occupier of the decreetal land measuring 1 bigha- 0 katha- 1 lessa. Therefore, the learned Executing Court had rightly rejected the said Misc. (J) Case 77/2023 on the ground that the appellant had not filed any document since 1930 to *prima facie* show the appellant's so called adverse possession of a part of the decreetal land.

26) In the suit, the respondent nos. 2 to 8 and their predecessor-in-interest had taken a plea of adverse possession. After TS 46/1989 was decreed, three other persons had filed suit and applications under Order XXI, Rules 98 and 100, etc. claiming third party rights. The appellant could not demonstrate

that in none of these previous proceedings, reference has been made that the appellant was also in occupation of any part of the decretal land in T.Ex. Case No. 2/2018. When the said proceedings failed to have the execution stayed, like the mythological story of Phoenix, the appellant has come to life from the ashes of the previous objectors to stake a claim of adverse possession, without any document or pleading regarding essential facts in support of adverse possession, such as the date on which the appellant or his predecessor-in-interest had come in possession of the suit land and the date on and from which they were claiming independent, hostile and adverse possession against the true owner of the land, i.e. the respondent no. 1. The date or year of birth of the father of the appellant and/or the date of his death has also not been pleaded, which according to the impugned judgment passed by the learned first appellate Court, was very relevant. Hence, in the absence of foundational facts, the rejection of the Misc. (J) Case 77/2023 appears to be fully justified.

27) The cases cited by the learned senior counsel for the appellant does not help the appellant in any way. None of the cases cited by the learned senior counsel for the appellant in an authority on the point that during the pendency of TS No. 17/2023, which was previously instituted by the suit, a parallel adjudication of Misc. (J) Case 77/2023, under Order XXI, Rules 97, 98, 99, 100 and 101 read with Section 151 CPC was permissible, which, if allowed would bring two parallel operating decrees in suits and application filed by the same party, i.e. the appellant. If the said Misc. (J) Case 77/2023, was the only application, then perhaps the cases cited by the learned senior counsel for the appellant would have some relevance, but none of the cases cited by the learned senior counsel for the appellant have been decided on facts similar to the present case in hand, where TS No. 17/2023, filed by the appellant is also

pending adjudication. It is well settled that a judgment is an authority on what it decides and not what would logically flow from it.

28) Had the appellant withdrawn TS No. 17/2003, the situation would have been different. Then perhaps, it could have been a strong argument to support the plea of adjudication of the right of the appellant. In this regard, the provision of Rule 101 of Order XXI CPC is quoted below:-

O.21 R.101:

Question to be determined.- All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

29) Therefore, as TS No. 17/2023 has been filed by the appellant, which is proceeded with, the appellant is not found to have suffered any prejudice if the proceeding of Misc. (J) Case 77/2023, under Order XXI, Rules 97, 98, 99, 100 and 101 read with Section 151 CPC has been dismissed. At this juncture we hasten to clarify that the Court has not examined the merit and maintainability of the said TS No. 17/2023, which is pending for adjudication before the Court of Civil Judge (Senior Division), Sivasagar and therefore, nothing contained in this order shall prejudice the parties when the said suit is heard and/or adjudicated.

30) In so far as the impugned appellate judgment is concerned, in light of the discussions above, the Court does not find any legal infirmity and/or perversity in the said appellate judgment.

31) The impugned first appellate judgment and order 26.09.2023,

passed by the learned Civil Judge (Senior Division), Sivasagar in Title Appeal No. 6/2023, thereby dismissing the appeal and affirming the order dated 22.06.2023, passed in connection with Title Execution No. 02/2018 by the learned Civil Judge (Junior Division) No.1, Sivasagar (earlier Court of Munsif No.1, Sivasagar), is affirmed.

32) Accordingly, in light of the discussions above, no substantial question of law arises for adjudication in this appeal and therefore, this appeal does not merit admission. Hence, the appeal is dismissed at the "admission" stage.

33) Let a decree of dismissal of this appeal be prepared.

34) The parties are left to bear their own cost.

JUDGE

Comparing Assistant