

GAHC010092382009



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

Case No. : RSA/174/2009

SMTI. LAKHIPRIYA KALITA and 7 ORS
W/O LT. KHAGENDRA NATH KALITA,

2: JITENDRA NATH KALITA

S/O LT. KHAGENDRA NATH KALITA

3: PRAFULLA KR. KALITA

S/O LT. KHAGENDRA NATH KALITA.

4: SUBODH CH. KALITA

S/O LT. KHAGENDRA NATH KALITA.

5: TAPAN RAJ KALITA

S/O LT. KHAGENDRA NATH KALITA.

6: UTTAM KALITA

S/O LT. KHAGENDRA NATH KALITA. ALL ARE R/O VILL. MAHILAPARA
MAUZA-ORANG
P.S. MAZBAT
DIST. DARRANG
ASSAM.

7: SMT. ALOKA KALITA CHOUDHURY
D/O LT. KHAGENDRA NATH KALITA
R/O VILL. MAHILAPRA
MAUZA-ORANG
P.S. MAZBAT
DIST. DARRANG

ASSAM.

8: SMT. BABI KALITA

D/O LT. KHAGENDRA NATH KALITA
R/O VILL. MAHILAPARA
MAUZA-ORANG
P.S. MAZBAT
DIST. DARRANG
ASSAM

VERSUS

SRI CHANDRA SARMA and 6 ORS
S/O LT. JAGAT SARMA,

2:GOJEN SARMA

3:GANESH SARMA

4:DHARMESWAR SARMA

5:NIRANJAN SARMA

6:PAPU SARMA

7:CHAKRA SARMA

RESPONDENT NO. 2 TO 7 ARE THE SONS OF SRI CHANDRA SARMA
AND ALL ARE RESIDENT OF MAZBAT TOWN
MAUZA-ORANG
P.S. MAZBAT
DIST. DARRANG
ASSAM

Linked Case : CO/6/2011

SMTI LAKHIPRIYA KALITA and 7 ORS
W/O LATE KHAGENDRA NATH KALITA

2: JITENDRA NATH KALITA

3: PRAFULLA KUMAR KALITA

4: SUBODH CH. KALITA

5: TAPAN RAJ KALITA

6: UTTAM KALITA

7: SMTI. ALOKA KALITA CHOUDHURY

8: SMTI. BABI KALITA

NOS. 2 TO 8 ALL ARE SONS AND DAUGHTERS OF LATE KHAGENDRA NATH
KALITA

ALL ARE RESIDENTS OF VILL. MAHILAPARA

MOUZA-ORANG

P.S. MAZBAT

DIST. DARRANG

ASSAM.

VERSUS

GOJEN SARMA and ORS

2:GANESH SARMA

3:DHARMESWAR SARMA

4:NIRANJAN SARMA

5:PAPU SARMA

6:CHAKRA SARMA

NOS. 1 TO 6 ALL ARE THE SONS OF LATE CHANDRA SARMA
ALL ARE THE RESIDENTS OF MAZBAT TOWN
MOUZA-ORANG
P.S. MAZBAT
DIST. DARRANG
ASSAM.

For the Petitioner(s) : Mr. D. Choudhury, Advocate
: Mr. S. Disuza, Advocate
For the Respondent(s) : Mr. T. Islam, Advocate

Date of Hearing : **12.03.2024**

Date of Judgment : **12.03.2024**

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

Heard Mr. D. Choudhury, the learned counsel appearing on behalf of the Appellants and Mr. T. Islam, the learned counsel appearing on behalf of the Respondents.

2. This is an appeal filed under Section 100 of the Code of Civil Procedure, 1908 (for short "the Code") assailing the judgment and decree dated 30.04.2009 passed by the learned Civil Judge, Darrang, Mangaldoi in Title Appeal No.28/2003 whereby the judgment and decree dated 26.09.2003 passed by the learned Civil Judge (Jr. Division), Udalguri in Title Suit No.15/1995 was affirmed.

3. This Court vide an order dated 04.06.2010 had admitted the instant

appeal by formulating the following substantial question law:

“Whether in view of the denial of tenancy by the defendant, the notice under Section 106 of the Transfer of Property Act is required to be issued by the plaintiff before institution of the suit for declaration of right, title and interest and recovery of khas possession”.

4. This Court has also taken note of that a cross-objection has been filed by the Respondents which have been numbered as CO No. 6/2011.

5. In the backdrop of the above, let this Court take into account as to whether the substantial question of law so formulated by this Court is involved in the instant appeal.

6. The facts which could be ascertained from the pleadings more particularly from the plaint reveals that one Shri Khagen Kalita, who was the original plaintiff had instituted a suit being Title Suit No.15/1995. As per the plaint, a plot of land measuring 1 Bigha 2 Katha 10 Lechas covered by Dag No.163 and included in periodic Patta No.27 of Mazbat Town under Orang Mouza in the district of Darrang, Assam stood in the name of one Shri Madhab Chandra Kalita who was the son of Late Habiram Kalita. The original plaintiff was the brother of the said Madhab Chandra Kalita. On account of certain differences, a suit was filed by the original plaintiff against the said Shri Madhab Chandra Kalita and 7 Others in respect to the said property measuring 1 Bigha 2 Kathas 10 Lechas. The said suit was registered and numbered as Title Suit No.13/1987. Subsequently, the said suit was transferred to the Udalguri Munsiff Court and re-numbered as Title Suit No.02/1990. The said Title Suit was disposed of on compromise vide an order dated 07.12.1992. In terms with the compromise, out of the land

measuring 1 Bighas 2 Kathas 10 Lechas, a plot of land measuring 1 Katha 10 Lechas was specifically given to the original plaintiff and the remaining land of 1 Bigha 1 Katha was shared between the original plaintiff and the said Shri Madhab Chandra Kalita.

7. It is the further case of the plaintiff that in terms with the said compromise, a total plot of land measuring 4 Kathas 10 Lechas out of 1 Bigha 2 Kathas 10 Lechas fell into the share of the original plaintiff and this particular plot of land has been most specifically described in Schedule-A to the plaint. The said Schedule-A land included the plot of land measuring 1 Katha 10 Lechas which have been most specifically described in Schedule-B to the plaint. It is the further case of the original plaintiff that the Defendant No.1 was the tenant under the said Shri Madhab Chandra Kalita in respect to the structures standing on the Schedule-B land which have been specifically described in Schedule-C land and thereupon, after the compromise decree passed in Title Suit No.2/1990, the structures described in Schedule-C land wherein the Defendant No.1 was residing fell into the share of the original plaintiff taking into account that the said structures stood on the Schedule-B land.

8. It is the further case of the plaintiff that the land described in Schedule-B and the house standing thereon fell into the share of the original plaintiff and the Defendant No.1 agreed to pay the monthly rent of the suit house to the plaintiff since January, 1993 @ Rs.200/- per month. However, the defendant No.1 did not pay any rent w.e.f. 01.01.1993 as promised. Under such circumstances, on 12.06.1995, a notice was issued to the Defendant No.1 to vacate the suit house by removing all his belongings to

the suit house by 15.07.1995 failing which it was mentioned that the suit for ejectment would be filed against the defendant for eviction from the suit house on the ground of default in payment of rent as well as also on the ground of bona fide requirement. Thereupon, the instant suit was filed seeking inter alia the declaration of right, title and interest of the plaintiff over the Schedule-B land; for ejectment of the Defendant No.1 from the Schedule-C suit house and delivery of khas possession; decree for arrear of rent amounting to Rs.5,800/- and for permanent injunction.

9. Pursuant to the filing of the said suit which was registered and numbered as Title Suit No.15/1995, the Defendant No.1 appeared and filed a written statement along with a counter claim. In the said written statement, the defendant No.1 categorically denied that the Defendant No.1 was a tenant of the plaintiff. Further to that, it was mentioned that the said compromise decree in Title Suit No.2/2020 shall not be binding upon the defendant No.1 taking into account that the said defendant was not a party to the said proceedings. In addition to that, various pleas were taken as regards the maintainability of the suit including the plea at Paragraph No.24 that the plaintiff had not complied with the provisions of Section 106 of the Transfer of Property Act, 1982 (for short "the Act of 1982") while serving notice and as such the said suit filed was not maintainable. Be that as it may, it is relevant to take note of that at Paragraph No.14 of the written statement, it was duly admitted that the plaintiff's notice was duly received by the Defendant No.1 but the said notice was contrary to the provisions of Section 106 of the Act of 1982. Further to that, it was also stated that the Mazbat Town being not a notified town but a revenue town for which the provisions of the Assam Urban Area Rent Control Act, 1972 (for short "the

Act of 1972”) is not applicable.

10. In addition to the pleadings in the written statement, the Defendant No.1 had also filed a counter-claim. In the said counter-claim, it was the specific case of the defendant No.1 that since 1940, the Defendant No.1 had occupied the suit land measuring 1 Katha 10 Lechas of land and constructed a thatched house thereon and started a tea stall business. It was mentioned that at that point of time, one Shri Chitta Ranjan Choudhury was the owner of the land but neither he nor his heirs nor any person ever objected to the possession and the construction of the house thereon and running of the business by the defendant No.1 till filing of the suit by the plaintiff. It was further mentioned that the thatched house standing and constructed by the Defendant No.1 was demolished and removed in or about 1963 and the houses described in the Schedule to the suit were constructed by the Defendant No.1 and thereupon continued the tea stall. It was further mentioned that the defendant thereafter stopped the tea stall and let out the suit houses to different tenants on monthly rent. In and around 1987, the Defendant No.1 again started tea stall business and in the year 1988, the said tea stall business was converted to a grocery shop and it is being continued till the date of filing of the written statement cum counter claim. It was also mentioned that though Shri Madhab Chandra Kalita had purchased the said land from Chitta Ranjan Choudhury, he could never take possession of 1 Katha 10 Lechas of land from the standing possession of the Defendant No.1.

11. Further to that, the Defendant No.1 stated in his pleadings that he had been possessing the said Schedule-B land by constructing house exclusively,

openly and uninterruptedly as his own and adversely against the interest of the true owner for more than the statutory period of 12 years and whatever right, title and interest, the owner including the plaintiff had, if any, was extinguished and the same had vested upon the Defendant No.1.

12. This Court further finds it relevant to take note of that at Paragraph No.31 of the said written statement cum counter claim, it was categorically mentioned by the Defendants that the suit land had not fallen into the share of the plaintiff. It was stated that it was not within the boundary of the land in the share of the plaintiff and the present suit land is on the extreme south where the land of Gopal Poddar is bounded by the share of Shri Madhab Chandra Kalita on the north and the present suit land is situated on the south.

13. On the basis of the said pleadings and the counter claim, the Defendants sought for a declaratory decree that the Defendants were the lawful owners due to the adverse possession and the plaintiff had lost his right and title and the Defendants had acquired the right of ownership by adverse possession over the suit land. In addition to that, the Defendants also sought for a declaratory decree that the mutation order passed in respect to the suit land in the name of the plaintiff is not proper and illegal and accordingly liable to be cancelled. Further to that, the Defendants also sought relief for issuance of a precept to the Circle Officer, Mazbat Revenue Circle for cancellation of the mutation recorded in the name of the plaintiff in respect to the suit land and to record mutation in the name of the Defendant Nos. 1 to 7 in the suit land.

14. The plaintiffs thereupon filed written statement to the counter claim

filed by the defendants.

15. On the basis of the pleadings, as many as 14 issues were framed by the learned Trial Court. The plaintiffs had adduced the evidence of 5 witnesses and exhibited various documents from Exhibit-1 to Exhibit-18. The defendant side adduced the evidence of 3 witnesses and exhibited various documents from Exhibit-Ka to Exhibit-Cha.

16. The learned Trial Court vide judgment and decree dated 26.09.2003 dismissed the suit. This Court however finds it very pertinent to observe that while dismissing the suit, the learned Trial Court came to a categorical finding that on the basis of the compromise decree passed in Title Suit No.2/1990, the land in Schedule-B fell into the share of the plaintiffs. The learned Trial Court also came to a finding that the defendants failed to prove their claim of adverse possession. The learned Trial Court came to a finding that the plaintiffs could not established that the plaintiffs had possession over the suit land pursuant to the compromise decree passed in Title Suit No.2/1990. The learned Trial Court also came to a finding that the dispute in respect to the property did not fall within the ambit of the Act of 1972 taking into account that the Mazbat Town was only a revenue town and not a notified town.

17. However, while deciding the question of notice under Section 106 of the Act of 1882, which was issue No.2, the learned Trial Court came to a categorical finding that the said notice was not in accordance with the provisions of Section 106 of the Act of 1882 taking into account that as per Section 106 of the said Act of 1882, it ought to have been mentioned that the tenancy would expire on 30th or 31st of every month but as per the

notice which was issued, the Defendants were asked to vacate by 15.07.1995 which in no case can be the date of expiry of the tenancy. On the basis of the said decision, in respect to the Issue No.2, the Issue No.1 was decided that the suit was not maintainable and consequently, the suit was dismissed. In addition to that, the learned Trial Court also dismissed the counter claim.

18. Before proceeding further, this Court finds it relevant to observe that it is well settled proposition of law that a counter claim is also a suit and as such the dismissal of the counter claim would also come within the ambit of a decree. Be that as it may, the plaintiffs filed an appeal before the learned First Appellate Court i.e. the Court of the Civil Judge, Darrang, Mangaldoi which was registered and numbered as Title Appeal No.28/2003. However, the defendants did not file any appeal against the dismissal of the counter claim. Under such circumstances, the dismissal of the counter claim had attained finality.

19. The learned First Appellate Court dismissed the said appeal vide the impugned judgment and decree dated 30.04.2009. While deciding the said appeal, the learned First Appellate Court affirmed the findings of the learned Trial Court to the effect that the plaintiffs had acquired right, title and interest over the Schedule-B property on the basis of the compromise decree dated 07.12.1992 passed in Title Suit No.2/1990. The learned First Appellate Court further affirmed that the plaintiffs had no possession over the said Schedule-B land pursuant to the compromise decree dated 07.12.1992 passed in Title Suit No.2/1990. Be that as it may, the learned First Appellate Court without taking into consideration that the counter claim of the

Defendants was dismissed, reversed the findings of the learned Trial Court in respect to Issue No.11 as regards the mutation made in favour of the plaintiffs. In the opinion of this Court, the learned First Appellate Court could not have been done so in view of the dismissal of the counter claim and there being no appeal filed thereagainst.

20. Be that as it may, the learned First Appellate Court again affirmed the decision as regards the non-maintainability of the suit under Section 106 of the Act of 1882 for the same reason as was observed by the learned Trial Court. Consequently, the learned First Appellate Court also held that there was no cause of action for the suit and therefore, the appeal was dismissed.

21. In the backdrop of the above, let this Court now take up the Cross Objection which has been filed by the Defendants in the instant proceedings. In the said Cross Objection, the Defendants proposed 4 (four) substantial questions of law. The said Cross Objection was admitted erroneously without framing any substantial question of law. Under such circumstances, this Court takes up the said Cross Objection within the ambit of Order XLI Rule 11 of the Code of Civil Procedure, 1908 (for short "the Code") and to decide as to whether the said substantial question of law which have been proposed can be formulated. This Court is of the opinion that the said requires to be done at the foremost taking into account that in the circumstance, any substantial question of law is formulated, then in that case, the decision of the accompanying second appeal has to be deferred.

22. This Court has duly taken note of the four substantial questions of law which have been proposed. The first substantial question of law was whether the compromise decree dated 07.12.1992 is legal and valid. In the

opinion of this Court, the said compromise decree dated 07.12.1992 was never put in question during the trial and as such, the same cannot be formulated as a substantial question of law involved in the instant appeal.

23. The second substantial question of law was as to whether the suit for declaration of title in respect to the suit land is barred by the proviso to Section 34 of the Specific Relief Act, 1963 (for short "the Act of 1963"). This Court finds it relevant to take note of that Section 34 of the Act of 1963 stipulates as to when a Court is required to make a declaration. The proviso to Section 34 of the Act of 1963 makes it clear that no Court shall make such declaration where the plaintiff being able to seek further relief than mere declaration of title omits to do so. In the instant case, this Court had duly perused the written statement. Such a plea was never raised in the written statement. Under such circumstances, the said plea could not have been raised for the first time before this Court at the Second Appellate stage. Apart from that, this Court has also perused the plaint in Title Suit No.15/1995 and from a perusal thereof, it is seen that the plaintiffs not only asked for declaration of right, title and interest in respect to the suit land most specifically described in Schedule-B to the plaint but also sought for recovery of possession and permanent injunction. The claim for recovery of possession and permanent injunction are further reliefs which the plaintiffs being capable enough had duly sought for. Under such circumstances, the proviso to Section 34 of the Act of 1963 does not come into play for which the second substantial question of law so proposed does not arise in the instant appeal.

24. The third substantial question of law so proposed was as to whether

the judgments of both the Courts below are vitiated by non-consideration of the admission and Exhibit-Ka. This Court had duly taken note of the said substantial question of law so proposed which is completely vague inasmuch as a perusal of both the judgments of the First Appellate Court as well as the learned Trial Court, it is seen that Exhibit-Ka has been duly taken into consideration. This Court further finds it relevant to take note of that in the pleadings of the defendants both in the written statement as well as in the counter claim, there is no mention about a purchase made by Shri Gopal Poddar vide the Deed of Sale dated 16.12.1963 which is Exhibit-Ka. Under such circumstances, the said question of law so proposed in the opinion of this Court cannot be said to be a substantial question of law involved in the instant appeal.

25. The fourth substantial question of law so proposed is as to whether the Courts below were right in holding that the defendants did not acquire title by adverse possession. The counter claim has been already dismissed vide the judgment and decree passed by the learned Trial Court and there being no appeal filed thereagainst. The said dismissal of the counter claim have already attained finality on the issue of adverse possession. Apart from that, this Court had duly taken note of the evidence of the DW-1 where it was categorically stated that he did not know who was the owner of the land upon which he was in possession. It being a trite principle of law that adverse possession has to be adverse to the true owner and the defendant in his evidence categorically having admitted that he does not know who was the owner of the land in question makes it clear that the plea of adverse possession on the face of it was totally misconceived. Under such circumstances, the fourth substantial question of law so formulated does not

arise.

26. Consequently, the Cross Objection stands dismissed for the reasons above mentioned.

27. Moving forward, this Court finds it relevant to take into account as to whether the substantial question of law framed by this Court in its order dated 04.06.2010 can be said to be a substantial question of law involved in the instant appeal. This Court has duly taken note of the provision of Section 106 of the Act of 1882 as it stood prior to 31.12.2002 inasmuch as the suit was filed in the year 1995. In terms with the said provision, it is clear that in respect to a lease of immovable property for any other purpose, the said lease shall be deemed to be a lease from month to month, terminable on the part of either by lessor or lessee by 15 days' notice expiry with the end of the month of the tenancy. The question therefore arises as to whether the said provision can be made applicable and the plaintiff be non-suited on the ground of Section 106 of the Act of 1882 in a case where the defendant has categorically denied the landlord tenant relationship between the plaintiff and the defendant and also have claimed adverse possession.

28. This Court also taken note of that the learned First Appellate Court had categorically come to a finding that defendant was not a tenant of the plaintiff or even Shri Madhab Chandra Kalita. Under such circumstances, the learned First Appellate Court ought to have considered as to whether Section 106 of the Act of 1882 as it stood prior to 31.12.2002 could have at all be applied to the facts of the case. This clearly shows the total non-application of mind by both the learned Trial Court as well as the Appellate Court in passing the impugned judgments thereby dismissing the suit on the ground

of Section 106 of the Act of 1882.

29. This Court has also taken note of that it was on account of the Issue No.2 which decided against the plaintiffs, all other important issues and have taken a backseat and the preliminary objections as regards cause of action and non-maintainability of the suit had taken the forefront. Taking into account that the Issue No.2 was wrongly decided by the learned Trial Court as well as the First Appellate Court inasmuch as Section 106 of the Act of 1882 was not applicable to the facts of the instant case, this Court has no other option but to reverse the judgment and decree passed by the learned First Appellate Court on 30.04.2009 in Title Appeal No.28/2003.

30. The consequential affect of the said judgment and decree passed by the learned First Appellate Court having been set aside is that this Court decrees the suit filed by the plaintiffs inasmuch as the other issues as regards the title over the Schedule-B land and the Schedule-C structures were decided by both the Courts below in favour of the plaintiffs. Accordingly, this Court declares that the plaintiffs have right, title and interest over the land described in Schedule-B to the plaint. The plaintiffs are entitled to recovery of khas possession of the Schedule-B land along with the structures described in Schedule-C to the plaint. The plaintiffs are further entitled to a permanent injunction thereby restraining the defendants, their representatives, servants, agents from dispossessing the plaintiffs from the suit house described in Schedule-C to the plaint after the delivery of the possession of the same to the plaintiffs.

31. This Court however is not inclined to grant the relief of recovery of arrear rent taking into account that the learned Courts below has

categorically opined that there was no landlord tenant relationship.

32. With above observations and directions, the instant appeal stands allowed.

33. In the peculiar facts of the instant case, this Court further imposes a cost of Rs.10,000/- upon the Respondents as the costs of the instant proceedings. The Appellants/Plaintiffs shall be entitled to costs throughout.

34. Prepare the decree.

35. The Registry is directed to forthwith return the LCR to the Court below.

JUDGE

Comparing Assistant