

GAHC010157662023



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

Case No. : CRP/106/2023

DURBAL CH BISWAS @ DUBAL CH BISWAS AND 12 ORS
S/O LT. CHEMARU BISWAS VIL. SOUTH RAIPUR PT I P.O. AND P.S
GOLAKGANJ DIST. DHUBRI ASSAM PIN 783334

2: PRASAD BISWAS
S/O LT. CHEMARU BISWAS VIL. SOUTH RAIPUR PT I P.O. AND P.S
GOLAKGANJ DIST. DHUBRI ASSAM PIN 783334

3: LALITA BISWAS
W/O PROSAD BISWAS VIL. SOUTH RAIPUR PT I P.O. AND P.S GOLAKGANJ
DIST. DHUBRI ASSAM PIN 783334

4: SUSHIL CH ROY
S/O LT. SATISH CH ROY VILL. KHATAMARI P.O. DHEPDHEPI P.S
GOLAKGANJ DIST. DHUBRI ASSAM PIN 783334

5: JAYESHREE ROY
W/O LT. PROTAP CH. ROY VILL. BISONDAI PT I P.O. BISONDAI DIST.
DHUBRI ASSAM PIN 783334

6: BIMAL CH. ROY
S/O L. KAILASH CH ROY VILL. BISONDAI PT II P.O. BISONDAI P.S.
GOLAKGANJ DIST. DHUBRI ASSAM PIN 783334

7: NIREN KARMAKAR
S/O LT. NIBARAN KARMAKAR R/O GOLAKGANJ BAZAR WARD NO. 1 P.O.
AND P.S. GOLAKGANJ DIST. DHUBRI ASSAM PIN 783334

8: SARASWATI ROY
W/O LT. SUSHIL ROY VILL. SOUTH TOKRERCHARA PT II P.O. AND P.S.
GOLAKGANJ DIST. DHUBRI ASSAM PIN 783334

9: DHANANJAY BARMAN
S/O KHOKA BARMAN VILL AND P.O. BISHKHOWA P.O. GOLAKGANJ DIST.

DHUBRI ASSAM PIN 783334

10: KANONBALA ROY
W/O NAGEN CH. ROY VILL. BALABARI P.O. AND P.S. GOLAKGANJ DIST.
DHUBRI ASSAM PIN 783334

11: LALIT CH ROY
S/O LT. RADHA MOHON ROY VILL. NALIA PT I P.O DIMAKURI DIST
DHUBRI ASSAM PIN 783334

12: ANUKUL CH. ROY
S/O LT. RADHA MOHON ROY VILL. NALIA PT I P.O DIMAKURI DIST
DHUBRI ASSAM PIN 783334

13: KAMINI KANTA RAY
S/O SUREN CH. RAY R/O GOLAKGANJ WARD NO. 4 P.O. AND P.S.
GOLAKGANJ DIST. DHUBRI ASSAM PIN 78333

VERSUS

LEGAL HEIRS OF LATE KHAGENDRA NATH BISWAS SADANANDA BISWAS
AND 7 ORS
W/O R/O WARD NO. 1 (2 NO. KALIBARI GAURIPUR) P.O. AND P.S
GAURIPUR DIST. DHUBRI ASSAM PIN 783331

2:LEGAL HEIRS HAREKRISHNA BISWAS DIPAK KR. BISWAS
S/O LT. HAREKRISHNA BISWAS R/O VILL. AND P.O. BAHAKATI DIST.
DHUBRI ASSAM PIN 78334

3:BUI BISWAS
D/O LT. HAREKRISHNA BISWAS R/O VILL. AND P.O. BAHAKATI DIST.
DHUBRI ASSAM PIN 78334

4:PUNOTI BISWAS
D/O LT. HAREKRISHNA BISWAS R/O VILL. AND P.O. BAHAKATI DIST.
DHUBRI ASSAM PIN 78334

5:EKHA BISWAS
D/O LT. HAREKRISHNA BISWAS R/O VILL. AND P.O. BAHAKATI DIST.
DHUBRI ASSAM PIN 78334

6:RAMKRISHNA BISWAS
R/O VILL. AND P.O. BAHAKATI DIST. DHUBRI ASSAM PIN 78334

7:PATIT BISWAS
R/O VILL. AND P.O. BAHAKATI DIST. DHUBRI ASSAM PIN 78334

8:BHAGIRATHI BISWAS

W/O MANU BISWAS R/O WARD NO. 1 (2 NO. KALIBARI GAURIPUR) P.O.
AND P.S. GAURIPUR DIST. DHUBRI ASSAM PIN 783331

9:UTTAM BISWAS
S/O LALCHAND BISWAS R/O VILL. AND P.O. BAHAKATI DIST. DHUBRI
ASSAM PIN 78334

10:NIREN BISWAS
S/O ALID BISWAS VILL. PROTAPGANJ P.O. BARUNDANAGA P.S. TAMAR
HAT DIST DHUBRI ASSAM PIN 783334

11:THE STATE OF ASSAM
REP BY THE COLLECTOR DHUBRI DIST. DHUBRI ASSAM PIN 78330

Advocate for the Petitioner : MR R ISLAM

Advocate for the Respondent : MS B TALUKDAR (R-2 TO 10)

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

ORDER

Date : 12.01.2024

Heard Mr. P.S. Deka, learned senior counsel, assisted by Mr. R. Islam, learned counsel for the petitioners. Also heard Mr. P.K. Kalita, learned senior counsel, assisted by Mr. K. Bhattacharjee, learned counsel for the respondent nos. 1 to 7 and Mr. T.R. Gogoi, learned Government Advocate appearing for respondent no. 8.

2) By filing this application under Article 227 of the Constitution of India read with section 151 and 115 CPC, the petitioners have assailed the order dated 21.06.2023, passed by the learned Civil Judge (Junior Division) No.1, Dhubri (formerly called Munsif No.1, Dhubri) in connection with Misc. (J) Case No. 184/2022, arising out of T.S. No. 263/2011. By the said order, the prayer for amendment of the plaint was allowed.

Background facts:

3) The respondent nos. 1 to 7 are the plaintiffs in TS No. 263/2011, wherein the respondents had prayed for (a) declaring that power of attorney deed 64 IV of 1994 as regards 'B' Schedule land is invalid deed, and its cancellation vide deed no. 135 IV of 1996 and on death of Khagendra Nath Biswas (executant) on 15.05.1996; (b) declaration that ex-attorney holder, Prasad Biswas (defendant no.1) had no valid right to execute a sale deed no. 1241 dated 03.06.1996 in favour of his wife Lalita Biswas (defendant no.2) and sale deed no. 1394 dated 25.06.1996 in favour of defendant no.3; that he had no right to execute sale deeds in favour of defendant nos. 2 to 11 or anybody else as regards 'B' schedule land or any part of it; and for cancellation of sale deeds, if any, by defendant nos. 1 to 3 in favour of defendant nos. 4 to 11; cancellation of mutation as regards 'B' schedule land of the plaint or any part of it; (c) declaration that the plaintiffs and proforma defendants (Group-A) have acquired right, title and interest over 'B' schedule land on the death of *khatian holder*- Khagendra Nath Biswas on 15.05.1996; and that they are possessing 'D' schedule land measuring 6B-4K-2L (a part of 'B' schedule land) of the plaint and remaining part of 'B' Schedule land is under possession of Group-C purchasers; (c-1) to deliver *khas* possession of 'E' schedule land to the plaintiffs by evicting defendant no. 14 therefrom by demolishing the present structures and structures erected during the pendency of the suit; (d) permanent injunction restraining defendant nos. 1 to 11 or anybody else from dispossessing the plaintiffs and Group-A proforma defendants from 'D' Schedule land forcibly and erecting any structure in it and to change the present position of the suit land; and (e) for cost and other reliefs to which the plaintiffs may be found entitled to in law and equity.

4) Along with the plaint, the respondent nos. 1 to 7 had also filed an injunction application which was registered as Misc.(J) Case No.176/2011 and the learned Trial Court, by order dated 27.01.2012, passed an order to maintain status quo as on that date. Alleging violation of injunction, the respondent nos. 1 to 7 had filed Misc.(J) Case No. 320/2012, 222/2014 and 223/2014, which were all dismissed.

5) In the suit, the issues were framed. During trial, 7 (seven) plaintiff's witnesses and 15 (fifteen) defendant's witnesses were examined. Thereafter, the suit was fixed for argument. On 12.08.2022, the respondent nos. 1 to 7 i.e. plaintiffs side did not make any argument and prayed for adjournment. However, the petitioners' side (i.e. defendant nos. 1 to 13) had advanced their argument and the suit was fixed on 25.08.2022. However, as the learned Munsif No. 1 was on leave, the suit was fixed for argument on 16.09.2022.

6) On 16.09.2022, the respondent nos. 1 to 7 i.e. plaintiffs had submitted a petition for amendment of plaint under Order VI, Rule 17 CPC, which was registered as Misc. (J) Case No. 184/2022, alleging that the petitioner nos. 3, 6 and 9 had illegally dispossessed them from a part of 'D' Schedule land and had erected their dwelling houses. The respondents had filed their objection by stating that on same set of allegations, three violation applications, being Misc.(J) Case No. 320/2012, 222/2014 and 223/2014 were filed; false dates of alleged dispossession were alleged and that the petitioners were residing in their dwelling houses over the suit land since the year 1996 till date. However, the prayer for amendment was allowed at a cost of Rs.5,000/-.

Submissions on behalf of the petitioners (defendant nos. 1 to 12):

7) By referring to the documents annexed to this application, the

learned senior counsel for the petitioners had submitted that all throughout in the suit and misc. cases arising therein, the consistent stand of the petitioners as well as the respondents was that the petitioners were in physical possession of the suit land described in 'D' Schedule land and that in various orders of the learned Trial Court the stand of the petitioners has been recorded to the effect that they were in possession of the suit land since more than 30 years. Accordingly, it was submitted that despite the fact that the respondent nos. 1 to 8 had not shown due diligence and that they had belatedly approached the learned Trial Court for amendment of the plaint long after commencement of trial and at the argument stage of the suit and as such it was submitted that the impugned order was not sustainable on facts and in law.

Submissions on behalf of the respondent nos. 1 to 7:

8) Per contra, the learned senior counsel for the respondent nos. 1 to 7 had submitted that the endeavour of the Courts should be to arrive at a truth and to determine all the issues and/or real controversies involved in the suit. Accordingly, it was submitted that the approach of the Courts should be liberal in allowing amendment of the pleadings. In support of his submissions, reliance has been placed on the following cases, viz., (i) *Ganesh Prasad v. Rajeshwar Prasad & Ors.*, (2023) 0 Supreme(SC) 223, (ii) *Life Insurance Corporation of India v. Sanjeev Builders Private Limited & Anr.*, AIR 2022 SC 4256, and (iii) *Md. Abdul Matin v. Mustt. Nurzahan & Ors.*, CRP 344/2006, decided by this Court on 14.05.2007.

Reasons and decision:

9) Perused the documents annexed to this instant application. Considered the submissions of senior counsel for the petitioners and respondent

nos. 1 to 7. Also considered the cases cited by the learned senior counsel for the respondents.

10) The learned senior counsel for the petitioners had submitted that the amendment was allowed after commencement of trial and that the respondent nos. 1 to 7 had failed to show that they had exercised due diligence.

11) It is seen that in their written statement filed on 28.10.2011, the petitioners had asserted that they were in possession of the suit land for more than 12 years by constructing their houses and carrying out cultivation.

12) It is also seen from the contents of the order dated 27.01.2012, passed by the learned Trial Court in Misc. (J) Case No. 176/2011 that it had been recorded therein that both parties are claiming possession over the suit land, and while the plaintiffs were claiming possession on the basis of inheritance, the defendants were claiming possession on the basis of purchase and thus, *status quo* as on that date was ordered to be maintained in respect of the suit lands.

13) It is also seen from the contents of the order dated 27.02.2015, passed by the learned Trial Court in Misc.(J) Case No. 320/2012, which was an application filed under Order XXXIX, Rule 2A CPC that the petitioners herein were claiming that they were in possession of the suit land by constructing RCC houses over the suit land and were residing therein with their families, further claiming that the suit land was their purchased land and they had been validly residing on it and accordingly the said violation petition was rejected.

14) From the contents of Misc. (J) Case No. 125/2013, which is an application filed by the respondents- plaintiffs under Order I, Rule 10(2) and Order VI, Rule 17 CPC, it is seen that the respondent nos. 1 to 7 had

categorically admitted that the petitioners i.e. defendants had pushed their own man, namely, Kamini Kanta Roy in the suit land in the month of September, 2012 and he had erected two tin-roofed house and one *chapra* and occupied 2K-10L part of 'D' Schedule land. Accordingly, prayer for impleading and amendment of the plaint was filed.

15) It is also seen that in their written objection in Misc. (J) Case No. 125/2013, the petitioners herein had claimed that they were in possession of the suit land since more than 30 years and had dwelling houses thereon for more than 30 years.

16) It is also seen that in the order dated 28.01.2019, passed by the learned Trial Court in Misc. (J) Case No. 222/2014, it has been recorded that in his cross-examination, the PW-1 had admitted that the petitioners were staying in the suit land since 2012. Accordingly, the said petition filed under Order XXXIX, Rule 2 CPC was also dismissed.

17) It is seen from the contents of the order dated 28.01.2019, passed by the learned Trial Court in Misc.(J) Case No. 223/2014, being an application filed under Order XXXIX, Rule 2A CPC that Amin Commissioner's report after survey of suit land was not brought on record by way of evidence by the respondents herein, for which the violation petition was dismissed.

18) Thus, the learned senior counsel for the petitioners has been able to successfully demonstrate that in this case, there was an admission on part of the respondent nos. 1 to 7 to the effect that the petitioners were in possession of the suit land.

19) The learned senior counsel for the respondent nos. 1 to 7 has not denied that the plaintiffs' side had examined 7 (seven) witnesses and that the

defendants' side had examined 15 (fifteen) witnesses.

20) The learned Trial Court, in the impugned order dated 21.06.2023, had taken note of the fact that the evidence of both sides was concluded and the defendant's side had also advanced their argument, but the plaintiff's side had avoided to place their argument and that in this case not only the trial had commenced but trial was completed. The said learned Court appears to be conscious that the fact of dispossession took place many years ago and that the respondents herein were sleeping over their responsibility to bring the petition for amendment. Nonetheless, the prayer for amendment was allowed on the ground that the *procedure* is a *handmaid of justice* and moreover, the learned Trial Court was of the view that whether or not the respondents herein were dispossessed and whether they would be entitled to recovery of possession will be the lookout of the Court at the time of deciding the case and thereupon, it was held that it cannot be ignored that the amendments are necessary.

21) It is seen that in order to allow the prayer for amendment, the learned Trial Court had placed reliance on the case of *Life Insurance Corporation of India v. Sanjeev Builders Pvt. Ltd., 2022 SCC OnLine 1128*. The relevant observations of the Supreme Court of India is quoted below:-

“70. Our final conclusions may be summed up thus:

(I) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negated.

(II) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall" in the latter part of Order VI Rule 17 of the CPC.

(III) The prayer for amendment is to be allowed:

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties.

(ii) to avoid multiplicity of proceedings, provided:

(a) the amendment does not result in injustice to the other side.

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side.

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(IV) A prayer for amendment is generally required to be allowed unless:

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration.

(ii) the amendment changes the nature of the suit.

(iii) the prayer for amendment is mala-fide.

(iv) by the amendment, the other side loses a valid defence.

(V) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(VI) Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(VII) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(VIII) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(IX) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(X) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(XI) Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. [See: Vijay Gupta vs. Gagninder Kr. Gandhi and Others, 2022 SCC Online Del. 1897] There is no quarrel with the said legal proposition. However, in this case, the learned Trial Court had failed to take into consideration its own orders dated 27.01.2012, 27.02.2015, and 28.01.2019 that in the said orders, it had taken into consideration that the petitioners-defendants were in possession of the suit land. The said learned Court had also failed to consider that in his cross-examination the PW-01 had admitted that the petitioners were in the suit land since 02012. Moreover, in the written objection filed by the petitioner in Misc.(J) Case No. 125/002013 that they had claimed to be in possession over the suit land since 30 years."

22) The Supreme Court of India, in the case of *Ganesh Prasad (supra)* had reiterated the principles laid down in the case of *Life Insurance Corporation of India (supra)*. There is no quarrel with the said legal proposition.

23) However, in this case, the learned Trial Court had failed to take into consideration its own orders dated 27.01.2012, 27.02.2015, and 28.01.2019 that in the said orders, it had taken into consideration that the petitioners-defendants were in possession of the suit land. It has perhaps escaped the notice of the learned Trial Court that in his cross-examination the PW-1 had admitted that the petitioners were in the suit land since the year 2012. Moreover, in the written objection filed by the petitioners in Misc. (J) Case No. 125/2013, they had claimed to be in possession over the suit land since 30 years, which also perhaps did not come to the notice of the learned Trial Court.

24) The Court is conscious of the fact that where there is additional approach to the same fact, the amendment of the plaint can be allowed, even

belatedly. However, in sub-paragraph (IV)(i) of paragraph 70 of the case of *Life Insurance Corporation of India (supra)*, the Supreme Court of India had held that “a prayer for amendment is generally required to be allowed unless by amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration.” This is a relevant factor because despite orders of the Court, referred above and pleadings referred herein before, the respondents – plaintiffs no. 1 to 7 had not pleaded any specific date when they were dispossessed from the suit land by the petitioners- defendants.

25) Therefore, in light of the above, it was the duty of the learned Trial Court to examine if the amendment of plaint is beyond the prescribed period of limitation. In this regard, it may be mentioned that while allowing prayer for amendment of plaint, the Trial Court is also required to examine whether the amendment, if allowed, would defeat right accrued in favour of defendant. In this regard, if one requires any authority on the point, one may refer to the case of *Radhika Devi v. Bajrang Singh, AIR 1996 SC 2358*.

26) In this case, the date on which the respondent- plaintiff nos. 1 to 7 is of immense bearing because it might result in giving rise to a cause of action which might or might not be barred by limitation. It is too well settled principle of law that amendment can be allowed only if it does not change the cause of action or introduce a cause of action which is barred by limitation. The case of *Life Insurance Corporation of India (supra)*, on which reliance was placed by the learned Trial Court is an authority on the said legal proposition. This particular aspect has perhaps escaped the notice of the learned Trial Court.

27) The learned senior counsel for the respondents had placed reliance

on the case of *Abdul Matin (supra)*. In the said case belated application for amendment of plaint to incorporate correct *dag* and *patta* number was allowed. The facts of the present case, as narrated herein before, is distinguishable from the facts of the cited case and therefore, not applicable under the facts of the present case.

28) Thus, in view of the discussions above, the Court is constrained to hold that the learned Civil Judge (Junior Division) No.1, Dhubri (formerly called Munsif No.1, Dhubri) has committed jurisdictional error in passing the impugned order dated 21.06.2023, in connection with Misc. (J) Case No. 184/2022, arising out of T.S. No. 263/2011.

29) Therefore, the said impugned order dated 21.06.2023, passed by the learned Civil Judge (Junior Division) No.1, Dhubri (formerly called Munsif No.1, Dhubri) in connection with Misc. (J) Case No. 184/2022, arising out of T.S. No. 263/2011 is set aside.

30) Resultantly, the petition no. 1570/2022, which was registered as Misc. (J) Case No. 184/2022 stands restored to file before the said learned Court. Accordingly, the said learned Court shall hear the matter afresh in light of the legal proposition contained in this order and decide the matter afresh in accordance with law, but without being influenced by any observations made in this order.

31) The interim order, staying the suit, is vacated.

32) As all sides are represented in the Court, the respective parties are directed to appear before the learned Trial Court on 02.02.2024, without waiting for any notice of appearance and by producing a certified copy of this order, seek further instructions from the said learned Court.

33) Under the circumstances, the parties are left to bear their own cost.

JUDGE

Comparing Assistant