

**IN THE HIGH COURT OF TRIPURA
A G A R T A L A**

RSA.NO. 15 OF 2010

1. Smti. Pinki Roy,
 2. Smti. Rumki Roy,
 3. Smti. Chumki Roy,
- (Sl.No. 1 to 3 are all daughters of late Khangendra Kumar Roy)
4. Smti. Niva Roy,
wife of late Khangendra Kumar Roy,
- (all are resident of Vill. Mohanpur, Kailashahar town,
P.O. & P.S. Kailashahar, North Tripura)

.....Appellants

-V E R S U S-

1. Smti. Mira Malakar (Roy),
wife of late Bijoy Malakar , Vill. Kubjar,
P.O. & P.S. Kailashahar, North Tripura
2. Smti. Sandhya Rani Roy,
wife of late Nagendra Kumar Roy,
3. Smti. Maya Rani Roy,
daughter of late Nagendra Kumar Roy
4. Smti. Swapna Rani Roy,
daughter of late Nagendra Kumar Roy
5. Smti. Silpi Rani Roy,
daughter of late Nagendra Kumar Roy

(the respondents No.2 to 5 are residents of 23, Selkirk
Road, Tooting Broad Way, London, United Kingdom)

.....Respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellants : Mr. D. K. Biswas, Advocate
For the respondents : Mr. P. Chakraborty, Advocate
Date of hearing and judgment & order : 09.06.2015
Whether fit for reporting : **No**

JUDGMENT & ORDER (ORAL)

Heard Mr. D. K. Biswas, learned counsel appearing for the appellants as well as Mr. P. Chakraborty, learned counsel appearing for the respondent No. 1.

[2] It appears from the record that the notice was duly issued on the respondents No.1 to 5 by the registered post with A/D on 28.04.2010. From the note dated 28.05.2010, it appears that respondents No. 2 to 5 acknowledged their receipt of the notice by e-mail but they preferred not to appear, hence there is no representation from those respondents.

[3] During the pendency of this appeal, the appellants and the respondent No. 1 settled their dispute in respect of the suit land. Joint application under Order XXIII Rule 1 read with Section 151 of the CPC has been filed for abandonment of the part of the claim made in the suit, being T.S. 25 of 2007 from which this appeal arises and

also for passing a decree in terms of the compromise so recorded in that petition being C. M. Appl. No. 51 of 2015. The said compromise petition is jointly filed by the appellants and the respondent No.1 for consideration and for passing the decree as prayed for.

[4] The brief facts that would essentially be required for recording such compromise are laid in the outset. One Khagendra Kr. Roy instituted the suit being T.S. No. 25 of 2007 for declaration of title by adverse possession and also for recovery of Schedule A land, from which, according to the said plaintiff, he was dispossessed by the defendant No. 5, Smt. Mira Malakar (Roy).

[5] The defendant No. 5 contested the suit while other defendants No. 1 to 4, the respondents No. 2 to 5 herein, did not even file their written statement and as such against them the proceeding was ex-parte. It is to be further noted that the prayer for recovery of the Schedule A land was made by way of amendment. The defendant No. 5, the respondent No. 1 herein, by filing the written statement contested such prayer. The said defendant No.5 categorically stated that the story of dispossession on 28.12.2008 is imaginary, unreal and fabricated for purpose of ulterior motive. She even denied that the plaintiff was on adverse possession over the suit land.

[6] After hearing, the Civil Judge, Sr. Division, North Tripura, Kailashahar the trial court, allowed the suit by the judgment and decree dated 18.11.2009 observing that:

"Hence, the suit is decreed in favour of the plaintiffs on contest with cost and the plaintiffs' title in the suit land as well as in 'A' Schedule land is declared being acquired by virtue of adverse possession and the defendants acquired no right, title and interest in the suit land. Defendant No. 5 acquired no right, title and interest in the suit land as well as in 'A' Schedule land and the plaintiffs are entitled to recovery possession of 'A' schedule land by evicting defendant No. 5 from it and the plaintiffs are entitled to get cost of the suit from the defendant No. 5 ".

[7] The defendant No. 5, the respondent No. 1 herein, preferred an appeal under Section 96 of the CPC, in the court of the District Judge, North Tripura, Kailashahar, particularly against the finding on dispossession that has been returned by the trial court.

[8] As it is evident, during the pendency of the suit the original plaintiff died and he was substituted by his legal heirs. The said appeal filed by the defendant No. 5 being T.A. No. 20 of 2009 has been decided by the impugned judgment and order dated 28.03.2010 by the District Judge, reversing the finding on the adverse possession with observation as reproduced hereunder:

“Third issue is the main issue. It is about ownership of the plaintiff over the suit land by way of adverse possession. While discussing the issue, the learned court below reflected the ill motive of seller Bijoy Krishna Roy who registered the Sale Deed in the name of Nagendra Kumar Roy instead of Khagendra Kumar Roy. But Nagendra Kumar Roy left to United Kingdom and never returned back to India. Thereafter, Khagendra Kumar Roy began to possess the suit land adversely, uninterruptedly. It was a paper transaction, nothing else. Thus the plaintiffs-respondents challenged the ownership of original owner Nagendra Kumar Roy who never entered into the suit land. Original Khatian (Exbt-A) is in the name of Nagendra Kumar Roy for the total land measuring 3.48 acres. There were eight dags for the total land and suit land measuring 3.48 acres appertains to that Khatian. Four legal heirs of Nagendra Kumar Roy are made party in this suit. They did not appear and by order dated 04.12.2008 the case was heard ex-parte on assumption that the letters/summons have been served on the four defendants residing at London. Subsequently byway of amendment Smti. Mira Malakar appeared as a party and Smti. Niva Roy, Smti. Pinki Roy, Smti. Rumki Roy and Smti. Chumki Roy all claiming to be the legal heirs of plaintiff Khagendra Kumar Roy who died on 11.03.2008 are also made party in this suit. The learned court below declared title by adverse possession in favour of the legal heirs of Khagendra Kumar Roy. Khatian is a proof of possession and title unless contrary proved. As per Khatian No. 279/1 it is clear that Nagendra Kumar Roy was the original owner of the suit property. He had titled and possession over the suit land. He purchased the suit land from its original owner on 10.10.1969 by registered Sale Deed (Exbt-3) and thereafter, Khatian was prepared in his name. The claim of the plaintiffs-respondents that Khagendra Was in possession of the suit land before purchase and he continued the possession is not supported by evidence. All the plaintiffs’ witnesses in the lower

court stated that Khagendra Kumar Roy was in possession of the land, leased out the land to Bargaders for cultivation and Bargaders actually cultivated the land for Khagendra Kumar Roy. On the other hand, the witnesses appeared on behalf of defendant No.5, the villagers and Panchayaet members of the area verbally stated that Khagendra or his successors never in possession of the land. Thus, the verbal evidence in respect of possession is contradictory. From the documentary evidence it is clear that the land was owned by Nagendra Kumar Roy by registered Sale Deed and Khatian was prepared in his name. The matter of possession was settled by order dated 18.08.1976 in the court of Executive Magistrate. The dispute was in between Khagendra Kumar Roy and Khirode Ram Malakar, not between the original owner and Nagendra Kumar Roy at all. Subsequently, Smti. Mira Malakar purchased 56 satak land from Smti. Sandhya Rani Roy vide Sale Deed No. 1-180, dated 25.01.2008 (Exbt-B). After purchase the land was mutated in the name of Smti.Mira Malakar as per Section 46 of the TLR &LR Act. Generally mutation done when the title and possession are found undisputed. The plaintiffs-respondents did not challenge the validity of the Sale Deed and also the Khatian No.1004. Smti. Sandhya Rani Roy, wife of Nagendra Kumar Roy, original rayat is a legal heir of the total land measuring 3.48 acres. Even in case of partition of the land between all legal heirs of late Nagendra Kumar Roy, her share is not less than 56 satak which she had sold out to Smti. Mira Roy(Malakar). The claim of the plaintiffs-respondents was that they had been possessing the land adversely since 1969 before purchase of the land by Nagendra Kumar Roy. The adverse title only can be created by admitting the title of the original owner. By denial the ownership of the original owner adverse title cannot be created. Learned Advocate for the appellant referred the decision of the Hon'ble Supreme Court vide 2009 SCC 101 volume 12 to reiterate that there must be animus possidendi to

support adverse possession. Plaintiff-respondent or his legal heirs never had physical possession over the land. It is admitted by them that the suit land was leased out to others and also given to Bargaders for cultivation. They were not the owner, but illegally giving the property in lease to others or Bargaders cannot create title at all. In 2006 SCC 570 Vol.VII our Hon'ble Supreme Court held that denial of the title of true owner is necessary to constitute adverse possession. On 10.10.1969 Nagendra Kumar Roy purchase the land, but the plaintiff claim adverse possession from the same date, so it is not a denial of the title of the true owner at all. The plaint is not clear from which date actually the claim for adverse possession is made. In 2007 AIR SCW 1560 our Hon'ble Supreme Court held that limitation starts from the date of claim. So from what date the period of 12 years is to be counted not clear at all. In AIR 1995 SC 73 our Apex Court held that mere possession for howsoever long does not necessarily mean that it would be adverse against the true owner. Person pleading adverse possession has no equity in his favour. Possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to true owner. It is admitted that the original owner Negendra Kumar Roy left for London in the year 1969 and there is nothing in the evidence as adduced by the plaintiff or in the plaint to show that any communication was made to Negendra Kumar Roy to inform him that they he had taken over the possession of the land by denying his title. So the knowledge of original owner about the adverse possession is absent in this case. The learned court below after calculation of the period form the assertion of defendant No. 5 concluded that Negendra Kumar Roy left London in the year 1963 and address of Nagendra Kumar Roy in London not known. He had given stress over the marriage of defendant No. 4 and only written that from the circumstances and evidence he is fully satisfied that Khagendra Kumar Roy and after his death his successors acquired title over the

suit land byway of adverse possession. So he declared the title of the plaintiff byway of adverse possession. But in the judgment it is not clarified at all how he satisfied, when the possession was not physical and open then no animus possidendi present and it was not continuous, open and adverse to tune owner. Plaintiff is to prove his own case. Only the defects or weakness of the case of defendant cannot be a ground for giving decree in favour of the plaintiff who failed to prove the case by virtue of evidence. So the issue decided by the learned court below that the plaintiffs-respondents and his successors acquired title over the suit land byway of adverse possession suffers from illegality and such title cannot be declared as adverse at all".

[9] Being aggrieved by that finding, returned by the first appellate court this appeal under Section 100 of the CPC has been filed by the substituted plaintiffs. At the time of admission of the appeal the following substantial questions of law were formulated:

- (I) Whether the gift of an un-partitioned property by one of the co-sharers and that too without delivery of possession can be said to be valid in the eye of law?**
- (II) Whether the finding of learned first appellate court that possession of the plaintiff over the suit land is not proved, is perverse or not? And**
- (III) Any other substantial questions of law need to be formulated in the course of hearing of the present second appeal?**

[10] It is further to be noted that the defendants No. 1 to 4 in the suit did not challenge the order of ex-parte proceeding at any point of time, nor did they file appeal against the judgment and decree passed by the trial court. So the judgment and decree has become final so far as the defendants No.1 to 4 are concerned. But a new situation has developed since the first appellate court has observed that the plaintiff failed to prove the adverse possession as pre-requisite to the declaration of title by prescription, notwithstanding the fact that the defendants No.1 to 4 did not contest the suit. Apart that, those defendants have not contested the appeal filed by the plaintiffs under Section 100 of the CPC and they are not on the same plane with the respondent No.1 herein. Therefore, this Court has no hesitation to hold that the defendants No. 1 to 4, the respondents No. 2 to 5 herein, did not show any inclination to resist the suit or the appeal. As the order of ex-parte proceeding has been passed against them and that remained in the record un-altered, they are not the necessary parties in the subsequent appeals.

[11] In view of that, this Court has considered the petition being C.M. Appl. No. 51 of 2015 wherein, the terms of compromise are embedded and which are as follows:

1. That the Title Suit 15 of 2007 was filed in the court of the Civil Judge, Sr. Division, Kailashahar seeking a declaration of title of the plaintiffs (the appellants herein) over all the lands described in the Schedule 1, Sch. A Sch-II and Sch-III, and also recovery of possession of the 0.56 acar land described in Schedule-A of the plaint, from the defendant No. 5 [Mira Malakar (Roy)].

2. That the declaration was prayed for against the true owners namely defendant No. 1 to 4 are residents of London (UK) and never came to contest the suit in spite of summons. As a result the suit was decided ex-parte against the defendant o. 1 to 4.

3. That the suit was contested by the defendant No. 5 (respondent No. 1 here) alone in the trial court which decreed the suit by judgment dated 18.11.2009 allowing both the relief namely (1) declaration that the plaintiffs are the title holders of the land in all the Schedules and recovery of the land from Smt. Mira Malakar (Roy) described in Sch. A of the plaint.

4. Smt. Mira Malakar (Roy) aggrieved by the decree of recovery of possession of her land in Sch-A preferred appeal which was registered by the District Judge, kailashahar as T.A. 20 of 2009. The appellate court set aside the judgment of the Trial Court and dismissed the suit by a judgment dated 20.03.2010.

5. The plaintiff-appellants preferred this appeal before the Hon'ble High Court. During pendency of the appeal the respondent No. 1 [Smt. Mira Malakar (Roy)] amicably settled the matter with the plaintiff-appellants. Her title on the Sch-A land of the plaint (which is again described below) has been accepted by the appellants on satisfaction of certain terms of agreements made out side the court. As a result after the said compromise there is no *lis* as between the appellants and the respondent No. 1 Smt. Mira Malakar (Roy). Hence, this application for considering a decree on compromise on the following terms:

(1) That in the Title Suit 15 of 2007 before the learned Civil Judge, Sr. Division, Kailashahar, the plaintiff-appellants withdraw or abandon their claim on Schedule-A land. Simultaneously the appeal No. T.A. 20 of 2009 passed by the District Judge, Kailashahar, is hereby withdrawn by the appellant Smt. Mira Malakar (Roy) Kailashahar and that has to be treated to be withdrawn.

(2) The decree of the trial court dated 18.11.2009 in T.S. No. 15 of 2007 shall prevail subject to deletion of the relief in respect of the Schedule-A. that is the declaration in respect of the land in Sch-I, Sch-II and Sch-III of the plaintiff shall remain effective/in force and the relief of recovery of possession of land in Sch-A will be treated to be withdrawn/abandoned.

(3) For the purpose of the decree of the trial court it would be a decree only on Sch-I, Sch-II and Sch-III described below, (exception the Schedule-A) once again for clarity.

SCHEDULE-II

Sub-Div: Kailashahar, Mauja: Laxmipur, Khatian :
279/1,

C.S.Plot: 1339 (Sabek) = 1605 (hal) C.S. Plot :1343
(Sabek)=1603 (hall)

C.S.Plot: 1340 (Sabek) = 1605 (hal) C.S. Plot :1341
(Sabek)=1601 (hall)

C.S.Plot: 1342 (Sabek) = 1602 (hal)

SCHEDULE-II

Sub-Div : Kailashahar, Mauja : Laxmipur, Khatian:
279/2,

**C.S.Plot :1326, 1268, 1269, 1285, 1412,
1391/2013, 842, 1332 1069, (all Sabek)
corresponding to 1547, 1507, 1506, 1509, 1648,
1685, 988, 1554, 1436 (all hal)**

SCHEDULE-III

**Sub-Div : Kailashahar, Mauja : Laxmipur, Khatian :
255/1 (old) = 279/3(present)**

C.S. Plot : 1080 (Sabek) = 1425 (hal)

Total land in 3 Schedules : 3.48 acres.

SCHEDULE-A

**Sub-Div : Kailashahar, Mauja : Laxmipur,
Khatian:279/1,**

**C.S.Plot :1339, 1343, 1340, 1341, 1342, (all Sabek)
corresponding to 1598, 1603, 1605, 1601, 1602,
(all hal)**

Total land in the Schedule : 0.56 acres.

[12] It is apparent on the face of the terms as above that the plaintiff has abandoned his claim for recovery of the Schedule-A land, as appended to the plaint, against the defendant No. 5, the respondent No. 1 herein. The respondent No. 1 and the appellants have settled the dispute, acceding that the land described in the Schedule (I), (II) and (III) were adversely possessed by the predecessor of the plaintiffs, the original plaintiff and the plaintiffs beyond the period of prescription showing hostility and thus, the title over the said land described in the

Schedules I, II and III of the plaint has matured in favour of the appellants, the plaintiffs, by prescription. The respondent No. 1, defendant No. 5 in the suit has acceded to that status.

[13] After hearing the learned counsel for the parties and on perusing this application for the decree in terms of the compromise, this Court is satisfied that the settlement has been arrived at, without any unlawful means or duress. Therefore, the settlement is liable to be treated not suffering from any invalid action.

[14] Having observed thus, the suit is decreed in terms of the compromise, meaning the appellants, the plaintiffs, have acquired title by prescription, having on possession showing hostility against the true owners, the defendants No.1 to 4 on the land as described in the Schedules hereunder :

Schedule-I

Sub-Div : Kailashahar, Mauja : Laxmipur, Khatian :279/1, C.S. Plot Nos. 1339 (old) 1598 (new), 1343 (old) 1603 (new), 1340 (old) 1605 (new), 1341 (old) 1601 (new), 1342 (old) 1602 (new), 1376 (old) 1668 (new), 1327 (old) 1551 (new), 1328 (old) 1550 (new), classification of lands cherra, Bastu and Nal, land measuring 0.99 acres.

Schedule-II

**Sub-Div : Kailashahar, Mauja : Laxmipur, Khatian :
279/2, C.S. Plot Nos. 1326 (old) 1547 (new), 1268
(old) 1507 (new), 1269 (old) 1506 (new), 1286
(old) 1509 (new), 1412 (old) 1684 (new),
1391/2013 (old) 1685 (new), 842 (old) 988 (new),
1332 (old) 1554 (new), 1069 (old) 1436 (new),
classification of lands Nal and Viti, land measuring
2.12 acres.**

Schedule-III

**Sub-Div : Kailashahar, Mauja : Laxmipur, Khatian:
255/1 (old) 279/3 (present) C.S. Plot Nos.
1080(old) 1425 (new), classification of lands Nal,
land measuring 0.36 acres.**

Total land measuring:

Schedule - I 0.99 acres.

Schedule - II 2.12 acres.

Schedule - III 0.37 acres.

3.48 acres.

[15] The defendants are restrained from interfering with their possession in any manner over the land described in the Schedules I, II and III, it is further declared that the defendant No. 5, the respondent No.1 herein, has right, title and interest in the same manner over the A- Schedule land which is as under :

Schedule-A

**Sub-Div : Kailashahar, Mauja : Laxmipur, Khatian :
279/1, C.S. Plot Nos. 1339 (old) 1598 (new), 1343
(old) 1603 (new), 1340 (old) 1605 (new), 1341
(old) 1601 (new), 1342 (old) 1602 (new),**

Total land measuring 0.56 acres.

**Bounded by – North –Birendra Malakar, South &
East – Village Path, West- Giyash Uddin Choudhury
& Mamud Ali.**

[16] The appellants, the plaintiffs in the suit and the other defendants, being defendants No.1 to 4, are as well restrained from interfering with the possession of the said land. All other claims or all other reliefs in the suit are dismissed by this Court.

[17] Draw the decree accordingly. The joint petition being C.M Appl. No. 51 of 2015 praying for the decree on compromise shall form the part of the decree, but the order shall prevail in the event of inconsistencies.

[18] After preparing the decree, send down the LCR.

JUDGE

A. Ghosh.