GAHC010099022006

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

Case No. : RSA 148/2006

1:LOHIT CH. BARUAH

2: 2. UTTAM CH. BARUAH.

3: 3. NAKUL CH. BARUAH

4: 4. RABIN CH. BARUAH

ALL ARE SONS OF LATE NABIN CH. BARUAH
NO.1 IS A JUDICIAL OFFICER BY PROFESSION NO.2 IS A RETIRED GOVT. SERVANT NO.3 IS ADVOCATE and NO.4 IS A MEDICAL SERVICE HOLDER BY PROFESSION AND ALL PERMANENT RESIDENT OF SILSAKOO
NORTH GUWAHATI
MOUZA-SILASINDURI GHOPA
DIST - KAMRUP

VERSUS

1:ARUNA BARUAH and ORS

2:2. CHANDAN BARUAH

3:3. ANJAN BARUAH
NO.1 IS THE WIFE
2and3 ARE THE SONS OF LATE KARUNA KANTA BARUAH
NO.1 and 2 ARE THE GOVT. SERVICE HOL
DER BY PROFESSION
NO.3 IS A CONTRACTOR BY PROFESSION. ALL THE RERSIDENTS OF SILSAKOO

NORTH GUWAHATI
MOUZA-SS GHOPA
DIST - KAMRUP.

4:4. GOVT. OF ASSAM
REP. BY THE CHIEF SECRETARY TO THE GOVT. OF ASSAM
DISPUR.

5:5. THE SECREARY TO THE GOVT. OF ASSAM
REVENUE DEPARTMENT
DISPUR.

6:6. THE COLLECTOR OF KAMRUP DISTRICT
GUWAHATI D.C.KAMRUP.

7:7. ISHAN BARUAH
S/O LATE MAHIDHAR BARUAH.

8:8. JOGESH BARUAH
S/O LATE HANGSHADHAR BARUAH
BOTH ARE BY CASTE - HINDU
HOISE HOLDER BY PROFESSION
R/O SILSAKOO
NORTH GUWAHATI
MOUZA-S.S.GHOPA
DIST - KAMRUP

:: BEFORE ::

HON'BLE MR. JUSTICE KALYAN RAI SURANA

Advocates for the appellants	: Mr. S.P. Roy, Mr. N. Alam, Mr. R.P.N. Singh,
	: Mr. K. Rajbongshi, Mr. V.K. Rai,
	: Mr. H.S. Kalsi, Ms. N. Rai.
Advocates for respondents	: Mr. S.C. Keyal, Mr. S.K. Ghosh,
No.1, 2 and 3	: Mr. S.P. Choudhury.
Advocates for State respondents	: Mr. G. Bordoloi, Govt. Advocate.
No.4, 5 and 6	
Advocates for Proforma	: Mr. M.U. Mahmud,
Respondents No.7 and 8	: Mr. AT Sarkar, Mr. MI Hussain, Mr. S Haque.
Date of hearing	: 28.11.2019, 09.12.2019.
Date of judgment	: **02.01.2020**.

:: JUDGMENT & ORDER::
(*CAV*)

Heard Mr. S.P. Roy, learned counsel for the appellant. Also heard Mr. S.K. Ghosh, the learned counsel for the respondents No.1, 2 and 3 and Mr. G. Bordoloi, learned Govt. advocate appearing for respondents No.4 to 6. No representation by the proforma respondents No.7 and 8.

2) By this appeal under Section 100 CPC, the appellants have assailed the first appellate judgment and decree dated 30.08.2005 passed by the learned Civil Judge (Senior Division) No. 1, Kamrup, Guwahati, thereby dismissing the appeal and affirming the judgment and decree dated 11.02.2004 passed by the learned Civil Judge (Jr. Division) No.2 Kamrup (M), Guwahati in TS No.294/1998, thereby dismissing the suit of the appellants and dismissing the counter-claim filed by the respondents.

3) The case of the appellants-plaintiffs they are the absolute owners of the land measuring 2B-3K-11L, covered by Dag No. 854, 855, 901 of K.P. Patta No. 597 of North Guwahati Town, Mouza- Silasindurighopa, district- Kamrup. The said land is described in the schedule of the plaint. It was projected that the respondent No.1 is the wife of Late Karuna Kanta Baruah and the respondents No. 2 and 3 are the sons of Late Karuna Kanta Baruah and that Late Karuna Kanta Baruah was the son of paternal aunt of the appellants. Accordingly, Karuna Kanta Baruah was appointed as the caretaker of the property of Nabin Chandra Baruah, who was lying in bed during the last part of his life on condition that he would vacate the land as and when required by the appellants. However, the said Karuna Kanta Baruah fraudulently got his name mutated as occupancy tenant and manage to get a draft *khatian* bearing No. 101/128 over the suit land in the settlement operation of 1957-64 and that the *khatian* was issued without any notice to the appellants, as such, they were not aware of occupancy right recorded in the name of Karuna Kanta Baruah in the draft *chitha* of 1957 in respect of the suit land. It was projected that the suit land was a non-agricultural land and was within the jurisdiction of North Guwahati Municipal Town and the said Karuna Kanta

Baruah was neither a cultivator nor he had cultivated the suit land for the purpose of his livelihood as he was in government service. Hence, by projecting that the *khatian* in respect of occupancy tenancy was illegally granted, the suit has been filed by projecting that only when notice of tenancy case No. 9/1997 was served on the appellants, they came to know about the recording of occupancy tenancy right in respect of Karuna Kanta Baruah. Accordingly, the appellants had prayed for the following reliefs.

i. Declaring the occupancy right and the tenancy khatian granted to Karuna Kanta Baruah, predecessor-in-interest of the defendant No. 1 to 3 and occupancy right tenancy khatian granted to defendant No. 1 to 3 over the suit land, described in the schedule below of this plaint, is illegal, inoperative, unlawful and without jurisdiction.

ii. That the occupancy right and tenancy khatian granted to the defendant No. 1 to 3 and to their predecessor-in-interest, Karuna Kanta Baruah over the suit land, described in the schedule blow, be cancelled and accordingly issue direction to the Revenue Authority and to the Govt. of Assam to cancel it.

iii. That a decree for delivery of khas possession removing the defendant No. 1 to 3 from the suit land described in the Schedule below in favour of the plaintiffs be passed.

iv. That the defendant No. 1 to 3 be permanently restrained by injunction from disturbing the possession of the plaintiffs over the suit land described in the schedule below.

v. That the Govt. of Assam be permanently restrained by injunction from issuing owner-ship right to the defendant No. 1 to 3.

vi. That cost of the suit also be decreed against the defendant No. 1 to 3.

vii. That if the defendant No. 7 and 8 contests the suit they should be treated as main defendant and decree should also be passed against them.

viii. That any other relief or reliefs to which the plaintiffs are entitled also be decreed in favour of the plaintiffs.

4) The respondents No. 7 and 8 herein by filing their joint written statement, supported the case of the appellants by stating that they were in possession of the land with permission from the appellants who are the owners of the Patta No. 597 and accordingly, it

was claimed that they cannot be evicted from the land under their possession. The respondents No. 1, 2 and 3 herein by filing the joint written statement, denied the statements made by the appellants in the plaint and apart from usual plea of the suit being barred by limitation, the suit was hit by principles of estoppel, waiver and acquiescence etc. claimed that they were in continuous possession of the suit land and houses described in schedule of the plaint from the time of the forefathers. It was stated that Late Ghana Kanta Baruah, the grandfather of the respondents No. 2 and 3 was the *Tehsildar* and had constructed a house on suit land which is in possession of the respondents No. 1, 2 and 3. It was stated that Late Karuna Kanta Baruah, being the son of Late Ghana Kanta Baruah, was the owner and possessor of the suit land and, as such, it was denied that Karuna Kanta Baruah was the caretaker of property of Late Nabin Chandra Baruah. It was further stated that Late Karuna Kanta Baruah was the surviving son and sole heir of Late Ghana Kanta Baruah after the death of Suresh Kanta Baruah, the elder son of Late Ghana Kanta Baruah, and instead of issuing a patta in his name, the Revenue authorities in connivance with the appellants had recorded the name of Late Karuan Kanta Baruah as occupancy tenant, although he had never applied for recording his name as occupancy tenant. It was claimed that although they were the actual owners of the suit land and were possessing the suit land and houses standing thereon, on the basis of incorrect advice from the counsel, they had instituted Tenancy Case No. 9/1997 to get their name mutated as occupancy tenants though they were entitled to get the patta in respect of suit land as the successors of Late Ghana Kanta Baruah. The respondents No. 1, 2 and 3 claimed that they were entitled to occupy the suit land and had a right to construct structure on their own land. Accordingly, by denying that any cause of action arose on 08.05.1997 and 03.11.1997, the said respondents had prayed for dismissal of the suit.

5) Along with the written statement, the respondents- defendants had also filed their counter-claim by projecting that the appellant's predecessor- in- interest, namely, Late Nabin Chandra Baruah had got his name fraudulently mutated in the revenue records in the year 1957- 64 in respect of the land belonging to the predecessor- in- interest of the respondents No.1, 2 and 3. It was also projected that the respondents No.1, 2 and 3 were in continuous possession of the suit land and houses thereon since the days of their grand-

father. Accordingly, in the counter-claim, the respondents- defendants had prayed (i) for a decree declaring the right, title and interest of the defendants No.1, 2 and 3 in respect of the land and houses described in the schedule of the counter-claim; (ii) for a decree confirming possession of the defendants No.1, 2 and 3 in respect of the land and houses described in the Schedule below; (iii) for a decree of permanent injunction restraining the plaintiffs and the proforma defendants No.7 and 8, their men, agents from entering upon and disturbing the peaceful possession of the defendant Nos. 1, 2 and 3 in respect of the land and houses morefully described in the schedule of the counter-claim; (iv) for a decree directing the defendant Nos. 4, 5 and 6 to record the name of the defendant Nos. 1, 2 and 3 in respect of the land described in the schedule of the counter-claim; (v) for cost of the counter-claim; and (vi) decree for any other relief. The appellants- plaintiffs had filed their written statement against the counter- claim filed by the respondent Nos. 1, 2 and 3.

6) On the basis of the pleadings, the learned trial Court had initially framed 8 (eight) issues in respect of the suit and 6 (six) issues in respect of the counter- claim. However, for the sake of convenience, in its judgment, the learned trial Court had framed 12 (twelve) issues, as follows:-

1. *Whether the suit is maintainable in its present form?*
2. *Whether there is any cause of action for the suit?*
3. *Whether the suit is barred by law of limitation?*
4. *Whether the suit is bad for non-joiner of necessary parties?*
5. *Whether the occupancy right and tenancy khatian granted to the defendant No. 1 to 3 and to their predecessor-in-interest Karuna Kanta Baruah over the suit land is illegal, inoperative and without jurisdiction?*
6. *Whether the plaintiffs are entitled to the reliefs as prayed for?*
7. *Whether the counter claim is maintainable in its present form?*
8. *What there is any cause of action for the counter claim?*
9. *Whether the counter claim is barred by law of limitation?*
10. *Whether the counter claim is bad for non-joinder of necessary parties?*
11. *Whether the defendants have right, title and interest over the suit land?*
12. *Whether the defendants are entitled to the relief as prayed for?*

7) In support of the plaint, the appellants- plaintiffs had examined 4 witnesses, namely, (i) Uttam Chandra Baruah (PW-1), Dulomani Saikia (PW-2), Satish Chandra Das, working as *Mandal* (PW-3), and Bipin Chandra Goswami, employee in office of Sub- Registrar, Guwahati (PW-4, wrongly recorded as PW-3). The following documents were exhibited by the appellants, viz., (i) certified copy of *jamabandi* (Ext.1); (ii) certified copy of draft *khatian* (Ext.2); (iii) certified copy of order dated 29.09.95 passed by Circle Officer, North Guwahati Revenue Circle in Case No. Kha: Da: 525/94-95 (Ext.3); (iv) copy of notice in Form 6 on application under Section 23 of the Assam (Temporarily Settled Areas Tenancy) Act, 1971 (Ext.4); (v) copy of notice dated 03.11.97 under Section 80 CPC (Ext.5); (vi) postal receipts (Ext.6); (vii) letter dated 21.11.1997 by Deputy Secretary to the Govt. of Assam, Revenue (Settlement) Department (Ext.7); (viii) certificate dated 16.10.1997 issued by the Chairman, North Guwahati Town Committee that holding number was issued in 1996-97 and construction order was issued in 1995-96 (Ext.8); (ix) certificate dated 31.12.99 regarding extension of house since 1999 (Ext.9); (x) photocopy of volume register book No.1, Vol-I of 1934 in respect of pages 263 and 264 (Ext.10); (xi) certified copy of *chitha* (Ext.11); (xii) application for ownership/ intermediary rights (Ext.13); another copy of application for ownership/ intermediary rights (Ext.14). It would be pertinent to mention herein that on the perusal of LCR, no document is found to have been marked as Ext.12 by any PWs or by the learned trial Court.

8) In support of the defence as well as counter-claim, the respondents-defendants No.1, 2 and 3 had examined two witnesses, namely, (i) Sri Chandra Kanta Baruah (DW-1), and (ii) Smt. Aruna Baruah. The following documents were exhibited, viz., (i) certified copy of *jamabandi* (Ext.A); (ii) land revenue paid receipt (Ext.B); (iii) petition filed by predecessor- in- interest of respondents, i.e. Karuna Kanta Baruah before Assistant Settlement Officer, Kamalpur regarding inheritance and for granting *katcha patta* (Ext.C); (iv) postal receipt (Ext.D); (v) returned postal acknowledgment card (Ext.E); (vi) receipt issued by North Guwahati Town Committee (Ext.F); (vii) receipt issued by North Guwahati Town Committee (Ext.G); (viii) letter dated 26.11.1975 by chairman, North Guwahati Town

Committee regarding tax payable (Ext.H); (ix) demand letter dated 16.08.2000 by North Guwahati Town Committee (Ext.I); (x) demand letter by North Guwahati Town Committee (Ext.J); (xi) land revenue paid receipt (Ext.K).

9) In respect of issue No.1, it was held by the learned trial Court that there is nothing on record which hits at the maintainability of the suit and, as such, the issue was decided in the affirmative and in favour of the appellants. In respect of issue No.2, it was held by the learned trial Court that the respondents had not raised the plea of lack of cause of action in their written statement and, as such, the said issue was struck off. In respect of issue No.3, the learned trial Court had arrived at a finding that the PWs had failed to adduce evidence that prior to 08.05.1997, the fact of grant of occupancy tenancy to the predecessor-in- interest of the respondents was not known within their knowledge. As the suit was filed after 30 years in the year 1980 for declaring *khatian* granted in the year 1957-64 as illegal, it was held that the appellants had failed to prove that the suit was filed within the period of limitation and, as such, the issue was decided in the affirmative and against the appellants. In respect of issue No.4, it was held that the plea of mis-joinder was taken by the respondents, which was not fatal to the suit and, as such, the issue was decided in the negative and in favour of the appellants. In respect of issue No.5, it was held that the jurisdiction of the civil Court was barred from deciding the issue of grant of tenancy *khatian* to the respondents under Sections 66(c) and 66(1) of the Assam (Temporarily Settled Areas) Tenancy Act, 1971 and that the Revenue Court was the competent forum to deal with the question raised in the issue. In respect of issue No.6, it was held that in view of finding on foregoing issues, the appellants were not entitled to any relief in the suit.

10) In respect of issue No.7, it is was held that apart from a mere statement in the written statement against counter-claim there is nothing on record which hits at the maintainability of the counter-claim and, as such, the issue was decided in the affirmative and in favour of the respondents. In respect of issue No.8, it was held that there was cause of action for the counter-claim and the issue was decided in the affirmative and in favour of the respondents. In respect of issue No.9, it was held that as per *jamabandi* (Ext.A), the name of

the predecessor- in- interest of the plaintiffs was mutated in the year 1955 and that the respondents had failed to explain delay in filing their claim, as such, it was held that the counter-claim was barred by limitation and the issue was decided in the affirmative and against the respondents. In respect of issue No.10, it was held that there was no evidence in support of the plea of non- joinder of necessary parties, as such, the issue was decided in the negative and in favour of the respondents. In respect of issue No.11, it was held that Ext.A, as well as Ext.1, Ext.2, Ext.3 showed that the appellants were the *pattadars* and Ext.4 proved that the respondents were the occupancy tenant in respect of the suit land. However, as the respondents had filed Tenancy Case No. 9/1997 for grant of ownership rights, it was held that the projection in the counter-claim that the respondents were owner of the suit land was contradictory. It was held that the matter of grant of ownership right over the suit land would be decided in Tenancy Case No.9/1997 and unless such right is decided, the respondents cannot be regarded as owners of the suit land, as such, the issue was decided in the negative and against the respondents. Accordingly, in respect of issue No.12, the learned trial Court had dismissed the suit as well as the counter-claim.

11) The appellants- plaintiffs had preferred an appeal against the decree of dismissal of the suit, being Title Appeal No. 26/2004, which was made over to be tried by the learned Civil Judge (Senior Division) No.1, Kamrup, Guwahati. The respondents- defendants No.1, 2 and 3 had neither preferred any appeal against the dismissal of their counter- claim, nor had filed any cross objection in the said appeal. The learned first appellate Court upon hearing the learned counsel for the parties, had dismissed the said appeal by passing the judgment and decree dated 30.08.2005. On a perusal of the judgment passed by the learned first appellate Court, it is seen that the said learned Court had not framed any point of determination. However, the said learned Court had discussed issue No.3 and 5 framed by the learned trial Court. In respect of issue No.3, the said learned Court had taken note of the fact that the father of the appellants had died in 1951, and that on 08.05.1997, they had come to know that the name of Karuna Kanta Baruah, the predecessor- in- interest of the respondents No.1, 2 and 3 was entered as occupancy tenant in the settlement operation of the year 1957-64, and was of the view that the appellants were sleeping over their rights by not taking

steps for recording their names in respect of the suit land as per right of inheritance and that had they taken any steps for recording their names in the record of right, they would have certainly known that tenancy right was granted to the respondents No.1, 2 and 3, as such, it was inferred that the appellants had slept over their right and by holding that the appellants could not adduce any evidence that they had no knowledge about the fact of granting occupancy tenancy to the respondents No.1, 2 and 3 during the settlement process of 1957-64, it was held that the suit was barred by limitation and the decision of the learned trial Court on issue No.3 was held to be just and proper. In respect of issue No.5, the learned first appellate Court had held that the suit for declaring that the tenancy *khatian* granted to respondents No.1, 2 and 3 was illegal and was barred under Section 66(c) and (d) of the Assam (Temporarily Settled Areas) Tenancy Act, 1971 and it was further held that as Tenancy Case No. 9/1997 was still pending before the Revenue Court, it was the proper forum for the appellants. Accordingly, no infirmity was found with the decision by the learned trial Court on issue No.5. Moreover, it was held that there was no necessity for discussing issues on counter-claim and, accordingly, the appeal was dismissed and the judgment and decree passed by the learned trial Court was affirmed.

12) The learned counsel for the appellants has submitted that the learned first appellate Court has committed dereliction of its duty by neither framing points of determination nor by deciding the issues framed by the learned trial Court afresh. It is submitted that the appeal was an extension of the suit and therefore, the last Court of facts and, as such, by not deciding the issues afresh, the impugned first appellate judgment and decree is not sustainable. It is submitted that in the judgment of the learned trial Court, the list of witnesses and incomplete list of exhibited documents were mentioned, and there was no mention about Exts. No. 11, 13 and 14 and moreover, it is submitted that the sale deed exhibited by the appellants as Ext.10, was wrongly mentioned as "application", which amounted to perversity in appreciating evidence on record. It is also submitted that both the learned Courts below did not refer to or discussed any documents exhibited by the appellants- plaintiffs, or the evidence of the witnesses of either side, as such, it is submitted that the present case was a fit case for remanding the matter back to the learned trial Court.

13) It is submitted that important law points had been argued before the learned Courts below, but the learned Courts below had not gone into the legal points involved in the suit and in first appeal. In this connection, it is submitted that the suit land was under the jurisdiction of North Guwahati Town Committee. It is submitted that the rubber seal contained in Ext.F would show that the said Town Committee was established in the year 1950, as such, the occupancy tenancy rights could not have been granted to the respondents- defendants No.1, 2 and 3 in the settlement operation of 1957-64 and, as such, it is submitted that the grant of such occupancy tenancy right by recording the name of Karuna Kanta Baruah , the predecessor- in- interest of the respondents in respect of the suit land was ex facie illegal and, as such, the suit was maintainable on facts and in law. It is also submitted that the finding recorded by the learned first appellate Court to the effect that had the appellants applied for mutation after their father and predecessor- in- interest had died in the year 1951, they would have come to know about the recording of name of respondent's predecessor- in-interest in settlement operation of 1957-64 is based on surmises and conjunctures, as such, perverse because, there was no law in force by virtue of which the right of inheritance would be taken away if mutation of legal heirs of deceased holder of patta (i.e. *pattadar*) is not done immediately after his death. Moreover, the finding by the learned first appellate Court that the appellants did not lead any evidence to show that they had no knowledge about the entry of the name of father and predecessor- in- interest of the respondents in *khatian* as occupancy tenant is also perverse because it is too well established that the burden of negative proof could not have been imposed on the appellants- plaintiffs.

14) It is further submitted that the law is too well settled by several judgments of this Court that the revenue Courts cannot decide the right, title and interest in respect of the suit land and that if the order of the revenue Court can be shown to be illegal, the civil Court would have power and jurisdiction to annul such an illegal grant of *khatian* in favour of the predecessor- in- interest of the respondents.

15) In support of his submissions, the learned counsel for the appellants has extensively referred to the various provisions of (i) The Assam Land and Revenue Regulation, 1886, (ii) Assam (Temporarily Settled Areas) Tenancy Act, 1971, (iii) The Assam Municipal Act, 1956.

16) Moreover, reference to the following case citations has been made, viz., (i) *Ramesh Chand Ardawatiya Vs. Anil Panjwani (2003) 7 SCC 350* (para-26, 28) for the manner of filing counter-claim; (ii) *Management of Goodwill Girls high School Vs. J. Mary Susheela & Ors., (2003) 9 SCC 106* (para-12) on the point that Court ought not to have considered all the issues if no evidence was led; (iii) *V.M. Salgaokar & Bros. Vs. Board of Trustees of Port of Mormugao, (2005) 4 SCC 613* (para-27, 28) for the point that service of statutory notice is a pre-condition without which suit cannot be filed; (iv) *Vishwanath Achari Vs. Kanakasabapathy, (2005) 6 SCC 56* (para 8) for the point that decision of appellate Court on issue other than those framed is improper; (v) *Dharmarajan Vs. Valliammal, (2008) 2 SCC 741* (para 17) on the point that in the absence of revenue records there is no question of title over property; (vi) *Maria Margarida Sequeria Fernandes Vs. Erasmo Jack de Sequeria, (2012) 5 SCC 370* (para 70, 97) on the point of possessor as a licensor; (vii) *Daulatram Lakhani Vs. State of Assam, (1989) 1 GLR 131* (para 13, 22, 23) on the point that bar created under Regulation 154A of Assam Land And Revenue Regulation, 1886 would not operate when the question of title is raised and when the order of the Revenue Court is illegal; (viii) *Harimati Das Vs. Jadav Chandra Deka, 1990 (1) GLJ 304 (para-5)* on the point that revenue Court have power to consider possession but when issue of title arises, they have no jurisdiction to decide such an issue and the parties have to be referred to the civil Court; (ix) *Fazal Sheikh Vs. Abdur Rahman, AIR 1991 Gau 17 (FB)* (para 16) on the point that *khatian* issued under the Tenancy Act are not evidence of title, at most they would indicate possession.

17) Per contra, the learned counsel for the respondents No.1, 2 and 3 has submitted that the appellants had incorrectly presented the facts. It is submitted that land measuring 2 bigha- 3 katha- 11 lechas is the suit land and that the respondents are absolute owners thereof. The suit land belonged to Ghana Kanta Baruah, the grand- father of the

respondents No.2 and 3, who had built a large house which is still in occupation of the respondents No.1, 2 and 3 as his legal heirs. It is stated that Ghana Kanta Baruah had left his son, Karuna Kanta Baruah and on the death of Late Ghana Kanta Baruah and Late Karuna Kanta Baruah, the said property had devolved on the respondents. It is submitted that Ghana Kanta Baruah had married Sabhya and had two sons, Karuna Kanta Baruah and Suresh Baruah, but when Ghana Kanta Baruah died, Karuna Kanta Baruah was a minor and the land came to be mutated in the name of Suresh Baruah alone, but Suresh Baruah died issueless and the land was illegally mutated in the name of Nabin Chandra Baruah, father of the appellants, by showing the name of Karuna Kanta Baruah, the husband of respondent No.1 and father of respondents No.2 and 3 as occupancy tenant *(raiyot)* in settlement operation of 1957-64, when the respondent No.2 was still a minor. It is submitted that Nabin Chandra Baruah, father of the appellants was the brother of Sabhya, the mother of Karuna Kanta Baruah, who was the caretaker of the property left behind by Ghana Kanta Baruah, and belonged to a different family. It is submitted that the respondents No.1, 2 and 3 became aware of the claim made by the appellants for ownership rights over the suit land only on receipt of notice of the Tenancy Case No.9/1997 and, as such, they had filed their objection and thereafter the suit was filed by the appellants to prevent any decision to be rendered in the said tenancy case. It is submitted that only after receipt of notice of the said revenue case, upon enquiry, the respondents No.1, 2 and 3 came to know that fraudulently, Late Nabin Chandra Baruah had managed to get his name mutated in respect of the suit land.

18) In background of the said projection, the learned counsel for the respondents No.1, 2 and 3 has submitted that as Nabin Chandra Baruah was only a caretaker, the appellants were permissive occupier of the suit land and that the hostile activities of the appellants had started only in the year 1996, when the respondents No.1, 2 and 3 was compelled to institute proceedings under Section 145 Cr.P.C., which was numbered as Case No. 637/1996, which was pending when the suit was filed. It is submitted that the appellants could not prove how they derived title and in this regard, it is submitted that entry made in revenue records would not confer title. It is also submitted that the appellants did not prove that they were the legal heirs and/or representatives of Late Ghana Kanta Baruah, the

original title holder of the suit land and that the appellants had not proved that Late Karuna Kanta Baruah, the predecessor- in- interest of the respondents ever applied for getting his name recorded in the *khatian* as *raiyot*. The learned counsel for the private respondents has referred to *jamabandi* of year 1928 (Ext.A) in order to show that Ghana Kanta Baruah was the original *pattadar* of the suit land and on his death, the land was mutated in the name of Suresh Kanta Baruah and that vide remark No. "*Kha"*, in view of *chitha* order dated 26.03.1937, the land was mutated in the name of Nabin Chandra Baruah, the predecessor-in- interest of the appellants on 11.09.1937, although he is a rank outsider in the family of Late Ghana Kanta Baruah. It is also submitted that the name of the appellants was entered in the revenue records on the basis of remarks dated 22.02.1955 in the *jamabandi*, when the respondents were still minors.

19) The alternative submissions of the learned counsel for the respondents No.1, 2 and 3 is that in the *chitha* (Ext.1), the name of Karuna Kanta Baruah, son of Ghana Kanta Baruah is shown as *raiyot*. Therefore, as a legal heir of the *raiyot*, the respondents had a right of inheritance and their names are liable to be recorded in place of the deceased *raiyot*. It is also submitted that the appellants did not prove any record to show the date when the name of Karuna Kanta Baruah was recorded as *raiyot* and in this connection, it is submitted that it was not in dispute that their predecessor- in- interest was dead in 1971 when the Assam (Temporarily Settled Areas) Tenancy Act, 1971 was enacted. Thus, his tenancy was created under the Assam (Temporarily Settled Districts) Tenancy Act, 1935 and thus, such tenancy was created before the suit land was declared to be a municipal town land on creation of North Guwahati Town Committee in the year 1950 under the erstwhile Assam Municipal Act, 1923 and it is submitted that North Guwahati Town Committee could not have been established in the year 1950 under the Assam Municipal Act, 1956. In this connection, it is submitted that while the respondents No.1, 2 and 3 could establish that the occupancy tenancy was created prior to 1950, the appellants had miserably failed to prove the date when the suit land came to be included as a Town land under the North Guwahati Town Committee. It is alternatively submitted that if the tenancy is not reckoned under the Assam (Temporarily Settled Districts) Tenancy Act, 1935 then such tenancy must be held to be one

under the provisions of Assam Non- Agricultural Urban Areas Tenancy Act, 1955 and the possession of the respondents is protected under Section 5 thereof.

20) It is also submitted that Ext.10 was a title deed, but without any pleading in respect of the same, no amount of evidence could be looked into by any Courts. Similarly, Ext. Nos. 11, 13, and 14 were also introduced without any pleading and, as such, the learned trial Court had not committed any error in not taking note of the said exhibits. Moreover, it is submitted that the said Ext.10 was a photocopy and not the original volume book and was proved under objection and that the PW-4, who had proved the same was an employee of the Sub- Registry and did not give any statement about the parties thereto or the land in respect of which the said document was exhibited. The learned counsel for the respondents No.1, 2 and 3 had justified the finding of the learned trial Court on the issues No.1 to 6 in respect of the suit filed by the appellants. It is submitted that the issues No.1, 2, 4 and 5 were decided in favour of the appellants, as such, the learned first appellate Court had not committed any error in only limiting its decision on issues No.3, 5 and 6. In support of his submissions, the learned counsel for the respondents No.1, 2 and 3 has placed reliance on the case of (i) *Ramsarup Gupta (Dead) by LRs. Vs. Bishun Narain Inter College & Ors., (1987) 2 SCC 555* (para-6) for the point that non- reference to exhibited documents is not fatal, (ii) *Kalyan Singh Chauhan Vs. C.P. Joshi, (2011) 11 SCC 786: AIR 2011 SC 1127 (para- 28)* for the point that evidence beyond pleadings cannot be looked into.

21) The learned Govt. Advocate has submitted that the basic litigation is between the appellants and the respondents No.1, 2 and 3. Therefore, so long as the interest of the State is not hampered, he has nothing to submit.

22) The present appeal was admitted for hearing by order dated 09.06.2001, on the following substantial questions of law:-

1. *Whether the finding of the learned Courts below that the suit is barred by limitation is correct?*
2. *Whether in the facts and circumstances of the case, suit land being 'basti*

land' in town area, the provisions of Assam (Temporarily Settled Areas) Tenancy Act, 1971 is attracted?

3. *Whether the jurisdiction of the Civil Courts, in view of the issues raised by the plaintiffs, is ousted?*

Discussion on the substantial question of law No.1:

23) It is seen that the appellants- plaintiffs had stated in the plaint that they were owners of the suit land, but there is no statement as to how they or their predecessor- in-interest had derived title over the suit land, rather, in his cross- examination, the PW-1 had stated that he was not aware from where his father got the land. The PW-1 had also stated in his cross examination that in the *jamabandi* (Ext.1), it is not mentioned how the land was mutated in their name. Later on, PW-1 had admitted that the name of his father was mutated after removing the name of Suresh. The PW-1 had also admitted in his cross examination that his father was the maternal uncle of Suresh and that he did not know how the name of his father was mutated in place of Suresh. The PW-1 had stated that they had not seen Suresh Kanta Baruah, although he was 62 years of age when he had given his examination- in chief as PW-1 in Court and, as such, he must have been born in the year 1938. In his cross-examination, the PW-1 had further stated that the name of his father was mutated in the year 1937. The learned counsel for the appellant had submitted that Ghana Kanta Baruah, the predecessor- in- interest of the respondents had sold the suit land to their father, Late Nabin Chandra Baruah vide Sale Deed No. 217/34 (Ext.10), proved by Bipin Chandra Goswami (PW-4, wrongly written as PW-3), but there is total absence of pleading in respect of the said sale deed in the plaint as well in the written statement by the appellants to the counter-claim of the respondents. In his examination- in- chief as PW-1, the appellant No.2 did not prove the said sale deed No. 217/34 (Ext.10), rather he had specifically stated in his cross- examination that they did not get the sale deed of their father and that no such sale deed was filed in Court. Moreover, although the appellants had stated in the plaint that the name of Karuna Kanta Baruah was illegally entered in *khatian* in the settlement operation of 1954-67, but the appellants did not call for (i) the records of settlement operation of the year 1954-67, or (ii) the land revenue records to prove the date when the said name was entered

in *khatian* as occupancy tenant. The PW-1 had also stated in his examination- in- chief as well as in his cross examination that his father had died in the year 1951. Thus, if the father of the appellants had died in the year 1951, the suit land must have been mutated in the name of the father of the appellants prior to his death after deleting the name of Suresh Kanta Baruah, son of Late Ghana Kanta Baruah. PW-1 had also submitted that the predecessor- in-interest of the respondents was the *Tehsildar* had built a *haweli*. Thus, it cannot be conceived that Ghana Kanta Baruah would built a mansion and his son would be a care-taker under the father of the appellants and yet reside in the same house built by his father. Accordingly, it is seen that through the cross- examination of PW-1, the appellants had admitted the case as projected by the learned counsel for the appellants. Moreover, the appellants had not taken any steps to prove the date when the suit land came to be included in North Guwahati Town Committee. It may be stated that in his cross examination, the PW-1 had stated that his father had allowed Karuna Kanta Baruah to look after the land in the year 1950 as a caretaker and that prior to 1950, they were looking after the land themselves.

24) Thus, the appellants could not prove their title over the suit land, and that the case projected by the respondents was proved through the cross examination of PW-1 to the effect that the suit land was the ancestral land of the predecessor- in- interest of the respondents, but the said land was mutated in the name of Nabin Chandra Baruah, who was the maternal uncle of the respondents No.2 and 3 after deleting the name of Late Suresh Kanta Baruah in the year 1937, it must be deemed that the appellants were aware of the entries made in the land revenue records regarding entry of the name of Karuna Kanta Baruah as *raiyot* with effect from a date prior to such land being included as town land under North Guwahati Town Committee. Thus, it is seen that the appellants had avoided mentioning the relevant dates, which had come out in course of cross- examination of PW-1 and the preponderance of probability is that the appellants wanted to avoid disclosure of such dates, which would expose that their suit was barred by limitation.

25) Therefore, it is seen that the appellants could not disprove that the suit was barred by limitation. Accordingly, there is no material before the Court to disagree with the

concurrent finding by the learned Courts below and, as such, the substantial question of law No.1 is answered in the affirmative and against the appellant by holding that the finding of the learned Courts below that the suit is barred by limitation is correct.

Discussion on substantial question of law No.2:

26) The learned counsel for the appellants had submitted that the suit land was a *basti* land, falling within the municipal area. But, the appellants had not called for and proved any municipal records from the North Guwahati Town Committee to show the date when such land came to be included as land falling under municipal area. The PW-1 had proved the case of the respondents in his cross examination by admitting that Ghana Kanta Baruah was the *Tehsildar* and had built a *haweli* (mansion), where the respondents were residing. The PW-1 could not prove how his father and title over the suit land and how the name of his father came to be mutated in place of Suresh Kanta Baruah.

27) The Assam (Temporarily Settled Areas) Tenancy Act, 1971 had come into force on and from 10.12.1971. By virtue of Section 76 thereof, (i) The Assam (Temporarily Settled Districts) Tenancy Act, 1935, and (ii) the Assam Adhiar Protection and Regulation Act, 1948 were repealed. Moreover, prior to 10.12.1971, the Assam Non- Agricultural Urban Areas Tenancy Act, 1955 had existed. Thus, when the Assam (Temporarily Settled Areas) Tenancy Act, 1971 had come into force on and from 10.12.1971, it is not possible that the name of Karuna Kanta Baruah, the predecessor- in- interest of the respondents would be entered in the *khatian* as occupancy tenant in the settlement operation of 1957-64. Thus, the preponderance of probability tilts in favour of submission made by the learned counsel for the respondents that such an entry must have been made by the land revenue authorities under the under any one of the previous enactments like (i) The Assam (Temporarily Settled Districts) Tenancy Act, 1935 (since repealed), or (ii) the Assam Adhiar Protection and Regulation Act, 1948 (since repealed), or (iii) Assam Non- Agricultural Urban Areas Tenancy Act, 1955. Moreover, as the North Guwahati Town Committee was established in the year 1950, the said Town Committee could not have been constituted under the Assam Municipal Act, 1956 but it was constituted under the Assam Municipal Act, 1923 (since repealed).

Therefore, without proving the date when the suit land came into the jurisdiction of the North Guwahati Town Committee, even if the suit land is a '*basti*' land in town area, the tenancy having been created prior to the enactment of the Assam (Temporarily Settled Areas), Tenancy Act, 1971, the said provisions is held to be not attracted in so far as the respondents are concerned. The substantial question of law No.2 is answered accordingly, against the appellants. Thus, the decision of the learned Courts below on issue No.5 cannot be faulted with.

Discussions on substantial question of law No.3:-

28) In view of the discussions above, the Court is of the considered opinion that the name of Karuna Kanta Baruah, the predecessor- in- interest of the respondents was not entered in the *khatian* under the provisions of Assam (Temporarily Settled Areas), Tenancy Act, 1971.

29) It is seen that in the present case in hand the appellants had not sought for any declaration of their title in respect of the suit land. Moreover, the appellants have not been able to establish by admissible evidence that the name of Karuna Kanta Baruah, the predecessor- in- interest of the respondents was illegally entered in the *khatian* illegally as occupancy tenant. Rather, it is seen that in his cross examination, the PW-1 had virtually admitted the case of the respondents, but the respondents had not preferred any appeal against the dismissal of their counter-claim, as such, the decree of dismissal of the counter-claim has attained finality.

30) Notwithstanding the finding recorded herein before in respect of substantial question of law No.2 to the effect that the preponderance of probability tilts in favour of submission made by the learned counsel for the respondents that such an entry must have been made by the land revenue authorities under the under any one of the previous enactments like (i) The Assam (Temporarily Settled Districts) Tenancy Act, 1935 (since repealed), or (ii) the Assam Adhiar Protection and Regulation Act, 1948 (since repealed), or (iii) Assam Non- Agricultural Urban Areas Tenancy Act, 1955. Moreover, as the North

Guwahati Town Committee was already established in the year 1950, the said Town Committee could not have been constituted under the Assam Municipal Act, 1956 but it was constituted under the Assam Municipal Act, 1923 (since repealed), but it is too well settled that the second appellate Court cannot make out a new case which was not pleaded by any of the parties. Therefore, in light of the said observations, it is seen that in paragraph 5 of the plaint, the appellants had taken a stand that "... *The suit land is basti-land and so the provisions of the Assam (Temporarily Settled Areas), Tenancy Act, 1971 are not applicable to the basti-land and to the land within the area of Municipal Town*..." It appears that in light of the said pleading, the learned Courts below had held that the jurisdiction of the civil Courts is ousted under Section 66(c) of the Assam (Temporarily Settled Areas), Tenancy Act, 1971.

31) Thus, when the suit filed by the appellants is not for declaration of title and when the appellants had failed to establish that the name of the predecessor- in- interest of the respondents was illegally entered in the *khatian* as *raiyot*, the jurisdiction of civil Courts is ousted under Section 66(c) and 66(d) of the Assam (Temporarily Settled Areas), Tenancy Act, 1971 and this position is fortified by the case of *Daulatram Lakhani (supra)* and *Harimati Das (supra)* cited by the learned counsel for the appellants. Thus, the decision of the learned courts below on issue No.5 cannot be faulted with and accordingly, the substantial question of law No.3 is answered in the affirmative and against the appellants that the jurisdiction of the Civil Courts, in view of the issues raised by the appellants- plaintiffs, is ousted.

32) It would be pertinent that few other points raised by the learned counsel for the appellants be answered:-

a. *Non- mentioning of Ext. Nos. 11, 13 and 14 and that Ext.10 was wrongly mentioned as "application", though it was photocopy of sale deed*: It was urged that the learned trial Court had not made any mention about Ext. Nos. 11, 13 and 14 and that Ext.10 was wrongly mentioned as "application. In this regard, it is seen that the PW-1 had marked Ext. Nos. 1 to 10. In his examination- in- chief, the PW-1 had mentioned Ext.10 to be an application made by the respondents No.1, 2 and 3. The said application (Ext.10) is found to be marked at page No.5 of

Tenancy Case No. 9/1997, which was called for from the Court of A.D.C., Kamrup. It is further seen that when the appellants had examined Bipin Chandra Goswami (as PW-4, wrongly written as PW-3), the appellants had marked photocopy of the Sale Deed No.217 /34 as Ext.10 (second). The appellants had examined Satish Chandra Das, as PW-3. The said witness was working as *Mandal*. The said PW-3 had marked documents from Tenancy Case No. 9/1997 as Ext.11(1), 11(2) and 11(3). But, the said documents, which are found available at pages 4 and 5 of the said revenue records, are seen to be marked as Ext.13 and Ext.14. Thus, the document at page-4 of the Tenancy Case No. 9/1997 has been marked by the appellants as Ext.10 as well as Ext.13. Despite a thorough search made by the learned counsel for the appellants as well as respondents No.1, 2 and 3 in Court, no document was found to be marked as Ext.11(1), Ext.11(2) , Ext.11(3) or Ext.12. None of the four PWs had exhibited Ext.12. Therefore, the learned trial Court cannot be blamed for its omission of not referring to any documents other than Ext. Nos. 1 to 10. The appellants- plaintiffs have improperly marked exhibits No. 10, 11, 13 and 14, as such, no fault is found with the learned trial Court as regards improper reference to exhibits. Moreover, the Sale Deed No. 217/34 (second Ext.10) is found to be a photocopy. The PW-4 had stated in his cross examination that the document was certified copy given by the Registrar's Office. However, there is no endorsement in the photocopy of the said sale deed that it was certified by the Sub- Registrar, Kamrup as a true copy. Moreover, on reading the examination- in- chief of Bipin Chandra Das (PW-4, wrongly mentioned as PW-3) it does not appear that original volume book was brought for examination by the learned trial Court. The PW-4 had not given any statement as to who were the parties to the said sale deed, or whether the said sale deed relates to the suit land. Thus, the Sale Deed (second Ext.10) cannot be read in evidence, and it does not prove anything. Moreover, Ext.13 and Ext.14 relates to the Tenancy Case No. 9/1997, and neither the said proceeding nor any order passed therein is the subject matter of the suit. Hence, the appellants are not found to have suffered any prejudice by the lack of reference to the said document in the judgment passed by the learned trial Court. Ext. 10 (first), Ext.11, Ext.13 and Ext.14.

b. *Failure of the learned first appellate Court to formulate points of determination or to decide issues other than issue No.3 and 5:* In this regard, the appellants had not challenged the decision of the learned trial Court on issues No.1, 2 and 4, which were decided in favour of the appellants. Therefore, in the considered opinion of the Court, there was no necessity for the learned trial Court to re-visit the said issues. In respect of issues No. 7 to 12, those had been framed for the purpose of deciding the counter-claim. However, as the counter-claim was dismissed and no appeal and/or cross objection was preferred by the respondents, there was no necessity for the learned first appellate Court to re-visit the said issues. Thus, as the learned first appellate Court had re-visited issues No.3, 5 and 6, non- framing of points of determination as required under Order XLI, Rule 31 CPC is not found to be fatal.

c. *Lack of discussion of exhibited documents:* While discussing substantial questions of law, it has been discussed that the appellants did not prove the relevant dates (i) when their predecessor- in- interest had got his names mutated in the record of rights, (ii) date when the name of Karuna Kanta Baruah was entered in *khatian* as occupancy tenant, (iii) date when suit land came within the jurisdiction of North Guwahati Town Committee, (iv) dates when various names came to be recorded in the *jamabandi, chitha*, etc. Therefore, the documents exhibited by the appellants are of recent origin and have no relevance once the PW-1 has admitted in his cross examination that the estate of Ghana Kanta Baruah was inherited by Suresh Kanta Baruah and that he did not know how the name of his father, namely, Nabin Chandra Baruah was entered in place of Suresh Kanta Baruah, and that his father was the maternal uncle of the respondents, because while the respondents have been able to trace their lineage with Ghana Kanta Baruah, the appellants have not been able to trace their own lineage with Ghana Kanta Baruah. Moreover, the PW-1 had admitted in his cross- examination that Ghana Kanta Baruah was a *Tehsildar* and had constructed a *haweli* (mansion), where the respondents are living, documents of 1995-97 showing that some construction was carried out by the appellants had no relevance. Therefore, no infirmity is found with the concurrent finding by the both the learned Courts below

merely for not referring to exhibits in their respective judgments because it is too well settled that a mere marking of documents as exhibits is not sufficient, but the contents of the documents is required to be proved and the learned counsel for the appellants has not been able to satisfy the Court that contents of any of the documents marked as exhibits by the appellants had been duly proved in accordance with law.

d. *Counter-claim was not in accordance with law:* In this connection, it is submitted that the written statement and the counter-claim was not filed jointly, but the written statement and the counter-claim were filed separately. It is seen that in the written statement, there is a mention about the counter-claim, and the counter-claim is filed separately. It is seen that the counter-claim had been dismissed and no appeal has been preferred by the respondents No.1, 2 and 3, as such, there is no need to go into that aspect of the matter.

e. *Cases cited by the learned counsel for the appellants:* The purpose of citing case law has been indicated in paragraph 16 above. In view of the decision on the substantial question of law, it would be suffice to mention that none of the cases cited by the learned counsel for the appellants are found to help the appellant in any manner whatsoever. The case of *Ramesh Chand Ardawatiya (supra)* in respect of counter-claim, but as there is no cross objection by the respondents No.1, 2 and 3 in respect of their counter-claim the said case is not found to help the appellants. The Courts below had not granted any title to the respondents No.1, 2 and 3 on the basis of *khatian or revenue records*, as such, the case of *Fazal Sheikh (supra)* and *Dharmarajan (supra)* and is of no help to the appellants. Though the learned counsel for the appellants has cited the case of *Management of Goodwill Girls High School (supra)*, but no submission has been made that which Court had considered any point on which no evidence was led. Similarly, the case of *V.M. Salgaokar & Bros.(supra)* was cited without mentioning the reason for citing the same. Although the case of *Vishwanath Achari (supra)* was cited, but no submission has been made that which point the appellate Court had decided, which was not based on issues framed by the learned trial Court. On facts as discussed above, the case of *Dharmarajan (supra), Maria Margarida Sequeria Fernandes (supra)*, *Daulatram*

Lakhani (supra) and *Harimati Das (supra)* also does not help the appellants in any manner.

33) In view of the discussions above, the appeal fails and the same stands dismissed with cost. Resultantly, the decree of dismissal of the suit, as passed by both the learned Courts below stands affirmed. Let a decree be prepared accordingly.

34) The LCRs be returned back. The learned trial Court shall see that the records of Tenancy Case No.9/1997 be expeditiously returned to the Revenue Court concerned after retaining a photocopy of the exhibited documents in file No.C[1].

JUDGE

Comparing Assistant