

BEFORE

THE HON'BLE MR. JUSTICE B.P. KATAKEY

This appeal by the plaintiffs are directed against the judgment and decree dated 29th August, 2001 passed by the first appellate Court in Title Appeal No.41/2000, partly decreeing the suit of the plaintiffs by reversing the judgment and decree dated 22nd August, 2000 passed by the learned Civil Judge (Jr. Division), Hojai in Title Suit No.35/1995, whereby and whereunder the plaintiffs' suit was dismissed.

[2] The predecessor-in-interest of the present appellants, namely Harikrishna Dalai, instituted the aforesaid suit against the predecessor-in-interest of the present respondent Nos.1 to 4, namely, Prameswar Das, praying for a decree declaring his right, title and interest in respect of Schedule-A land, measuring 3 Bighas 4 Kathas covered by Dag No.79 of Periodic Pata No.33 of Dalpukur Kissam under Hojai Mouza in the district of Nagaon; for confirmation of possession in respect of the Schedule-C land, measuring 1 Bigha 4 Kathas, out of the Schedule-A land and for recovery of khas possession in respect of Schedule-B land measuring 2 Bighas, which is also the part of the Schedule-A land, contending inter alia that the Schedule-A land originally belonged to the proforma defendant No.8, Sri Harendra Dalai which was, however, transferred to the plaintiffs by registered sale deed dated 30th March, 1977 (Exhibit-1) and accordingly, the plaintiffs have acquired the right, title and interest over the said land. It has also been pleaded that on 7th March, 1984, there was an attempt made by the original defendant to dispossess the plaintiffs from Schedule-B land, which having been resisted by the plaintiffs, though they failed in their design, the plaintiffs, however, were subsequently dispossessed from the Schedule-B land on 14th December, 1988, for which the plaintiffs have to institute the suit for declaration of right, title and interest over Schedule-A land, confirmation of possession in respect of Schedule-C land and recovery of khas possession in respect of Schedule-B land.

[3] The claim of the plaintiffs have been resisted by the defendant Nos.1(a) to 1(d) (respondent Nos.1 to 4 in the appeal), the successors-in-interest of the original defendant, by filing written statement contending inter alia that the suit is barred by time and that the defendants have perfected their right by right of adverse possession. The defendants have denied the title of the plaintiffs and have contended that they are possessing the said land for about 45 (forty-five) years initially through their predecessor-in-interest and presently by them.

[4] On the basis of the pleadings, the Trial Court framed the following issues for determination:-

- 1) Is there any cause of action for the suit?
- 2) Is the suit maintainable in its present form?
- 3) Is the suit barred by waiver, estoppel and acquiescence and law of limitation?
- 4) Whether the plaintiff has right, title and interest over the suit land?
- 5) To what relief, if any, is the plaintiff entitled to?

Addl. issue:

- 6) Whether the plaintiff was in possession of the land described in the Schedule 'A' of the plaint, and whether the plaintiff was dispossessed by the defendant on or about 14/12/88 from the land described in the Schedule 'B' of the plaint

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[5] The plaintiffs in support of their claim examined 4(four) witnesses and proved 4(four) documents, namely the sale deed dated 30th March, 1977 (Exhibit-1); the Periodic Kheraj Patta issued in favour of the original owner, namely Harekrishna Dalai (Exhibit-2); copy of the Jamabandi for the settlement year 1968-69 in respect of Dag No.79 of Periodic Patta No.33 (Exhibit-3) and the copy of the order passed by the Additional Deputy Commissioner, Nagaon in the mutation proceeding (Exhibit-4). The defendant examined 3(three) witnesses including the defendant No.1(b) himself. The trial Court, upon appreciation of the evidences as adduced by the parties, dismissed the suit by holding that the suit is barred by limitation in view of the provisions contained in Article 64 of the Limitation Act, 1963.

[6] Being aggrieved, the plaintiffs preferred the aforesaid appeal, which has been partly decreed, as noticed above. Hence, the present appeal.

[7] The appeal was admitted for hearing vide order dated 4th January, 2002 on the following substantial question of law:-

Whether the learned Court below committed error in fact and law in not granting a decree for recovery of possession of the suit land by evicting the respondents?

[8] During the pendency of the appeal, the original plaintiff died and in his place the present appellants were substituted.

[9] I have heard Mrs. T. Goswami, learned counsel for the appellants and Mr. B.R. Dey, learned senior counsel appearing for the respondent Nos.1 to 4, who were the defendant Nos.1(a) to 1(d) in the suit. None appears for the other respondents.

[10] Mrs. Goswami, learned counsel appearing for the appellants referring to the pleadings in the plaint as well as in the written statement has submitted that the First Appellate Court has refused to pass a decree for recovery of khas possession in respect of Schedule-B land solely on the ground that the defendant Nos.1(a) to 1(d) being the tenant, they cannot be evicted without initiating a proceeding under the provisions of the Assam (Temporarily Settled Areas) Tenancy Act, 1971 (in short, the Act). The learned counsel submits that it was neither the case of the plaintiffs nor of the defendants that the defendants are the tenant in respect of the land and as such, the learned First Appellate Court solely based on the Exhibit-3 Jamabandi ought not to have refused to pass a decree for recovery of khas possession in respect of Schedule-B land, when the First Appellate Court has held that the plaintiffs have right, title and interest in respect of the Schedule-A land. It has also been submitted that it is not being the case of the defendants that they are possessing the Schedule-C land, the learned first appellate Court ought to have passed a decree confirming the possession of the plaintiffs in respect of Schedule-C land.

[11] Mr. Dey, learned senior counsel appearing for the respondent Nos.1 to 4, on the other hand, supporting the judgment and decree passed by the First Appellate Court has submitted that as it is evident from the Exhibit-3 Jamabandi that the land covered by Dag No.79 is the Rayati land in respect of which ri yati khatian has been issued, the First Appellate Court has rightly refused to pass a decree for khas possession in respect of Schedule-B land, for which it has also rightly been held that the plaintiffs have to institute the proceeding under the provisions of the 1971 Act. Mr. Dey, learned senior counsel, however, has fairly submitted that the defendants having no claim in respect of Schedule-C land, the Court below could have pass the decree for confirming the possession of the plaintiffs in respect of Schedule-C land. Mr. Dey has further submitted t

hat it is being the pleaded case of the defendants in the written statement and also the evidence relating to the claim of adverse possession having been led by them, by examining their own witnesses and also by cross-examining the plaintiffs' witnesses, the Court below ought not to have decreed the suit of the plaintiffs without deciding the claim of adverse possession, which having not been done, it is a fit case for remand to the first Appellate Court to record the finding relating to the claim of adverse possession on the basis of the evidences adduced.

[12] I have considered the submissions advanced by the learned counsel appearing for the parties and also perused the judgments and decrees passed by the learned Courts below.

[13] As noticed above, the case of the plaintiffs in the plaint is that they acquired the right, title and interest by virtue of purchase, vide registered sale deed dated 30th March, 1977 (Exhibit-1) from the original owner Harekrishna Dalai. The defendant Nos.1(a) to 1(d) (respondent Nos.1 to 4 in the appeal) have pleaded that they are in possession of the land described in Schedule-B of the plaint for about 45(forty-five) years, initially through their predecessor in interest and presently by themselves. The defendants have denied the title of the plaintiffs and according to them, they are possessing the same by clearing jungle and their right over the Schedule-B land has been perfected by adverse possession. It is neither the case of the plaintiffs in the plaint nor the case of the defendants in the written statement filed that the defendants are tenant either under the plaintiffs or the original owner, namely Harekrishna Dalai.

The defendants in the written statement have, however, pleaded the adverse possession.

[14] The trial Court, in view of the above, ought to have framed the specific issue relating to the adverse possession, which, however, has not been done. Even in the absence of any specific issue on the question of adverse possession, the parties, as it appears from the evidences available on record, adduced evidence and as such, non framing of the issue would not be a ground for non-deciding the question relating to the adverse possession by the Court below.

[15] It appears from the judgment passed by the First Appellate Court that the plaintiffs could prove their title over the Schedule-A land by right of purchase vide registered sale deed dated 30th March, 1977 (Exhibit-1), which was duly proved. The First Appellate Court based on the said sale deed has declared the right, title and interest of the plaintiffs over the Schedule-A land, without going into the question relating to adverse possession. It has, however, refused to pass a decree for recovery of khas possession in respect of Schedule-B land, which is part of the Schedule-A land, on the ground that the defendants being the tenant, the plaintiffs have to initiate the proceeding under the provisions of the aforesaid Act for their eviction. Such finding by the First Appellate Court cannot be sustained as it is nobody's case that the defendants are tenant. There is also no evidence on record to demonstrate that the defendants are tenant. The First Appellate Court was also not right in refusing to pass a decree for recovery of khas possession in respect of Schedule-B land solely on the ground that in the jamabandi (Exhibit-3), in respect of Dag No.79 of periodic patta No.33, there is a note relating to tenancy, without recording any finding as to the total land in that Dag, as the plaintiffs claim their right only in respect of 3 bighas 4 kathas of land and the tenancy may be in respect of other land in that Dag. In any case, no finding relating to the tenancy can be recorded by the First Appellate Court even if there is evidence on record to that effect, as neither of the parties has pleaded the existence of tenancy in the plaint or the written statement filed. The First Appellate Court, however, ought not to have decreed the suit of the plaintiffs declaring their right, title and interest in respect of the Schedule-B land, which is part of the Schedule-A land, without deciding the claim of the defendants for adverse possession. The decree declaring t

he right, title and interest of the plaintiffs and for recovery of khas possession in respect of the Schedule-B land would depend upon the determination of the plea of adverse possession taken by the defendants in respect of Schedule-B land .

[16] There is no dispute that the plaintiffs are in possession of the Schedule-C land, which land is also part of the Schedule-A land and purchased by the plaintiffs vide Exhibit-1 sale deed dated 30th March, 1977. The defendants have also no claim in respect of the Schedule-C land. The First Appellate Court has completely overlooked the said position and did not pass a decree declaring the right, title and interest of the plaintiffs in respect of the Schedule-C land and also the confirmation of possession.

[17] In view of the above, while decreeing the suit of the plaintiffs declaring their right, title and interest and confirmation of possession in respect of Schedule-C land, which is part of the Schedule-A land, the case is remitted to the First Appellate Court to record finding relating to the plea of adverse possession taken by the defendants in the written statement and on the basis of the evidences already adduced by the parties and to pass a decree relating to the claim of the plaintiffs for declaration of right, title and interest and recovery of khas possession in respect of Schedule-B land.

[18] The Parties are directed to appear before the First Appellate Court, i.e. the Court of the learned Civil Judge No.1, Nagaon, on 20th December, 2012. The First Appellate Court shall make all endeavour to decide the appeal, as directed, within a period of 2(two) months from the date of appearance of the parties, as fixed by this Court.

[19] It is, however, made clear that the First Appellate Court would not go into the question of title and confirmation of the possession of the plaintiffs in respect of Schedule-C land, which has already been decreed by this Court by this judgment.

[20] The appeal is accordingly allowed. No costs

[21] The Registry is directed to send down the records forthwith, so as to reach the First Appellate Court on or before 17th December, 2012.