

HIGH COURT FORM NO- (J) 2
HEADING OF JUDGMENT IN ORIGINAL SUIT

District-Kamrup

In the Original Court of Munsiff No. 2

Present- Ms. S. Handique

Thursday the 4th day of Aug'2012

Title Suit No. 904/06 (T.S. 441/04)

Shree Gauhati Gaushala

Plaintiffs

V

Smti Putuli Das & 3 ors.

Defendants

This suit coming for final hearing on 23-7-12 in presence of

Mr. D. K. Bhatra,
Mr. S.S.S Sharma,
Mr. S.K. Sanganeria

Advocates of the plaintiff

Mr. K. Sharma

Advocates of the defendant

And stood for consideration to this day the court delivered the following judgment.

J U D G M E N T

This is a suit for recovery of Khass possession and realization of damages and mesne profits. The case of the plaintiff in brief is as follows :-

The plaintiff is a registered public trust owning 242 bighas 3 katha 9 lechas of land falling under dag No.11 & 12 under F.S. Grant No.1 situated at Maligaon which is described as schedule A in the plaint. The land is being used for grazing, maintenance of cows and other incidental and ancillary purposes. The schedule A land consist of both plain well as hillocks and the plaintiff has leased out some of the hillocks to quarries. The defendants are illegally occupying schedule B land which is a part of schedule A land. The plaintiff has pleaded that about 7 acres of hillock land in dag no.11 was leased out to one Om Prakesh Saraf for quarrying purpose since 1974 and Late Ganesh Ch. Das, the predecessor-in-interest of the defendants was a labour supplier. Late Ganesh Ch. Das was allowed to construct a thatched house in one portion of the hillock land leased out to Om Prakesh Saraf. So, Late Ganesh Ch.Das, his wife, i.e., the defendant No.1 were permissive occupiers of the schedule B land and they were occupying the land peacefully till 1992. But from the later part of 1992 late Ganesh Ch. Das on being misguided by someone started to claim that the land is sarkari land and does not belong to the plaintiff. After expiry of the lease deed, Om Prakesh Saraf surrendered possession of the land to the plaintiff in 1990. But Late Ganesh Ch. Das sought for some time to vacate the schedule B land. The plaintiff stated that Late Ganesh Ch. Das instead of vacating the land filed one proceeding under Sec. 145 Cr.P.C. and got the land attached. The plaintiff then filed T.S. No. 546/96 against Ganesh Ch. Das and his wife Putuli Das in the court of Ld. Civil Judge (Jr. Div) No.1, Kamrup. However, that T.S No. 546/96 was held to be not maintainable by the Ld. Court vide judgment dated 29.06.04 as the suit was filed through its Manager. Hence, the present suit is filed through the general secretary of the plaintiff trust. The plaintiff alleges that the defendants are in illegal occupation of the suit land and are liable to be evicted and are also liable to pay compensation for their illegal occupation.

The defendants filed their written statement denying the case of the plaintiff. They took the usual pleas that the suit is not maintainable, the suit hit by principle of res-judicata, the suit is hit by Art. 64/65 of the Limitation Act, 1963, is bad for non joinder of necessary parties and so on. The defendants denied that the plaintiff is a public trust and that the grazing grounds belong to the plaintiff. They on the other hand, alleged that the plaintiff for ulterior purpose used the so called grazing land for quarrying even though the plaintiff claims that the land was settled by the Govt. in its name for the Goshala. The defendants took the plea that they are in position of the land for the past 70 years since the days of the grandfather of defendant no. 1 and their possession has acquired legal status. According to them, the government temporarily settled the land and lost its title over the land u/Art. 111 and the plaintiff lost title to the land u/Art. 65 of the Limitation Act. It is however, admitted by the defendants that Late Ganesh

Das was labour sardar under Om Prakesh Saraf. But they denied that there existed any landlord tenant relationship between the parties. According to them, they have been occupying Govt. land since prior to settlement of the land with plaintiff. They denied that they are the permissive occupiers of the land. It is contended that they were earlier paying touzi bahira khazana and claimed that they have acquired adverse possessory title to the suit land. Hence the defendants prayed for the dismissal of the suit.

The following issues were framed by my Id. predecessor:

ISSUES :

1. Whether the suit is maintainable in its present form?
2. Whether there is cause of action for the suit?
3. Whether the defendants are in unauthorized and illegal occupation of the B schedule land and are liable to be evicted there from?
4. Whether the plaintiff is entitled to the relief claimed in the suit?

DISCUSSIONS AND RESONS THEREOF:

The plaintiff examined three witnesses and adduced documentary evidence in support of its case. The defendant side filed evidence on affidavit of three D.W.s but D.W. 2 & DW3 evidence were expunged as these witnesses failed to face the dock for cross examination. Heard arguments from both the sides.

Decision on issue No.1

The defendants have contended that the suit is not maintainable as the earlier suit for the same cause of action has been dismissed and the present suit is barred by the principle of res-judicata. It is an admitted fact that the plaintiff filed T.S. 546/96 prior to this case. In the earlier suit the plaintiff prayed for declaration of right, title and interest and also for recovery of possession of the suit land and in that suit also the plaintiff narrated the same story. The defendants of that suit (late Ganesh Das and present defendant no. 1) took the plea that they are in possession of a land measuring 2 kathas in dag No.7 and not dag No.11. The defendants had pleaded in that suit that they were in possession of the land for the past 70 years and their possession is adverse to the plaintiff. Their plea was that the land was never allotted to the plaintiff but it belonged to the Kamakhya temple and thereafter it vested with the Govt. I have perused the judgment of Ld. Civil Judge (Jr. Div.) No. 1, Kamrup, dated 29/06/04. The Ld. Court while deciding the issue of maintainability held that the suit was not maintainable as it was not filed by a person authorized to file the suit. As the suit was held to be not maintainable the Ld. Court held that the defendants are not liable to be evicted and the plaintiff is not entitled to get the decree.

Now coming to the principle of res judicata, I find that this principle is not attracted in the present case. Where res judicata is pleaded by way

of estoppel to an entire cause of action, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact.

The rule of res judicata incorporated in section 11 of the Code of Civil Procedure, 1908 prohibits the court from trying an issue which "has been directly and substantially in issue in a former suit between the same parties", and has been heard and finally decided by that court. It is the decision on an issue, and not a mere finding on any incidental question to reach such decision, which operates as res judicata. The earlier suit was dismissed for being not maintainable and the plaintiff was held to be not entitled to the decree for declaration of right, title and interest and recovery of possession. So the substantial issue of right, title and interest of the plaintiff and the illegal occupation of the land by defendants were not finally decided but were merely decided in the negative as the suit was held to be non-maintainable. So the earlier decision would not operate as res judicata.

The instant suit is now filed by one of the trustees of the plaintiff trust who is also the General Secretary of the trust who is the duly constituted attorney of the plaintiff vide resolution dtd 23-9-04 (Ext. 2) and General Power of Attorney deed dtd 29-10-04 (Ext. 3). There is no dispute in this regard.

Hence I decide issue no. 1 in the affirmative.

Decision on issue No. 3

The plaintiff side examined Sri Rampal Sikaria, one of the trustees of the plaintiff as P.W.1. P.W.1 is the General Secretary of the plaintiff trust. He deposed in his examination- in -chief that Late Ganesh Ch. Das was a permissive occupier of the schedule B land. According to him, Late Ganesh Ch. Das, the predecessor in interest of the defendants was labour sardar under Om Prakesh Saraf to whom seven acres of land in dag No.11 was leased out in 1974. He also stated that Late Ganesh Das and his wife, i.e., defendant no.1 recognized the plaintiff as absolute owner of the suit land and he was allowed to retain possession of the land even after expiry of the lease deed with Om Prakesh Saraf in 1990. Late Ganesh Ch. Das and his family till 1992 did not challenge the right, title and interest of the plaintiff over the schedule B land. But from the later part of 1992 he and his wife started claiming that the suit land is a sarkari land. P.W.1 further stated that a proceeding under sec. 145 Cr.P.C. and one complaint case were lodged by the defendant against the plaintiff. He alleged that late Ganesh Das and his family continued in their illegal occupation in spite of repeated requests by the plaintiff. He admitted that T.S. 546/1996 was instituted against Late Ganesh Das and his wife by the plaintiff but it was dismissed for being not maintainable.

P.W.1 exhibited the following documents in support of his case.

Ext. 1: copy of the trust deed.

Ext. 2: Authorization letter in favour of P.W.1.

Ext. 3 : General Power of Attorney executed by the chairman of the plaintiff trust in favour of P.W.1 and Santosh Kr. Sharma, Manager of the plaintiff.

Ext. 4 & 5: Copies of leased deed dated 28/04/81 & 28/06/84.

Ext.6: Deed of declaration executed by Om Prakesh Saraf bearing his signature.

Ext.7 : Order dated 30/01/92, passed by SDM, Guwahati in C.R. Case No. 48m/92.

Ext.8 : Certified copy of judgment dated 31/07/95, passed by Ld. CJM, Kamrup, in C.R. Case No. 78/92.

Ext.9 : Certified copy of the plaint in T.S. 546/96.

Ext.10: Certified copy of W.S filed by defendants in T.S. 546/96.

Ext.11: Certified copy of judgment dated 29/06/04, passed by Civil Judge (Jr. Div.) No.1, Guwahati in T.S.546/96.

Ext.12: Certified copy zamabandi of patta No.1.

Ext.13: Copy of certificate dated 8/5/95 issued by Senior Settlement Officer.

Ext.14: Copy of Challan showing payment of land revenue pertaining to Maligaon Gosala land.

During cross examination P.W.1 testified that the trust land would be about 242 bighas of which 50% are hilly and the remaining 50 % of the land is plain. He deposed that the revenue authority issued patta to the plaintiff and there is no annual patta land within those 242 bighas of land. He stated that out of the total houses of the laborers in the stone quarry only the defendant's house is in existence. He denied that the house of the defendant is there for the last 70 years. He denied that there are other persons in the suit land with whom the plaintiff trust has some understanding. He further denied that the defendants never recognized the plaintiff as landlord. Ext.12 is the zamabandi of patta no.1 in F.S. grant no.1 containing dag no.11 & 12 which are in the name of the plaintiff. Ext.13 which is a certificate issued by the Sr. Settlement Officer, Guwahati shows that 242 bighas 3 kathas 9 lechas of land of patta no.1 in F.S. Grant no.1 containing dag no.11 & 12 under Jalukbari Mouza was settled and later on mutated in the name of the plaintiff trust.

P.W.2 Santosh Sharma, Manager of the plaintiff trust. He supported the case of the plaintiff in his evidence –in- chief as well as during cross examination. He also denied that any annual patta was issued on the trust land.

P.W.3 is Om Prakesh Saraf, who testified that he entered into lease agreement with the plaintiff trust for setting up a stone quarry on the hillock land in dag no.11. He admitted that Ext. 4 & 5 are the copies of lease deed executed between him and plaintiff and Ext.6 is his deed of declaration. He admitted that Late Ganesh Ch. Das was engaged by him who constructed a thatched house over a small portion of lease hold land with consent of the plaintiff. According to him, after expiry of the lease he handed over possession of the land to plaintiff but Late Ganesh Ch. Das sought for some more time to vacate the land so as to find an

alternative accommodation. He further deposed that the defendants, after expiry of Ganesh Das continued to possess the land and have refused to vacate the land. During cross examination he testified that labour quarters subsisted during the period of lease and were not assessed by the Municipality. He deposed further that the defendant constructed their own house and he helped them partly. He denied that the defendants are residing in the land for the past 70 years. He on the other hand stated that Late Ganesh Das and his family started residing there since commencement of the lease agreement.

Only defendant No.1 was examined and cross examined as D.W.1 as the evidences of the other two DWs were expunged. In her evidence- in-chief DW1 asserted that the suit land is an annual patta land and her father was having annual patta land which was later on cancelled. She claimed that land was under Khass possession of her father and after him the defendants and her father's family are residing there. According to her, the plaintiff never asked her to vacate the land prior to institution of the suit. However she admitted that the Government settled some land in the locality in favour of the plaintiff trust. She stated that the suit land is situated at South-East corner of the land settle by the Govt. But since the land is situated at slope of the hill the plaintiff has falsely instituted this suit with the intention to evict them. According to her, Late Ganesh Das was a house husband and he after marrying her started living there. D.W.1 further asserted that the defendants have acquired adverse possession over the suit land on the basis of their 70 years of long and continuous possession.

However, during her cross examination admitted that after the labour houses were damaged, she rebuilt her house. She further admitted that the contractor of the quarry allowed them to reside in the quarter. But she again stated that she built the house (quarter) some 20 years ago. She denied that she entered into the suit land only after the quarters in the quarry were constructed and that she is a permissive occupier of the land. She stated that they were possessing a sarkari land by paying revenue and some twenty years ago the Goshala raised walls surrounding her land. This admission on her part proves that the suit land is within the compound of the plaintiff Gaushala.

It seen from the evidence of defendant side that they could not prove that the land is annual patta land. In fact it is admitted by DW1 that the patta in her father's name was cancelled. Although the defendant side tried to prove that the leasing out of land to quarries by the plaintiff was illegal, that does not affect the merits of the case because the legality or illegality of leasing out is not an issue in this case. From the pleadings of the defendants and evidence of D.W.1 it has become clear that they are in occupation of the land since long but their possession cannot be termed as adverse to that of the plaintiff. In their W.S. they on one hand took the plea that the suit land is Govt. land and they have acquired title by adverse possession by virtue of Art.111 of the Limitation Act and that the house belongs to defendant no.1 but on the other hand they admitted that the land was settled with the plaintiff. So the defendants themselves are not sure of the type/ class of the suit land. The defendants are making contradictory statements.

They claim that their possession is adverse to the Government u/Art. 111 and as against the plaintiff u/Art. 65 of the Limitation Act. In that case the plea of adverse possession is not sustainable.

Further Ext. 8 shows that the Complaint Case no. 78c/92 was lodged by the present defendant no. 1 against the erstwhile Manager of the plaintiff trust who instituted T.S. 546/96 and another person. The judgment dtd 31-7-95 passed in the above case shows that the daughter of the defendant no. 1 had stated during her cross examination that Om Prakash Agarwala @ Saraf constructed the houses for the laborers as well as the labour sardar, i.e., late Ganesh Ch. Das. The court found that the prosecution witnesses supported the defense plea that the after closure of the quarry of Om Prakash Saraf all the labourers except the husband of the complainant (present defendant no. 1) vacated the quarters.

From the above discussion it is proved that the defendants are only permissive occupiers. DW Putuli Das stated in her evidence that the plaintiff never asked them to vacate the land prior to institution of the suit. I find her evidence not reliable because it is an admitted fact the plaintiff had earlier filed T.S. 546/96 seeking declaration and recovery of possession. The defendant side could not refute the allegation that they have not vacated inspite of requests by the plaintiff. As the defendants are permissive occupiers, their possession is not absolute. They are liable to vacate the land as and when the demand for vacation is made by the true owner.

In the instant case, I find that the plaintiff has been continuously pursuing their cause since 1996. The earlier suit was dismissed on 29-6-04. The present suit was filed on 15-12-04. From the conduct of the plaintiff it can be inferred that they never gave up their cause of action.

Decision on issue No.2

Although the defendants took the plea that there is no cause of action for the suit, a bare perusal of the plaint would reveal that the suit does have a cause of action. The plaintiff has claimed that the defendants are illegal occupiers of the suit land whereas the defendants have claimed that their possession is adverse to the plaintiff and so they are not entitled to be evicted. From the above discussions, especially on issue no. 3, I find that the plaintiff has a cause of action to file the suit.

Issue no 2 is therefore decided in the affirmative.

Decision on issue no. 4:

In view of the above discussions in the forgoing issues, I hold that the plaintiff trust is entitled to get the decree for recovery of possession. However, as far as the entitlement to mesne profits is concerned, I find that the plaintiff has not been able to show what profits and how it accrued to the defendants by being in illegal occupation of the land. The definition of mesne profits as given in **Sec. 2 (12) of the Code of Civil Procedure, 1908** means those profits which the person in wrongful possession of such property actually received or might with ordinary

diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

The defendants as it is proved were permissive occupiers till the time the plaintiff made the demand for vacation of the suit premises. The defendants have their dwelling house there. The plaint is silent as to whether any amount was claimed ever by the plaintiff for the occupation of the land from the defendants prior to the expiry of the lease with the quarry or after that. The plaintiff has not stated what profits actually accrued or might have accrued. No evidence is led in that respect nor pressed during argument. Hence I hold that the plaintiff is not entitled to mesne profits.

Issue no. 4 is decided accordingly.

ORDER

The suit is decreed on contest with cost. The plaintiff is entitled to recover vacant possession of the suit land by evicting the defendants. Prepare decree accordingly. Given under my hand and seal of the court on 4-8-12.

S. Handique
Munsiff No. 2, Kamrup

ANNEXURES

PLAINTIFF SIDE

PW1.. RAMPAL SIKARIA

PW2..SANTOSH KR. SHARMA

PW3..OM PRAKASH SARAF

DOCUMENTS

Ext. 1: copy of the trust deed.

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DEFENDANT SIDE

DW1.. PUTULI DAS

DOCUMENTS

NONE