

(2024) 05 GAU CK 0025

In the Gauhati High Court

Case No : Regular Second Appeal No. 96 Of 2004

Anjan Kr Dey And Anr

APPELLANT

Vs

Jayanti Dey And Ors

RESPONDENT

Date of Decision : 08-05-2024

Acts Referred:

Limitation Act, 1963 — Article 65

Code of Civil Procedure, 1908 — Section 100(4), Order 41 Rule 11, Order 41 Rule 31

Citation : (2024) 05 GAU CK 0025

Hon'ble Judges : Devashis Baruah, J

Bench : Single Bench

Advocate : P. K. Roychoudhury, S. K. Ghosh

Final Decision : Dismissed

Judgement

1. Heard Mr. P. K. Roychoudhury, the learned counsel for the appellants and Mr. S. K. Ghosh, the learned counsel appearing on behalf of the respondent Nos.2 to 4.

2. The instant Appeal is directed against the judgment and decree dated 26.03.2004 passed in Title Appeal No.23/2002 whereby the Appeal was dismissed thereby affirming the judgment and decree passed in Title Suit No.23/1996 dated 22.05.2002. The instant Appeal is being taken up at the stage of Order XLI Rule 11 of the Code of Civil Procedure, 1908 (for short, 'the Code') to ascertain as to whether the substantial questions of law so proposed by the learned counsel for the appellant can at all be formulated in terms with Section 100 (4) of the Code.

3. The learned counsel for the appellants has proposed before this Court the following three substantial questions of law which can be formulated in terms with Section 100 (4) of the Code:-

(i) Whether the First Appellate Court while deciding the Issue No.3 failed to frame and/or determine the question of adverse possession of the Defendant No.

1, 2, 3?

(ii) Whether the judgment of the First Appellate Court failed to state the point for determination and the reason for the decision?

(iii) Whether the plaintiff has not come forward and ascertained his title by the process of law within the period prescribed by the provisions of the statute of the limitation?

4. The question arises as to whether the said substantial questions of law so proposed can be at all formulated in the instant Appeal. For deciding the same, this Court briefly would like to take note of the facts leading to filing of the instant Appeal. The respondent Nos.1 to 5 as plaintiffs had instituted a suit seeking recovery of khas possession of the suit land by evicting the defendants; for compensation/mesne-profit for unauthorized use and occupation of the suit premises etc. The claim of the plaintiffs in the suit was that that the Smti. Hemprobha Dey was the first wife of one Ramesh Chandra Dey who was the elder brother of Late Bisweswar Dey, the predecessor-in-interest of the plaintiffs. The said defendant No.1 used to occupy the suit premises as permissive occupier with the children at first under the predecessor-in-interest of late Bisweswar Dey and after his death on 06.04.1981 under the plaintiffs.

5. It is the case of the plaintiffs that taking into account the helplessness and measurable situation of the defendant No.1 and the children and there was no shelter, the predecessor-in-interest of the plaintiffs as well as the plaintiffs permitted the defendants to reside in the suit premises. However, the husband of the defendant No.1 instituted a Title Suit No.18/1986 in the Court of the learned Assistant District Judge, Jorhat against the plaintiffs and the proforma defendant No.2 claiming right, title and interest over half share of the land in that suit alone and confirmation of joint possession thereof. The case set out by the said Ramesh Chandra Dey that he contributed the entire consideration of Rs.30,000/- in installment in respect of the 3 kathas of land and paid to the owner Mahesh Chandra Buragohain through his brother Bisweswar Dey but the latter obtained the Sale Deed registered in his name alone excluding Ramesh Chandra Dey. However, the said suit was dismissed on merit ultimately.

6. It was the further case of the plaintiffs that the entire land of 3 Kathas as covered by Dag No. 4748 of P.P. No.132 in Block No,2, Jorhat town with standing structures with a garage including the suit premises was the self acquired property of Late Bisweswar Dey. Late Bisweswar Dey was a tenant earlier in a portion of the above land, paid a sum of Rs.1,500/- as advance for purchase of the entire land of 3 kathas, vide receipt dated 24.03.1965 to be paid in installments and paid the consideration of money of Rs.20,000/- only in installments and got the sale deed executed and registered on 12.12.1970 in respect of 2 kathas of land, and thereafter, paid the sum of Rs.10,000/- and got requisite sale deed executed and registered on 30.08.1973 in respect of 1 katha of land of the same Dag and Patta from the owner Mahesh Burhagohain. It is on

account of the action of the husband of the defendant No.1 as well as the defendants not inclined to vacate the suit premises, the suit was filed seeking for the reliefs as already stated herein above.

7. The defendant Nos.1, 2 & 3 jointly filed a written statement denying the contents of the plaint and further stating that the defendants were not in permissive occupiers of the suit premises as they were in fact occupying the same as their own since time immemorial and without having any knowledge and information of the ownership of the plaintiff predecessor-in-interest Late Bisweswar Dey and after his death, the ownership of the plaintiffs and without acknowledging their rights and title over the suit property. It was stated that due to such long and continuous hostile occupation of the suit premises against the interest of the plaintiffs more than the statutory period, the defendants have acquired the right, title and ownership over the suit property on termination of all types of right, title and ownership of the plaintiffs, if they had any.

8. On the basis of the above pleadings, as many as six issues were framed. Issue No.2 pertains to as to whether the suit was barred by limitation. Issue No.3 was in relation to as to whether the defendant Nos.1 to 3 were permissive occupier of the suit premises and the Issue No.4 was whether the plaintiffs had any right, title and interest over the suit land.

9. The learned Trial Court vide the judgment and decree dated 15.05.2002, decreed the suit in favour of the plaintiffs. The Issue No.2 which was an Issue pertaining to limitation was held in the negative and against the defendants. As regards the Issue No.3, the learned Trial Court on the basis of evidence on record opined that the defendant Nos.1 to 3 were permissive occupiers of the suit premises. In respect to Issue No.4, the learned Trial Court on the basis of the evidence on record held that the plaintiffs had right, title and interest over the suit land on the basis of the two registered Deeds of Sale exhibited as Ext.2 and Ext.3. Consequently, the other Issues were also decided in terms with the said three Issues.

10. Being aggrieved, an Appeal was preferred by the defendant Nos.1 to 3 which was registered and numbered as Title Appeal No.23/2002. The said Appeal was dismissed vide the judgment and decree dated 26.03.2004 by deciding the said Appeal Issue wise. It is against the said judgment and decree, the instant Appeal has been filed.

11. In the backdrop of the above, let this Court now consider as to whether the substantial questions of law so proposed can be formulated by this Court in exercise of powers under Section 100 (4) of the Code.

12. This Court has heard Mr. P. K. Roychoudhury, the learned counsel for the appellants who submitted that the entire case of the appellants who were the defendants was that they were in adverse possession of the suit land and on the basis thereof, the substantial questions of law Nos.(i) & (iii) have been proposed. The learned counsel for the appellants submitted that the learned Trial Court as

well as the learned First Appellate Court while deciding the Issue No.3 ought to have framed and/or determined the question of adverse possession of the defendant Nos.1 to 3 and this aspect if would have been done so, the course of the entire proceedings would have been in favour of the defendants. The learned counsel for the appellants further submitted that as the suit is based upon Article 65 of the Schedule to the Limitation Act, 1963, the plaintiffs were required to file the suit within 12 years which was however not done in the instant case in as much as the suit was filed in the year 1993. In addition to that, the learned counsel for the appellants also submitted that the learned First Appellate Court did not decide the suit in accordance with Order XLI Rule 31 of the Code by framing the points for determination and the reason for the decision.

13. On the other hand, Mr. S. K. Ghosh, the learned counsel appearing on behalf of the respondents submitted that when the Issue No.3 relates to permissive occupiers, the defendants' defence was duly taken as to whether the possession of the defendants were adverse to the true owner or were permissive in nature and both the Courts below which are the Courts of facts have given a concurrent findings of fact that the appellants herein were permissive occupiers. The learned counsel for the respondents further submitted that to claim adverse possession, the claimant is required to not only plead but also prove that the claimant was possessing the immovable property openly, hostilely, uninterruptedly and with the due knowledge of the true owner. Referring to the written statement, the learned counsel for the respondents submitted that it is an admitted case of the defendants that they did not know who was the true owner and as such the question of adverse possession so contended does not arise at all. The learned counsel for the respondents further submitted that there is no limitation for a suit based on title claiming possession unless the defendants prove that the defendants had been in possession for a statutory period of 12 years adverse to the plaintiffs and as such the substantial questions of law Nos. (i) & (iii) are totally misconceived. The learned counsel for the respondents further submitted that the learned First Appellate Court had duly considered the grounds of objection so taken and on the basis of that had decided the Appeal issue-wise and as such there was no infraction to the provision of Order XLI Rule 31 of the Code.

14. I have heard the learned counsels for the parties and given anxious consideration to the respective submissions of the parties. The substantial questions of law Nos.(i) & (iii) which have been proposed are not related to adverse possession. Under such circumstances, this Court finds it very pertinent to observe what is required to prove the plea of adverse possession. To prove the plea of adverse possession (a) the plaintiffs must plead and prove that he was claiming possession adverse to the true owner; (b) the plaintiff must plead and establish that the factum of his long and continuous possession was known to the true owner; (c) the plaintiff must plead and establish when he came into possession and (d) the plaintiff must establish that his possession was open and undisturbed.

15. This Court finds it very pertinent to observe that if the defendants set up a defence of adverse possession, the defendants have to prove the above. It is also well settled principle of law that by pleading adverse possession, a party seeks to defeat rights of the true owner and therefore there is no equity in his favour. After all, the plea is based on continuous wrongful possession for a period of more than 12 years. Therefore, the facts constituting the ingredients of adverse possession must be pleaded and proved by the plaintiff or the defendant as the case may be.

16. In the instant case, if this Court duly takes note of the written statement, it would be seen that the defendants were not aware against whose rights they were possessing in as much as they categorically stated in their written statement "without having any knowledge and information of the ownership of the plaintiffs' predecessor Bisweswar Dey and after his death, the ownership of the plaintiffs and without acknowledging their right and title over the suit property".

17. This Court also finds it very pertinent to observe that the written statement is completely silent from what date the defendants claim to be in adverse possession. There is also no mention whatsoever as to how the defendants possession was opened and hostile to the true owner in as much as no materials facts have been stated in that regard. Under such circumstances, without those pleadings, the question of adverse possession does not arise. In this regard, if this Court takes note of the decision of the learned Trial Court as well as the learned First Appellate Court in respect to Issue No.3, it would transpire that the learned Trial Court as well as the learned First Appellate Court have on the basis of the evidence on record come to a finding of fact that the defendant No.1 to 3 are permissive occupiers and the learned counsel appearing on behalf of the appellants could not show before this Court any perversity in the findings so arrived at. Consequently, in the opinion of this Court, the substantial questions of law so proposed at Sl. No. (i) and (iii) does not arise.

18. As regards the substantial question of law proposed at Sl. No.(ii), it would be seen that the learned First Appellate Court has duly taken into consideration the grounds of objection and on the basis thereof had decided the said Appeal issue-wise by taking each Issue as a point of determination, and as such, this Court is of the opinion that the impugned judgment and decree is in conformity with the provisions of Order XLI Rule 31 of the Code. Consequently, the substantial question of law so proposed at Sl. No. (ii) does not arise.

19. In the backdrop of the above, this Court is of the unhesitant opinion that no substantial questions of law can be formulated in the instant Appeal under Section 100 (4) of the Code for which the instant Appeal stands dismissed with cost quantified at Rs.10,000/- for the instant proceedings and further the plaintiffs would be entitled to costs throughout the proceedings.

20. The Registry is directed to forthwith remit the LCR.

21. In view of the above, any interim order passed staying the execution of the decree stands vacated.