

(2004) 08 GAU CK 0011
In the Gauhati High Court
Case No : S.A. No. 62 of 1993

Banamali Das @ Banoram Das

APPELLANT

Vs

Padmanath Goswami and Others

RESPONDENT

Date of Decision : 23-08-2004

Acts Referred:

Assam (Temporarily Settled Areas) Tenancy Act, 1971 — Section 3, 5, 5(1), 64(1)
Civil Procedure Code, 1908 (CPC) — Section 80
Limitation Act, 1963 — Article 100, 113, 65

Citation : (2005) GLT 457 Supp

Hon'ble Judges : P.G. Agarwal, J

Bench : Single Bench

Advocate : B.K. Goswami and B.M. Sarma, for the Appellant; C.K. Sharma Baruah, A. Dey, S. Shyam, B.C. Talukdar, K. Basar and D. Choudhury, for the Respondent

Final Decision : Allowed

Judgement

P.G. Agarwal, J.—Heard Mr. B.M. Sarma, learned Counsel for the Appellant and Mr. K. Basar, learned Counsel for the Respondents.

2. This Second Appeal has been preferred by the Plaintiff Appellant challenging the order of the first appellate Court (Asstt. Dist. Judge, Barpeta) in T.A. No. 21/90 passed on 13.11.92. The Appellant Plaintiff, hereinafter, referred as the Plaintiff, for convenience sake, instituted T.S. No. 112/86 before the Court of Munsiff No. 1, Barpeta stating interalia that he was a tenant in respect of the suit land, measuring 1 bigha 3 kathas 12 lechas of land covered by Dag No. 282 under N.K. Patta No. 22 situated at village Gobindapur under Pub Bajali Mouza, fully described in Schedule B to the plaint, hereinafter, referred as the suit land. The suit land originally belonged to Chandra Kanta Goswami and thereafter, it came under the possession of the Defendants on the death of Chandra Kanta Goswami. The further claim of the Plaintiff is that the suit land was in possession of the Plaintiff since the days of their forefather and they are paying land

revenue regularly. The Plaintiff was given Khatian No. 175/27 under the Assam (Temporarily Settled Areas) Tenancy Act, 1971, for short, the Act. The said Khatian was issued in the year 1977.

3. The further case of the Plaintiff is that at the time of Assam Agitation, the Plaintiff had to leave the suit land and he had to take shelter in Barpeta town as his house was burnt down by the agitationists. Thereafter, on an application filed by the original landlord (Defendant No. 3), the Deputy Commissioner, Barpeta vide impugned order dated 24.06.85 cancelled the khatian issued in favour of the Plaintiff and the Defendant No. 3 entered into the suit land by dispossessing the Plaintiff and by raising a house thereon. The Plaintiff thereafter filed the present suit for quashing of the cancellation order of khatian issued by the Deputy Commissioner and for consequential relief.

4. The suit was contested by the Defendant Nos. 1, 2 and 3 by filing a written statement stating inter alia that the suit is barred by limitation. The Defendants, however, admitted that the Plaintiff was a tenant under them till 1981 and in 1981, the Plaintiff had abandoned the suit land whereupon the Defendant approached the Deputy Commissioner who rightly passed the impugned order and as such the suit is liable to be dismissed. The learned Munsiff framed the following eight issues:

1. Whether there is any cause of action for the suit?
2. Whether the suit is not maintainable in the present form?
3. Whether the suit is barred by law of limitation?
4. Whether the suit is bad for want of notice u/s 80, Code of Civil Procedure?
5. Whether the order of Deputy Commissioner, Barpeta dated 24.06.85 passed in connection with the Khatian No. 27 cancelling the Khatian of the Plaintiff is illegal and void?
6. Whether the Plaintiff is entitled to get the decree as prayed for?
7. To what reliefs if any the parties are entitled?
8. Whether the suit is barred by law?

5. Both the parties adduced evidence and thereafter the learned trial Court decided the issues in favour of the Plaintiff and decreed the suit. Feeling aggrieved, the Respondent Defendants preferred Title Appeal No. 21/90 and the first appellate Court vide impugned order allowed the appeal and set aside the order of the trial Court and dismissed the suit.

6. The Plaintiff, thereafter, preferred the present Second Appeal and the appeal was admitted by formulating the following substantial questions of law:

1. Whether the learned Asstt. District Judge committed error of law in holding that the Deputy Commissioner rightly passed the order of cancellation of the

validity granted khatian in respect of the suit land?

2. Whether the learned appellate Court below erred in law in holding that the Plaintiff's suit was barred by Article 100 of the Limitation Act?

3. Whether the learned Asstt. District Judge committed error of law in holding that the Plaintiff abandoned the suit land?

7. The Second Appeal was disposed of vide order dated 21.12.99 whereby the appeal was allowed. The impugned judgment of the first appellate Court was set aside and that of the trial Court was restored. The Respondent Defendant took up the matter to the Hon"ble Supreme Court in Civil Appeal No. 3343 of 2003 and the Hon"ble Supreme Court remanded the matter back for fresh decision in the second appeal stating interalia that the substantial question of law as regards limitation was not considered by this Court and the same question needs to be considered and answered. This is how the matter has again been heard by this Court today.

8. The Defendant has claimed that the suit filed by the Appellant is barred by limitation in view of the provisions of Article 100 of the Limitation Act, 1963, which provides for a period of one year as limitation to alter or to set aside any decision or order of the Civil Court or an order passed by an officer of the Government in his official capacity. The impugned order was passed by the Deputy Commissioner, Barpeta on 24.06.85 and Mr. B.M. Sharma, learned Counsel appearing for the Plaintiff has fairly submitted that if the period of one year is calculated with effect from that date, the present suit is apparently filed beyond limitation as it was filed on 30.08.86 and even if we exclude the period of 60 days u/s 80 Code of Civil Procedure, the suit was filed beyond the stipulated period. The learned Counsel for the Plaintiff has further submitted that the question of applicability of Article 100 does not arise in the present case as the impugned order was passed by an incompetent authority having no jurisdiction and hence, when the order is void ab-initio for lack of jurisdiction and competency, the period of limitation will not make or convert the said invalid order to be a valid order or confer right on others. There is no dispute at the Bar that if the Deputy Commissioner, Barpeta is found to be lacking jurisdiction or competency in passing the impugned order and the order is void ab-initio, the period of limitation will not save the said invalid order.

9. From the impugned order, we find that it was passed u/s 64(1) of the Act. The application filed by the Defendant also shows that the Defendant has prayed the Deputy Commissioner, Barpeta to exercise his jurisdiction u/s 64(1) of the Act. The tenant is alleged to have abandoned the suit land. Section 64(1) of the Act reads as follows:

64. Abandonment.-(1) If a tenant not being an occupancy tenant voluntarily abandones his usual residence in the village or the neighbourhood without notice to his landlord and without arranging for payment of his rent, ceases to cultivate his holding, either by himself or by some other person, and is not traceable in

spite of the best efforts of the landlord, then the landlord may, at any time after expiration of two years from the date of the tenant's ceasing to cultivate the holding, and after giving information to the Deputy commissioner and obtaining his permission thereto enter on the holding.

10. In view of the language of the provisions of Section 64(1) as quoted above, we find that the relief u/s 64(1) is not available in respect of occupancy tenant. In other words, there is no question of abandonment by a occupancy tenant and the Deputy Commissioner has not been empowered to cancel the khatian of occupancy tenant u/s 64(1) of the Act. The above provisions u/s 64(1) are in conformity with the rights of the occupancy tenant as provided u/s 5 of the Act. The learned Counsel for the Respondent Mr. K. Basar in his usual fairness has submitted that the main point for consideration in this case, is whether the Plaintiff was a tenant or occupancy tenant under the Defendant.

11. The "tenant" has been defined in Clause (17) of Section 3 of the Act as below:

(17) "tenant" means a person who cultivates or holds the land of another person, and is, or but for a special contract (express or implied) would be liable to pay rent for that land to that other person, and includes a person who under system generally known as "Adhi" (whether Guchiadhi or Gutiadhi), "barga", "chuki" "bhag", or "chukani" cultivates the land of another person on condition of delivering a share or quantity of the produce of such land to that person:

Provided that a person who cultivates or holds land immediately under the State Government is not a tenant within the meaning of this definition.

12. Chapter II of the Act provides Classes of tenants and Section 5 in Chapter III of the Act defines occupancy tenant as follows:

5. Acquisition of occupancy rights.-

(1) A person who for a period of not less than 3 years has continuously held land as a tenant shall have a right of occupancy in that land.

(2) The period of 3 years may be wholly or partly before or after the commencement of this Act.

(3) A person shall be deemed, for the purposes of this section to have continuously held land under a landlord notwithstanding that the particular landlord under whom he held the land was different at different times, provided the land held by him was the same.

(4) A person shall be deemed, for the purposes of this section, to have held as a tenant any land held as a tenant by a person whose heir he is.

(5) If a tenant recovers possession of his holding under any law in force, any period during which he might have been out of possession, shall count towards the period specified on Sub-section (1).

13. On a conjoint reading of the above provisions of law, we find that a tenant acquires status of occupancy tenant when he had held the land in question as a tenant continuously for a period of three years. We have perused the pleadings wherein the Plaintiff has claimed that they were tenants from the days of Chandra Kanta Goswami and even Plaintiff's forefathers were in possession of the suit land and even the khatian certifying the tenancy of the Plaintiff was issued in the year 1977. The Defendants have filed their written statement wherein the status of the Plaintiff as tenant under them is not disputed. In para 13 of the written statement, the Defendant has stated as follows:

That the Plaintiff was a tenant under the Defendant holding khatian No. 175 under Temporarily Settled Areas Tenancy Act. Previously the Plaintiff cultivated the land and used the land for agricultural purpose. But after obtaining khatian in the year 1977 the Plaintiff constructed his homestead upon the suit land and made the land unfit for agriculture. Then in the year 1981 the Plaintiff shifted his houses from the suit land and went somewhere without informing anything to the Defendant since then the whereabouts of the Plaintiff remained unknown to the Defendant. Further the landholder did not receive any rent from the Plaintiff since 1981.

14. Thus, we find that there is absolutely no dispute at the Bar that the Plaintiff was tenant under the Defendants and the khatian (Ext. 5) was issued in favour of the Plaintiff in 1977. Moreover, by the Defendant's own admission, the suit land was allegedly abandoned in the year 1981. Hence, the Plaintiff was a tenant in respect of the suit land for more than three years continuously and as such he is an occupancy tenant. There is a finding to that effect recorded by the trial Court and Ext. 5 lends support to the above statement and in view of the overwhelming materials available on record, this Court has no hesitation to record that the Plaintiff was an occupancy tenant. The provisions of Section 64(1) of the Act does not apply in case of occupancy tenant and hence, the Deputy Commissioner had no jurisdiction to cancel the khatian granted to an occupancy tenant. The question of limitation in such a situation was considered by the Apex Court in the case of *Ajudh Raj and others Vs. Moti*, wherein the Apex Court held as follows:

The principle for deciding the question of limitation in a suit filed after an adverse order under a Special Act is well settled. If the order impugned in the suit is such that it has to be set aside before any relief can be granted to the Plaintiff the provisions of Article 100 will be attracted and if no particular Article of the Limitation Act is applicable the suit must be governed by the residuary Article 113, prescribing a period of three years. Therefore, in a suit for title to an immovable property which has been the subject-matter of a proceeding under a Special Act if an adverse order comes in the way of the success of the Plaintiff, he must get it cleared before proceeding further. On the other hand, if the order has been passed without jurisdiction, the same can be ignored as nullity, that is, nonexistent in the eye of law and it is not necessary to set it aside; and such a

suit will be covered by Article 65.

15. In view of the above, the substantial question of law No. 2 as regards limitation is answered in favour of the Plaintiff Appellant and against the Respondent Defendant. The suit was not barred under Article 100 of the Limitation Act as in the instant case, Article 65 applies and admittedly, the suit was not barred under Article 65. So far the substantial question of law No. 1 is concerned, it has already been held as above that the Deputy Commissioner had no jurisdiction to cancel the khatian of the Plaintiff as the Plaintiff was an occupancy tenant and Section 64(1) of the Act was not attracted. The said question is also answered in favour of the Plaintiff. So far the substantial question of law No. 3 is concerned, learned Counsel for both sides submitted that this matter has become redundant in view of the finding as regards issue No. 1.

16. In the result, the Second Appeal is allowed. The impugned order passed by the appellate Court is set aside and that of the trial Court is restored. The Appellant is entitled to decree as prayed for. Let the Appellant be put back into possession. The Respondent Defendants are directed to deliver vacant possession of the suit land to the Appellant Plaintiff. learned Counsel appearing for the Respondent prays for three months time for the same. We allow the Respondent Defendants three months time to hand over vacant possession of the suit land to the Plaintiff. Costs easy.