
(2016) 03 GAU CK 0059
In the Gauhati High Court
Case No : RSA No. 92 of 2007

Chandipur Tea Estate

APPELLANT

Vs

Devilal Basfor

RESPONDENT

Date of Decision : 29-03-2016

Acts Referred:

Citation : (2016) 4 GauLJ 418 : (2016) 3 GauLT 765

Hon'ble Judges : Mr. N. Chaudhury, J.

Bench : Single Bench

Advocate : Mr. P.K. Deka, Advocate, for the Appellant; Mr. M.H. Rajbarbhuiya, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Mr. N. Chaudhury, J.(Oral)—Plaintiff of Title Suit No.30/2005 of the Court of learned Civil Judge (Junior Division) No.1, Hailakandi has preferred this Second Appeal challenging the first appellate judgment and decree dated 16.05.2007. The learned First Appellate Court allowed the appeal and dismissed the suit of the plaintiff by reversing the judgment and decree passed by the learned trial Court.

2. The facts involved in the Second Appeal are required to be stated before entering into the merit of the Second Appeal. The present appellant as plaintiff instituted Title Suit No.30/2005 in the Court of learned Civil Judge (Junior Division) No.1, Hailakandi stating that it is a company having head office at Calcutta and is engaged in the business of production, manufacture and sale of tea at Chandipur Tea Estate within the jurisdiction of the Court. The suit land belonged to it and occurs at the center of the garden. In the month of March, 2005, when the plaintiff company wanted to raise the suit land, which is a low lying land, the defendant and their family members raised objection and threatened the employees of the Tea Estate with dire consequences. Situated thus, the plaintiff instituted a proceeding under Section 107 Cr.P.C. before the learned Executive Magistrate and thereafter instituted the suit praying for a

decree declaring its right, title and interest over the suit land and for confirmation/recovery of khas possession by evicting the defendant or any person occupying the land through them. A prayer for temporary and permanent injunction was also prayed for. The suit land was described to be a land measuring 1 bigha 11 katha 3 chattaks covered by 2nd R.S. Patta No.1, Dag No.41 of Mouza-Bashbari, Phargana - Saraspur in the district of Hailakandi. Specific boundaries were also mentioned in the schedule to the plaint.

3. On being summoned, the sole defendant appeared and submitted written statement. In paragraph 11 of the written statement it was claimed that the defendant has been in peaceful possession of the suit land and that the plaintiff does not have any possession in respect thereto. In paragraph 14 it is further stated that on 09.03.2005 plaintiff by engaging its employees and labourers tried to dispossess the defendant from the suit land and also caused damage to the pig farm of the defendant and further sold away the fish from the pond. With these prayers the defendant prayed for dismissal of the suit with cost.

4. On the basis of the aforesaid pleadings of the parties, the learned trial court framed five issues which are quoted below :-

"(1) Whether the plaintiff has the right, title and interest over the suit land?

(2) Whether suit is barred by law of limitation?

(3) Whether suit is barred for non-joinder of necessary parties?

(4) Whether the defendant is evicting from their possession over the suit land?

(5) To what relief, parties are entitled to?"

5. In the course of trial, plaintiff examined one witness and adduced some documents whereas the defendant examined four witnesses and exhibited some documents. Upon consideration of the materials available on record the learned trial Court decided issue No.1 in favour of the plaintiff holding that the plaintiff has right, title and interest over the suit land. The defendant though claimed title over the suit land but did not produce any document of title. Relying on Ext-1, the copy of jamabondi and Ext-2, the Form -A1 which is return of land for special cultivation submitted in course of ceiling operation, the learned trial Court was of the view that the land not only belonged to the plaintiff company but it is also free from ceiling and was retained for the purpose of special cultivation. Ext-A, a possession certificate issued by the Circle Officer, Algapur Circle and Ext-B, certified copy of judgment dated 01.12.2005 passed by the learned Civil Judge (Senior Division), Hailakandi and Ext-C series, the land revenue receipts produced by the defendant was also taken into consideration. Since the defendant could not produce any document of title in support of his claim for the land, the learned trial court held that although possession of the defendant was proved but the plaintiff succeeded to establish its title over the suit land. The issues on limitation (Issue No.2), defect of parties (Issue No.3) and the Issue No.4 were all decided in favour of the plaintiff and consequently the suit of the

plaintiff was decreed in entirety. This judgment and decree passed by the learned trial Court on 19.01.2007 was called into question by the defendant in Title Appeal No.6/2007 of the Court of the learned Civil Judge (Senior Division) at Hailakandi.

6. The learned First Appellate Court in its judgment and decree dated 16.05.2007 considered cases of both the parties and thereafter framed three additional issues but without remanding the case to the learned trial Court for decision and without coming at any conclusion that evidence available on record are not sufficient to decide the newly framed issues, decided the issues himself. According to the learned First Appellate Court, the plaintiff failed to prove the cause of action and the suit was not maintainable in the present form. The learned First Appellate Court decided Issue No.3 holding that the defendant acquired adverse possession with respect to the suit land and accordingly by judgment and decree dated 16.05.2007 allowed the appeal setting aside the judgment and decree of the learned trial Court and thereby dismissed the suit of the plaintiff in entirety. This first appellate judgment and decree has been called into question in the present second appeal.

7. This Court while admitting the Second Appeal on 24.08.2007 framed the following three substantial questions of law :-

"I. Whether the learned Lower Appellate Court below was correct in setting aside the judgment and decree passed by the learned Trial Court below by holding that there was no specific date of cause of action of the suit whereas the pleading of the parties clearly states about such specific date of cause of action.

II. Whether the learned Lower Appellate Court below was correct in setting aside the judgment and decree passed by the learned trial court below by holding that the suit is bad for non-joinder of necessary parties as the plaintiff/Tea Estate is not represented by anybody whereas the fact remains that one Shri Jahwar Choudhury, Superintendent-cum-Manager of Chandipur T.E. represented the plaintiff/appellant by filing affidavit in the plaint.

III. Whether the learned Lower Appellate Court below was correct in setting aside the judgment and decree passed by the learned trial court below by holding that merely on the basis of enjoyment and possession of the suit land for a long time by the defendant/ respondent will enable him to get the benefit of adverse possession whereas the said defendant/respondent at no point of time claimed for such adverse possession and even the written statement is also absolutely silent in this regard."

8. I have heard Mr. P. K. Deka, learned counsel for the appellant and Mr. M. H. Rajbarbhuiya, learned counsel for the respondent. I have also perused the records of both trial court as well as the first appellate court.

9. Arguing the first substantial question of law, Mr. P.K. Deka, learned counsel for the appellant, submits that the plaintiff stated in paragraphs 5 and 6 of the plaint

that the defendant and his family members raised vehement protest when plaintiff wanted to fill up the earth in the month of March, 2005. In paragraph 14(b) of the written statement the defendant also stated that plaintiff wanted to dispossess them from the suit land on 09.03.2005 by engaging his employees and labourers. Thus, it is vindicated that in the first week of March, 2005 there was a commotion between the parties and this is what has been described to be the date of cause of action in paragraph 9 of the plaint. Under such circumstances, it cannot be said that the plaintiff could not make out a cause of action for the suit. Mr. M.H. Rajbarbuiya, learned counsel for the sole respondent, however, submits that the plaint does not disclose sufficient material to hold that there is any cause of action at all. The averments made in paragraphs 5 and 6 of the plaint are not sufficient to make out that there was a cause of action for the suit. Plaintiff has not stated on which date the defendant had dispossessed the plaintiff, particularly when a prayer for recovery of khas possession has been made.

10. Having heard the learned counsel for the parties and on perusal of the materials available on record it does not appear that the plaintiff has succeeded to show since which date the plaintiff was dispossessed from the suit land. The defendant even claiming that their predecessor was an employee of the garden and accordingly he was occupying the land. May be it was a case of permissive occupier or the land was allowed to be enjoyed by the tea garden labourer as one of his conditions of service.

11. Thus, once the learned First Appellate Court framed additional Issue No.1(a) in regard to cause of action, the learned Court ought to have given adequate opportunity to the parties to lead their respective evidence so that the three issues could have been decided by the learned trial Court. It is seen from both the judgments of the learned Courts below that no date of dispossession of the plaintiff by the defendant or the date of possession of the plaintiff over the suit land could have been ascertained. In view of absence of date of dispossession of the plaintiff from the suit land it is not possible to decide as to whether the suit is barred by limitation or not. It is also necessary to see as to whether the defendant was a permissive occupier with effect from a particular date or not. No evidence has been led in regard thereto.

12. In view of the averments made in the written statement, however, it is sufficient to arrive at the finding that the plaintiff has succeeded to make out a prima facie cause of action with respect to the suit land. The first substantial question of law is accordingly decided in favour of the appellant.

13. The second substantial question of law is in regard to defect of parties. The learned First Appellate Court observed that plaintiff is a tea estate and has not been represented by anyone. Under Order 30, Rule 1 of the Code of Civil Procedure any two or more persons claiming or being liable as partners and carrying on business may sue or be sued in the name of the firm. Here, in this case, it has been stated that the plaintiff is a private company. However, no

averment has been made in regard to the authorisation by the Board of Directors for institution of the suit. These defects appear to be irregularities in the plaint and unless and until the plaintiff is given a scope to make amendment for these irregularities it is not fair to dismiss the suit at the first appellate stage, and that too, immediately after framing an additional issue at the appellate stage. The parties have not led evidence knowing this issue and so this is why there is no material whatsoever on record in regard to authorisation or decision of the company for institution of the suit. In the absence of the materials available on record it was not possible on the part of the learned first appellate court to arrive at a decision and it would have been more appropriate to remand the suit to the learned trial court for deciding the additional issue No.2. In view of the materials available on record, it is not possible to decide the second substantial question of law.

14. The third substantial question of law is in regard to adverse possession. It is established law that a case of adverse possession has to be made out by a defendant by appropriate pleading. The party pleading adverse possession has to prove that he has been in possession of the suit land over the statutory period of limitation openly, publicly and hostile to the interest of the original owner. In the case of *Secretary of State for India in Council v. Debendra Lal Khan* (AIR 1934 PC 23) their Lordships observed that the ordinary classical requirement of adverse possession is that it should be *neck vi*, *neck clam*, *neck precario* which means that the possession required must be adequate in continuity and publicity and in extent to show that its possession adverse to the true owner. The aforesaid law enunciated by the Privy Council has been all along followed by the courts in this country including the Hon"ble Apex Court and the Hon"ble Supreme Court held in catena of cases that adverse possession has to be specifically pleaded and proved by the defendant in regard to its necessary ingredients. In the case of *Abubakar Abdul Inamdar (dead) by LRs and others v. Hauru Abdul Inamdar and others*, reported in AIR 1996 SC 112 the Hon"ble Supreme Court held in paragraph 5 as follows :-

"5. With regard to the plea of adverse possession, the appellant having been successful in the two courts below and not in the High Court, one has to turn to the pleadings of the appellant in his written statement. There he has pleaded a duration of his having remained in exclusive possession of the house, but nowhere has he pleaded a single overt act on the basis of which it could be inferred or ascertained that from a particular point of time his possession became hostile and notorious to the complete exclusion of other heirs, and his being in possession openly and hostilely. It is true that some evidence, basically or Municipal register entries, were inducted to prove the point but no amount of proof can substitute pleadings which are the foundation of the claim of a litigating party. The High Court caught the appellant right at that point and drawing inference from the evidence produced on record, concluded that correct principles relating to the plea of adverse possession were not applied by the courts below. The finding, as it appears to us, was rightly reversed by the High

Court requiring no interference at our end."

15. The averments made in paragraph 11 of the written statement obviously do not contain the required ingredients to make out a case of adverse possession. The defendant even plainly have not mentioned the year of adverse possession and in the absence of any pleading to that effect no amount of evidence could have been led to prove that the defendant acquired or perfected title by way of adverse possession. The learned First Appellate Court committed error in not noticing these aspects of the matter. In view of the apparent absence of necessary pleadings as to adverse possession in respect of the aforesaid requirement of *neck vi*, *neck clam*, *neck precario* it is not possible to hold that the defendant acquired or perfected title by way of adverse possession. It is not the case of the defendant that he had acquired possession of the suit land. He claimed state of possession of the land and denied the title thereto. The classic case of adverse possession is that the defendant would admit the title of the real owner and then claim that he has possessed the suit land over the period of limitation publicly and to the detriment of the true owner and thus his possession was hostile to the real owner. None of these ingredients arise from the pleadings of the defendant. The third substantial question of law is accordingly decided in favour of the plaintiff and against the defendant.

16. In view of the findings recorded above, more particularly with respect to additional issue No.2 the first appellate judgment stands set aside and in view of the fact that the First Appellate Court framed three additional issues and additional Issue No.3 having found to be not valid and additional issue No.1 having already decided in favour of the plaintiff it is necessary to remand the case to the learned trial court to decide additional Issue No.2. Accordingly, the matter stands remanded to the learned trial Court. The learned trial Court shall afford adequate opportunities to the parties to amend their respective pleadings and to lead evidence, if so advised. Such extraordinary recourse is taken in view of the peculiarity of facts and circumstances of the case noticed in this case. The defendant having claimed that he was an *ex tea* garden labourer and was enjoying the suit land, may be in enjoyment of one of his conditions of service, he is entitled to adequate opportunity to make out and establish his case as well. At the same time, the plaintiff is also entitled to remove the apparent material defects occurring in the plaint. The learned trial Court shall make an endeavour to dispose of the suit preferably within a period of six months from today.

17. Parties shall appear before the learned trial court on 02.05.2016. The records shall be sent to the learned trial court in the meantime.

18. As the appeal has been remanded, there is no question of framing any decree.