

GAHC010006322009



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : RSA/159/2009

SMTI ADITY SARMAH,
RAMAKANTA SARMA SABHAPANDI, R/O DIGAMBAR CHUK, JORHAT.

VERSUS

SMTI ARUNA CHAKRAVORTY and ORS,
W/O LATE NONI KUMAR CHAKRABORTY.

2:SMTI ANTARA CHAKRABORTY

D/O LATE NONI CHAKRABORTY
BOTH ARE RESIDENT OF DIGAMBAR CHUK
P.O. JORHAT
DIST. JORHAT

Advocate for the Petitioner : Mr. P. S. Deka, Sr. Advocate

Mr. B. Lakhan, Advocate

Advocate for the Respondent : Mrs. S. Sarma, Advocate

BEFORE

HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 02.04.2024

Date of Judgment : 02.04.2024

JUDGMENT AND ORDER (ORAL)

The instant appeal has been filed under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code') challenging the judgment and decree dated 17.06.2009 passed in Title Appeal No.21/2007 by the learned District Judge, Jorhat (for short, 'the First Appellate Court') whereby the judgment and decree dated 26.06.2007 passed in Title Suit No.42/2005 by the learned Civil Judge, Jorhat (for short, 'the Trial Court') was affirmed.

2. The instant appeal was admitted by this Court by formulating five substantial questions of law which reads as under:-

1. *Whether the learned first appellate court committed an error of law in deciding the Title Appeal No.21/2007 without following the procedure laid down in Order 41 Rule 31 of the Code of Civil Procedure, 1908 and whether failure to formulate points for decision in the appeal resulted in miscarriage of justice?*
 2. *Whether the findings of the courts below that the plaintiff/appellant was in permissive possession of the suit land is based on no evidence?*
 3. *Whether both the courts below misconstrued the law and evidence relating to claim of the plaintiff/appellant over the suit land by prescriptive right of adverse possession without taking relevant facts and materials record?*
 4. *Whether both the courts below committed an error of law declaring title of the suit land in favour of the defendants/respondents in the counter claim arising out of Title Suit No.42/05 in absence of positive evidence in support of their title?*
 5. *Whether both the courts below committed an error in ignoring the provision of section 27 of the Limitation Act 1963 in absence of delivery of possession by the auction purchaser to the defendants/respondents?*
3. The question whether the five substantial questions of law so formulated

by this Court are involved in the instant appeal, this Court finds it relevant to take note of the brief facts leading to the filing of the instant appeal.

4. The appellant herein as plaintiff had filed the suit being Title Suit No.42/2005 before the Court of the Civil Judge (Senior Division), Jorhat seeking declaration and for permanent injunction. The brief facts for filing the suit are that a plot of land measuring 1 bigha 2 kathas 11 lechas covered by Periodic Patta No.298 admittedly belonged to Late Ramakanta Sarma Sabhapandit, Late Harikanta Sarma Sabhapandit, Late Gauri Kanta Sarma Sabhapandit and Harendra Nath Sabhapandit. This periodic patta was partitioned by the Deputy commissioner vide an order in the year 1970 whereby a part of the land falling in periodic patta No.298 fell into the share of Ramakanta Sarma Sabhapandit. The separate patta being patta No.391 fell into the share of Harikanta Sarma Sabhapandit, the patta No.392 fell into the share of Gauri Kanta Sarma Sabhapandit and patta No.393 fell into the share of Harendra Nath Sabhapandit. Each patta has 1 katha $1\frac{1}{4}$ lechas. The plaintiff claimed to be in possession of the share of Harikanta Sarma Sabhapandit which is the separate patta No.391. On account of non-payment of revenue, the said land in patta No.391 was put to auction sale in the year 1976 in relation to Case No.1750 of 1975-76 and one Santa Kumar Bhupal purchased the said land from the Government. Subsequent thereto, the said Santa Kumar Bhupal sold the land to one Nani Kumar Charkavorty (the predecessor of the defendants) some time in the year 1989 and his name was duly mutated in the revenue records. The said Nani Kumar Chakravorty as claimed by the plaintiff was her brother and due to some family dispute, he shifted to another house and lived separately and never remained in possession of the ancestral land or the suit land at

any point of time. Pursuant to the death of Nani Kumar Chakravorty, the defendant No.1, i.e. Smti. Aruna Chakravorty got her name recorded in the record of rights in the year 1992. It was alleged in the plaint that the said mutation was carried out by the defendant No.1 mischievously and concealing material facts. It was also alleged that in the year 2004, the defendant No.1 made an unsuccessful attempt to take over the possession of the suit land and thereupon filed an application before the Circle Officer, Jorhat for demarcation of the suit land on the strength of alleged mutation over the suit patta, but was not successful. It was further alleged that the defendant No.1 collected building materials for raising boundary wall over the suit land which was objected by the plaintiff on 07.06.2005. It is under such circumstances the suit was filed seeking declaration that the defendants had no title over the suit land; the plaintiff acquired title over the suit land; permanent injunction be granted restraining the defendant, their men, agents from disturbing the peaceful possession of the plaintiff over the suit land etc.

5. Pursuant to the filing of the suit, the defendants filed written statement-cum-counterclaim. In the said written statement-cum-counterclaim, it was mentioned that Late Harikanta Sarma Sabhapandit came in possession of Patta No.391 after partition. The said land was put to auction sale for default in payment of the Government revenue and one Santa Kumar Bhupal purchased the same and Late Nani Kumar Chakravorty, son of Late Ramakanta Sabhapandit had thereupon purchased the said land from the said Santa Kumar Bhupal by the registered Deed of Sale No.2777 dated 24.01.1984 and came in possession thereof and got his name mutated in the record of rights vide order dated 18.09.1989 of S.D.C., Jorhat. It was

also mentioned that Late Nani Kumar Chakravorty was the only son of Late Ramakanta Sabhapandit and he used to pay the land revenue of the said purchased land and also the other lands of his father. It was also mentioned that the defendants, after the death of Nani Kumar Chakravorty has been paying the land revenue of the said land along with other lands. Further to that, it was also stated that Late Nani Kumar Chakravorty also constructed a house over the land covered by Periodic Patta No.298 of his father in the year 1974 partly and in 1988 in the said land and also in the part of the land of periodic patta No.391 of his own. In addition to that, other constructions in the land of his father was also made by Late Nani Kumar Chakravorty and the constructions form one Municipal holding. The Municipal holding stood in the name of Late Nani Kumar Chakravorty, i.e. Holding No.389 of Ward No.1 of Jorhat Town. It was further mentioned that the Municipal taxes were paid by said Late Nani Kumar Chakravorty during his life time and after his death his wife, i.e. the defendant No.1. The defendants further mentioned that the plaintiff is an unmarried daughter of Late Ramakanta Sarma Sabhapandit and used to reside with her parents. The plaintiff was only a permissive occupier. In addition to that, it was further mentioned that the proforma defendant No.3 was married to one Dulen Borthakur and she was residing with her husband in her husband's house situated nearby and she was never in possession of the suit land. It was also stated in the written statement that the mutation was made in favour of Santa Kumar Bhupal and thereupon in favour of Late Nani Kumar Chakravorty on the basis of purchase and possession. In paragraph No.7 of the written statement, it was categorically stated that plaintiff being unmarried sister of the husband of the defendant No.1 and being a

member of the same family, she was allowed reside in the part of the aforesaid Municipal holding. It was also mentioned that the defendant No.1. after the death of Late Ramakanta Sarma Sabhapandit and his wife in 1995 and 1996 respectively allowed the plaintiff to continue to reside the plaintiff as a permissive occupier only, and as such, her possession cannot be hostile and cannot mature into the title by alleged adverse possession. The defendants in addition to that on the basis of her right over the said suit land, filed the counterclaim seeking declaration of her right, title and interest and for recovery of khas possession of the suit land by evicting the plaintiff therefrom.

6. The plaintiff also filed a written statement to the counterclaim denying the statements and allegations.

7. On the basis of the said pleadings, the learned Trial Court framed as many as four Issues of which Issue No.2 pertains to as to whether the plaintiff has right, title and interest over the suit land and Issue No.3 pertains to as to whether the plaintiff is entitled to the declaration of title and permanent injunction as prayed for. Although there was no specific issue farmed as regards the counterclaim, but from the materials on record and the evidence so adduced, it appears that the parties were ad idem that the issue of right, title and interest of the defendants and the recovery of possession as claimed in the counterclaim was also an issue, and as such, both the parties accordingly adduced evidence in that regard.

8. The record reveals that the plaintiff adduced evidence of 5 witnesses and exhibited 6 documents. The defendants adduced evidence of 3 witnesses and exhibited various documents. Amongst the documents which have been exhibited by the plaintiff, it is relevant to take note of Ext.2,

Ext.3, Ext.4 and Ext.5 are documents which came into existence some time in the year 2004-05 just before filing of the suit whereas Ext.1 and Ext.6 relates to the certified copy of the Jamabandi. On the other hand, the exhibited documents of the defendants were certified copy of the Deed of Sale being No.2777 of 1984 whereby Late Nani Kumar Chakravorty purchased the suit land in the year 1984; the certified copy of the Jamabandi of Periodic Patta No.391 wherein Late Nani Kumar Chakravorty's name was duly inserted and thereupon the defendants' names were also inserted; the land revenue receipts showing the name of Late Nani Kumar Chakravorty; and the Municipal receipts showing the name of Late Nani Kumar Chakravorty in respect to the holding standing over the suit land.

9. The learned Trial Court vide the judgment and decree dated 26.06.2007 dismissed the suit and decreed the counterclaim in favour of the defendant. Being aggrieved, an appeal was preferred by the plaintiff which was registered and numbered as Title Appeal No.21/2007. The said appeal was dismissed by the learned First Appellate Court vide the judgment and decree dated 17.06.2009. Being aggrieved, the instant Appeal has been preferred.

10. Before further proceeding on the adjudication of the substantial questions of law which have been formulated by this Court vide the order dated 20.11.2009, this Court has put a specific query upon Mr. P. S. Deka, the learned senior counsel for the appellant as to against which judgment and decree, the instant Appeal has been filed taking into account that vide the judgment and decree passed by the learned Trial Court on 26.06.2007, two decrees were passed. The first decree pertains to dismissal of the suit and the second decree whereby the counterclaim was decreed in favour of

the defendant. The learned senior counsel appearing on behalf of the Appellant submitted that the instant Appeal should be constricted as an Appeal against the decree passed in the counterclaim. The consequential effect of the said submission made by the learned senior counsel for the Appellant is that the plaintiff/appellant claim to any right, title interest over the suit land on the basis of adverse possession no longer exists as the learned Trial Court as well as the First Appellate Court had categorically held that the plaintiff/appellant herein did not acquire any right on the basis of the adverse possession. In view of the said aspect, the question therefore arises as to whether the defendants/respondents herein would be entitled to a decree for recovery of possession.

11. This Court further finds it apposite to take note of that the plaintiff duly admitted that the defendant No.1's husband had purchased the suit land vide a Deed of Sale being Deed No.2777/1984. The plaintiff further admitted that the defendant No.1's husband was the owner of the suit land. Therefore, the title of the defendant No.1's husband or for that matter, the defendants were not in dispute. The question therefore arises as to whether the plaintiff without having any claim on the basis of adverse possession and having admitted the defendants' title can forestall the right of the defendants to recover possession of the suit land.

12. Keeping in mind the above perspective, let this Court now take note of the five substantial questions of law which were formulated. The first substantial question of law pertains to whether the learned First Appellate Court had decided the said Appeal by following the mandate of Order XLI Rule 31 of the Code of Civil Procedure, 1908 and whether failure to formulate points for decision in the appeal resulted in miscarriage of justice.

This Court had duly perused the said judgment passed by the learned First Appellate Court and from a perusal of the said judgment, it reveals that the learned First Appellate Court has duly taken into consideration what is required to be done in terms with Order XLI Rule 31 of the Code. It is further seen from the judgment of the learned First Appellate Court that the First Appellate Court has duly taken note of the pleadings, the issues which were duly framed, the contentions which were raised by the counsels appearing for the parties and given the reasons for decision. This Court also finds it relevant to note of that the learned counsel appearing on appellant could not show as to how the non-framing of the point of determination had prejudiced the appellant, moreso, when the learned First Appellate Court has duly decided each and every issue as point of determination in the appeal. Under such circumstances, the first substantial question of law is not involved in the instant Appeal.

13. The second substantial question of law relates to as to whether the findings of the Courts below that the plaintiff/appellant was in permissive possession of the suit land is based on no evidence. The said substantial question of law so formulated is not a substantial question of law involved in the instant Appeal primarily on the ground that when the claim of the plaintiff that she had been in adverse possession, it was for the plaintiff to show that the plaintiff's possession was adverse to the true owner. However, from a perusal of the materials on record and the findings of facts which had attained finality, the plaintiff could not show that the possession of the plaintiffs was adverse to the true owner. Moreover, the plaintiff admittedly was a family member, i.e. being the sister of the husband of the defendant No.1, and as such, it was the requirement as per law to prove

byway of evidence that her possession was adverse to her brother, i.e. hostile, open and continuous for a period of 12 years. However, the finding of facts arrived at clearly show that she had miserably failed to prove the same. Under such circumstances, the conclusion so arrived at by the learned Trial Court as well as by the learned First Appellate Court that the plaintiff/appellant was in permissive possession cannot be said to be erroneous and more so in a proceedings under Section 100 of the Code.

14. The third substantial question of law is as to whether both the Courts below misconstrued the law and evidence relating to claim of the plaintiff/appellant over the suit land by prescriptive right of adverse possession without taking relevant facts and materials on record is not only a too vague but it is also a mixed question of law and facts and as such it cannot be a substantial question of law involved in the instant Appeal. It is a settled principle of law that if the Appellant in the Second Appeal wishes to urge misconstruction of law and non-consideration of evidence, the said question of law in order to be substantial has to be specific as to what provision of law had been misconstrued or what evidence if taken into account it would have changed the course of the proceedings. However, nothing could be shown in that regard by the learned counsel for the Appellant.

15. The fourth substantial question of law so formulated is whether both the courts below committed an error of law declaring title of the suit land in favour of the defendants/respondents in the counterclaim arising out of Title Suit No.42/05 in absence of positive evidence in support of their title. In the opinion of this Court, the substantial question of law so formulated is totally misconceived taking into account that the plaintiff has duly admitted

the title of the defendants. Not only that, the defendants have also placed on record vide various exhibits, i.e. Deed of Sale, the record of rights, the revenue receipts as well as the Municipal receipts, and as such, the said substantial question of law so formulated cannot be a substantial question of law involved in the instant Appeal.

16. The fifth substantial question of law is as to whether both the Courts below committed an error in ignoring the provision of Section 27 of the Limitation Act 1963 in absence of delivery of possession by the auction purchaser to the defendants/respondents. The said substantial question of law in the opinion of this Court cannot be said to be involved in the instant appeal in view of the fact that in the present case, the case set up by the plaintiff/appellant is on the basis of Article 65 of the Limitation Act, 1963. For the purpose of application of the said Article, the suit had to be filed based on title which the defendant has duly done by filing the counterclaim. It was the burden of the plaintiff to show that her possession was adverse to the true owner for the prescriptive period of 12 years. Both the Courts below have arrived at a finding of facts that the plaintiff had failed to prove adverse possession. Under such circumstances, application of Section 27 of the Limitation Act is totally misconceived.

17. Accordingly, it is the opinion of this Court that all the substantial questions of law which have been formulated by this Court are not substantial question of law involved in the instant Appeal. In view of the above discussion and taking into account that the defendants have proved their right, title and interest over the suit land and the plaintiff could not show that she had any semblance of right over the suit land, the defendants are entitled to recovery of possession.

18. Accordingly, this Court finds no reasons to interfere with the judgment and decree passed by the learned Courts Below. Consequently, the instant Appeal stands dismissed of with costs quantified at Rs.20,000/- for the present Appeal proceedings.

19. The respondents/defendants would further be entitled to costs throughout the proceedings.

20. Return the LCR to the Court Below.

JUDGE

Comparing Assistant