

GAHC010199782023



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

RSA/90/2020

SRI BIDHU BHUSAN HAZARIKA @ BIBLU HAZARIKA
S/O- LATE LAMBESWAR DAS
R/O- JAIL ROAD
P.O.
P.S. AND DIST.- JORHAT.

VERSUS

SRI JAYANTA LEKHARU AND 32 ORS

S/O- LATE CHENIRAM LEKHARU
R/O- KRISHNA NAGAR
CHANDMARI
GUWAHATI- 781003
DIST.- KAMRUP(M)
ASSAM.

2:SMTI. RUMA HAZARIKA
W/O- LATE INDU BHUSAN HAZARIKA
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.

3:MANASH INDU HAZARIKA
S/O- LATE INDU BHUSAN HAZARIKA
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA

P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
4:SMTI. MANURAMA HAZARIKA
D/O- LATE LAMBESWAR DAS
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
5:BASANTA KUMAR GOHAIN
S/O- LATE BHOLA NATH GOHAIN
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
6:PADMA PHUKAN
S/O- LATE PHULESWAR PHUKAN
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
7:RUDRA KANTA BORA
S/O- PADMESWAR BORA
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
8:UMESH BORA
S/O- LATE BHOTARAM
R/O- JAIL ROAD
JORHAT

BLOCK NO. 10 OF JORHAT TOWN
MOUZA
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P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
9:JUGAL CHANDRA DOLOI BARUAH
S/O- LATE PADMADHAR
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
10:BIPIN CH BHARALI
S/O- LATE ADIRAM
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
11:RATNESWAR KALITA
S/O- LATE PURNA KANTA KALITA
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
12:LEHKARAM CHANDRA SAIKIA
S/O- LATE DURGESWAR
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
13:SABITA THAKUR
W/O- UMESH THAKUR

R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.

14:GANESH CHANDRA BORA
S/O- LATE RUPRAM BORA
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.

15:JITENDRA NATH SANGMAI
S/O- LATE KABIRAM SAGMAI
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.

16:LAKHI NATH BORUAH
S/O- PADMESWAR BORUAH
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.

17:SANJIB BORGOHAIN
S/O- LATE KULADHAR BORGOHAIN
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.

18:KAMAL MORANG
S/O- LATE BORMANUH MORANG
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
19:JAYANTA PRASAD HAZARIKA
S/O- LATE GIRISH CH HAZARIKA
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
20:DIMBESWAR GOGOI
S/O- LATE BORKON GOGOI
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
21:SMTI. KALPONA GOGOI
W/O- DIMBESWAR GOGOI
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
22:JAYANTA KUMAR SARMA
S/O- LATE LAKHI NATH SARMA
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT

ASSAM
PIN- 785001.
23:NITU KUMAR GOGOI
S/O- LAKHESWAR GOGOI
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
24:SMTI. MAYA CHUTIA
W/O- LATE KHAGENDRA NATH CHUTIA
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
25:RATUL HAZARIKA
S/O- LATE INDUBHUSAN HAZARIKA
R/O- JAIL ROAD
JORHAT
BLOCK NO. 10 OF JORHAT TOWN
MOUZA
P.O.
P.S. AND DIST.- JORHAT
ASSAM
PIN- 785001.
26:HEMANTA LEKHARU
S/O- LATE CHENIRAM LEKHARU
R/O- KRISHNA NAGAR
CHANDMARI
GUWAHATI- 781003
DIST.- KAMRUP(METRO)
ASSAM
27:LAYANTA LEKHARU
D/O- LATE CHENIRAM LEKHARU
R/O- KRISHNA NAGAR
CHANDMARI
GUWAHATI- 781003
DIST.- KAMRUP(METRO)
ASSAM
28:DINA LEKHARU
D/O- LATE CHENIRAM LEKHARU

R/O- KRISHNA NAGAR
CHANDMARI
GUWAHATI- 781003
DIST.- KAMRUP(METRO)
ASSAM

29:RITA LEKHARU
D/O- LATE CHENIRAM LEKHARU
R/O- KRISHNA NAGAR
CHANDMARI
GUWAHATI- 781003
DIST.- KAMRUP(METRO)
ASSAM

30:SMTI. RINA LEKHARU SAIKIA
W/O- LATE CHANDRAMOHAN SAIKIA
R/O- DOWNTOWN
RUKMININAGAR
GUWHATI- 781006.

31:SMTI. ANU LEKHARU SAIKIA
W/O- DR. JOGENDRA SAIKIA
R/O- HENGRABARI
GUWAHATI- 781036
DIST.- KAMRUP (M)
ASSAM.

32:SMTI. MTI RUBI LEKHARU SAIKIA
W/O- DR. JUGESWAR SAIKIA
R/O- COLLEGE OF VETERINARY SCIENCE
KHANAPARA
GUWAHATI- 781022
DIST.- KAMRUP(M)
ASSAM.

33:SMTI. PARUL LEKHARU DAS
W/O- PRANJIT DAS
R/O- HATIGAON
GUWAHATI- 781038
DIST.- KAMRUP(M)
ASSAM.

Advocate for : MR A D CHOUDHURY
Advocate for : MR. D DAS SR. ADV (R1

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R32

R33) appearing for SRI JAYANTA LEKHARU AND 32 ORS

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

Date : 21-03-2024

JUDGMENT & ORDER

The instant appeal has been filed under Section 100 of the Code of Civil Procedure, 1908 (for short, the Code) against the judgment and decree dated 13.12.2019 passed by the learned Additional District Judge, Jorhat in Title Appeal No.9/2014 whereby the judgment and decree dated 31.05.2014 passed in Title Suit No.16/2010 was set aside and quashed.

2. This Court vide order dated 04.09.2020 admitted the instant appeal by formulating two substantial question of law:

i. Whether the first appellate court was justified in setting aside the judgment and decree passed by the trial court granting the relief of partition on the face of the pleading that the predecessor-in-interest of the respondents plaintiffs sold her land measuring 3 Kathas which was gifted to her by the common predecessor-in-interest of the parties to the suit as her share?

ii. Whether granting of relief to the respondents plaintiffs without considering the fact of gift to the daughters of the common predecessor in interest of the parties to the suit including the mother of the respondents plaintiffs amounts to perversity?

3. For deciding as to whether the above mentioned two substantial questions of law are involved in the instant appeal this Court finds it relevant to take note of the facts involved which led to the filing of the instant appeal.

4. One Lambeswar Das (since deceased) was the original pattadar of Periodic Patta No.97, who left behind two daughters and two sons. The two sons were Indu Bhusan Hazarika and Bibhu Bhusan Hazarika and two daughters were Nirmala Hazarika (Lekharu) and Manurama Hazarika. It was mentioned in the plaint expressly that this patta No.97 became patta No.241, which had various dags being dag Nos.7114, 7134, 7162, 7169, 7170, 7171 and 7272. It has been admitted in the plaint that during the lifetime of Late Lambeswar Das, he sold various plots of land in dag Nos.7171, 7114 and 7134 and resultantly in those dags i.e. dag No. 7171, the remaining land was 2 bighas 0 katha 17 lessas and in dag No.7134 only 14 lessas of land remained. In addition to that, Late Lambeswar Das had lands in the other Dag Nos. detailed hereinunder:

In dag No.7170 – 2 bighas 1 katha 9 lessas.

In dag No.7162 – 2 bighas 3 kathas 10 lessas.

In dag No.7169 – 3 bighas 2 kathas 12 lessas.

In dag No.7272 – 1 bigha 3 kathas 4 lessas.

The total measurement of the lands come to 12 bighas 2 kathas 6 lessas.

5. Mr. A Das, the learned counsel appearing on behalf of the respondents who were the plaintiffs submitted that in the plaint, there was a mistake of

mentioning that the remaining land in dag No.7171 to be 2 bighas 17 lessas which ought to have been 1 bigha 4 kathas 17 lessas. Accordingly, after the sale which had been made, the total remaining land was 12 bighas 1 kathas 6 lessas.

6. It is further seen from the plaint that from dag No.7169, 7170 and 7172, two plots of land were gifted measuring 2 bighas 4 kathas 4 lessas and 2 bighas 4 kathas 15 lessas i.e. totaling to 5 bighas 3 kathas 19 lessas. It has also been specifically mentioned in the plaint that this 2 bighas 4 kathas 4 lessas was gifted to the 15th number pattadar and 2 bighas 4 kathas 5 lessas was gifted to the 16th number pattadar. This Court, therefore, finds it very pertinent now to take note of Exhibit-1 which shows that the pattadar No.15 was Indu Bhusan Hazarika and the pattadar No.16 was Bidhu Bhusan Hazarika. This aspect of the matter was duly admitted by the plaintiffs in the plaint itself. It is relevant, therefore, to mention that from a perusal of the plaint, it is apparent that the father Late Lambeswar Das during his lifetime had gifted 2 bighas 4 kathas 5 lessas of land to the appellant from dag No.7169, 7170, 7172 and another plot of land measuring 2 bighas 4 kathas 4 lessas of the same dags to the predecessor-in-interest of defendant Nos.1 and 2. On the basis, thereof, the plaintiffs in the suit claims that an area of land measuring 6 bighas 3 katha 17 lessas remained, which fell into the share of all the four sons and daughters of Late Lambeswar Das. It was further claimed that the plaintiffs, who are the successor-in-interest of Nirmala Hazarika, the daughter of Late Lambeswar Das was entitled to 1 bigha 3 kathas 9 lessas of land which has been described in Schedule B. The plaintiff further sought for partition of the Schedule B land by

metes and bounds, amongst, the plaintiffs and the proforma defendant No.31 stating *inter alia*, that each plaintiffs and the proforma defendant No.31 would be entitled to 1/9th of the share of Schedule B. This aspect of the matter is clear from a reading of paragraph 11 of the plaint and Schedule C appended thereto.

7. This Court before further proceeding finds it relevant to take note of that the mother of the plaintiffs and the proforma defendant No.31 expired in the year 1982. During the lifetime of the mother of the plaintiffs and the proforma defendant No.31, there was no claim made after the death of Late Lambeswar Das. It was only on 22.07.2009, a legal notice was issued demanding share in the suit patta. But there was no response. Prior to that on 10.03.2009, it was mentioned that the plaintiffs could come to know while processing to regularize the land records by obtaining a certified copy of the jamabandi, after the death of their mother.

8. The suit was contested by the defendant No.16, Sri Bidhu Bhusan Hazarika by filing written statement. In the said written statement, it was mentioned that during the lifetime of the father of the defendant No.16, he gifted properties to his two sons i.e. Indu Bhusan Hazarika and to the defendant No.16 in the year 1965 and this fact was very much known to the mother of the plaintiffs who was also gifted an area of 3 kathas of land along with another 3 kathas of land gifted to the other daughter of Late Lambeswar Das. It is also seen from the written statement that the mother of the plaintiffs during her lifetime sold 3 kathas of land to Sri Anil Kumar Saikia and Sri Nabaratna Kumar Saikia and the other sister of the mother of the plaintiffs had also sold her portion of the three

kathas of land. It was specifically pleaded that after the death of Late Lambeswar Das in the year 1974, the mother of the plaintiffs knowing fully well that she had received her share did not claim any share in respect to the property till her death in the year 1982. It was only after 28 years, the plaintiffs had issued a legal notice claiming a share of the property of the grandfather.

9. On the basis of the above pleadings, four issues were framed which were:

- (i). Is there any cause of action for the suit?
- (ii). Is the suit barred by limitation?
- (iii). Whether the plaintiffs have right, title and interest over the suit land?
- (iv). Whether the plaintiffs are entitled to the reliefs as claimed?

10. The learned Trial Court by the judgment and decree dated 31.05.2014 dismissed the suit on contest holding, inter alia, that the suit was barred by limitation and the defendants have acquired right, title and interest over the suit land by way of adverse possession. Being aggrieved, an appeal was preferred being Title Appeal No.9/2014 before the Court of the learned District Judge, Jorhat which was subsequently endorsed to the file of the Court of the learned Additional District Judge, Jorhat for disposal. The learned 1st Appellate Court framed two points for determination i.e:

(1). Whether the observations of the learned Civil Judge, Jorhat in respect of the issue regarding limitation of the suit is sustainable in law?

(2). Whether the learned Civil Judge, Jorhat was right in the view that the respondent (defendant) have established prescriptive title to the suit property?

11. Both the points of determinations were held in favour of the plaintiffs/appellants therein and accordingly, the appeal was allowed and a decree was passed in favour of the plaintiffs. In paragraph 54 of the said judgment passed by the learned 1st Appellate Court on 13.12.2019, it was observed that the plaintiffs were entitled to right, title and interest in respect of 1/4th share equal to 1 bigha 3 kathas 9 lessas of land (described in Schedule B), out of Schedule A land (6 bighas 3kathas 17 lessas covered by PP No.97 (old) 241 (new) in respect to dag No.7169, 7170, 7172, 7171, 7134, 7162 of Block No.10 Jorhat Town Mouza) and further 8/9th share in Schedule B land i.e. 1 bigha 2 kathas 10 lessas out of Schedule A suit land. Further to that, the learned Trial Court was, therefore, directed to take necessary steps for passing a preliminary decree for partition and thereafter a final decree for partition expeditiously in any case within three months from the date of production of the copy of the said judgment.

12. Being aggrieved, the present appeal was filed by the appellant herein, who was the defendant No.16 in the suit and this Court vide order dated 04.09.2020 had admitted the appeal by formulating two substantial questions of law which had already been quoted hereinabove.

13. In the backdrop of the above facts, this Court had duly heard the learned counsels appearing for the parties. Mr. RB Phookan, the learned counsel appearing on behalf of the appellant submitted that in addition to the two other substantial questions of law which have been formulated by this Court, another

substantial question of law is on the question of limitation. This Court heard the learned counsels on the aspect of framing the additional substantial question of law. In the opinion of this Court an additional substantial question of law is required to be framed which is as follows:

Whether the learned 1st Appellate Court was justified in decreeing the suit without taking into consideration Article 110 of the Schedule to the Limitation Act, 1963?

14. This Court gave due opportunity to both the counsels to address their arguments on the three substantial questions of law formulated including the additional substantial question of law.

15. Mr. RB Phookan, the learned counsel for the appellant submitted that from a perusal of the plaint, it is a clear case of admission that in dag Nos.7169, 7170, 7172 of patta No.241, 2 plots of land were gifted to the two sons by Late Lambeswar Das. The said area in respect of the three dags was 2 bighas 4 kathas 4 lessas to the predecessor-in-interest of the defendants No.1 and 2 and 2 bighas 4 kathas 5 lessas to the Appellant. The learned counsel for the appellant further drawing the attention of this Court to the Exhibit-2 (legal notice dated 22.07.2009), submitted that a perusal of the said legal notice categorically shows that it was alleged in the said legal notice that the defendant Nos.1 and 2 and defendant No.16 started possessing the entire land for their benefit and making construction of the road side land under dag No.7169,7170, 7172 leaving nothing for the share of the plaintiffs as well as the other legal heirs. He further drew the attention to the contents of paragraph 9

of the said legal notice, wherein it has been stated that after obtaining the copy of the jamabandi on 10.03.2009, it was detected that the defendant Nos.1, 2 and defendant No.16 had obtained gift deed from Late Lambeswar Das for the roadside land depriving all other legal heirs very fraudulently which the donor was never entitled to gift under the provisions of law and the said Gift Deed had no legs to stand. It was, therefore, claimed in the said legal notice that the plaintiffs were entitled to $1/4^{\text{th}}$ share from the remaining unsold land of each dags. The learned counsel further submitted that from a perusal of the legal notice as well as the contents of the plaint, it would be seen that in the legal notice, it was mentioned that the total land remaining in the dag No.7169 was 3 bighas 2 kathas 12 lessas and the share of the plaintiffs was 4 kathas 8 lessas, whereas, in the plaint, the plaintiffs have duly admitted that only 1 bigha, 3 kathas, 16 lessas remained from the dag Nos. 7169, 7170 and 7172. The learned counsel for the appellant further submitted that although in the legal notice the right and authority of Late Lambeswar Das was questioned as regards the gifts made to the predecessor-in-interest of the defendant Nos.1 and 2 as well as to the defendant No.16 of the land measuring 5 bighas 3 kathas 9 lessas, but there was no challenge to those gift deeds.

16. Drawing the attention to paragraph 15 of the plaint, the learned counsel for the appellant further added to his submission that the plaintiffs had given up the land pertaining to those portions which had been gifted. Adding further, the learned counsel submitted that the perusal of the plaint would not show that in any manner that the mother of the plaintiffs from whom the plaintiffs claim their right had claimed her share immediately after the death of the grandfather of the plaintiffs i.e. in the year 1974. During the lifetime of the mother of the

plaintiffs till 1982, she never claimed any share. The plaintiffs thereafter did not claim their shares for the next 28 years and there is not even any whisper that any share or proceeds or any benefits out of those land was given to the plaintiffs at any point of time prior to 2009.

17. The learned counsel submitted that this is a pure and simple case which falls within the ambit of Article 110 of the Schedule to the Limitation Act, 1963. It is a different aspect of the matter that both the Courts below have dealt with in terms of Article 65 of the Limitation Act, 1963 on a misconstrued notion but facts as would be discernible would show that it was a case falling under Article 110 of the Limitation Act. He further submitted that in view of Section 3 of the Limitation Act, the issue can even be taken up even without any defence on this point. He further submitted that while in a case falling under Article 65, the burden is upon the person who is claiming adverse possession, whereas in the case of Article 110, it is the burden of the plaintiff to show that they have filed the suit within 12 years. He, therefore, submitted that the substantial question of law so framed duly arises in the instant appeal for which the impugned judgment and decree passed by the learned 1st Appellate Court requires to be interfered with. Adding further Mr. RB Phookan, the learned counsel for the appellant submits that the learned 1st Appellate Court did not take into consideration the fact that 3 kathas of land was gifted to the mother of the plaintiffs for which she never claimed any further right. The learned counsel further submitted that even without traversing to the facts alleged in the plaint, it would be seen that from the very admission in the plaint in respect to dag Nos.7169, 7170, 7172, the remaining land was 1 bigha 3 kathas 16 lessas and,

as such, even $1/4^{\text{th}}$ share of that land could not have been more than 2 kathas 4 lessas.

18. On the other hand, Mr. A Das, learned counsel appearing on behalf of the respondents who were the plaintiffs submitted that the learned 1st Appellate Court rightly decided the point of limitation, *inasmuch as*, the learned Trial Court could not have come to an opinion that by virtue of Article 65 of the Limitation Act, the defendant Nos.1 and 2 and defendant No.16 had any exclusive right over the suit land. The learned counsel further referred to the judgment of the Supreme Court in the case of *Karbalai Begum vs Mohd. Sayeed And Anr.*, reported in (1980) 4 SCC 396 as well as the decision in *Vidya Devi @ Vidya Vati (Dead) by L.Rs Vs. Prem Prakash & Ors* reported in 1995 (4) SCC 496. The learned counsel for the respondent further submitted that from a perusal of the plaint, it would transpire that only on 10.03.2009, the plaintiffs while processing to regularise the land records by obtaining the certified copy of the Jamabandi after the death of their mother could come to learn that they had been completely excluded and as such when the suit was filed in the year 2010, the same was within the period of limitation, in terms of Article 110 of the Schedule of the Limitation Act. Referring to paragraph 15 of the plaint, the learned counsel for the respondent/plaintiffs submitted that the plaintiffs do not admit the gift so made as valid. But the share of the plaintiffs has to be admitted by taking into account that the defendants have got the benefit on the basis of the Deed of Gifts. Referring to paragraph 15, the learned counsel for the respondents/plaintiffs submitted that although in the notice exhibited as Exhibit.2, the plaintiffs have challenged the gifts, but in the instant proceedings, the rights in respect of those lands which have been gifted have been abandoned. The learned counsel further referring to paragraphs 12 and 13 stated that the plaintiffs on various occasions have been demanding their share in the suit land, but the defendants had not paid any care to the effect and

were not vacating the possession from the share of the plaintiffs.

19. In the backdrop of the above, let this Court, therefore, take into account the three substantial questions of law, so framed in the instant appeal as to whether the same are involved. The first two substantial questions of law are interlinked. In terms with the said substantial questions of law so formulated, it transpires that the question which have been framed is as to whether the learned 1st Appellate Court was justified in setting aside the judgment and decree passed by the learned Trial Court granting the granting the relief of partition on the face of the pleadings that the predecessor-in-interest of the respondent/plaintiffs sold her land measuring 3 kathas which was gifted to her by the common predecessor-in-interest of the parties and the second substantial question of law relates to as to whether the non-consideration of the fact of the gift to the daughters of the common predecessor-in-interest of the parties amounts to perversity.

20. Upon a perusal of the materials on record as well as the pleadings, it reveals that the defendant had stated categorically in paragraph 7 of the written statement that 3 kathas of land was gifted to the mother of the plaintiffs. This very aspect of the matter was duly admitted in the cross examination of the PW-1 Jayanta Lekharu wherein he has admitted that his mother was gifted 3 kathas of land by his grandfather. This Court has duly taken note of the judgment and decree passed by the learned 1st Appellate Court and in the said judgment, the learned 1st Appellate Court did not take into consideration the said aspect of the matter that the plaintiffs' mother was gifted 3 kathas of land. The learned 1st Appellate Court merely granted the relief as prayed in the plaint, not even taking into account what Schedule B connoted and Schedule C meant. This aspect of the matter if had been taken into consideration, the decree which was passed by the learned 1st Appellate Court would have been different on the admitted facts of the case. This analysis, therefore, goes to show that there was perversity in the judgment passed by the learned 1st Appellate Court dated 13.12.2019. But the question arisen as to whether this Court in the present facts should remand the suit, *inasmuch as*, this particular mistake which has been committed has to be again looked into by the learned 1st Appellate Court or should this Court decide the same in the present proceedings. The answer to the above would be based upon the discussions made in respect to the additional substantial question of law so framed as to whether the suit was barred by limitation in view of Article 110 of the Schedule to the Limitation Act.

21. A perusal of Article 110 of the Limitation Act would show that in order to enforce the right to share of a joint family property by a plaintiff excluded from it, the plaintiff has to file a suit within a period of 12 years from the said of such exclusion becomes known to the plaintiff. The above Article makes it clear that it is the burden of the plaintiff to state in detail, the date on which it comes to the notice of the plaintiff that he had been excluded. The time as per Section 9 of the Limitation Act, in the opinion of this Court runs from the date the entitlement which accrues upon the plaintiff and when he had noticed that he had been excluded. The entitlement and the knowledge of exclusion are interrelated in so far as Article 110 is concerned. It cannot be understood that a plaintiff whose entitlement accrues on a particular date and sleep over his accrued rights and after a long lapse of time i.e. after 12 years, he claims his entitlement to his interest in the joint family property. The plaintiff has the burden to prove that after his entitlement, he had filed the suit within 12 years, unless he shows by way of evidence or otherwise that the co-sharers of the joint family property had recognized his right to a particular point of time and then only the period of Limitation shall continue to run.

22. The learned counsel appearing on behalf of the plaintiffs during the course of the hearing had placed reliance on paragraphs, 12, 13 and 16 of the plaint. As regards, the pleadings pertaining to the date of their knowledge about their exclusion on behalf of the plaintiff, PW-1 have adduced evidence and in verbatim have repeated the statement made in paragraphs 12, 13, and 16 in his evidence on affidavit. However, from the admitted facts, it would show that the grandfather of the plaintiffs expired in the year 1974 and there is no mention, whatsoever, that the plaintiffs' mother claimed during her lifetime till 1982. There is no mention, whatsoever, that immediately after the mother's death, the plaintiffs claimed, although the plaintiff No.1 at the time of the death of the mother was 18 years which is apparent from a perusal of his cross examination. In paragraphs 12 and 13, of the plaint as well as the evidence on affidavit of the PW-1, the plaintiffs duly mentioned that the defendant Nos.1, 2 and 3 have been possessing the entire Schedule A land without leaving scope to use of the share of the plaintiffs and the plaintiffs have been demanding their share on various occasions, but the defendants have paid no care to the effect. Both the plaint as well as the evidence of the plaintiffs is bereft of necessary details as to when the plaintiffs claimed and was not given their share. However, it was the burden of the plaintiffs to provide the details why they or their mother did not make a claim till 2009, whereas their entitlement accrued in the year 1974. It is also seen that the plaintiffs all along did not even after the death of their mother took any steps. There is not even a pleading or a shred of evidence that the plaintiffs was at any point of time given any benefit out of the joint family property. Under such circumstances, in the opinion of this Court the suit was barred under Article 110 of the Schedule to the Limitation Act. In view of the decision in the third substantial question of law so framed, the question,

therefore, of remanding or deciding the share of the plaintiffs in the present proceedings do not arise.

23. Accordingly, the impugned judgment and decree passed by the learned 1st Appellate Court is set aside and quashed. The judgment and decree of the learned Trial Court is restored, but for different reasons as detailed hereinabove.

24. The appeal stands allowed with costs quantified at Rs.11,000/- and the Appellant would be entitled to costs throughout the proceedings of the present litigation.

JUDGE

Comparing Assistant