

Assam Schedule VII, Form No. 133

Form No. [J] 3

HEADING OF JUDGMENT IN APPEAL

In the court of Civil Judge, Lakhimpur, North Lakhimpur.

Present :-Smt. T. Hussain

Civil Judge, Lakhimpur,
North Lakhimpur.

Thursday, the 27th day of February , 2020.

Misc. Appeal No.1/19

Indra Boruah

.....Appellant.

Versus

Chukedeu Boruah

.....Respondent.

This Appeal coming on for final hearing on 30.01.2020 in
presence of :-

Mr. R BoruahAdvocate/Pleader for the Appellant

Mrs. M.G. Boruah..... Advocate/Pleaders for the Respondent

And having stood for consideration to this day, the Court delivered the
following Judgment :

JUDGMENT

1. This appeal has been preferred against the order dated 10.12.18 passed by the Learned Munsiff Dhakuakhana in Misc (J) Case No. 6/17(in Title Execution Case No.4/16) dismissing the application filed by the Appellant/Petitioner under order 21 Rule 99,100 and 101 R/W section 151 of CPC.
2. The facts leading to filing this appeal is that the respondent/Decree holder instituted T.S 5/15 in the court of Munsiff, Dhakuakhana against one Sri Biren Bhuyan for recovery of possession of the suit land/Decreetal land, for permanent injunction restraining him from entering into the suit land. The case of the plaintiff/ respondent was that he was the owner of a plot of land measuring 1 Bigha, 1 katha and 15 lessa under Dag no. 368 pertaining to P.P No.- 44 of village- Aroya Revenue Map under Mouza Gohain (Ghilamara).On 04.04.15, the defendant illegally entered into the land and encroached two katha land out of total land 1 Bigha, 1 katha 15 lessa and fenced the land with bamboo and constructed dwelling house with bamboo and tin and started dwelling there along with his family without knowledge of the plaintiff. The plaintiff/ respondent came to know about the matter after one week and came to the spot and asked the defendant to vacate it. Then the defendant told him that he had purchased the plot of land from one Indra Baruah (i.e appellant). To clarify the matter, the plaintiff/ respondent suggested the defendant to call the Lat Mandal and Gaon Burah. On 12.04.15, the lat Mandal arrived at the spot with relevant Revenue Map of the village and confirmed that the said land was owned by the plaintiff. After that, the Gaon Burah told the defendant to vacate the suit land and handed over it to the plaintiff. The defendant sought some time from the plaintiff to make some alternative arrangement. The plaintiff/ respondent on humanitarian ground, on request of the defendant, permitted the defendant to remain on his land to make his alternative arrangement. After that the defendant did not vacate the land and asked the plaintiff for more time. Thereafter, the defendant remained on the land on different pre-texts. Hence, the plaintiff finally on 25.10.15 approached

the defendant to vacate the land whereupon the defendant became angry and refused to vacate the land. The plaintiff reported the matter to Lat Gaon Burah. Under these facts and circumstances, the plaintiff/respondent instituted the suit for recovery of possession of the suit land, for permanent injunction restraining the defendant from entering into the suit land.

3. The defendant contested the suit denying the claim of the plaintiff/respondent over the suit land. According to the defendant, the defendant took possession of the land on the basis of handing over the possession by the pattadars Phanidhar Gohain and others. Later, the suit proceeded ex parte and vide judgment dated 26.08.16, the learned Munsiff, Dhakuakhana decreed the suit declaring right, title and interest of the plaintiff over the suit land, for khas possession of the suit land and also granted permanent injunction.

4. Thereafter, the plaintiff filed Title. Execution No. 4/16 for execution of the decree. During the pendency of this Title Execution case, the Appellant filed petition being No. 395/17 under Order 21 Rule 90, 100 and 101 CPC with prayer for an order that the Petitioner/Appellant is entitled for possession of the land described in the schedule to the petition and for permanent injunction restraining the decree holder, his agents, men etc from entering into the schedule land.

5. The case of the petitioner/Appellant is that, his father late Kuledhar Boruah and the decree holder's father late Bogendra Boruah were brothers. Before the marriage of late Kuledhar Boruah, he was living jointly with his father late Bhogram Boruah and elder brother Bhogendra Boruah at their original residence where the respondent is residing. After the marriage of Kuledhar Boruah, on first day of Bohag in the year 1963, late Bhogram Boruah separated his younger son Kuledhar from the joint family and directed him to construct separate residence and homestead over the plot of land measuring 3 Bighas 9 lessa in Dag No. 366 and 1 Bigha 1 katha 15 lessa in the Dag No. 368 in the Revenue Village Aroia, Mouza- Gohain in the District of Lakhimpur, Assam. Late Bhogram Boruah by an oral family settlement kept the rest of the land under Dag no. 184 and 362 under his

exclusive possession. The elder son namely Bhogram Boruah resided with his father jointly. Kuledhar Boruah took the possession of total land measuring 4 Bigha 2 kathas 4 lessa of land from 2nd day of Bohag, in the year 1963 as per the direction of his father. Thus Kuledhar had been in possession of plot of land measuring 4 Bigha 2 kathas 4 lessas of land under Dag No. 366 and 368. It is alleged that the decreetal land of T. Exe. Case No. 4/16 includes the land given in the schedule to the plaint under the possession of Kuledhar Boruah. Kuledhar Boruah constructed residential house and home stead over the said plot of land under the Dag No. 368 and the rest land was used for cultivation and for fishery. During his life time from the year 1963, Kuledhar Boruah enjoyed the entire land peacefully without any intervention of his brother Bogendra and his sons. Bogendra Boruah had been enjoying his share of lands in Dag NO. 184 and 362 as those land measuring 6 Bighas 7 lessa fell in his share as per partition made by his father. Kuledhar Boruah died on 24.05.2005 leaving behind his wife and children. Except the daughter Bhan Boruah, all the daughters of Kuledhar Boruah got married. His son Manik Boruah, daughter of Bhan Boruah and his wife have been living separately as the land of Dag No. 366 and 368 falls in the exclusive share of the petitioner/Appellant. After death of his father, the petitioner has been enjoying the land of Dag No. 366 and 368 by renovating the old dilapidated house of his father and also by cultivating and digging fisheries.

6. During such continuation of possession, suddenly on 20.11.17, some employees of the court led by the decree holder/ respondent started to measure the land under Dag No. 368 and started to uproot the bamboo fencing of the petitioner/Appellant and started to dispossess the petitioner/Appellant by fixing new bamboo fencing under Dag No. 368 and 366. The petitioner/Appellant and some neighbors somehow prevented the employees of the court and the decree holder/ respondent from doing further damage to the bamboo fencing of the petitioner/Appellant. But the O.P/ decree holder directed the petitioner not to repair the uprooted bamboo fencing, posts fixed over the land of Dag No. 368 and intimated the petitioner that they

would come again with order of the court within a very short period and completely dispossess the petitioner from the land under Dag No. 368 and 366. Then from the employees of the court, the petitioner came to know that the O.P/ Decree holder had filed title suit being T.S 5/15 before the court for declaration of right, title and interest and recovery of possession of land measuring 2 kathas against one Sri Biren Bhuyan. According to the Petitioner/ appellant, Biren Bhuyan had no connection with the land under Dag no. 368 of P.P no. 44. Biren Bhuyan had purchased the land of Dag No. 367 of P.P No. 68 from the pattadar Sri Phanidhar Gohain and others. Biren Bhuyan is stranger to the land under Dag No. 368. The petitioner has come to know that the O.P/ decree holder with a purpose to fulfill his ill- intention of dispossessing the petitioner/Appellant from the entire land under Dag No. 368 and 366, instituted the suit against Biren Bhuyan in spite of having knowledge that Kuledhar Boruah ,the father of the petitioner/Appellant had been in possession of the land. The purpose of the D.H/ plaintiff is to dispossess the petitioner from not only the entire land of Dag No. 368 but also from the land of Dag No. 366 by obtaining a decree against some other person who is not in possession of the suit land for which the plaintiff did not implead the petitioner as party defendant in the Title Suit No. 05/15.

7. The further case of the Appellant/Petitioner is that the respondent/ Decree holder,his father Bogendra Baruah and his brother Harukoti Baruah were custodians of all the documents of the landed properties of Late Bhogram Baruah and by taking advantage of that the respondent and his brother Harukoti Baruah mutated their names in the land under dag No.184,362,366 and 368 covered by Periodic Patta No.44 in spite of having exclusive possession of their uncle Kuledhar Baruah i,e the father of the Appellant /Petitioner over 4B 2 K and 4 L of land under dag No.366 and 368 since second day of *Bohag* 1963.

8. It is further stated by the petitioner/Appellant that on the next date of the death of his father i,e on 25.05.2005, the Respondent/Opposite party tried to dispossess the petitioner and his

family from the land under dag No.368 and 366. But due to strong *résistance*, the respondent/Opposite party failed to do so. According to the petitioner since 25.05.05, he has been in continuous possession of the land denying the ownership and title of the respondent/Opposite party. The respondent/Opposite party/ decree holder filed a petition before the circle Officer ,Subansiri Revenue Circle on 11.06.2009 for recovery of possession of the land under dag No.366 and 368 from the petitioner/Appellant . But the said petition was dismissed by the Circle Officer on the filing of objections by the petitioner/ Appellant. The respondent/Opposite party/ decree holder again on 07.04.2016 tried to dispossess the petitioner and his family from the land under dag No.368 and 366 and again failed to do so. The petitioner took the plea of adverse possession over the said land under dag No.368 including the schedule land by contending that he has been in possession over the land under dag No.366 and 368 including the decreetal land of T.Ex case No.4/16 denying the right ,title and interest of the Opposite party /Decree holder/ Respondent since the days of his father and also since 25.05.2005 and thereafter on each and every dates when the Opposite party /Decree holder/ Respondent tried to dispossess him.

Under these facts and circumstances, the petitioner/ appellant filed the petition No.395/17 with prayer for an order that he/petitioner/Appellant is entitled for possession of the land described in the schedule given in the petition by removing the bamboo posts fixed over the said land and for permanent injunction restraining the decree holder ,his agents ,men etc from entering to the said land giving rise to Misc(J) case No. 6/17 (in Title Execution No.4/16).

9. The Decree holder/ respondent submitted written objection contending that the petition is not maintainable. In his written objection, the decree holder has denied the case of the petitioner regarding his possession over the decreetal land. The further contention of the decree holder/ respondent is that in the original suit, the defendant Biren Bhuyan submitted his written statement wherein he claimed that he had interest and possession over the land covered under Dag No., 367 , P.P No. 68 and that Sri Horu Koite Boruah is the

pattadar of the suit land and thereafter, by amending the plaint Sri H. Boruah was impleaded. He also contested the suit by filing written statement and thereafter, the suit was decreed. The petitioner is not pattadar nor has any legal right to get order for injunction against the O.P/ decree holder. The further contention of the O.P/ decree holder is that the petitioner has made contradictory claims and thus not entitled to any relief.

10. In support of his claim, the petitioner/ appellant examined five witnesses and exhibited several documents.

11. Thereafter, hearing both the parties, vide order dated 20.12.18 the learned Munsiff, Dhakuakhana rejected the petition of the petitioner/ appellant.

12. Being aggrieved and dissatisfied, the appellant/ petitioner preferred this appeal on the following grounds:

- i For that, the learned court bellow has not properly interpreted the provisions of law specially the right, title and interest of the parties as provided by Rule 101 of order 21 of CPC.
- ii For that, the leaned court below has not properly discussed the evidence adduced by the appellant including the documents exhibited.
- iii For that since the respondent has not supported his objection by adducing evidence as such no right title or the interest of the respondent can be determined but, the learned court below ignored this aspect and dismissed the petition of the appellant and as such the order dated 20.12.18 is liable to be set aside.
- iv For that the learned Munsiff, Dhakuakhana in its order dated 20.12.18 has not properly discussed the principles of adverse possession and arrived at a wrong conclusion .

13. Called for LCR has been received and perused the same.

14. Heard the Learned Counsel for the parties.

15. Points for determination :

Whether the learned court below erred in law and facts in passing the impugned order requiring any interference by this court?

16. Decision and reasons thereof:

During the hearing, the learned counsel for the Appellant has submitted that under order 21 Rule 101 CPC all the questions (including questions relating to right, title and interest in the property) arising between the parties shall have to be determined by the court dealing with the Application but the Learned court below without considering the evidence adduced by the Appellant and his witnesses arrived at a wrong conclusion.

17. On the other hand, the Learned counsel for the Respondent has argued that since the Appellant made contradictory claims in his petition in respect of the land described in the schedule of the petition by once contending that the same was inherited by his father Kuledhar Baruah from his Grand father Bhogram Baruah and thereafter claiming adverse possession over the land, the Learned court below rightly passed the impugned order .

18. The contents of the petition filed by the petitioner/Appellant under order 21 Rule 99,100 and 101 CPC show that initially the petitioner said that the concerned land under dag No.68 fell in the share of his father Late Kuledhar Bauah as per family settlement and since the 2nd day of Bohag 1963 , Kuledhar Bauah had been in possession of the land along with his family (including the petitioner) and after his father the petitioner inherited the same and thereby he claimed his right, title and interest over the said that. In this respect ,it is an admitted fact the Respondent Sri Chukdew Baruah and his brother Harukoti Baruah are Pattadars of the land under dag No. 68 whereas the petitioner is not a recorded pattadar nor his father was .The contention of the Appellant/Petitioner in this respect is that respondent, his father Bogendra Baruah and his brother Harukoti Baruah were custodians of all the documents of the landed properties of the original owner Late Bhogram Baruah and by taking advantage of that, the respondent and his brother Harukoti Baruah mutated their names in the land under dag No.184,362,366 and 368 under Periodic

Patta No.44 in spite of having exclusive possession of their uncle Kuledhar Baruah i,e the father of the Appellant /Petitioner over 4B 2 K and 4 L of land under dag No.366 and 368 since second Bohag , 1963.

subsequently in his pleading the petitioner/Appellant took the plea of adverse possession by contending that he has been in possession over the land under dag No.366 and 368 including the decreetal land of T,Ex case No.4/16 denying the right ,title and interest of the Opposite party /Decree holder/ Respondent since the days of his father and also since 25.05.2005 and thereafter on each and every dates when the Opposite party /Decree holder/ Respondent tried to dispossess him.

19. Though he claimed adverse possession, the petitioner himself said in his petition that on the next date of the death of his father i,e on 25.05.2005, the Respondent/Opposite party tried to dispossess him and his family from the land under dag No.368 and 366. But due to strong résistance,the respondent/Opposite party failed to do so. According to the petitioner since 25.05.05, he has been in continuous possession of the land denying the ownership and title of the respondent/Opposite party. On 11.06.2009,the respondent/Opposite party/ decree holder filed a petition before the circle Officer, Subansiri Revenue Circle for recovery of possession of the land under dag No.366 and 368 from the petitioner/Appellant . But the said petition was dismissed by the Circle Officer on the filing of objections by the petitioner/ Appellant. The respondent/Opposite party/ decree holder again on 07.04.2016 tried to dispossess the petitioner and his family from the land under dag No.368 and 366 and again failed to do so.

20. During the hearing, the learned counsel for the petitioner/Appellant has made it clear that the Appellant /Petitioner has claimed possession over the land under dag No.68 including the decreetal land of T.Ex case No. 04/16 by taking the plea of adverse possession.

21. Therefore let us now come to the law of Adverse possession. Under the doctrine of adverse possession, a person who

is not the original owner becomes the owner because of the fact that he has been in possession of the property for a minimum of 12-years, within which the real owner did not seek legal recourse to oust him.

Regarding adverse possession, the Hon'ble Supreme court held in the case *Amarendra Pratap Singh v Tej Bahadur Prajapati* reported in (2004)10 SCC 65 that "A person, though having no right to enter into possession of the property of someone else, does so and continues in possession setting up title in himself and adversely to the title of the owner, commences prescribing title into himself and such prescription having continued for a period of 12 years, he acquires title not on his own but on account of the default or inaction on part of the real owner, which stretched over a period of 12 years results into extinguishing of the latter's title."

Here in this case though the petitioner has taken the plea of adverse possession, by saying that his father has been in possession of the land since 2nd Bohag 1963 and thereafter since 25.05.05 he has been continuous possession of the land denying the right title and interest of the Respondent, it is to be noted as per his own pleadings, his father came in to possession of the land as the same fell on his share as per family settlement and therefore the plea of Adverse possession regarding the possession of his father is not sustainable.

22. One of the essential conditions of the doctrine of adverse Possession is that the person claiming adverse possession must show that his possession was open and undisturbed.

According to the petitioner, since 25.05.05, he has been in continuous possession of the land denying the ownership and title of the respondent/Opposite party. But in his pleadings itself, he showed how the respondent tried to dispossess him from the concerned land on different dates by saying that on the next date of the death of his father i.e on 25.05.2005, the Respondent/Opposite party tried to dispossess the petitioner and his family from the land under dag No.368 and 366. But due to strong resistance the respondent/Opposite party failed to do so. On 11.06.2009, the respondent/Opposite party/decree holder filed a petition before the circle Officer, Subansiri

Revenue Circle for recovery of possession of the land under dag No.366 and 368 from the petitioner/Appellant . But the said petition was dismissed by the Circle Officer on the filing of objections by the petitioner/ Appellant. The respondent/Opposite party/ decree holder again on 07.04.2016 tried to dispossess the petitioner and his family from the land under dag No.368 and 366 and again failed to do so.

23. Therefore it is established that the petitioner's/Appellant's possession over the land was not uninterrupted and undisturbed and hence it can not be called adverse possession. Thus the petition/Appellant was not able to prove its claim of right and title over the land by way of adverse possession.

It is seen that in the impugned order dated 20.12.18 , the Learned court below thoroughly discussed the matter and I find that the appeal is devoid of any merit. Therefore decision of the learned trial court requires no interference.

24. Order: The appeal is dismissed on contest with costs.

25. Return the LCR along with a copy of this judgment to the court of the learned Munshiff, Dhakuakhana , immediately.

Given under my hand and seal of the court on this 27th day of February, 2020

(T. HUSSAIN)
Civil Judge, Lakhimpur,
North Lakhimpur.

Dictated and corrected by me-

(T. HUSSAIN)
Civil Judge, Lakhimpur,

North Lakhimpur.

Transcribed and typed by-

Sri Jimaya Deuri, Stenographer.