

**(2003) 05 GAU CK 0028**

**Gauhati High Court**

**Case No:** Second Appeal No. 45 of 96

Monabari Tea Co. Ltd.

APPELLANT

Vs

On the Death of Amar Bahadur  
Khowas, his Legal Heir

RESPONDENT

**Date of Decision:** May 30, 2003

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11

**Citation:** (2004) 1 GLR 156

**Hon'ble Judges:** S.K. Kar, J

**Bench:** Single Bench

**Advocate:** S. N Sarma, Yadav Doloi, H. Sarma and Y.S. Mannan, for the Appellant; T.C. Khatri and A.K. Roy, for the Respondent

**Final Decision:** Allowed

### **Judgement**

S.K. Kar, J.

A title suit, T.S. No. 48/78, instituted to the plaintiff before Munsiff No. 2, Tezpur, was decreed but appeal being filed by defendant against it, T.A. 28/93, was allowed by Asstt. District Judge, Sonitpur, reversing the decree and dismissing the suit hence this second appeal has been filed by the plaintiff (Monabari Tea Co. Ltd.).

2. Briefly stated, case for the plaintiff (appellant before this court) is that 3 khata of land covered by dag No. 217 (New) patta No. 65, village : Hindugaon, Mouza : Balipara, hereinafter called the suit land, is the property owned and was possessed by the plaintiff exclusively till the defendant trespassed upon it and constructed a house thereupon (the suit land) on or around the month of January 1973 and started living there with his family. That due to illegal entry and occupation the defendant is liable to pay compensation.

3. Defendant (respondent before the court) contested the suit raising usual and formal pleas and denied the allegation, contending, inter alia, that title of plaintiff, if

any, over the suit land has since been extinguished u/s 27 of Limitation Act. That defendant had been occupying the suit land with permission of the Manager of Kacharigaon Tea Estate from the year 1960 by clearing the jungles. That town committee allotted a holding number to the defendant and for that reason he was not supposed to take permission of plaintiff and as such was occupying the land on his own right from 1960. That since he is occupying the land since 1965 he is not liable to be evicted or to pay compensation.

4. Trial court (Munsiff) framed the issues in the suit as follows :

- "1. Whether there is cause of action for the suit.
2. Whether the suit is barred by limitation.
3. Whether the plaintiff has title over the suit land.
4. Whether the plaintiff has right to sue in the corporate name.
5. Whether the suit is correctly valued for the purpose of Court fee.
6. Whether the defendant trespassed into the suit land in January 1973.
7. Whether the defendant caused any wrongful loss to the plaintiff and whether the defendant is in peaceful possession of the suit land.
8. Whether the plaintiff is entitled to a decree.
9. To what other relief/reliefs the parties are entitled to?"

5. Three witnesses (PWs) for plaintiff and one for the defendant (defendant himself, d.w.1) were examined. Documents relied upon are Jamabandi, certificate of incorporation (all photocopies).

6. I have heard learned counsel on both sides. The substantial question of law formulated are as follows :

"(a) Whether the order of the First Appellate Court opining that the suit is not properly valued under the Rules is a ground or not for dismissal of the suit.

(b) Whether finding of the First Appellate Court regarding adverse possession of the defendant is legally valid or not."

I have examined the impugned judgment of First Appellate Court and the Original judgment of the court of Munsif and considered the evidence and materials on record.

7. Question No. (a) : Proper valuation of the suit is a pre-requisite for further progress of the suit and law is settled that such a dispute is to be taken up the 1st instance as preliminary issue along with other legal issues on a decision of which suit may not be maintainable. Order VII Rule 11(b) and (c) provides that a plaint may be rejected even if after the direction of the court to correct the valuation it remains

undervalued or insufficiently stamped within a time fixed by the court. There cannot be a dispute that court fees is a revenue matter which has nothing to do with the merit of the suit. But then, suit will not be entertained and continued if requisite court fees are not paid on judicial valuation of the claim in the suit. Issue No. 5 was framed in this context in the suit. It will be significant to note that the present suit was instituted on 31.7.1978 and hence in considering the issue attention to be made to the valuation of things at that time of 1978. The objection in the W.S. in this regard goes as follows :

"8. That the claim or the plaintiff is not properly valued and proper court fee is not paid. The market value of the suit land would far exceed than that assessed by the plaintiff and needs determination by court after enquiry according to law."

The W.S. has, thus, not suggested what should have been the market-value of the suit land. There is nothing to show that defendant insisted or pressed for such a decision of the court in requirement of Order VII Rule 11 to get any benefit for such defect. The defendant might have valued his right to resist the suit there and then. It is true that in case of recovery of possession of any plot of land the valuation to be made is the market-value of the land and learned First Appellate Court was wrong in holding that the suit in its present form was required to be valued u/s 7(iv)(c) of the suit Valuation Act. Even than valuation of Rs. 900 for three katha of land in the year 1978 in or around a village land may not be in the lower side. Even if the argument of improper valuation is accepted than also the course of remedy will be as per the settled law to direct valuation within a fixed time and making payment of this balance of court fees before proceeding further with the suit. It is permissible also in law to decree the suit conditionally subject to payment of requisite court fees on re-valuation within a time fixed by court. Dismissal of suit on such technical matter is neither desired nor is in consonance with proper administration of justice. Court can't be just casual.

8. Be that as it may, it will be seen that decision on this issue was not the solitary ground on which suit was dismissed. It was one of the grounds along with issues of limitation, trespass and absence of cause of action to refuse relief. Had it been the sole ground than the proper course would have been sending back (remand) of the suit for proper valuation and payment of court-fees. I don't find the objection of appellant here as any force.

9. Question No. (b) : This is the vital issue which will decide the ultimate fate of the suit. Law of adverse possession has its divergent aspect and cannot be put into any straitjacket. It is a question of extinction of title against one and acquisition in favour of another on the existence of certain exigencies recognised in law. One of such law is that all claim of adverse possession must be definitive and distinctive assertion of right in denial of that of the true owner of the property in dispute. Law of pleading also requires a consistent and unequivocal claim as opposed to any stretch of confusion of hesitation or imagination etc.

10. In the instant suit what has been pleaded in the written statement is a claim in confusion and inconsistency, in my opinion, if one goes by the averments on the written statement (W.S. in short). In para 11 of the W.S. the defendant/respondent Amar Bahadur Khowas stated :

"The defendant says that he has been occupying the land since 1960 as it was full of jungle by being permitted by the manager of Kacharigaon Tea Estate to occupy the same. The Town Committee had allotted the holding number to the defendant. In view of this the defendant was not supposed to take permission of the plaintiff to occupy the land and he has been possessing the land by his own right peacefully since 1960 hostile to and contrary to the rights now being claimed by the plaintiff in the suit."

Then again, para 13 of the W.S. goes as below :

"That the defendant is entitled to continue occupation of the land as of his own as he has been occupying the same peacefully and continuously since 1965 and is not liable to be evicted from the land and/or to pay compensation to the plaintiff as alleged in para 5 of the plaint."

One can find the inconsistencies and confusions clear and patent enough for not inviting/drawing the sympathy of the court of Law. Hon"ble Apex Court held that person pleading adverse possession has no equity in his favour (Refer law given vide citation [Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumar Sharma and others,](#) It is entirely for the person/party desiring/claiming to plead and establish all facts necessary to give evidence of any case of adverse possession. There is not dispute in law that the pleadings is the foundation of the claim of a party and no amount of evidence can substitute pleadings [Abubakar Abdul Inamdar \(dead\) by LRs. and others Vs. Harun Abdul Inamdar and Others,](#) Coming to evidence part of the case of the defendant/respondent also it will be seen during his deposition on oath d.w.1 (defendant) has stated in this context as follows:

"I have title less than one bigha of land in town Rangapara. I live there with my family. The suit land was earlier covered with jungles. I cleared the jungles and am living there since 1960 by constructing houses. The land where I am living is the suit land."

The suit land is, however, only three katha (1 bigah means 5 katha) and not more as per plaint D.W. 1 further stated when he started occupying the suit land none was in actual possession of the same, it was mere jungle land and none objected to his possession at that time. A reading of the deposition of d.w.1 will show that he was indirectly admitting title of plaintiff, at least there is no categorical denial of title of the plaintiff or setting any hostile title on claim of adverse possession. The evidence is evasive in nature and inconclusive in character to find and hold any case of claiming of title on the principle of adverse possession beyond the statutory prescribed period of limitation of 12 years as provided by Article 65 of Limitation Act

read with provision of Section 27 of the said Act. Cases law cited by referring to [Konda Lakshmana Bapuji Vs. Government of Andhra Pradesh and Others](#), will be relevant here where Hon"ble Apex Court hold :

"53. The question of a person perfecting title by adverse possession is a mixed question of law and fact. The principle of law in regard to adverse possession is firmly established. It is well settled proposition that mere possession of the land, however, long it may be, would not ripen into possessory title unless the possessor has *animus possidendi* to hold the land adverse to the title of the true owner. It is true that assertion of title to the land in dispute by the possessor would, in an appropriate case, be sufficient indication of the *animus possidendi* to hold adverse to the title of the true owner. But such an assertion of title must be clear and unequivocal though it need not be addressed to the real owner. For reckoning the statutory period to perfect title by prescription both the possession as well as the *animus possidendi* must be shown to exist. Where, however, at the commencement of the possession there is no *animus possidendi*, the period for the purpose of reckoning adverse possession will commence from the date when both the actual possession and assertion of title by the possessor are shown to exist."

No other evidence of any type was adduced by the defendant/ respondent to support any claim of title. In his cross-examination he stated that he knew later that land belonged to Town Committee but admitted to have filed no document to support claim of holding and payment of taxes. He was confronted with facts given in his W.S. to discredit him as a inconsistent person to claim right.

11. I was again referred to by learned counsel for the appellant/plaintiff, law given in (2001) 2 SCC 478 para 7 where relying upon an earlier decision of the court Hon"ble Apex Court held :

"7. The law with regard to perfecting title by adverse possession is well settled. A person claiming title by adverse possession has to prove three nec - nec vi, necc clam and nec precario. In other words, he must show that his possession is adequate in continuity, in publicity and in extent."

There is no ground for any confusion that the onus of proving claim of title by adverse possession is on person who claims it, refer [Konda Lakshmana Bapuji Vs. Government of Andhra Pradesh and Others](#), This High Court vide AIR 1995 Gau 76 para 5 also held :

"A court cannot under the law, make out a new case not pleaded by parties. I find the learned First Appellate Court just committed this mistake leading to an error of judgment in interpreting essentials of claim of title in principles of adverse possession."

This court held on another occasion that goes as follows :

"Mere possession, however long, does not necessarily mean that it would be adverse against the true owner-Adverse possession becomes hostile to the true owner when a person openly and continuously possesses land under a claim of right and adverse to the title of the true owner for the statutory period."

1990(2) GLJ 472.

Law is also settled that a permissive possession cannot be converted into adverse possession. [The State Bank of Travancore Vs. Aravindan Kunju Panicker and Others,](#)

12. Thus, from all or any angle, vis-a-vis the pleadings on record, cannot make out any case of acquisition of title by adverse possession by the contesting defendant/respondent in back ground if facts and circumstances of this present case. Question answered.

13. I find for the reason as aforesaid the learned First Appellate Court as wrong and the Judgment and decree passed by him is liable to be struck down, which I do.

14. In the result, the appeal is allowed. The impugned judgment and decree of court of Asstt. District Judge, Sonitpur, is hereby set aside and the judgment and decree passed by learned trial court (Munsiff) is restored.

15. No costs.