

(2000) 09 GAU CK 0018

Gauhati High Court

Case No: Second Appeal No. 73 of 1996

Union of India (UOI) and Another

APPELLANT

Vs

Mst. Azibun Nessa Khatun and
Others

RESPONDENT

Date of Decision: Sept. 12, 2000

Acts Referred:

- Assam Land (Requisition and Acquisition) (Amendment) Act, 1964 - Section 17
- Civil Procedure Code, 1908 (CPC) - Section 100
- Criminal Procedure Code, 1973 (CrPC) - Section 145

Citation: (2000) 3 GLT 606

Hon'ble Judges: J.N. Sharma, J

Bench: Single Bench

Advocate: CGSC, for the Appellant; H.R. Choudhury, S. Baruah and K.A. Mazumdar, for the Respondent

Final Decision: Dismissed

Judgement

J.N. Sarma, J.

This appeal has been filed by the defendants. The plaintiffs brought a suit being Title Suit No.43/89. The learned Munsiff No.2, Karimganj decreed the suit. An appeal being Title Appeal No. 16/93 was filed and that was dismissed by the learned District Judge, Karimganj. Hence, this Second Appeal.

2. During the pendency of the appeal respondent No. 1(e) died, but the heirs were not substituted. Looking to the matter I find that the estate is properly represented by other respondents on record. So the appeal has not abated.

3. The brief facts are as follows:-

That the plaintiff No. 1 is the owner of the Schedule land appertaining to Taluk 14875/186 Abul Md. and 14884/195 khow as Bakshi and some other land comprising

some other taluks by mourashi right and the plaintiff Nos. 2 to 4 are his sons and the plaintiffs have right, title interest and possession over the suit land and they have been residing there since long years back. The homestead of the plaintiffs was originally covered by the schedule land alongwith some other land comprising several settlement dags including settlement dag Nos. 813 and 814 and the total area is 13 bighas. During last settlement survey operation, the homestead land of the plaintiffs were wrongly recorded in the name of some other persons. Then the plaintiff No. 1 filed D.P. Case No. 163 of 1963 and some other cases in the Court of Revenue and settlement officer, Karimganj for correction of the settlement records of the schedule land and other lands in the name of the plaintiff No. 1 and in that case order was passed on 13.5.1965 for correction of Khatian No.2639 Dag No. 814 covering Taluk No. 14875/186 Abul Md. to open a new mourashi Khatian in the name of the plaintiff covering an area of 1.44 decimals and accordingly fresh Khatian No. 5176 was issued. In respect of schedule remaining land in Dag No. 813 the Revenue and settlement officer passed an order on 18.5.1965 to the effect that dag No. 813 covering an area of 1.34 decimals be cancelled form the Khatian No. 2411 and ordered to open a new mourashi Khatian in the name of Khan Bahadur Mahmad All. Ahmadur Rahman and the plaintiff No. 4 under estate No. 14884/195 Khowaj Bokshi Mahmad Ali and Ahmadur Rahman were owners of 40 decimals land of original settlement dag No. 813 as plaintiff No. 1 sold 40 decimals land to Khan Bahadur Mahmad Ali and Ahmadur Rahman. The Govt. of Assam acquired some land of the plaintiff excluding the schedule land and some other lands for B.S.F. Camp, but the homestead land of the plaintiff was neither requisitioned nor acquisitioned by the defendants. The B.S.P. Camp of the defendant No.4 is situated adjacent to the homestead land of the plaintiff, but the defendants have no right or interest in the schedule homestead of the plaintiffs. But the defendant No.4 and his subordinates military personnel were threatening the plaintiffs to leave the scheduled homestead land-. In the last week of October, 1987 the defendant No.4 forcibly entered into the schedule homestead land and erected iron fencing adjacent to the house of the plaintiffs and also constructed temporary motor garrage and shed house in the schedule land. Hence the suit.

The defendants have contested the suit by filing written statement contending, inter alia, therein that there is no cause of action for the suit and the suit is not maintainable. The defendant's case is that the suit land was requisitioned by the Govt. of Assam for B.S.F. authorities. The scheduled land of the plaint measuring 2.38 decimals falls within 20 bighas 16 kathas 2 chataks of the land requisitioned by the Govt. of Assam vide Requisition Case No. 1 of 1968-69. About one bigha of tilla land is in illegal occupation of the plaintiffs and the plaintiffs have been possessing the same illegally since 22.10.1987 and this one bighas of land is within 2.38 decimals of the land described in the Schedule of the plaint. For acquiring the abovementioned 21 bighas and odd land, the land Acquisition Case No. 16 of 1971-72 was started by the Collector, Karimganj, and the publication of the notice in

official gazette is in process. The plaintiffs have no right and title over any portion of the schedule land of the plaint and the B.S.F. authorities did not dispossess the plaintiffs from any land. It is further contended that the schedule land of the plaint was duly delivered to the BSF authority as soon as the suit land was requisitioned etc.

4. Five issues were framed, 3 witnesses were examined on behalf of the plaintiffs and 2 witnesses were examined on behalf of the defendants. Documents were exhibited.

5. Issue No. 2 non-joinder of parties was not pressed before the trial court. Issue no.4 is the issue on right, title and interest of plaintiffs. The Munsiff found as follows:

"From the foregoing discussions I find that the suit land appertaining to settlement dag Nos. 813 and 814 measuring an area of 2.38 acres is "Mourashi" land of the plaintiffs and the plaintiffs have been maintaining possession over the S/L as described in the 1st schedule of the plaint since the time of their predecessor. I find and hold that the plaintiffs are the owners of the S/L by mourashi right. I therefore find (p/11) and hold that the plaintiffs have right, title, interest and possession over the suit land. This issue is therefore in favour of the plaintiffs."

Issue No. 3 is with regard to requisition and acquisition of the suit land.

The learned Munsiff found as follows:-

(a) There is no evidence to show that statutory notices were issued and served before requisition and acquisition.

(b) To sum up, the authority in L.A. proceeding did not serve any notice to the predecessor of the present plaintiffs (plaintiff No. 1) as well as the present plaintiffs in spite of name of plaintiff No. 1. Masaddar Ali's entered in the settlement record in respect of S/L. Thus the Govt. of Assam failed to comply with the mandatory provisions of Assam Land (Requisition and Acquisition) Act, 1964 therefore find and hold that the S/L is neither requisitioned or acquired land. The issue is therefore answered in negative (p/18) and decided in favour of the plaintiffs."

Issue No.1 is bar of civil suit u/s 17 of the Act of 1964.

The finding is as follows:-

In the instant suit plaintiffs have come for a declaration of their right, title, interest and possession over the S/L and that the S/L is neither requisitioned nor acquisitioned land. In the instant case there is dispute of facts whether S/L is requisitioned/acquisitioned land. Civil Court has imply jurisdiction to try suits for declaration of right, title, interest and possession in respect of S/L and for declaration of other right of the parties in respect of S/L. In the issue No.4 it has also been decided that the S/L is neither requisitioned nor acquisitioned land and as such Civil Court has jurisdiction to try the suit for declaration of right, title and possession

of the parties.

Accordingly the suit was decreed. There was an appeal being Title Appeal No. 16/93. The learned District Judge found as follows:-

(1) The issue of non-joinder was not challenged/agitated before him.

(2) Regarding right, title and interest of plaintiffs in para 11 it was found that the plaintiffs have right, title and Interest.

(3) So it is clear from the above discussion that even if the suit land falls within the alleged requisitioned and acquisitioned land, such requisition and acquisition are bad in law due to non-compliance of the mandatory provisions regarding service of notice of such requisition and acquisition on the plaintiffs as well as publication of the notice of acquisition in the official gazette as referred above. So due to non-compliance of the mandatory provisions, the requisition and acquisition allegedly made by the Government are not valid in law and as such, the suit land has not vested in the Government due to non-compliance of such mandatory provisions. According to the defendants the plaintiffs are in illegal possession of one bigha of the suit land since 1987. But this claim of the defendants is believed by the evidence led by the plaintiff respondents which I have discussed while dealing with Issue No.4. Rather it is proved by the evidence on record that the plaintiffs are owners of the suit land by virtue of their mourashl right and they have been possessing the same since long before the relevant period of requisition and acquisition.

(4) It is clear from the pleadings of both the parties that according to the plaintiff the suit land does not fall in the requisition land but according to the defendants, the suit land falls within the requisition and acquisition land. So there is dispute as to whether the suit land is requisitioned and acquisitioned land. In view of the above cited ruling the above mentioned dispute has given ample jurisdiction of the civil court to try this suit. So it is clear that the Civil Court has sufficient jurisdiction to try the suit and the Civil Court jurisdiction is not barred u/s 17 of the said Act.

Accordingly the appeal was dismissed.

Hence, this Second Appeal.

6. The following are the substantial questions of law:-

1. The suit being for declaration of right, title and interest In respect of the suit land besides other consequential reliefs, and there being several pattadars, whether the suit is maintainable without making some of the pattadars as parties?

2. Whether the findings of the courts below that the suit land was not requisitioned and acquisitioned are perverse ?

3. Admittedly at the relevant time, the plaintiffs not being recorded pattadars, whether they are entitled to get notice for acquisition of the suit land?

4. Whether in view of the provisions of Section 17 of the Assam Land (Requisition and Acquisition) Act, 1964, the instant suit is maintainable in the Civil Court ?
5. Whether the learned courts below have committed error of law by waiting the notice u/s 80 CPC under the facts and circumstances of the case?
6. The plaintiffs case u/s 145 CrPC having been dropped, whether the courts below have committed error by holding that the plaintiffs are in possession of the suit land?

I have heard learned Central Govt. Standing Counsel for the appellant and Shri H.R.A. Choudhury, learned Advocate for the respondents.

7. Question Nos. 1,5 and 6 need no elaborate discussion.

Question No. 1, the plea of non-Joinder was abandoned before the trial court and appellate court and that now cannot be reagitated in Second Appeal. Order 1 Rule 9 CPC is a rule of procedure and it shall not affect if a decree can be passed in presence of the parties before the court. Further this rule is subject to Section 99 of CPC.

Question No.5 - Notice u/s 80 CPC

Notice u/s 80 can be waived. When the plea as to absence of notice though taken in the written statement, but no issue was framed and not agitated in the lower Courts, it cannot be agitated for the first time in Second Appeal, in such a situation notice must be regarded as waived. Further by conduct also the authority may be deemed to have waived the notice.

Question No.6 - Proceeding u/s 145 CrPC.

The findings arrived at a proceeding u/s 145 CrPC are not binding and evidence of possession in a civil suit. The Civil Court is to arrive at its own independent findings on the basis of materials on record both oral and documentary. Only if there are admissions made by the parties in such a proceeding that can be utilised if it is properly brought in the record of civil suit. So the dropping of 145 CrPC proceeding shall not lead to a presumption or inference that the party who initiated the proceeding was out of possession. After all such a proceeding is only initiated to prevent breach of peace and the possession decided therein is subject to civil proceeding. In such a proceeding question of title cannot be decided and it is beyond the jurisdiction in such a proceeding.

Question No.4 - Bar of Civil suit.

Section 17 of the Act of 1964 is quoted below:

" 17. Saving, - Save as otherwise expressly provided in this Act no decision or order made in exercise of any power conferred by or under this Act shall be called in question in any Court."

The jurisdiction of Civil Court is all embracing except to the extent it is excluded by an express provision of law or by clear intendment arising from such law (See Dhubabhai, AIR 1969 SC 78). Jurisdiction of Civil Courts deal with civil causes can be excluded by Legislature by Special Acts to deal with special subject matters, but statutory provisions must expressly provide for such exclusion or must necessarily and indubitably lead to that inference (See 1966 SC 893, Ramswarup). But the Civil Court always will have the jurisdiction to examine into cases where the provisions of the Act have not been complied with. Where certain things are to be done under the Special Act and the grievance is that they have not been adhered to or followed, the action can be challenged if there is no remedy for it under the Special Act. It is in this background that we are to decide the question of bar. of jurisdiction of Civil Court. The general principle of interpretation of Special Acts is that where the Special Act provides a special remedy no other remedy is available to the parties. So, I hold that the present suit is not barred u/s 17 for the reliefs claimed.

8. Question Nos.2 and 3

Both the Courts below considered Ext. 1 (Certified copy of D.C. case No.163/63), Ext.2, Ext.3, Khatian, Exts.14, 15, -16 Sale Deeds, Exts.19, 20, 21 Kutha pattas. It was further found that original plaintiff No. 1 Masuddar Ali was the recorded owner of the suit land covered by Dag Nos. 814 and 813. It was further found that the plaintiffs were in possession of the suit land. It was found that no notice of acquisition or requisition was served on the plaintiffs -though they were recorded pattadars. Notification was also not published in the Gazette or local newspaper. This aspect of the matter has been considered by the Apex Court in [Collector of Kamrup and Others Vs. Kamakhya Ram Barooah and Others](#), and in para 6, the law has been laid down as follows:-

"It was urged that notwithstanding the illegality in the acquisition, the order of acquisition was saved by Section 11 of the Assam Act, which provides:

"Save as otherwise expressly provided in this Act, no decision or order made in exercise of any powers conferred by or under this act shall be called in question in any Court. It cannot, however, be said that the order passed u/s 4 acquiring the land of the respondents was made in exercise of the powers conferred by or under the Act. The power which was exercisable u/s 4 being expressly a power to acquire land which is under requisition u/s 3, and there being no effective order of requisition under that Section 11 is no bar to the maintainability of the objection raised to the validity of the acquisition. The High Courts was, therefore in our Judgment, right in holding that the acquisition was illegal."

9. That being the position there is no merit in this appeal and the same is dismissed. No costs.