

(2013) 09 GAU CK 0031

Gauhati High Court

Case No: Regular Second Appeal No. 140 of 2002

Shri Puspendra Hazarika, Shri
Dilip Hazarika, Shri Madhab
Hazarika and Shri Chandan
Hazarika

APPELLANT

Vs

Shri Gajen Hazarika

RESPONDENT

Date of Decision: Sept. 6, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 1, Order 41 Rule 2, Order 41 Rule 31, 96
- Evidence Act, 1872 - Section 115

Citation: (2014) 1 GLD 332

Hon'ble Judges: C.R. Sharma, J

Bench: Single Bench

Advocate: A. Choudhury, for the Appellant;

Final Decision: Dismissed

Judgement

C.R. Sarma, J.

Heard Mr. A. Choudhury, learned counsel, appearing for the appellants/defendants. None represented the respondent/plaintiff. This appeal is directed against the judgment and decree, dated 04.06.2002, passed by the learned Civil Judge (Senior Division), Nagaon, in Title Appeal No. 04/2001, whereby the learned Civil Judge (Senior Division), Nagaon set aside the judgment and decree, dated 19.12.2000, passed by the Civil Judge (Junior Division) No. 1, Nagaon in Title Suit No. 137/1997.

2. The respondent, as plaintiff, claiming to be owner of a plot of land, measuring 1 (one) Bigha 2 (two) Khatas, as mentioned in the schedule "A" to the plaint, instituted T.S. No. 137/1997 before the Civil Judge (Junior Division), Nagaon, seeking declaration of right, title and interest, in respect of the "A" schedule land, khas

possession in respect of "B" Schedule land and confirmation of possession in respect of Schedule "C" land. Schedule "A" land includes the land described in Schedules "B" and "C".

3. The plaintiff's case, in brief, may be stated as follows:-

A plot of land measuring 1 (one) Bigha and 2 (two) Khatas, as described in Schedule "A" is his ancestral property and after the death of his father, he alongwith his brother namely, Biren Hazarika (since deceased) and their mother Smti. Gunamai Hazarika inherited, owned and possessed the entire suit land. The appellant i.e. the Principal Defendant, in 1995 trespassed into a plot of land, measuring 1 (one) Bigha 1 (one) Khata i.e. the "B" Schedule land and illegally occupied the same. The remaining 1 (one) Khata i.e. the "C" schedule land having a family Namghar (i.e. temple) therein, is in the possession of the plaintiff. Despite repeated requests, made by the plaintiffs, the said defendant refused to vacate the land and denied the right, title and interest of the plaintiff. Hence, the plaintiff instituted the said suit, seeking relief as indicated above.

4. The plaintiff, besides making some of the co-pattadars, as proforma defendants, added the son of his brother late Biren Hazarika, as proforma defendant No. 8 and the legal heir of his mother, Gunamai Hazarika, as proforma defendant No. 9. However, he did not seek any relief against the said proforma defendants. None except the Principal defendants contested the suit, therefore, it proceeded ex-parte against all the proforma defendants.

5. The principal defendants contested the plaintiff's claim by filing written statement. Their plea was that the suit land, measuring 1(one) Bigha 1 (one) Khata 15 1/2 (fifteen half) lechas, out of "A" Schedule land, though inherited by the plaintiff and his brother Biren Hazarika, they, by executing an unregistered sale deed (Kachha deed), on 15.5.1996, transferred the suit land in favour of the defendant No. 1 and his brother Shri Hiren Hazarika (since deceased) and accordingly, after taking possession of the same, the defendant No. 1 and his said brother have been enjoying the suit land from the said date of purchase. The defendants also stated, in the written statement, that, despite giving assurance, the said vendors i.e. the plaintiff and his brother failed to execute registered sale deed. The contesting defendants also averred that there was no cause of action for the suit, that the suit was barred by law of limitation, that the suit was bad for non-joinder and misjoinder of necessary parties and concealment of material facts. The contesting defendants further contended that their possession was adverse to the interest of the plaintiffs.

6. Upon the pleading of both the parties, the learned trial Judge framed the following issues:

(1) Whether the plaintiff has any cause of action?

- (2) Whether the suit is maintainable in its present form?
- (3) Whether the suit is bad for non-joinder and mis-joinder of necessary parties?
- (4) Is the suit barred by the principle of waiver, estoppel and acquiescence?
- (5) Is the suit liable to fail for want of jurisdiction?
- (6) Has the plaintiff any title to the land in suit?
- (7) Is the suit barred by limitation?
- (8) Is the story of plaintiff's possession and dispossession true?
- (9) Is the plaintiff entitled to any relief as prayed for?
- (10) To what relief, if any, is the plaintiff entitled?

7. In order to prove his case, the plaintiff examined 2 (two) witnesses as PW No. 1 and PW No. 2 and exhibited a land revenue paying receipt and certified copy of the Jamabandi. The contesting defendants also examined 2 (two) witnesses and exhibited an un-registered sale deed, land revenue paying receipt and certified copy of the order, passed in MR Case No. 660/1996.

8. Having heard the learned counsel for both the parties and considering the evidence, on record, the learned Civil Judge (Junior Division), Nagaon, while holding that there was cause of action for the suit observed that, (1) the legal heirs of late Biren Hazarika and late Hiren Hazarika not being impleaded as necessary parties, the suit was bad for non-joinder of necessary parties, (2) that the plaintiff, having only one-half share in the suit, land, cannot claim the entire suit land and as such the suit was hit by the principle of estoppel, (3) that the suit was bad for want of jurisdiction. Of course, the trial Judge held that the suit was not hit by the law of adverse possession and law of limitation.

9. With the above findings, the trial court held that the plaintiff was not entitled to get any relief as prayed for and accordingly dismissed the suit.

10. Aggrieved by the said judgment and decree, the plaintiff, as appellant, preferred an appeal, u/s 96 read with Order XLI Rules 1 and 2 of the CPC, before the learned Civil Judge (Senior Division), Nagaon. The appeal was registered as Title Appeal No. 4 of 2001. The First appellate court, while reversing the judgment and decree, passed by the learned Civil Judge (Junior Division), Nagaon, allowed the appeal declaring right, title and interest of the plaintiff over the suit land and directed the defendants to vacate the suit land.

11. Dissatisfied with the said judgment and decree, passed by the learned Civil Judge (Senior Division), Nagaon, the contesting defendants, as appellants, have come up with this appeal on the following amongst other grounds:-

- (1) that the suit was bad for non-joinder of the co-pattadars,

- (2) that the suit was bad for waiver, estoppel and acquiescence,
- (3) that the suit, filed after 22 years of dispossession, was not maintainable,
- (4) that courts below erred in law by not considering the claim of the appellants/defendants with regard to adverse possession in respect of the land as mentioned in the schedule "B" of the plaint.

12. The appeal has been admitted on the following substantial questions of law:-

- (1) Whether the first appellate court erred in law by reversing the original decree passed by the trial court or not?
- (2) Whether the first appellate court complied with the mandatory provisions of law as laid down under Order 41 Rule 31 CPC, while passing the impugned judgment and decree or not?
- (3) Whether the suit is maintainable?

(4) Whether the co-pattadars of the suit properties are necessary parties in the suit nor not.

13. Though, the sole respondent/plaintiff, after receipt of the notice, had entered appearance through the engaged counsel, none represented him at the time of hearing. I have heard Mr. A. Choudhury, learned counsel, appearing on behalf of the appellants and perused the record.

14. The learned counsel, appearing for the appellants, taking this court through the impugned judgment and decree, passed by the first appellate court, has submitted that the learned Civil Judge (Senior Division) committed error and illegality, in the eye of law, by reversing the judgment and decree, passed by the trial court, despite the fact that all the co-owners were not made party.

It is also submitted that the learned trial Judge rightly dismissed the suit for non-joinder of the necessary parties i.e. all the legal heirs of late Biren Hazarika, who was one of the co-sharers and was survived by three widows one son (i.e. the proforma defendant No. 8) and the legal heirs of late Hiren Hazarka, in whose favour also the unregistered sale deed was executed by the plaintiff and his said brother.

It is further submitted that the plaintiff i.e. sole respondent, being one of the co-owners is not entitled to get decree declaring right title and interest in respect of the entire suit land, which was inherited by the plaintiff and his brother, late Biren Hazarika from their predecessor-in-interest and as such the first appellant court committed gross illegality and error by declaring right, title and interest in favour of the plaintiff.

It is also submitted that the learned Civil Judge (Senior Division) committed error by failing to discuss and decide all the issues, as required by Order XLI Rule 31 of the

CPC.

15. It is further submitted that the defendants have been possessing the suit land since 1976, on the basis of an unregistered sale deed and as such the suit, for recovery of possession of suit land after 22 years, was not maintainable and that the courts below committed error by failing to consider the claim of the appellant, regarding adverse possession.

16. Having heard the learned counsel for appellants and carefully perusing the pleadings, the impugned judgment and decree, passed by the appellate court and also the judgment and decree, passed by the trial court, in order to appreciate the correctness of the impugned judgment and decree, I feel it appropriate to peruse and examine the evidence, on record, and I do so.

17. Admittedly, the suit land, originally, belonged to late Durga Hazarika, i.e. the predecessor-in-interest of the plaintiff and his brother Biren Hazarika and after the death of their said predecessor-in-interest, the names of the plaintiff and his brother Biren Hazarika, both sons of late Durga Prasad Hazarika and their mother Smti. Gunamai Hazarika i.e. the widow of Durga Prasad Hazarika, were mutated, in the revenue record, in place of Durga Prasad Hazarika. Ext. No. 2 i.e. the Jamabandi of the suit land, exhibited by the plaintiff, supports the said contention. Therefore, the plaintiff alongwith his said brother and their mother inherited the suit land after the death of his father. Undisputedly, the said legal heirs of Durga Prasad Hazarika became the owner/title holders of the suit land. According to the plaintiff, after the death of his father, he was possessing the suit land till 1995 and on, or about 08.12.1995, the defendants trespassed illegally occupied 1 (one) Bigha 1 (one) khata out of the suit land i.e. the "B" Schedule land and by refusing to vacate the suit land denied the right and title of the plaintiff in respect of the suit land. Though, the plaintiff did not seek any relief in respect of co-sharers, he impleaded some of the c--pattadars i.e. the son of his brother, Biren Hazarika and the legal heir of his mother Smti. Gunamai Hazarika as proforma Defendant Nos. 5, 6, 7, 8 and 9. Subsequently, the name of respondent No. 7 was struck off. None of the said proforma respondents contested the suit and as such the suit proceeded ex-parte. That apart, the plaintiff in his evidence, given as PW No. 1, stated that his brother was entitled to one half share in the schedule land. This admission made by the plaintiff, protects all rights and benefit of the other co-sharers, which accrued to them in respect of the suit land, as co-sharers.

18. The claim of the defendants is that the defendant No. 1 and one of his brother late Hiren Hazarika purchased the suit land in 1997 by an unregistered sale deed i.e., Ext. No. "Kha", executed by plaintiff and his brother Biren Hazarika, after receiving consideration money of Rs. 4,000/- and that they have been in possession of the suit land since then. Though, the plaintiff's brother Biren Hazarika i.e. one of the co-owners, died leaving three wives, three daughters and one son (proforma Defendant No. 8), the plaintiff made his brother's son as proforma defendant No. 8

and failed to implead other legal heirs of Biren Hazarkia as defendants. However, the plaintiff impleaded the legal heirs of his mother, Smti. Gunamai Hazarika, as indicated above and the said legal heirs of Biren Hazarika and Gunamai Hazarika failed to contest the plaintiff's claim. There is no dispute that his brother Biren Hazarika is entitled to one half share in the suit land. Thus, it is admitted position that the plaintiff, though not the absolute owner, is one of the co-owners of the suit land and as such he has right and title in each and every part of the suit land.

Another plea of the Defendant No. 1 is that the suit land was purchased by him alongwith his brother Hiren Hazarika and as such the legal heirs of Hiren Hazarika (since deceased) were also necessary parties to the suit.

The trial court held that, the legal heirs of Biren Hazarika, not being made co-plaintiffs, the suit was bad for non-joinder of necessary parties.

19. It has also been held by the trial court that the plaintiff, in view of his silence in the plaint, regarding his brother's share, was stopped from claiming the whole suit land. While rejecting the plea regarding adverse possession, as raised by the defendants, the trial court held that the plaintiff, having right, title and interest and possession over one half portion of the suit land, cannot claim that the defendants dispossessed him from the entire suit land. The learned trial Judge also came to the findings that there was no evidence that the defendants were in possession of the suit land since 1976 and that the defendants had right over the suit land. However, at the concluding part of the judgment, the learned trial Judge held that, in view of the discussion made in Issue Nos. 3, 4 and 5, the suit was not maintainable and as such the plaintiff was not entitled to get any relief, as claimed for. The Issue Nos. 3, 4 and 5 relates to, non-joinder and mis-joinder of necessary party, bar by the principles of estoppel, waiver, acquiescence and the question regarding jurisdiction of the trial court.

20. From the evidence, on record, as adduced by both the parties, it is found that it stood established that the plaintiff was one of the co-sharers i.e. joint owners. It is not the case that none of the other co-sharers were impleaded as parties. The son of Biren Hazarika, who was one of the co-sharers, has been impleaded as proforma Defendant No. 8 and the heir of another co-owner namely, Smti. Gunamai Hazarika (widow) has also been impleaded as proforma Defendant No. 9. None of the said co-sharers have challenged the plaintiff's claim.

21. The plaintiff, in the present case, has sought relief against the defendants, alleging that defendants, being trespassers, have been illegally occupying the suit land since 1995. The suit has been brought by one of the co-owners against the trespassers, in respect of a plot of land owned by all co-sharers including the plaintiff.

Now, the question is whether the suit, claiming right, title, interest and possession by one of the co-sharers, without making all the co-sharers, is maintainable against

a trespasser and whether the legal heirs of late Hiren Hazarika were also necessary parties.

22. In the present case, the defendants, though claimed that they had purchased the suit land by an unregistered sale deed (Ext. "Ka") in 1976, failed to prove, by adducing sufficient legal evidence, that the suit land was transferred and that the possession was delivered to them in 1976. Except producing an un-registered sale deed (Ext. "Ka", alleged to be executed by the plaintiff and his brother namely, Biren Hazarika, the defendants failed to prove the execution of the same as required by law. The trial court also, in deciding the issue No. 7 in favour of the plaintiff, rightly held that the defendant failed to establish his title over the suit land and that the long possession was not sufficient to confer right by way of adverse possession and that the suit was not hit by the principal of adverse possession and law of Limitation. The first appellate court has also concurred with the said view and upheld the said findings.

Therefore, as the transfer of land in favour of defendant No. 1 and late Hiren Hazarika has not been proved and as the plaintiff has also not sought any relief against late Hiren Hazarka or his heirs, the legal heirs of late Hiren Hazarika are not necessary party.

23. As rightly held by the trial court plaintiff and his brother Biren Hazarika were joint owners and the plaintiff was not absolute owner, in respect of the suit land.

The question regarding possession, being a matter of facts, both the courts have disbelieved the defendant's plea of possession since 1976 for want of any substantive evidence. The Gaonbura of the village, deposing as PW No. 2 supported the plaintiff's plea that he was dispossessed by the defendant in 1995.

DW No. 2, who stated that the defendant No. 1 occupied the suit land for 20/22 years, failed to properly identify the suit land by giving its boundary. Hence, it cannot be believed that he had any idea or knowledge about the possession of the land.

As discussed above, both the courts below disbelieved the defendants' plea that they have been in possession of the suit land since 1976. The said findings regarding possession, based on evidence, on record, as indicated above, needs no interference by this court, in exercise its jurisdiction in second appeal.

24. In view of failure of the contesting defendants to establish the plea of purchase of the suit land as well as acquiring right, on the basis of adverse possession, or in any lawful manner, their status, in respect of the suit land, was not better than that of trespassers.

25. In the case of Kanta Goel Vs. B.P. Pathak and Others, the question, whether a co-heir of deceased landlord can sue for eviction in absence of the other co-heirs came up for decision before Hon'ble Supreme Court. In deciding the question in

affirmative, the Supreme Court observed that coheirs constituted, the body of landlords and, by consent, implicit or otherwise, of the plurality of landlords one of them representing them all was collecting rent and as such he was entitled to institute the suit. The Supreme Court also observed that a co-owner owns every part of the composite property along with others and it can not be said that he is only a part owner or fractional owner of the property.

26. In the case of [A. Viswanatha Pillai and others Vs. Special Tahsildar for Land Acquisition No. IV and others](#), the Supreme Court has observed that one of the co-owners can file a suit and recover property against stranger and the decree would ensure to all the co-owners and that no co-owner has a definite right, title and interest in any particular item or a portion thereof. It has also been observed, in the said case, that a co-owner is as much an owner of the entire property as a sole owner of the property and that it is not correct to show that a co-owner's property was not his own. The Supreme Court has further observed that a co-owner owns several parts of the composite property along with others and it can not be said that he is only a part owner or fractional owner in the property. As observed by the Supreme Court, the said position will undergo a change only when partition takes place and division is affected by metes and bounds.

27. In the case of [Pal Singh Vs. Sunder Singh \(Dead\) by Lrs. and Others](#), the Supreme Court referred to the ratio held in the case of Kanta Goel (supra), wherein the Supreme court followed the decision in [Sri Ram Pasricha Vs. Jagannath and Others](#), and held that when other co-owners did not object to the eviction, one of the co-owners could maintain an action for eviction even in the absence of other co-owners. In the case of Pal Singh (Supra), the Supreme Court observed that an eviction suit, even in absence of other co-owner would be maintainable.

28. In the case at hand also the other co-owners did not raise any objection to the action initiated by the plaintiff.

The plaintiff has made it clear that he is entitled to one half share and the legal heirs of Biren Hazarika are entitled to remaining one half share in the suit land. Therefore, he has not denied/disputed the right of the other co-sharers. Even the son of late Biren Hazarika (proforma defendant No. 8) and the legal heirs of Smti. Gunamai Hazarika, who are also co-pattadars, have not challenged the plaintiff's claim.

29. In view of the said ratio laid down by the Apex Court, it can be held that a suit by co-owner is maintainable against the trespasser, even without determining the share of the other-co-sharer and also in the absence of other co-owners. Such relief granted in favour of the plaintiff, who is a co-owner will not adversely affect the right and interest of the other co-owners.

30. The defendants have failed to establish their title or right to enjoy the suit land. A title holder's right to enjoy the property cannot be denied by a trespasser, who holds the property without any authority.

In view of above, I have no hesitation in holding that the first appellant court rightly concluded that the plaintiff was entitled to file the suit against the defendants, who were trespassers in respect of the suit land, for recovery of the same for the benefit of all the co-sharers. Therefore, in the facts and circumstances of this case, as held by the first appellate court, the other co-sharers and pattadars are not necessary parties and as such, the suit brought by one of the co-sharers, against the trespassers, is maintainable.

31. From the impugned judgment and decree aforesaid, it is found that the first appellate court, reproduced all the issues, framed and decided by the trial court and while reversing the judgment and decree passed by the learned trial court, the appellate court has discussed and given its findings with reasons in respect of all the issues, more particularly with regard to maintainability of the suit for non-joinder of the co-sharers and the issue relating to adverse possession, which are the basic issues involved in the suit.

It transpires that the first appellate court discussed and decided all the issues, and thus complied with the requirement, prescribed by Order 41 Rule 31, CPC.

32. The trial court dismissed the suit holding that it was hit by the principles of estoppel on the ground that the plaintiff did not mention, in the plaint, about the share of his brother. Section 115 of the evidence, which provides the provision of estoppel, reads as follows:

Section 115 Estoppel -When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representatives, to deny the truth of that thing.

33. From the evidence on record, there is nothing to show that the plaintiff had in any manner declared, acted, omitted or permitted the defendants to believe a thing to be true and act upon such belief. Plaintiff's failure to mention, in the plaint, that his brother was also entitled to one half share in the suit land does not attract the provision of Section 115 of the Evidence Act. Therefore, the trial Judge committed error by holding that the suit was hit by the principle of estoppel and as such, the first appellant court rightly reversed the said decision of the trial court.

34. From the above discussion, it is found that a co-sharer alone can bring action for declaration of title and recovery of possession against the trespassers for the benefit of the co-sharers and as such the suit cannot be held to be bad for non-joinder of all the co-sharers. Because, a decree passed in favour of one of the co-sharers, against the trespasser, does not take away the right of the other co-sharers in respect of their joint property. Rather, such action, initiated by the co-sharer, is for the benefit of all the co-sharers and the decree protects the right, title and interest of all the joint owners in respect of the joint property, until such

property is partitioned amongst the share holders.

35. In view of the above discussion, it is found that the plaintiff, as co-sharer, could establish his right, title and interest over the suit land and the defendants failed to substantiate their plea that they had acquired right to enjoy the suit land, on the basis of transfer and adverse possession.

Therefore, the title of the plaintiff having been established and in the absence of any defect in the said title, he has been rightly held to be entitled to recover the possession form the defendants.

36. In view of the above discussion, it is found that the suit was maintainable and the first appellate court has committed no error by reversing the decision of the trial court and thereby declaring plaintiff's right, title, interest and possession over the suit land, with direction to the principal defendants to deliver vacant possession of the suit land.

37. In view of the above discussion, while answering all the substantial questions of law, in the manner as indicated above, I hold that there is no merit in this appeal, requiring interference with the impugned judgment and decree. Accordingly, the appeal is dismissed. Return the lower court record.