

Form No.(J)3
HEADING OF JUDGMENT ON APPEAL
District :: Nalbari

IN THE COURT OF CIVIL JUDGE :::::::::::::::::::::NALBARI

Present : Smti. Himakshi Thakuria Buragohain
Civil Judge
Nalbari.

Wednesday, the 26th day of February, 2020

TITLE APPEAL NO : 22/19

From the Judgment & Decree dated 24/06/2019 passed by Learned Munsiff
No.1, Nalbari in Title Suit No. 47/2006

SMTI. NIRALA BAISHYA

-----Appellant/ Plaintiff

- VS -

SRI NABIN BAISHYA

----Respondent/ Defendant

This appeal having been heard on in presence of :-

Advocates for the Appellant :- Sri Manoranjan Bhattacharjya

Advocate for the Respondent:- Sri Champak Dutta, Miss Runumi
Sarma.

J U D G M E N T A N D O R D E R

1. The judgment and decree dated 24/06/2019 passed by the Ld. Munsiff No.1, Nalbari in T.S. No. 47/2006, are the subject matter under challenge in this present first Civil appeal.

2. Being highly dissatisfied and aggrieved with the Judgment delivered in T.S. No.47/2006 in which the case was dismissed on contest with no cost vide the Judgment and decree dated 24/06/2019 passed by the Ld. Munsiff No.1 , Nalbari, the plaintiff as appellant have preferred the instant appeal on the following grounds:-

G R O U N D S

- a) That the learned Munsiff committed grave error of law and facts in passing the impugned judgment and decree and as such the same are liable to be set aside.
- b) That the learned Munsiff, misconceived law and facts and did not apply her judicial mind in passing the impugned judgement and decree and as such the same are liable to be set aside.
- c) That, the learned Munsiff ought to have decided all the issues in favour of the plaintiff/ appellant and against of the defendant and decreed the suit and as such the impugned judgment and decree are liable to be set aside.
- d) That, the learned Munsiff committed grave error of law in deciding the issue No "C" where the Ld. Munsiff wrongly hold the suit to be barred by limitation and as such the impugned judgement and decree are liable to be set aside.
- e) That learned Munsiff committed grave error of law holding that the suit is governed by Article 58 of the Limitation Act. 1963. Whereas the suit is for declaration of right, title, interest and recovery of possession and so the proper Article is Article 65 and not Article 58 because the main relief is recovery of possession.

- f) That, it is settled law that Article 65 applies to a suit brought by the plaintiff claiming to be the owner of the property against one who is in possession of the property as trespasser having no interest therein. The learned Munsiff while deciding the Issue No "C" has failed to consider the said settled law and as such the impugned judgment and decree are liable to be set aside.
- g) That the appellant has not challenged the decisions of other four issues except the decision on issue No "C" which has been wrongly decided by the Learned Munsiff.
- h) That, in view of the case the impugned judgment and decree are not sustainable.
- i) That, the appellant reserves the right of taking Additional grounds at the time of hearing.

3. On the above grounds the Plaintiff/Appellant has prayed for setting aside the impugned judgment and decree. After admitting the appeal, the record of T.S. No. 47/2006 was called for and the same was received.

4. On appraisalment of the original case record, it appears that the plaintiff has filed the suit for declaration of right, title, interest and recovery of possession.

5. The plaintiff's suit in brief is that Late Bhaben Baishya was the original pattadar of the suit land and after his death, the suit land devolved upon his two sons Gopal Baishya and Gopi Baishya and their name got mutated accordingly. After death of Gopal Baishya his share devolved upon his wife, the plaintiff No 1. The plaintiffs are paying the land revenues due to the government since their names got mutated. The suit land measuring 12 Lecha is a part of 1 Katha 4 Lecha land under Dag No 520 of KP Patta No 37 of village Mugkuchi, situated just on the northern boundary of village Tilana and Mugkuchi. The Suit land has been described in the schedule of plaint. It is alleged by the plaintiff that the defendant who is not a pattadar of this land is occupying 12 Lecha of land on the northern side of this 1katha 4 lecha land

since about 7 years back illegally and inspite of repeated request he has not vacated the land. The Dag No 520 covered by KP Patta No 37 of village Mugkuchi covers an area of 1 katha 4 lecha land and is bounded on the North- by defendant Nabin Baishya who has his homestead over the Dag No 521 of KP Patta No 167 of Mugkuchi, on the South-by the land of Bharat Baishya, on the west by Bala Mugkuchi road. On the west of Bala Mugkuchi road the plaintiffs have their house and establishment. On the east of the suit land there is Prafulla Baishya. The defendant taking advantage of his house and establishment on the northern side of 1 katha 4 lecha land has encroached about 12 lecha of land and has been possessing the same since 7 years. In this 12 lecha land which is referred as suit land the predecessor of the plaintiffs had grown a branch of bamboo trees, about five pieces Kadam Tree, two branches Jahaji Banana. As the defendant did not vacate the suit land, the plaintiff has filed this suit.

6. The defendant contested the suit by filing his written statement. In his written statement the defendant denied the averments made by the plaintiff in his plaint. The defendant stated that the suit land measuring 12 lecha is the part of the Dag No 521 and KP patta No 167 of village Mugkuchi belonging to him and he is possessing the same since the days of his forefather. Different jirats namely Kadam trees, bamboo tree, coconut tree, Halem tree etc were grown up by the defendant and enjoyed by him as well. According to the defendant the plaintiff had filed a petition before Circle Officer, Nalbari on 01/03/06 vide petition No 223/05-06 for fixation of the boundary of the suit land and the Lat Mandal after measurement of the boundary of the suit land on the northern side found it alright. The defendant stated that against the measurement done by the Lat Mandol, the plaintiff instituted a proceeding under section 145/146 CrPC but later the same was withdrawn. Hence, the defendant has prayed to dismiss the suit of the plaintiff.

7. Upon the pleadings of the parties, learned trial court has framed the following issues:

I S S U E S

- 1) Whether there is cause of action of the suit ?
- 2) Whether the suit is bad for non-joinder of necessary parties?
- 3) Whether the suit is barred by limitation ?
- 4) Whether the plaintiffs have got right, title, interest and possession over the suit land ?
- 5) Whether the defendant dispossessed the plaintiff from the suit land about 7 years back ?
- 6) Whether the suit land is covered by Dag No 521 of KP Patta No 167 of village Mugkuchi Mouza Bahjani ?
- 7) To what other relief/ reliefs the plaintiff is entitled to ?

8. The plaintiff side had adduced the evidence of 4(Four) witnesses and has exhibited 2(two) nos of documents. On the other hand the defendant side has also adduced the evidence of only one witness and has exhibited 5 (five) Nos. of documents.

9. I have heard the Ld. Counsels for both the parties and have gone through the materials on records as well as the memorandum of appeal.

FINDINGS AND REASONS THEREOF

10. **Issue No (1) is relating to the cause of action of the suit.** Cause of action means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support of his right to a judgment of the court. In his pleadings the plaintiffs averred that the 12 lecha land which is part of 1 katha 4 lecha land covered by KP patta No 37 of Dag No 520 of village- Mugkuchi originally belonged to their predecessor Bhaben Baishya and later inherited by her husband and brother in law i.e. plaintiff No 2 . On the death of her husband his share devolved upon her. It is alleged that taking advantage of the fact that the plaintiff is residing alone the defendant has encroached 12 lecha of land and has been possessing the same since 7 years back. The defendant on the other hand stated that the suit land

measuring 12 lecha is the part of Dag No 521 of KP patta No 167 of village Mugkuchi which belongs to defendant and that he has been in possession of that land since the date of his forefather. The main factor of determination here is whether the suit land falls in Dag No 520 of PP No 37 or in Dag No 521 of PP No 167. As there is assertion of right by the plaintiff and denial of right by the defendant, there is cause of action for the suit.

11. Issue No (2) is contingent upon the question as to, **“whether the suit is bad for non-joinder of necessary parties ?”**

12. In his written statement the defendant has avered that the suit of the plaintiff is bad for non joinder of necessary party. But the defendant has failed to mention as to who ought to have been impleaded as the necessary parties. “Necessary parties are only those parties against whom the relief is claimed. But their presence as a party is not necessary for the suit to be adjudicated upon and for passing an effective and complete decree granting relief.”

13. The plaintiff has filed this suit against the defendant for declaration that the plaintiff has right, title and interest over the suit land, for recovery of possession of the suit land along with other reliefs. It is revealed from the pleadings that the original pattadar Bhaben Baishya had two sons, namely Gopal Baishya, plaintiff's husband and Gopi Baishya. In this suit Gopi Baishya is one of the plaintiffs. The dispute arose only because the defendant is alleged to have encroached the plaintiff's land. As such no other persons are required to be made defendant as the plaintiff has claimed relief only against the defendant. Hence in my opinion the decision of the Ld. Munsiff warrants no interference. Situated thus issue No (2) is decided in the affirmative and in favour of the plaintiff/ appellant.

14. Coming up next are issue No (4) (5) and (6) which are discussed together for the sake of convenience as all the three issues are interdependent. Issue No (4),(5) & (6) are contingent upon the question as to, **“whether the plaintiffs have got right, title, interest and possession**

over the suit land ?”

AND

“Whether the defendant dispossessed the plaintiff from the suit land about 7 years back ?”

AND

“Whether the suit land is covered by Dag No 521 of KP Patta No 167 of village Mugkuchi Mouza Bahjani ?”

15. It is the pleadings of the plaintiff that the suit land measuring 12 lecha is a part of 1 katha 4 lecha land under dag No 520 of KP patta No 37. According to the plaintiff after the death of her husband the defendant taking advantage of the fact that his house is on the northern side of the said 1 katha 4 lecha land dispossessed her from the suit land illegally.

16. The defendant, on the other hand has stated that the land claimed by the plaintiff does not fall within his boundary and that he has been possessing his land in dag No 521 of KP Patta No 167 by virtue of inheritance since long. It is averred by the defendant that earlier the plaintiff prayed for fixation of boundary before the Circle Officer, Nalbari and accordingly the Lat Mandal measured the land and found the boundary alright. Against the said measurement the plaintiff filed the proceeding u/s 145/146 CrPC which was later withdrawn.

17. In order to prove their plea both the parties has exhibited their relevant documents and has also adduced the evidence of witnesses.

18. From the pleadings of both the parties it appears that the land of the defendant is on the northern side of the 1 katha 4 lecha land in dag No 520 of KP patta No 37. DW 1 Nabin Baishya also stated in his evidence that his land is on the northern side of Dag No 520 of patta No 37. I have gone through the trace map marked as Ext-'Ga'. Ext-'Ga' makes it clear that dag No 521 is on the northern side of Dag No 520 and both these dags are adjacent to each other.

19. Regarding the averment of the defendant that on the application of the plaintiff the mandal demarcated the land and found the boundary to be alright, PW 1 in her cross-examination denied the suggestion given to her. However, PW 1 stated that though mandal has done the measurement of the land, she did not sign on the report of the mandal and did not accept the report as he did not demarcate the land. PW 2 also stated that as the mandal could not demarcate the boundary the plaintiff did not sign on the report.

20. Now if we go through the evidence of lat mandal who is examined as PW 4 we find him stating that he knows the land in Dag No 520 of KP patta No 37. According to PW 4 also Dag No 520 and 521 are adjacent to each other. In his cross-examination PW 4 stated clearly that once he went to demarcate the suit land as per the application of the plaintiff but he could not demarcate the land.

21. The defendant has already stated in his written statement that the 12 lecha land claimed by the plaintiff falls in his land and in that respect during demarcation, the mandal found the land alright. But the defendant stated in his cross-examination as DW 1 that he does not know how much land is on the northern side of KP patta No 37, though he stated that his land is on the northern side of KP patta No 37 of dag No 520. If according to the defendant the mandal had done the demarcation, he should have known the area of his land which is situated on the northern side of the plaintiff's land. However, DW 1 has clearly stated in his cross-examination that he has no right title and interest over the 12 lecha land in dag no 520 of KP patta No 37. The Jamabandi and the land revenue receipt exhibited by DW 1 marked as Exhibit-Ka and Kha respectively shows that the defendant is the pattadar of KP patta No 167 and that he is paying land revenue in connection with the land in dag No 521 of KP patta No 167.

22. From the evidence of the PWs it appears that the demarcation of the boundary of the two dags i.e. dag No 520 and 521 could not be done by the lat mandal at that time. But one thing which is revealed from the pleadings and the evidence of PW 4 and DW 1 is that the land in dag No 520

of KP patta No 37 does not belong to the defendant. Whereas the defendant is the paddadar of the land in dag No 521 of KP patta No 167. Hence, there is no doubt that the land in dag No 520 of KP patta No 37 belongs to the plaintiff and the land in dag No 521 of KP patta No 167 belongs to the defendant.

23. At this point it is important to determine whether the suit land measuring 12 lecha falls in dag No 520 of KP patta No 37 or in dag No 521 of KP patta No 167. For determining this let us go through the evidence of the Circle Officer Smti. Baneshree Deka who was examined as CW 1. CW 1 stated in her examination in chief that she was issued a writ wherein she was asked to determine whether the suit land measuring 12 lecha falls in dag No 520 or 521. Accordingly she went to the spot accompanied by Kanango and lat mandal. It is stated by PW 1 that though their must be land measuring 4 katha 15 lecha in dag No 521, during measurement they found 8 lecha excess land than that. According to CW 1 this excess land of 8 lecha falls in dag No 520 which was in possession of the defendant Nabin Baishya. After verification and demarcation of the land CW 1 came to a conclusion that the 12 lecha land falls in dag No 520 of KP patta No 37. Out of the said 12 lecha land that falls in Dag No 520, the defendant is in possession of 8 lecha land and remaining 4 lecha land is already in possession and occupation of plaintiff. Hence, it appears plaintiff is entitled to get 8 lecha land from defendant in Northern boundary of suit land that belongs to his suit Dag 520 of KP patta 37 of village Mugkuchi.

24. The Ld. Munsiff No 1 has decided all these issues in favour of the plaintiff appellant. In view of the above discussion it appears that the defendant has dispossessed the plaintiff from the land measuring 8 lecha out of the suit land situated in dag No 520 of KP patta No 37 over which the plaintiff has right, title and interest. I find nothing to interfere with the decision of the Ld. Munsiff in these three issues. Situated thus, the above three issues are decided in favour of the plaintiff/ appellant.

25. Now let me take up the most vital issue in this suit i.e. Issue No (3) upon which the entire decision of the appeal rest. Issue No (3) is

contingent upon the question as to, **“whether the suit is barred by limitation.”**

26. The then learned Munsiff No. 1, Nalbari has decided this issue in affirmative and in favour of the respondent defendant and has dismissed the entire suit of the plaintiff on the basis of this issue, inspite of the fact that all the other issues were decided in favour of the appellant /plaintiff.

27. While dealing with this issue, the learned Munsiff No 1, Nalbari, had taken recourse to Article 58 of the Limitation Act. According to the learned Munsiff No 1 as per Article 58 of the Limitation Act, the period of limitation for suit relating to declaration is 3 years and the limitation starts to run when the right of suit first accrues. The learned Munsiff No 1 held that from the evidence as well as pleading it is clear that the right to sue first accrued about 7 years ago when the defendant forcefully encroached the boundary by raising fencing and occupying the 12 lecha land belonging to the plaintiff in the northern boundary. The Learned Munsiff No 1 further held that while filing this suit the plaintiff did not mention about any successive act that gave rise to institute this suit and accordingly decided this issue in the affirmative by holding that the suit is barred by limitation.

28. The learned counsel for the respondent defendant in his course of argument has submitted that the learned Munsiff No 1 has rightly decided this issue as the suit is filed for declaration as the main relief. The learned counsel for the appellant, on the other hand, has submitted that Article 58 of the Limitation Act is not attracted here. According to the learned counsel as the plaintiff has claimed for consequential relief along with declaration the suit falls under Article 65 of the Limitation Act.

29. In support of this submission the learned counsel for the appellant plaintiff has relied upon a decision of the Hon'ble Supreme Court in **Ghewarchand and Others -Vs- Mahendra Singh and Others reported in (2019) 1 SCC (Civil) 64** wherein it is held that “Article 65, which provides a Limitation of 12 years for filing the suit, was applicable to the suit

and the same was to be counted from the date when the possession of the defendant became adverse to the plaintiff. ”

30. At this point it is essential to refer to the relevant articles of the Limitation Act. Article 58 of the Act indicates that whenever a suit is filed for obtaining any other declarations not covered by the Articles, the period of limitation is three years and the period begins to run when the right to sue first accrues. Under Article 65 of the Act, it is mentioned that whenever a suit is filed for possession of immovable property or any interest therein based on title, the period of limitation for filing the suit is 12 years and the period begins to run when the possession of the defendants becomes adverse to the plaintiff. So, from Article 58 of the Act, it is clear that if it is a suit for declaration simpliciter without asking for any ancillary relief, the period of limitation is three years. According to Article 65 of the Act, whenever a suit for recovery of possession is filed basing on a title, the period of limitation is twelve years.

31. I would further like to elaborate my discussion by citing the case law, **Mohd. Yunus -Vs- Syed Unnissa reported in AIR 1961 SC 808**. In the said case the plaintiff filed a suit for declaration with the consequential relief of injunction against the defendants. Some of the defendants did not deny the title of the plaintiff. In those circumstances, the Supreme Court held as follows :

A suit for declaration with a consequential relief for injunction is not a suit for declaration simpliciter ; it is a suit for declaration with further relief. Whether the further relief claimed in a particular case as consequential upon a declaration is adequate must always depend upon the facts and circumstances of each case.

32. **In Pavan Kumar and another -Vs- K. Gopalakrishna and Others** also it was held that “Where a suit is filed on title but claiming declaration of title to the suit property with consequential relief of possession, Article 65 of the Limitation Act would apply and Article 58 would have no

application. Article 58 applies only to a case where declaration simpliciter is sought without consequential relief. As the suit for declaration of title and consequential relief of possession was filed within 12 years from the date when the defendant dispossessed the plaintiff in execution of the decree, when the possession of the defendants became adverse to the plaintiff, cannot be held to be barred by limitation.”

33. In our case also the plaintiff's suit is based on title and the consequential relief of possession was also sought for. The plaintiff has established before learned Munsiff No 1, Nalbari that the suit land originally belong to her father-in-law, Bhabesh Baishya, and after his death the suit land devolved upon his son Gopal Baishya and Gopi Baishya. On the death of Gopal Baishya, who is the husband of the plaintiff, his share devolved upon the plaintiff. According to the plaintiff after the death of her husband the defendant encroached 12 lechas of land. It is revealed from the evidence of the PWs that the husband of the plaintiff expired about 6/7 years back from the date of dispossession. In such a case the suit is governed by Article 65 of the Act as it is filed within 12 years of the dispossession.

34. If the contention of the defendant that Article 58 applies to the suit for possession based on title where declaration of title is also sought is accepted, it would amount to ignoring the relief for recovery of possession and application of Article 65 to a suit for possession and taking away the right of the plaintiff to prove that the suit is within 12 years from the date of dispossession. Therefore, when such an interpretation is given to the Article 58 and 65 of the Limitation Act and when the suit is filed for declaration of title to the suit property with consequential relief of possession, in my humble view Article 65 of the Limitation Act, would apply and not Article 58 of the Limitation Act. In the light of the foregoing discussion I hold that the suit is filed within time and under the present set of circumstances Article 58 of the Act is not applicable to the suit and only Article 65 of the Act is applicable and thus the suit is not bared by limitation.

Accordingly this issue is decided in the negative and in favour of the appellant/ plaintiff. The decision of the Learned Munsiff No 1 is hereby

interfered and is set aside.

35. **Issue No (7) is relating to the relief claimed.** In view of the discussions made in the previous issues, the plaintiff is entitled to a decree for declaration of right, title and interest a decree for recovery of possession and injunction along with cost of the suit.

ORDER

36. In the result, the present first appeal is allowed on contest with cost.

The plaintiff has right, title and interest over the 12 lecha land mentioned in the schedule of the plaint.

The defendant is directed to vacate the 8 lechas of land out of the suit land which is in his possession. within six months from the date of this order and is further restrained from entering into the same.

With this, the impugned judgment and decree dated 24/06/2019 passed by the Learned Munsiff No 1, Nalbari in title Suit No 47/2006 is hereby set aside.

Draw up a decree.

Send down the original case record being TS No 47/2006 to the court of the first instance with a copy of the judgment forthwith.

Given under my hand and seal of this court on this the 26th day of February/2020.

Civil Judge
Nalbari

Dictated & Corrected by me

Civil Judge, Nalbari