

J U D G M E N T

This Revision has been preferred by 1st Party of Misc. Case No. 22 / 107 / 2005 Sri Rohini Kalita on being dissatisfied with the final order under Section 145 Cr.P.C. dated 06-06-2010 passed by Additional District Magistrate, Sonitpur, Tezpur, Sri P.C. Nath.

The brief fact as per the Revisionist is as follows :

A plot of tilla land measuring 03 B - 01 K - 03 L covered by Dag No. 320 and Dag No. 312 under Periodic Patta No. 44 of Mouza Kolibari was purchased in the name of Late Satya Ranjan Kalita on auction sale in the year 1976. In the year 1978 the Lat Mandal demarcate the boundary and handed over the possession to the Revisionist. Since then Rohini Ranjan Kalita, the Revisionist, is in the possession of land because while he was Govt. employee he purchased the said plot of land on auction in the name of his younger brother Satya Ranjan Kalita (Hereinafter referred in this judgment the said plot of land as D/L.)

After taking possession of the D/L the Revisionist planted some Sagun (Tik wood) plant through his people and kept Kishori Sahani as caretaker and subsequently Atowar Singh was kept as caretaker. He also constructed a shed on the D/L for the caretaker. Anyhow, while he was in possession of the D/Land enjoy

fruits of fruit bearing trees such as lichi, jackfruit etc. from that D/L his brother Satya Ranjan Kalita never paid visit on the D/L. Now wife of his deceased brother Satya Ranjan Kalita and son of Satya Ranjan Kalita mutated their name in respect of the D/L in spite of filing his application for mutation. Anyhow when he wanted to sell some of Sagun (Tik wood) tree from the D/L he prayed before the DFO, Soitpur, Tezpur for permission to remove the logs from the D/L but permission was not granted due to objection raised by the widow of Late Satya Ranjan Kalita. Her name is Dipti Kalita. She is the 2nd Party in the Misc. Case No. 22 / 107 / 2005. Further more, on 25-03-2005 the 2nd Party by engaging her people constructed a shed on the D/L for which 1st Party lodged Ext - Ka, ejahar before the O.C, Tezpur Police Station. Accordingly a non-FIR Case No. 35 / 05 started. On the same date the 2nd Party also lodged one written ejahar before the O.C, Tezpur Police Station alleging inter-alia that the 2nd Party visited the D/L on 25-3-2005 and found a person was constructing a shed on the D/L as per instruction of 1st Party. The O.C tagged that ejahar with Non-FIE Case No. 35 / 05. After inquiry submitted Non-FIR Case u/s 107 Cr.P.C. before the Deputy Commissioner. On receipt of the said Police Report the Misc. Case No. 22 / 107 / 2005 u/s 107 Cr.P.C. started on 27-07-2005. Sri Rohini Ranjan Kalita was arrayed as 1st Party and Dipti Kalita was treated as 2nd Party. During pendency of the case for hearing, the proceeding under Section 107 Cr.P.c. has been converted under Section 145 Cr.P.C, with the strength of petitiOn of the 1st Party

vide Ext – Kha. Thereafter asked both the 1st Party and the 2nd Party to file written statement. Both the parties filed their respective written statements. Ext – Ga is the written statement of the 1st Party. The fact which brought by the 1st Party has been disclosed above.

The 2nd Party by her written statement stated that the D/L was purchased by her husband on auction sale in the year 1976 before her marriage and mutated accordingly. She also stated that land revenue for D/L was paid regularly. She stated further that she got married in the year 1981 and her husband died in the year 1997 leaving her only son Sudipta Kalita (2nd Party No. 2) and herself as legal heirs. Hence after death of her husband D/L has been mutated in their names and they are now paying land revenue regularly.

During hearing the 1st Party examined herself as PW-1. Sri Ganga Charan Bhattacharjee is PW-2, Sri Samin Kalita is PW-3. Sri Umesh Das is PW-4 and Atowar Singh is PW-5. The 2nd Party cross-examined all the PWs. Not only that the 2nd Party Dipti Kalita examined herself as DW-1 and submitted some documents regarding her title over the D/L. The 2nd Party also examined Rajen Domai as DW-2. After hearing argument, the Court below concluded that the 1st Party failed to prove his possession over the D/L, rather it is proved in favour of the 2nd Party. With the above conclusion he passed the following order

“Hence keeping all the aspects I am satisfied to conclude and declare that the 2nd Party is in possession over the D/Land they are entitled to retain their possession until ousted by due course of law. I do strictly forbid any disturbances to their possession in then maintenance and disposed off the proceeding finally.”

I have heard both sides counsel and perused the evidence on record.

From the very outset I am to say that identification of D/L is not in dispute. So evidence regarding boundary, Dag Number, Patta Number or actual area of land re irrelevant to discuss. Accordingly the evidence regarding identification of D/L is not requiring to analyze to appreciate. In this case from the written statement and evidence on record it is very much clear that D/L has been purchased in the year 1976 on auction sale in the name of Satya Ranjan Kalita and the Revenue Record mentioned his name but the 1st Party is claiming the possession over the D/L. His contention is that he purchased the D/L in the name of his younger brother i.e. husband of 2nd Party, Smt. Dipti Kalita. Therefore his plea leads me to understand that he wants to convince the Court that he purchased the D/L in benami. At present Benami transaction (Prohibition) Act is available. As per the provision of that Act a person if purchase the land in the name of other he subsequently

prohibited to claim the ownership. Exception is only if he could prove the fact that the person in whose name the property was purchased has a fiduciary character to the property. Which means the person in whose name property was purchased has no interest to the property. In the instant case, it is admitted fact that property is in the name of Satya Ranjan Kalita and after his death it has been mutated in the name of wife and son of Late Satya Ranjan Kalita. Whether Satya Ranjan Kalita during his life time showed any interest to have the property or remained with fiduciary character in respect of the D/L is a question of adjudication in the Civil Court. If the title is tainted in respect of the D/L it is the right forum to go to the Civil Court to get declaration along with consequential relief of recovery of possession or confirmation of possession as the case maybe. At present, nothing foundn from the record regarding pending of any Civil Suit between the parties regarding D/L. That is why as per provision of Section 145 Cr.P.C, the Executive Magistrate cannot adjudicate the dispute regarding title of D/L except to determine actual physical possession on this date of passing the order or 2 (two) months prior to the date of order. He is concerned with actual physical possession and to inquire who has title over the D/L. This is also viewed by our own High Court in Matilal Bhattacharjee Vs. Dinabandhu Das (1997) 2 GLR 355. The Gauhati High Court observed as follows :

"The proceeding under Section 145 Cr.P.C, is only for a temporary measure

for the purpose of preventing breach of peace concerning immovable property. In this proceeding the dispute regarding possession of the property is resolved by the Magistrate by an enquiry to find out as to which of the party was in possession of the land on the date of passing of the preliminary order under section 145 Cr.P.C. or dispossessed within two months next before the passing of the preliminary order. In such an enquiry the Magistrate has to determine the actual possession of the parties. Right to possession of the parties is not and cannot be considered in a proceeding under section 145 Cr.P.C. and such proceeding must be disposed of expeditiously. Unsuccessful party has to go to the appropriate forum like Civil Court for recovery of possession of the land on the basis of right and title.”

Keeping in mind the above law, I am to appreciate the evidence on record and like a Civil Suit preponderance of probability will be adopted to determine the actual physical possession of the D/L on the date of passing the impugned order or two months prior to the date of impugned order. Of course, it may raise a question as whether the Revisional Court can be allowed to re-appreciate the evidence on record to give different

conclusion than the court below. In that aspect both the parties referred the common case laws vide *Senaram Das and Others Vs. Kashiram Das* (1995)2 GLR 195. In this case our Gauhati High Court says that Revisional Court may in appropriate case exercised the power available to a Court of Appeal and the Revisional Court must see there is a manifest error of law or failure of justice apparent on the face of it.

By referring the above case law the Revisionist tried to convince this Court that the Court below has given a perverse finding regarding possession of D/L because the Revisionist has deposed clearly regarding identity of D/L whereas the Court below concluded that the boundary of D/L was not proved due to non-supporting evidence of the Revisionist. The Respondent side by referring the aforesaid case law tried to convince the Court that only in a rare circumstances the Revisional Court can re-appreciate the evidence on record but in the instant case the Court below appreciated the evidence rightly, so, no interference is called for. Anyhow, I shall go through the evidence on record to find out whether the Court below committed any error or I will assess the correctness of finding etc on the basis of available evidence on record and if find any error apparent on the face of it, I am empowered to interfere and give the correct finding because in *Krishnan Vs. Krishnaven* 1997 Cr.L.J. 1519 Supreme Court observed as follows :-

"Chapter XXX of the Code relating to reference and Revisional powers of the High Court consists of Section 395 to Section 405, Under the Code, the revisional power of the High court has concurrently been given by operation of sub-section (1) of Section 397 to Sessions Judge to call for the records of any proceeding and to exercise powers of revision. The power is given to examine the record of any proceedings before any inferior Criminal Court situated within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding g, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court."

As both the parties are claiming their possession over the disputed land, I can begin to peruse the evidence of either party, let me take the evidence of both the party together to analyze with intention to come to conclusion regarding possession of D/L.

It is an admitted fact that land record of the D/L is in the name of 2nd Party and prior to death of husband of 2nd Party Smt. Dipti Kalita it was in the name of Satya Ranjan Kalita, younger brother of the 1st party (husband of Smt. Dipti Kalita). To establish the actual

physical possession both the parties brought some fact of overt act. The 2nd Party being PW-1, deposited that she used to visit the D/L with her husband and also used to take the fruits from the fruit bearing trees standing on the D/L. Not only that she also brought the fact that her husband took possession of the D/L and planted Sagun tree before her marriage. Whether she has personal knowledge about the fact of taking possession in the year 1978 and planting Sagun trees subsequently is not clear from her deposition. Of Course during cross-examination she specifically replied that at the time of taking over possession of D/L she has no personal knowledge and cannot say to whom possession was handed over because at that time she was not married with Satya Ranjan Kalita. On the other hand 1st Party Rohini Ranjan Ranjan Kalita deposed that the possession was handed over to him by Mandal after demarcations and it was the year 1978. He also deposed that at the time of handing over possession of D/L PW-2, Sri Ganga Charan Bhattacharjee, PW-4 Sri Umesh Das, PW-5, Sri Atowar Singh and others were present. All the aforesaid PWs. 2, 5 and 5 supported the PW-1 regarding handing over possession. From the deposition it is not revealed that at that time Satya Ranjan Kalita, the husband of the 2nd Party Smt. Dipti Kalita, was present on the disputed land. Thus it can be concluded on the basis of preponderance of probability that possession of D/L was handed over to the 1st Party and not to the husband of the 2nd Party. The Court below did not discuss the evidence to come to the aforesaid factual aspect.

Coming to the next point of planting trees on the D/L the 1st Party deposed that he planted Sagun tree by engaging PW-5, Atowar Singh and Atowr Singh supported that fact. So, the fact brought by the 1st Party regarding planting trees on the D/L is more believable than the plea of 2nd Party because 2nd Party could not bring any reliable witness to establish that fact of planting Sagun tree by her husband. Moreover, she is not at all material witness to establish the aforesaid fact of planting Sagun tree because at that time her marriage was not held with Satya Ranjan Kalita or she was not remain present there. Now, coming to 3rd Point regarding construction of shed on the D/L, the 2nd Party by deposing tried to establish a fact that her husband constructed a shed on the D/L. When it was constructed? Whether it was constructed before her marriage or after and who was engaged to construct it are relevant facts. Of Course the DW-2 deposed that husband of 2nd Party Smt. Dipti Kalita constructed the shed. But his evidence disclosed nothing specific regarding his role at the time of construction of shed except a general statement. On the other hand PW-1, Sri Rohini Ranjan Kalita, deposed that he constructed shed. But supporting evidence are not reliable because who was his labour to construct th shed is relevant and material. Anyhow the PW-1 bought some other relevant fact that there was a shed and in that shed a person Bangshi by name was staying and he removed that person and thereafter another person attempted to construct a house on the other part of the D/L but he

raised objection and ultimately with interference of police the said person left the D/Land then demarcation was done. All those fact remain unrebuttable in the record. That is why the said facts are taken into consideration as believable and true. Not only that PW-3 deposed that with permission of PW-1 he constructed a cowshed on the D/Land it was remain there for 5 years. Of course the 2nd Party denied that fact of construction of cowshed but the PW-5 supported all the facts regarding overt act of the PW-1 regarding his possession over the D/L. Moreover PWs, 2 and 4 supported the PW-1 regarding his possession over the D/L.

From the aforesaid evidence on record, I find that description of land including proper identification has been given by the 1st Party but the Court below perversely concluded that the 1st Party could not adduce evidence regarding boundary etc. of the disputed land. His finding is based only on the basis of deposition of DW-1 and considering the fact of Revenue Record. In my considered view, for the above discussion and reasoning, it is to say that his finding is not free from infirmity. Therefore, I am interfering his finding and conclude that at the date of passing the impugned order the PW-1 Sri Rohini Ranjan Kalita was in the actual Physical possession of D/L and also he was in the possession of D/L prior to two months from the date of passing the impugned order.

Thus the impugned order is set aside and Revision is allowed.

-

Return the lower court record along with a copy of judgment of this Court.

This Revision is disposed of on contest.

Send back the case record along with a copy of this judgment.

**(B. Debnath)
Sessions Judge
Sonitpur : Tezpur**

**Dictated and corrected by me
and every page bears my Signature.**

**(B. Debnath)
Sessions Judge
Sonitpur : Tezpur**

Typed and transcribed on dictation by me –

**(I. Goswami)
Stenogrpher**