

HIGH COURT FORM NO. (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT/CASE

District: Sonitpur

In The Court of the Munsiff No. 1, Tezpur, Sonitpur

Present: Mrs.Chitra Rani Saikia, AJS

Thursday, the 26th day of September, 2013

Title Suit No. 18/2008

Smti Lily Kotoky & others

.....Plaintiffs

-Versus

Sri Sanat Kr. Das

..... Defendant

The suit coming on for final hearing on 12th day of September 2013 in the presence of:-

Sri T.C.Khatri, Sri S. Mishra

..... Advocates for the Plaintiffs

Sri K. K. Sarma

-----Advocate for the defendant.

And having stood for consideration to this day the court delivers the following judgment.

JUDGMENT

1. The case of the plaintiffs as unfolded in the plaint is that as per verbal permission of Sushil Kumar Das, the father of the defendant, Ganesh Kotoki, the predecessor in interest of the plaintiffs, occupied the suit land in 1972 by clearing the jungle on it and by constructing houses and structures on it. During his life time Ganesh Kotoki resided in the house and structures standing on the suit land. That after death of Ganesh Kotoki, the plaintiffs, being the legal heirs of Ganesh Kotoki, have been residing in the houses

and structures standing on the suit land. That on 06-04-2008 the defendants along with several unknown persons threatened the plaintiffs to evict them forcibly from the schedule land. The root of this instant suit lies in the aforesaid facts.

2. The defendant contested the suit by filing written statement. The defendant pleaded that there is no cause of action for this instant suit and the suit is not maintainable in its present form. According to the defendant the allegation leveled against him is vague. The defendant has averred that he purchased 2 Kathas of land out of total 4 Bighas 1 Lessa of land covered under Dag No 514(old) 507(new) of P.P. No 131/22(old) 20(new) situated at village Majgaon under Bhairabpad Mouza in the district of Sonitpur along with one Tali house, one thatched house and a pucca well standing thereon from its original owner Sri Naren Choudhury in the year 1969 vide registered sale deed No 3063/69 dated 08—8-1969 registered at Tezpur Sub-Registry Office. That after purchase of the said land and structures thereon the defendant shifted to Guwahati in the year 1970 and permanently settled there. That in the month of October 1972 the defendant rented out the house and premises standing over the said land to Ganesh Kotoki at a monthly rental of Rs 100/- . The defendant has stated that Ganesh Kotoki and the plaintiffs occupied the said house and premises as his tenants. Indeed in his pleading the defendant has denied all the allegations and prayed for dismissing the suit with cost.

3. Upon the pleadings of both sides my learned predecessor in office framed the following issues:

- (i) Whether the suit is maintainable in its present form?
- (ii) Whether the plaintiffs are permanent licensees in respect of the suit land and have right to continue occupying it irrevocably ?
- (iii) Whether the plaintiffs are entitled to the decree as prayed for?

4. During the course of trial plaintiff side adduced evidence of four witnesses in support of its case. The plaintiff side also exhibited certain documents. Defendant side adduced evidence of two witnesses and exhibited certain documents. The submissions made on behalf of both sides and the materials on record have received due consideration of this court.

After considering the matter in its entirety this court arrives at the following decision.

Discussion of evidence, decision and reasons thereof

Issue No (ii): Whether the plaintiffs are permanent licensees in respect of the suit land and have right to continue occupying it irrevocably ?

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5. The crux of the plaintiffs' suit lies in their pleading that they have been possessing the suit land since 1972 as permissive occupier of the same by constructing houses and structures on it. Therefore, the vital facts to be decided in this suit are framed in this issue and hence this issue is taken up for discussion first.

6. The plaintiffs in their pleading averred that Ganesh Kotoki, their predecessor in interest, occupied the suit land as per verbal permission of Sushil Kumar Das, father of the defendant way back in 1972. According to the plaintiffs, since 1972 they have been occupying the suit land even after the death of their predecessor in interest being his legal heirs. It is in pleading of the plaintiffs that they occupied the suit land by clearing the jungles covering it and started to reside there by constructing houses and structures thereon. According to the plaintiffs, Ganesh Kotoki, their predecessor in interest constructed a pucca house in the scheduled land in the year 1973 and the plaintiffs become the permanent licensee of the defendant and they have got the right to enjoy the suit property irrevocably.

7. PW 1 Smti Lili Kotoki and PW 2 Sri Atul Kotoki, two of the plaintiffs in this suit, deposed in their evidence in chief in the same vein as in their pleading regarding their possession of the suit land. Both these PWs deposed in their evidence in chief that on 20-10-1972 the defendant and his father verbally permitted Ganesh Kotoki to possess the suit land by constructing houses and structures thereon. These PWs have deposed that in 1972 Ganesh Kotoki raised a thatched house on the suit land and in 1973 he constructed a pucca house thereon by incurring expenditure of about Rs1,00,000/- (Rupees one lakh) and they have been residing in those houses

and structures since 1972. These witnesses have deposed that they have been paying land revenue of the suit land. According to these PWs as they have been continuously possessing the suit land since 1972 with knowledge and permission of the defendant, their right becomes irrevocable.

8. What is elicited from the cross examination of PW 1 and PW 2 reveals that what they stated in their pleading as well as in their evidence on affidavit is fabricated, inaccurate, untrue and erroneous. In her cross examination PW 1 stated that the defendant sold the suit land to them by executing an unregistered document in her favour in the year 1980. She clarified that she possessed the suit land after purchase of the same in 1980. She further clarified that before purchasing and possessing the suit land she used to reside in the land belonging to Kamal Ghosh which is in the western boundary of the suit land. In the latter part of her cross examination PW 1 stated that her advocate drafted the plaint as per her instruction and she put her signature thereon after the same being read over to her. Nowhere in her cross examination PW 1 stated that her deceased husband and she herself along with the other plaintiffs are the permissive occupier of the suit land. On the contrary to what she stated in her evidence in chief, PW 1 stated in her cross examination in consistent and persistent manner that she occupied the suit land by way of purchasing the same. In view of such apparent contradiction the evidence of PW 1 loses its force of credibility. Therefore, I find the evidence of PW 1 to be weak and infirm and not reliable.

9. Referring to such contradiction in the evidence of PW 1, Sri T.C.Khatri, learned senior counsel appearing for the plaintiffs, has contended that due to her anxiety PW 1 deposed in her cross examination as purchasing the suit land. In the latter part of her cross examination PW 1 denied categorically the suggestion that her husband took the house and premises over the suit land on monthly rental of Rs 100/- per month from the month of October , 1972 from the defendant. She also denied the suggestion that after the death of her husband she and the other plaintiffs used to pay the monthly rental regularly to the defendant but stopped such payment from the month of December 2007. If PW 1 were moved by anxiety, she could not have either denied categorically all the suggestions from the defendant side regarding they being the tenants of the defendant. As PW 1 was very categorical and

consistent in denying those suggestions of they being the tenants of the defendant , it can not be held that she deposed as purchasing the suit land due to anxiety. Therefore, I respectfully reject the contention raised by learned senior counsel in this regard.

10. The evidence of PW 2 also fails to inspire credence in view of his evidence in cross examination. PW 2 himself being another plaintiff of this suit is not sure as to whether they purchased the suit land or not. In his cross examination PW 2 stated candidly, “ I do not know whether my mother and we had purchased the suit land through sale deed.” At another place in his cross examination PW 2 stated, “ Before purchasing the suit land we use to reside as tenant in the house of Khutu Bhagat, this was before 1972 .” If we juxtapose these two statements of PW 2, it becomes crystal clear that PW 2 is quite confused regarding the means by which he along with the other plaintiffs possessed the suit land. In the latter part of his cross examination PW 2 stated that in the year 1972 defendant Sanat Kumar Das had permitted his father to reside in the suit house as permissive possessor. PW 2 further clarified that he did not know the terms and conditions of the oral permission. PW 2 stated that he and his mother were present at that time and he did not remember whether anyone was present at that time. The evidence of PW 2 wavers from one point to another point, from purchasing the suit land to being permissive occupier of the same. In view of such wavering nature of the evidence of PW 2, it fails to inspire due credence. For that reason I find the evidence of PW 2 not reliable and credible.

11. The evidence of PW 3 and PW 4 also fails to inspire requisite credibility regarding the plaintiff’s case. Both PW 3 and PW 4 are “Pujaris” and they use to go to the house of the plaintiffs to perform rituals. PW 3 Jadumoni Sarma stated in his cross examination that the suit land and house was originally in the name of Sanat Chandra Das. He clarified that he did not know how the plaintiffs came into possession over the suit land and what kind of relationship is shared by the plaintiffs and the defendant. PW 4 Pitambar Bora stated in his cross examination that he did not know whether the plaintiff had purchased the suit land. He stated that he had seen the plaintiffs in possession of the suit land and house since 1970. There is

nothing in the evidence of PW 3 and PW 4 to support the plea of the plaintiffs that they are the permissive occupier of the suit land.

12. The comprehensive effect of the evidence of PW 1, PW 2, PW3 and PW 4 as discussed above is that the evidence of these witnesses fails to inspire credence. The plaintiffs have taken the plea of being permissive occupier by oral permission. Therefore, the burden of proving the oral permission squarely lies upon the plaintiffs. But as transpires from the foregoing discussion of evidence, plaintiff side has failed to adduce cogent and convincing evidence to support their plea of permissive occupier.

13. Sri Sanat Kumar Das, the defendant and DW 1 stated that he purchased 2 Kathas of land (the suit land) out of total 4 Bighas 1 Lessa of land covered under Dag No 514(old) 507(new) of P.P. No 131/22(old) 20(new) situated at village Majgaon under Bhairabpad Mouza in the district of Sonitpur along with one Tali house, one thatched house and a pucca well standing thereon from its original owner Sri Naren Choudhury in the year 1969 vide registered sale deed No 3063/69 dated 08—8-1969 registered at Tezpur Sub-Registry Office. That after purchase of the said land and structures thereon the defendant shifted to Guwahati in the year 1970 and permanently settled there. That in the month of October 1972 the defendant rented out the house and premises standing over the said land to Ganesh Kotoki at a monthly rental of Rs 100/- . The defendant has stated that Ganesh Kotoki and the plaintiffs occupied the said house and premises as his tenant. In his cross examination defendant Sanat Kumar Das being DW 1 sated that in 1969 he purchased the suit land from Naren Choudhury vide registered sale deed. Defendant has exhibited the said sale deed as exhibit A. In their pleading as well as in their evidence in chief the plaintiffs also admitted the purchase of the suit land by the defendant.

14. Sri K.K. Sarma, learned counsel for the defendant, draws the attention of this court to the schedule of exhibit A and contended that as per the schedule of exhibit A the houses and structures standing on the suit land have been in existence since the time of purchase of the suit land. This court has perused Exhibit A sale deed vide which the defendant purchased the suit land. In the Schedule of Exhibit A it is written that apart from the land there

is one Tali House, one thatched house and a pucca well. The fact that at the time of purchase of the suit land by the defendant there was one thatched house and one Tali roofed house is supported by the plaintiffs in their pleadings as well as in their evidence on affidavit. What the plaintiffs deny is that the said thatched house and the tali roofed house are not in existence at present and those houses completely broke down in 1970. This denial of the plaintiffs is not believable because there is no cogent and convincing evidence on record to show that the houses and structures on the suit land are constructed by the plaintiffs. Therefore, the fact remains that the houses and structures on the suit land have been in existence from the time of its purchase. As such the contention made by learned counsel for the defendant on this point is befitting and therefore I respectfully accept this contention.

15. The defendant has pleaded that after the purchase of the suit land he shifted to Guwahati in 1971 and as per request of Ganesh Kotoki he rented out the suit houses and structures to Ganesh Kotoki at the monthly rate of Rs100/- only. In his cross examination DW 1/defendant has stated that there is no written tenancy agreement with Ganesh Kotoki or other plaintiffs. He further stated that there is no receipt of rent. It is in the evidence of DW 1 that he entrusted his childhood friend Rajat Barua to collect the rent of the suit house from the plaintiffs. Rajat Barua is examined as DW 2. In his cross examination DW 2 stated that he collected rent from the plaintiffs but there is no receipt. He further clarified that there is no written account about collecting rent from the plaintiffs. The evidence of DW 1 and DW 2 is consistent and coherent regarding the defendant renting out the suit house to the plaintiffs and the defendant collecting rent for the same through his friend Rajat Barua, DW 2.

16. Defendant has pleaded that he rented out the suit house to the plaintiffs on request of Ganesh Kotoki. The defendant has not pleaded that there was any written tenancy agreement with the plaintiffs. While it is admitted that the defendant left for Guwahati after purchase of the land along with the suit houses and permanently settled there, it is very normal and natural that he rented out the suit house as per oral request. As the defendant resided at Guwahati, it is also quite natural that he entrusted his friend, DW 2 to collect the rent. Admittedly there is no receipt of rent payment. It is a commonly

known fact that in most cases tenancy runs on oral terms and no rent receipt is issued. As the suit house is claimed to be rented out by the defendant way back in 1972 at monthly rent of Rs 100/- only, it is very normal and probable that there is no written tenancy agreement and there is no rent collecting receipt. Learned counsel for the plaintiffs asked DW 2 whether he knew the names of the people living around the suit houses in order to assess his credibility. Responding to that question DW 2 stated that he does not know the names of the persons who have homes near the suit land. This categorical reply of DW 2 does not assail his evidence, rather it lends credence to his evidence because it is very human and normal that DW 2 does not know the names of the neighbouring people of the suit houses because he goes there only for collecting the rent. I find the evidence of DW 1 and DW 2 to be cogent, coherent and consistent. Such evidence of DW 1 and DW2 lends more probability to the story of the defendant side.

17. Assailing the plea of the defendant that the plaintiffs are his tenants, Sri T. C. Khatri, learned senior counsel for the plaintiffs, has contended that this plea is not tenable because the defendant has not filed any counter claim for eviction of the plaintiffs. Answering to this contention Sri K.K. Sarma, learned counsel for the defendant has argued that non-filing of counter claim does not debar the defendant from filing fresh suit for eviction. As discussed above the evidence adduced by the defendant side lends more probability to the story of the defendant. In view of cogent and coherent evidence on behalf of the defendant side, mere fact that the defendant has not filed counterclaim for eviction necessarily does not defeat his plea of the plaintiffs being his tenants. Therefore, I find no merit in the contention made in this regard by learned senior counsel. Hence I humbly reject this contention.

18. From the foregoing discussion of the evidence of the plaintiff side and of the defendant side, it appears that the plaintiffs have failed to discharge their burden of proving the plea of permissive occupation of the suit house and premises. The case of the defendant side appears to be more probable and believable. As such the preponderance of probability lies in favour of the defendant.

In the net result of what is discussed above this issue is decided in negative against the plaintiffs.

Issue No (i): Whether the suit is maintainable in its present form?

19. Section 9 of The Civil Procedure Code , 1908(the code hereinafter) gives ample power to the civil court to entertain civil suit where there arises the question regarding the infringement of civil rights. Maintainability of a civil suit is to be determined on the basis of pleadings of the parties. Maintainability does not depend upon the evidence of the parties. Order IV of the Code deals with the legal and formal requirement for institution of civil suit. In the instant suit I find no express or implied bar or any formal defect in the pleadings of the parties barring the trial of the suit. The pleadings of the parties do not disclose any procedural defect barring the jurisdiction of this court to try this suit. Therefore, this court is of the considered opinion that this suit is maintainable in its present form.

Hence issue No 1 is decided in affirmative in favour of the plaintiff.

Issue No (iii): Whether the plaintiffs are entitled to the decree as prayed for?

20. In this suit the plaintiffs have prayed for decree of permanent and perpetual injunction against the defendant on the basis of their plea of being permissive occupier of the suit land and houses. As discussed in issue No (ii) above, the plaintiffs have failed to establish their plea of being permissive occupier. In view of the discussion and decision in issue No (ii) above, the plaintiffs are not entitled to the decree as prayed for.

This issue is, therefore, decided in negative against the plaintiffs.

ORDER

21. This suit is dismissed on contest with cost. The defendant shall get the cost of the suit. The plaintiffs are not entitled to get any relief.

Prepare the decree accordingly.

The judgment is delivered in the open court and the operative part of the judgment is pronounced in the open court today, the 26th day of September 2013 and it is given under my hand and seal.

Chitra Rani Saikia
Munsiff No 1, Tezpur

ANNEXURE

1. Plaintiff's witnesses:

PW 1: Smti Lily Kataki
PW 2 : Sri Atul Kataki
PW 3: Sri Jadumoni Sarma
PW 4: Sri Pitambar Bora

2. Plaintiff's exhibit:

Exhibit 1: Jamabandi
Exhibit 2: Jamabandi
Exhibit 3: Jamabandi
Exhibit 4(1) to 4(15): Revenue paying receipts
Exhibit 5(1) and 5(2) : Panchayat permission
Exhibit 6: Voter list
Exhibit 7 : Panchayat Receipt

Defendant's witnesses:

DW 1 : Sri Sanat Kumar Das
DW 2: Sri Rajat Barua

Defendant's exhibit :

Exhibit A : Copy of registered Sale Deed No 3063 dated 08-08-1969
of Tezpur Sub-registry office

Exhibit B : Jamabandi of P.P. No 22(new) of village Majgaon
Exhibit C(1) to C(5) : Land revenue paying receipts
Exhibit D: Land inspection certificate

Chitra Rani Saikia

Munsiff No 1, Tezpur