

HIGH COURT FORM NO. J (3)
HEADING OF JUDGMENT ON APPEAL

DISTRICT : DHUBRI

In the Appellate Court of the District Judge, Dhubri

Tuesday, the **11th** day of **May, 2016**

Title Appeal No.**10/2006**

Present : Sri Rajib Goswami, AJS
District Judge, Dhubri and made in

From a decree of Shri A.K. Borah,
Civil Judge, Senior Division, Dhubri

Title Suit No.15/2004

Jahan Uddin & Anr,Appellant (s)

Vs.

Sattar Ali & Ors, Respondent (s)

This appeal having been heard on 27-04-2016 in presence of

Sri Abdul Latif, Advocate for appellants

Sri M. Ali, advocate for respondents.

And having stood for consideration to this day the Court delivered
the following judgment :-

J U D G M E N T

This is a 1st appeal filed by the plaintiff Jahanuddin and Manik Uddin @ Manik Ali sons of Elahi Box on being aggrieved by impugned judgment and decree dated 25-11-2005 passed by learned Civil Judge, Sr. Division, Dhubri in T.S. No.15/2004 dismissing the suit of plaintiffs, present appellants.

2. The appeal is preferred primarily on following grounds:

(i) There was gross error in framing issues, appreciating the pleadings and evidence on record in true perspective and in appreciating the law i.e. Adhiyar Protection Act and Assam Temporarily Settled Areas Tenancy Act, 1971 which are not applicable in the present context of the suit since the suit land does not fall within these Acts.

(ii) The T.S. 15/2004 was dismissed on 25th November, 2005 and the present appeal is against the said judgment. The plaintiffs' case is that their predecessor in interest Elahi Box was the owner in possession of 9 bighas of land covered by Dag No.419 as described in the schedule A of the plaint. Defendants No. 1 and 2 are nephews of Elahi Box. Whereas defendant No.3 is the wife of brother of Elahi Box. Defendants being landless, Elahi Box out of compassion had allowed defendants to construct their respective houses on the northern portion of land described in the schedule "A" temporarily in the year 1989 as permissive occupiers. Thereafter, defendant 1, 2 and 3 having applied for allotment of 5 bighas land upon which they have been in possession to proforma defendant No.3. Proforma defendant No.3 made an order of allotment in respect of 5 Bighas in their names on 25-09-1999 and remaining 4 bighas remained with the predecessor in interest of the plaintiffs. Having learnt about development, the plaintiffs following deposit of Rs.1000/- as settlement fees (Premium), proforma defendant No.1 had issued memo dated 5-2-2004 for correction of record of rights of settlement in names of plaintiffs and they became pattadars in respect of 4 Bighas out of 9 Bighas in Dag No.419. Accordingly following correction in the settlement records 5 Bighas of scheduled-A land

that had been mutated in the name of defendants. The plaint further reveals that following issue of patta in respect of 4 bighas plaintiffs had been dispossessed by the defendants on 30-04-2004 from the suit land who had removed those boundary pillars on the four boundaries of the suit land constructed by plaintiffs. Hence this suit for right, title, interest and recovery of khas possession of the suit land.

(iii) Defendants were debarred from filing W.S, having come up with the written statement beyond of period of limitation as envisaged in order 8 Rule, 1 Of CPC. However, defendants were allowed to cross-examine plaintiffs witnesses. The suit No.T.S 15/2004 was dismissed on 25-11-2005 by Civil Judge, Sr. Division, Dhubri. Later the case had come up for first Appeal in the court of District & Sessions Judge, Dhubri, T.A. No.10/2006 which was also dismissed by District Judge, Dhubri on 21-03-2007. Then the present plaintiffs had preferred a second appeal before Hon'ble High Court No. RSA 70/2007. The Hon'ble High Court by its judgment & order dated 28-07-2015 had remanded the appeal to the 1st Appellate Court for fresh decision, on the findings that the 1st appellate court had not complied with the requirement of order 41 Rule 31 of CPC by not framing any point of determination on which the 1st appeal had been decided.

Heard learned advocates for both sides. Perused the evidence adduced.

3. Points for determination

1. Whether the plaintiff has, right, title & interest over land measuring of 4 bighas covered by Dag No.419 as described in the schedule A of the plaint incorporated in periodic patta No.421?

2. Whether the suit is bad for non-joinder of necessary parties?

3. Whether the defendants were Adhiyars, occupancy tenant under the predecessor of the plaintiffs.

4. Whether the Assam (Temporarily Settled Areas) Tenancy Act, 1971, The Assam Land Holding (Adoption of relationship under the Assam Land and Revenue Regulation, 1886 and Assam Adhiars Protection and Regulation Act, 1948.

4. **Now coming to point No-1**

The plaintiff is to prove his right, title interest over the land. The PW-1, Jananuddin in his affidavit-in-evidence had stated that land measuring 2B-4K-4L in Dag No.712/681, 2K-6L in Dag No.609/682 described in schedule B, part of schedule-A is the suit land. According to PW-1, defendants had been allowed to construct temporary houses in northern portion of the land in schedule-A for a temporary period in the year 1989 and thereby they became permissive possessor. However, on 25-09-1991 5 bighas in schedule-A land had been settled with the defendants by proforma defendant No.3 and 4 bighas was still in the name of Elahi Box, the father of PW-1. The plaintiffs had exhibited ext-1 the certified copy of Abantonna in the name of their father, Elahi Box. Ext-4 the settlement order in favour of present plaintiffs in connection with the suit land already described above. Ext-5 is the land holding certificate stood in their name.

In his cross-examination PW-1 had reiterated being pattadars in respect of 2B-2K-4L land in Dag No.712/681 and another plot of land in Dag No.609/682 totalling 3B-2K-10L and the said land had been originally allotted in the name of their father, Elahi Box in the year 1976, being land less. PW-1 admitted with regard to defendants, Sattar and Badsha presently cultivating the said land as Adhiars. PW-1 admitted to being a resident of Jhagarper and the suit land being located around 2 ½ to 3 k.m. away from his house.

5. PW-2 is Afjal Sk. had stated that he lives around 100 meters away from the suit land. According to PW-2 the father of the present plaintiffs Elahi Box was the original owner of a plot of land measuring 9 Bighas that had been settled with said Elahi Box by then Deputy Commissioner, 1976 and after 5 bighas had been settled with defendants, 4 bighas remained in possession of plaintiffs who had been in possession of the same. Out of this 4 bighas that had remained with present plaintiffs, 3K-10L had been lost in land erosion into river Gadadhar. Thus remaining 3B-1K-10L had been in the possession of plaintiffs and for some time in the year 2001 PW-2 had been cultivating the same as Adhiar for two years. After 2001 defendants had been cultivating the land as Adhiar on crops sharing basis. On 30-04-2004, the defendants dispossessed the plaintiffs from the suit land.

In his cross PW-2 admitted to plaintiff being his brother-in-law and deceased Elahi Box had been his father-in-law. According to PW-2 Elahi Box was a businessman who dealt with grocery items and used to live at Jahagarpar. Initially PW-2 had cultivated the suit land on crops sharing basis and later he had become a driver. According to PW-2 defendants had been cultivating the suit land and stopped giving share of crops to plaintiffs which resulted in present dispute between plaintiffs and defendants.

6. The ext-1 reveals that out of 9 bighas covered by Dag No.419 old that had been allotted to Ilahi Bux, the predecessor of present plaintiff by Abanton nama bearing serial No.182207 in LA Case No.909/DBB/75-76, only 4 bighas stood in the name of present plaintiffs. Remaining 5 bighas was settled with Remesha Bewa, one of the defendants on 25-09-1991. As per ext-3 and ext-4, only 4 bighas land had been settled with Jahanuddin and Manik Uddin, two sons of Ilahi Bux on payment of premium of Rs.1,000/- on 10-11-2003. They became pattadar in respect of the above 4 bighas as legal heirs of late Elahi Box. Ext-5 reveals that on 09-03-2004 both Jahanuddin and Manik Uddin had been certified to be Pattadars in respect of total land area 3B-1K-10L in Dag No.712/681/609/682 incorporated in Patta No.421.

7. Now, the Hon'ble Gauhati High Court in Mongilal Agarwal vs. State of Assam 1993 (1) GLJ 508 Guwahati defined periodic patta means "for a definite period if a leased document is performed through a settlement order and the premium money is paid, persons is bound to get a title and Sec. 9 of the Assam Land and Revenue Regulation Act, 1886 defines right of landholder a landholder shall have permanent, heritable and transferable right of use and occupancy on his land, subject to payment of all revenue tax, cesses and rest from time to time legally assessed or imposed in respect of the land."

8. It is evident from the evidence above that the suit land had been converted into miyadi patta by plaintiffs on payment of premium and as such they have become landholders in respect of the suit land having been vested with permanent, heritable and transferable right of use and occupancy on his land,.

9. Now so far coming to the point No.2 the suit being defeated by reason of misjoinder and non-joinder of parties as per Order 1, Rule- 9 of CPC

“and the Court may in every suit deal with the matter in controversy so far as regards rights of parties actually before it. Provided nothing in this rule shall apply to non-joinder of the necessary party. However, in the present case ext-5 is the land holding certificate issued by ASO, Dhubri in the names of plaintiffs/appellants in the suit land, their names have been recorded as periodic pattadars so they are the sole owners and title holder of the suit land. Hence the question of sisters of the plaintiffs /appellants having their interest in the suit land does not arise at all and Id trial court holding this suit not maintainable for non joinder of necessary party is illegal as per provision of order 8, rule 5 (1) & (2) of CPC that envisages as such “Every allegations of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

10. Provided that the Court may in its discretion, require any fact so admitted to be provided otherwise than by such admission. (2) When the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be provided”

11. Coming to points No.3 and 4 the learned advocate for the appellants in course of his submission contended that the suit land is situated outside the territorial area of Assam Temporally Settled Areas Tenancy Act, 1971 and Assam Adhiars Protection and Regulation Act, 1948. According to learned advocate for the appellants the then Goalpara District’s Dhubri Sub-Division (now Dhubri district), Goalpara Sub-Division (now Goalpara District) and some parts of Kokrajhar Sub-Division were outside the purview of the above noted two Acts. The Assam (Temporarily Settled Areas) Tenancy Act, 1971 under its S. 1(3) extends to:

- (a) The District of Kamrup, Nowgaong, Darrang, Sibsagar and Lakhimpur,
- (b) Silchar and Hailakandi Sub-Division of the District of Cachar and

(c) Temporarily settled areas of Gossaigaon, Sidli and Bijni Circles of Kokrajhar Sub-Division of the District of Goalpara and the temporarily settled areas of Karimganj Sub-Division.

12. So, it is crystal clear that the above noted two Acts are not applicable in the suit land which is situated in the then Dhubri Sub-Division of Goalpara district and considering that the suit land was settled with the appellants' father in the year 1976 with regard to Govt. khash land, the appellants and respondents/defendants were nowhere in the suit land at the time of enactment of Assam Land Holding Act, 1974 and as such the parties would not get benefits of land holding either as Adhiars, occupancy tenants, sub-tenants and other modes of holding land that existed at the time of passing the Act in 1974.

13. The trial Court in T.S. No.15/2004 held that the plaintiffs are Land Lord and the defendants are occupancy tenant within the meaning of the Assam Land Holding (Adoption of Relationship under the Assam Land & Revenue Regulation Act, 1886 in the acquired permanently Settled Estate) 1971 (page-5, Para-3 of the judgment). According to Id counsel the plaintiffs/appellants are recorded landless tenant under the Govt. Had the written statement been accepted by the Court, it would have come to light that in para-11 the defendants had themselves denied the status of Adhiars and the position of defendants would have been the suit land had not been settled with them and they have not a single documents regarding the suit land to establish their claim.

14. Since the predecessor in interest of the present plaintiffs himself was landless he was nothing short of an occupancy tenant himself in respect of khas land under the govt as is evident from ext-1 abontonama. Thus the trial court holding defendants occupancy tenant under Assam Land Holding (Adoption of Relationship under the Assam Land & Revenue Regulation Act, 1886 in the acquired permanently Settled Estate) 1971 (page-5, Para-3 of the judgment) was misconceived. Thus I agree with Id counsel for the present appellants that procedure of ejectment of tenant as envisaged in sec-54 of the Assam (temporarily settled areas) tenancy Act is not being applicable in the present case.

15. The suit of the plaintiff needs to be decided on its own merit and on scrutiny of materials on record. Until 2004, when on payment of premium present plaintiffs had obtained title over the suit land, the plaintiffs were tenants under the Govt. in respect of Govt. khash land. Since the appellants themselves were tenants and could not sub-let any part of his tenancy under any provision of existing laws governing settlement of lands and defendants in the TS, present respondents having not been recorded tenants in respect of the suit land under any provision of the above noted tenancy Act as such cannot be protected from ejection from the suit land in the light of the provision Section 54 of The Assam (Temporarily Settled Areas) Tenancy Act, 1971. Thus summing up the entire discussion above I am inclined to allow the present appeal and the impugned judgment of the trial court in T.S. No.15/2004 is set aside.

16. The appeal is decreed in favour of the present appellants with regards to following reliefs:

(1) The appellants are entitled to right, title & interest over the suit land and khas possession of the suit land described in schedule-B of the plaint through eviction of the present respondents/defendants in the due course of execution process.

(2) The appellants are entitled to cost of the suit and

(3) A decree for permanent injunction restraining defendants/present respondents from entering into the suit land after eviction.

17. A certified copy of the judgment in the appeal along with the original case record be sent back to the trial Court for initiating execution process.

Given under my hand and seal of this Court on this 11th day of May, 2016.

Dictated & Corrected by me

District Judge, Dhubri

District Judge, Dhubri.