

Assam Schedule VII, Form No. 132.

HIGH COURT FORM NO. (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT.

District :- Bongaigaon.

IN THE COURT OF CIVIL JUDGE :::: BONGAIGAON.

**Present :- Smti M.C.Bordoloi,
Civil Judge,
Bongaigaon.**

Tuesday, the 21st day of November, 2017.

Title Suit No. 44 of 2013.

1. Sri Monoj Khakholari.
S/O Late Purna Khakholari,
Resident of village Dolaigaon, Part-III.
P.S. & Dist- Bongaigaon.

Plaintiff

VERSUS

1. Smt. Pratima Khakholari,
W/O. Late Dilip Khakholari
2. Sri Hriday Khakholari
S/O Late Dilip Khakholari
Both are residents of
Guwahati Solapara
P.O. - Rehabari, P.S. Paltan bazaar,

Contd...

M.C.
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**Civil Judge,
Bongaigaon**



(2)

Dist – Kamrup (Metro)

Defendants

A N D

1. Sri Pradip Khakholari,
S/O Late Purna Khakholari,
Resident of village Dolaigaon, Part-III.
P.S. & Dist- Bongaigaon.

2. Smt. Smaronika Khakholari.

3. Smt Bitopi Khakholari.

Sl. No. 2 and 3 are daughters of

Late Dilip Khakholari

C/O Smt. Brialy Boro

Guwahati Solapara

P.O. - Rehabari, P.S. Paltan bazaar,

Dist – Kamrup (Metro)

Proforma-defendants.


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This suit coming for final hearing on 21.10.2017.

(I) Given date or dates
in the presence of

Mr. Samir Kr. Sarkar, Mr, M. Wary

Advocate for plaintiff

Mr. H.P.Karmakar,

Advocate for Defendants.

and having stood for consideration to this on the 21st day
of November, 2017 the Court delivered the following Judgment:

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(3)

T.S.44/2013.

::: J U D G M E N T :::

1. This is a suit for declaration and injunction.
2. The plaintiff's case as unfolded in the plaint is given briefly hereinunder :

3. **Plaintiff's Case :**

That one Purna Khakholari was the original owner and possessor of a plot of land measuring 1 bigha 5 lecha covered by dag no. 365 and khatian no. 224 of village Dolaigaon, being the schedule A lands, he having purchased the same from one Gangadhar Sarkar vide registered sale deed no. 1334 dated 6.4.1965. That after having secured the possession of the aforesaid land, Purna khakholari constructed a residential house thereon and continued to live therein with his family members. That said Purna Khakholari expired in the year 1986 leaving behind the plaintiff, the proforma-defendant no. 1 and one Dilip Khakholari (since deceased) and sisters as his surviving legal heirs and that vide order in partition case no. 4/2000, land measuring 2 katha 12.5 lecha land being the B and C schedule lands were recorded in the name of the plaintiff and the Dilip Khakholari respectively. That after the death of Dilip Khakholari, the name of the defendants being his wife and son were recorded in the records of rights against the C scheduled land.

It is the plaintiff's case that the share of Dilip Khakholari

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was decided and determined through partition, for which the suit land was not a joint property. It is also the case of the plaintiff that due to professional requirement Dilip Khakholari had been residing at Guwahati away from the suit land whereby plaintiff had been possessing the suit land continuously and uninterruptedly with the knowledge of Dilip Khakholari during his lifetime and after his death in the year 2005 the plaintiff continued to possess the suit land with the knowledge of the defendant.

It is the plaintiff's further case, that the C schedule land falls on the eastern boundary of the schedule B land for which the plaintiff had encircled the suit land by erecting boundary wall and had been enjoyed the same by planting trees thereon and there is no access to the suit land accept by way of passage through the plaintiff's land. It is alleged that the defendants never visited the suit land and only on 22.6.2013 the defendant alongwith their men had attempted to take possession of the suit land by demolishing the boundary wall, in order to make an entrance, though such attempt was foiled. Hence, in the compelling circumstances, plaintiff has filed the instant suit for declaration of his right, title, interest and possession over the suit land by dint of adverse possession therein since 6.1.2001, a further decree for permanent injunction alongwith costs of the suit.


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5.

Defendant's Plea:

Defendant nos. 1 and 2 entered appearance pursuant to summons and filed their joint written statement. In their written statement the defendants raised the plea of absence of cause of action, non-maintainability,

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bar of limitation, mis-joinder of necessary parties, non-joinder of necessary parties etc.

The defendant admitting the fact of partition of the ancestral property and the schedule C lands having fallen into the share of their predecessor-in-interest by dint of order passed in partition case no. 4/2000 and the fact of recording of the land measuring 2 katha 12.5 lechas covered by dag no. 1087 patta no. 324, denied however, the uninterrupted and continuation possession of the plaintiff over the suit land. The defendant claimed to have come into possession of the suit land since after partition and avers that the trees standing on the suit land are more than 50 years old. The defendant further denied the plaintiff's case of attempted dispossession and the non existence of any ingress and egress to their land. The defendant prays for dismissal of the plaintiff's suit with costs.

6. The proforma-defendant No. 1 failed to contest the suit despite receipt of summons and accordingly vide order dated 29.3.2014, suit proceeded exparte against the proforma-defendant no. 1.

7. Proforma-defendant nos. 2 and 3 entered appearance pursuant summons and filed their written statement, raising the pleas as raised by the defendants in their written statement. The proforma-defendant nos.2 and 3 prays for dismissal of the suit.

8. Upon perusal of the pleadings one of my learned

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predecessor-in-chair vide order dated 10.7.2014 framed the following issues for adjudication which are enumerated herein below :

Issues :

1. Whether there is cause of action for the suit ?
2. Whether the suit is barred by law of limitation ?
3. Whether the suit is bad for non-joinder & mis-joinder of necessary parties ?
4. Whether the plaintiff has been possessing the suit land since 6.1.2001 to the knowledge of defendants ?
5. Whether the plaintiff has acquired right, title, interest over the suit land by way of adverse possession ?
6. Whether the plaintiff is entitled to get a decree as prayed for ?
7. To what relief if any the parties are entitled ?

9. The plaintiff side in order to prove its case, examined two witnesses and also adduced documentary evidence. Defendant side also examined two numbers of witnesses but failed to exhibit any documents. Both sides cross-examined each others' witnesses.

Arguments :

10. Heard the argument advanced by the learned counsels of both sides.

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10.(i) Learned counsel for the plaintiff submits that the plaintiff had been openly and continuously residing over the suit land since the day of partition that is since 6.1.2001 with the knowledge of the Dilip Khakholari (since deceased) during his lifetime and after him with the knowledge of his legal heirs. Learned counsel submits that the possession of the plaintiff over the suit land got perfected by way of adverse possession and the suit ought to be decreed as prayed for.

10.(ii). Controverting the above submissions, learned counsel for the defendant side, submits that the defendant had been possessing the suit land and the question of bounding the suit land by the plaintiff is misleading. Learned counsel further submits raising hostile animus by the plaintiff against the defendants, does not arise and the suit cannot be decreed as prayed for.

11. Heard both sides.

12. Perused the case record.

13. My decision on the above issues so framed for adjudication, alongwith reasons is given hereinunder :

Discussion, Decision and reasons therefor

14. **Issue no. 2 :**

Issue No.2 relates to the question the suit being barred by law of limitation.

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Defendant in her written statement as well as the proforma-defendants in their joint written statement averred that the suit is one barred by law of limitation and that the suit land has been under continuous possession of the defendants.

It is the plaintiff's pleaded case that they have been in possession of the suit land since 6.1.2001 by dint of the order in partition case and because of their long continuous uninterrupted possession, their right over the suit land got perfected by way of adverse possession.

At this point, I am reminded of the submissions of the learned counsel for the plaintiff that the suit of the plaintiff is within time as it is brought about after continuous and long uninterrupted possession over the suit land for 13 long years and title of the plaintiff over the suit land having repined and perfected.

Article 64 of the Limitation Act 1963 will find attraction herein which provides for the period of 12 years for maintaining a suit based on possession and not on title.

Perusal of the evidence on record nowhere discloses that the plaintiff possession over the suit land was in "hostile animus" to the defendant. Plaintiff had also not shown any document in favour of the partition of the suit land and the delivery of possession of the same in favour of the defendant and he remaining in continuous possession thereafter openly and continuously raising a "hostile animus" against the true owner.

Plaintiff witness DW2, on the other hand, stated that the suit land is not bounded which is contrary to the plaintiffs stand that he had

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encircled the suit land by bounding the same with a boundary wall and by planting trees thereon. PW 2 further admitted that the land which had fallen into the share of the defendant's predecessor-in-interest was land-locked and that one has to pass through the land of the plaintiff to reach the defendant's land but the same does not amount to possession of the same by the plaintiff ousting the defendants therefrom. The plaintiff's case of "hostile animus" is therefore set at naught. Further it must be borne in mind that the plea of adverse possession is to be taken as a shield and not as a sword and the plaintiff not being able to show that he had been in possession of the said suit land ousting the co-owners. Merely by secret "hostile animus" on his part in derogation of the title, of the other co-owner, no ouster can be inferred. There being no open assertion of hostile title, coupled with exclusive possession and enjoyment of the property constituting ouster, it can not be said that the defendant had been actually driven away from the suit land.

A possession of one co-owner without proving ouster of the other co-owner, is possession for a and on behalf of all co-owners. The question of bar of limitation would not arise herein thus.

The issue is decided in the negative against the defendant.

15.

Issue No. 3 :

Issue no. 3 relates to the question of suit being rendered bad for non-joinder or mis-joinder of necessary parties.

Defendant in their written statement raised the plea that the suit is bad for non-joinder of the sisters of deceased Purna Khakalari in the suit.

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Perusal of the plaint discloses that plaintiff acknowledges the right of the defendant's predecessor-in-interest Dilip Khakalari as the owner of the suit land and he claims title thereon by virtue of adverse possession. Admittedly the suit land is the plaintiff's ancestral property, his father Purna Khakalari. But again it is his case that the original ancestral property had been partitioned and the suit land had fallen into share of his brother Dilip Khaklari (since deceased).

It is not in dispute herein that the suit property was the original property of Purna Khakalari. Question of impleading the sisters of Purna Khakalari at this point does not arise for, it is the plaintiff and his siblings who are necessary and proper parties in the suit and not the sisters of the original owner.

Defendant though had raised the pleas of mis-joinder of parties but has failed to show as to for whose mis-joinder the suit would be rendered bad. It is to be borne in mind that a suit would not fail for mis-joinder of parties, though it might be defective in form. Accordingly, in the above premises, I am constrained to hold that the suit is not bad for non-joinder or mis-joinder of parties.

The issue is decided in favour of the plaintiff.

16.

Issue Nos. 4 and 5 :

Issue Nos. 4 and 5 being inter-related and same being the pivot on which the entire suit revolves, are addressed together for the sake of convenience and brevity and to avoid repetition in the marshalling of evidence.

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Issue No. 4 relates to the question whether plaintiff has been possessing the suit land since 6.1.2001 to the knowledge of the defendants.

And **Issue No. 5** relates to the question whether the plaintiff has acquired right, title, interest over the suit land by way of adverse possession.

It is the plaintiff's pleaded case that the suit land being the A scheduled land was originally owned by his father Purna Khakalari and after the death of their father, vide partition Case No. 4/2000, as per order dated 6.1.2001, the schedule A lands had been partitioned and the land records have been corrected by creating new dag and patta and the schedule B land fell into the share of plaintiff while the schedule C land fell into the share of the defendant, each plot measuring 2 katha 12.5 lecha. It is also the plaintiff's pleaded case that the share of the defendant's predecessor-in-interest Dilip Khakalari was determined through partition and the title thereto was created through partition and that since the division of the property through partition vide order dated 6.1.2001 and that after the death of Dilip Khakalari in the year 2005 the plaintiffs have been possessing the suit land with the knowledge of the defendant continuously and uninterruptedly. Plaintiff further averred that he had encircled the suit land by erecting pucca boundary wall and had been possessing the same by planting trees and gardening thereon. Plaintiff as PW1 had submitted his evidence-in-affidavit reiterating his pleaded case.

In support of his case PW1 has exhibited an attested copy of periodic khiraj patta as Ext 1, a attested copy of sale deed No. 1334 as Ext 2, attested copies of Jamabandi as Ext 3 and Ext 4. It deserves mention that

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though in his evidence-in-affidavit PW1 made a mention of exhibition of original document and certified copies of document but in fact no such original or certified copies of documents were exhibited rather attested photo copies of documents have been filed. In fact, the plaintiff's document are all attested documents. Plaintiff had not craved leave to submit the alleged photo copies of document which he had exhibited. The said photo copies of document therefore are not admissible in evidence.

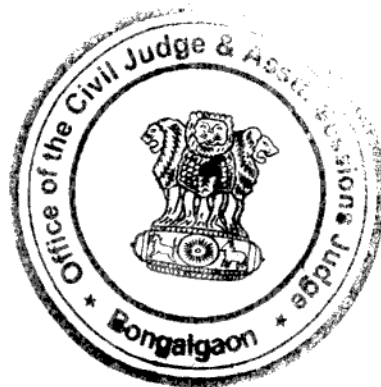
In his cross-examination PW1 discloses that the suit land originally belonged to his father and after the death of his father it was partitioned and that he had not submitted any record of partition case, in the instant case.


PW1 discloses his ignorance if the suit land was recorded in the name of Parbati Khakalari and Hriday Khakalari being the defendant No. 1 and 2 in the instant case. PW1 further disclosed that defendant No. 1 had lodged the case in the Assam State Commission For Women vide case No. 16/13 whereby he was asked to make a payment of Rs. 18,00,500/- (Rs. Eighteen lakhs five hundred) for the suit land and that he was not aware of the said order. PW1 disclosed that he had received notice of the said case.

PW2 supported PW1 in all material particulars. PW2 testified that on 22.6.2013 defendant threatened to demolish the boundary wall and to evict the plaintiff from the suit land and that due to their timely intervention, the attempt was foiled and that the defendants were not in possession of the suit land at any point of time.

But in his cross-examination PW2 disclosed that he his

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ignorant if the suit land was partitioned among the plaintiff and his brothers or not. PW2 disclosed further there is no house standing on the suit land and there is no distinct boundary wall on the suit land and the suit land is the ancestral property of the plaintiff and the defendant.

PW3 deposed in the same tune of PW2. However, in cross-examination of PW3 disclosed that he is ignorant as to from whom the plaintiff have acquired the suit land. PW3 also confirmed the fact that there is no house standing on the suit land and he had no knowledge as to in whose possession the suit land was. PW3 disclosed that he is ignorant as to who were the people present at the time of demolition of the boundary wall of the suit land.

Perusal of the aforesaid evidence, nowhere discloses that the original land, being the A schedule land was partitioned between the plaintiff and the defendant predecessor-in-interest. However, defendant in their written statement had admitted that the suit land was partitioned but said admission is sufficient to show that the suit land was delivered possession to the defendant's predecessor-in-interest on 6.1.2001. More so when the requirement of proving the same was there as the defendant have categorically stated that there was no demarcation of the suit property after partition. Plaintiff failed to show that there was actual physical partition of the property by metes and bounds.

Again plaintiff had averred that after the death of the defendant's predecessor-in-interest in the year 2005 he had been in possession of the same with the knowledge of the defendants.

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Even assuming that the defendant's predecessor-in-interest came into possession after partition on 6.1.2001, the plaintiff has failed to aver as to when his possession became adverse against the true owner. There is no evidence on record to show that plaintiff has raised a "hostile animus" against the defendant. Rather, plaintiff had admitted to a query of the defendant side that he was ignorant when the suit land was recorded in the name of defendant Nos.1 and 2. From this admission it is clear that suit land is recorded in the name of the defendant Nos. 1 and 2. Hence the question of plaintiff "hostile animus" against the defendant does not arise.

It is to be remembered that for adverse possession to succeed, it should be neck-vi, neck-clam, neck-precario and that the possession required must be adequate in continuity in publicity and in extent to show that it is possession adverse to the competitor. Again it is well settled that in order to establish adverse possession against a co-heir, it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered in law as possession all of the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret "hostile animus" on his part in derogation of the other co-heirs title. In fact, there must be open assertion of "hostile title" coupled with exclusive possession and enjoyment by one of them to the knowledge of the other to constitute ouster [(Emphasis Supplied : P.

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Laxmi Reddy Vs. R. Laxmi Reddy AIR 1957 SC 1789]

In the instant case the plaintiff has failed to raise a hostile animus against the true owner. Jointness of property is presumed herein . Though it is admitted fact that the defendant's predecessor-in-interest Dilip Khakholari was out of the suit land for professional commitments but this would not amount to his ouster from property as it has been averred that he was given a share of the property in the year 2001, though such share was not given effect to by formal partition.

It is again in the plaintiff's averment that he had been possessing the suit land since 2005 after the death of his brother with the knowledge of the defendant. If it is assumed to be true, then from 2005 till the date of filing of the suit, time of 12 years had not elapsed . Further possession of the plaintiff was not hostile against the true owner as because there was no open assertion of hostile title. Rather recording of the suit land in the name of the defendant suit shows that plaintiff had not successfully created a hostile title against the owner. The plaintiff's witnesses also failed to testify in respect of the exclusive possession of the plaintiff in respect of the suit land. Accordingly, on the above circumstances, I am constrained to hold that plaintiff has not acquired right, title, interest over the suit land by way of adverse possession.

The issue is decided in the negative against the plaintiff.

17.

Issue No. 1 :

Issue No. 1 relates to the question of presence of cause of action for the suit.

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In view of the discussions and decisions arrive at in Issue Nos. 4 and 5 I am constrained to hold that there is no cause of action for the suit.

The issue is decided in the negative against the plaintiff .

18.

Issue Nos. 6 and 7 :

Issue Nos. 6 and 7 being inter-related are addressed together for the sake of convenience.

Issue No. 6 relates to the question of entitlement of the plaintiff to a decree.

While **Issue No. 7** relates to the question what reliefs the parties could be entitled to.

In view of the discussions made and decisions arrived at in Issue Nos. 1, 4 and 5, I am but to hold that plaintiff is not entitled to reliefs in the suit.

The issues are decided against the plaintiff in the negative.

19.

O R D E R

In the light of the foregoing discussions, the plaintiff's suit is dismissed on contest with costs.

Prepare a decree accordingly.


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Given under my hand and the seal of this Court on the
21st day of November, 2017.

M.C. Bordoloi
21/11/17
Civil Judge,
Bongaigaon

M.C. Bordoloi
21/11/17
(M.C.Bordoloi)
CIVIL JUDGE,
Bongaigaon. Civil Judge,
Bongaigaon

Dictated & corrected by me,

M.C. Bordoloi
21/11/17
(M.C.Bordoloi)
Civil Judge,
Bongaigaon Civil Judge,
Bongaigaon



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A P P E N D I X

Plaintiff's witnesses :

PW1 - Monoj Kumar Khakholari.

PW2 – Khorgeswar Mahanta.

PW3 – Rajesh Ramchiary.

Defendant's witnesses :

DW 1 – Pratima Khakholari.

DW2 – Era Khakhalari.

Court witness

Nil

Plaintiff's exhibit (not admissible in evidence).

Ext 1 – Attested copy of periodic khiraj patta.

Ext 2 – Attested copy of sale deed no. 1334 dated 6.4.1965.

Ext 3 – Attested copy of jamabandi datd 4.1.2011.

Ext 4 – Attested copy of jamabandi dated 7.2.2011.

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Defendant's exhibit

Nil



M.C. Bordoloi
(M.C. Bordoloi) 21/11/17
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