

Form No. (J) 2

HEADING OF JUDGMENT IN APPEAL

District: Kamrup (M)

IN THE COURT OF CIVIL JUDGE NO.3, KAMRUP(M), GUWAHATI

Present: Rajesh Kumar Todi,

Civil Judge No.3,

Kamrup (M), Guwahati, 14th day of March 2017

Title Appeal No. 12/2011

Dharmeshwar BaishyaAppellant/plaintiff

Versus

Sarvodaya Trust and another.....Respondents/defendants

This appeal coming on for final hearing on 12-01-17, 09-02-17, 06-03-17 in presence of

D. Nandi, Ld. Counselfor the Appellant

H. K. Deka, Ld. Counsel.....for the Respondents

And having stood for consideration to this day, this Court delivers the following judgment:

JUDGMENT

1. This appeal is directed against the judgment and decree dt. 17.01.2011 passed by Ld. Munsiff No. 3, Kamrup, Guwahati, in Title Suit No.744/2006 (new) /127/2002 (old) whereby suit of the plaintiff (appellant herein) seeking a decree that the appellant (plaintiff) shall not be evicted by the respondents (defendants) without due process of law and for permanent injunction was dismissed and the Counter-claim of the respondents (defendants) for declaration of right, title, interest over Schedule-I (same as mentioned Schedule-A of the suit); for recovery of possession of the suit property Schedule-II (same as mentioned in Schedule-B) by evicting the appellant (plaintiff) and for restraining the appellant (plaintiff) from interfering with peaceful possession thereof of the respondents (defendants) was decreed.
2. I have gone through the memorandum of appeal containing grounds on which the aforesaid judgment and decree have been assailed. I have also gone through the impugned judgment and order as well as the pleadings of the parties, evidences recorded and documents exhibited in Title Suit No.744/2006 (new) / 127/2002 (old). I have also heard Ld. Counsels of both sides.
3. Case of the plaintiff (appellant herein), as disclosed in his plaint is that the defendant No.1 is a trust who is in control of scheduled properties of the plaint. The defendant No.2 is the secretary of defendant No.1. The scheduled properties were inherited by Dr. Tilottama Rai Chaudhury and late Amal Prabha Das from their late father Dr Hare Krishna Das. The said Dr. Tilottama Rai Chaudhury and late Amal Prabha Das gifted the schedule A property to the defendant No.1. When the plaintiff was a child, he

was brought to the schedule A property by Dr Hare Krishna Das in the year 1948 and since then he (plaintiff/appellant) has been staying there. Schedule B property is a part of schedule A property. Out of love and affection, Dr. Hare Krishna Das allowed the plaintiff (appellant) to stay over the schedule B property permanently and also permitted the plaintiff (appellant) to repair and extend the house over the schedule B property. After the death of Dr. Hare Krishna Das his said daughters allowed the plaintiff (appellant) to stay over schedule B land and repair and extend it. The plaintiff (appellant) was/is only required to pay the electricity charges to the defendant No.1. Prior to 1987 the defendant No.1 did not issue receipts against the electricity charges paid by the plaintiff (appellant) but since 1987 the defendant No.1 has been issuing receipts in favour of the plaintiff (appellant). By notice dated 17-2-1999, 13-12-1999 and several other dates the defendant No.1 asked the plaintiff (appellant) to vacate the suit premises and as such the plaintiff pleaded the defendant No.2 that as he (plaintiff) has been staying in the suit premises since the time of late Hare Krishna Das, he should be allowed to stay in the suit premises. The defendants are trying to evict the plaintiff from the suit premises without following the due process of law. Hence the suit.

4. The defendants contested the suit by filing written statement cum counterclaim. The defendants pleaded that said two daughters of late Hare Krishna Das gifted schedule I (same as mentioned Schedule-A of the suit) property to the defendant trust vide several gift deeds. The plaintiff was staying in a small Assam Type house measuring 26 ½ feet x 22 ½ standing over schedule II property (a part of schedule I property). After accepting the gift, the

defendant trust allowed the plaintiff to stay in the said house on condition that the plaintiff would vacate the same as and when asked by the defendant trust and on further condition that the plaintiff would pay the electricity charges consumed in the said house. In the year 1998 the plaintiff in the name of minor repairs damaged a portion of the said house and constructed a new room by extending the existing house without the consent of the defendant trust. The defendants raised objection against the said act of the plaintiff but the plaintiff did not pay any heed and as such the defendant on 17-02-1999 served notice on the plaintiff for vacating the suit premises. The plaintiff having not complied with the said notice, the defendant again on 13-12-1999 served a notice on the plaintiff asking him to vacate the suit premises. The plaintiff instead of complying with the said notice, started obstructing the peaceful possession of the property by the defendant. On 8-11-1999 the plaintiff removed the signboard of the defendant trust. On 17-11-19 the son of the plaintiff assaulted Bidur Mahanta who was entrusted with the work of putting lock on the gate of the schedule I property. In the first week of October 2001 the defendants came to know that the plaintiff accumulated sand and gravel in the said property of defendant trust for construction etc. Hence the defendants have filed the counterclaim for declaration of their right, title and interest over the schedule property and for recovery of possession and permanent injunction also and prayed for dismissing the suit.

5. Perusal of the record T.S. No. No.744/2006 (new) /127/2002 (old) reveals that upon the aforesaid pleadings the Ld. Munsiff No. 3, framed the following issues:

- (i) *Whether the plaintiff has right to sue?*

- (ii) *Whether the suit is maintainable in its present form and manner?*
- (iii) *Whether the plaintiff is entitled to get a decree has prayed for?*
- (iv) *Whether the counterclaim is maintainable?*
- (v) *Whether the plaintiff is a licensee under the defendant No.1 and if so whether he his right to possess the suit land after receiving notice issued by the defendant number one?*
- (vi) *Whether the defendants have acquired right title and interest over the suit property?*
- (vii) *Whether the defendants are entitled to get decree for recovery of possession by evicting the plaintiff from the land and property shown in the schedule I & II in the counterclaim?*

6. It appears on perusal of judgment dt. 17-01-11 that the Ld. Court below decided Issues No.1&2 in favour of the plaintiff (appellant) but decided Issue No.3 against him while the Issues relating to Counter-claim were decided in favour of the defendants (respondents). The Ld. Court below thus dismissed the suit and decreed the Counter-claim and arrived at the finding that defendants (respondents) shall recover possession of schedule-II property by evicting the plaintiff (appellant) and his men from the same.
7. Ld. Counsel for the appellant argued that the appellant (plaintiff) has been in possession of suit schedule-B property since long time and since before the creation of gift deed or deed of trust in favour of the respondents and none of the deeds of trust provided any condition to recover the possession or to evict the appellant from the said schedule property and therefore the appellant had acquired the right not to be evicted by the respondents and accordingly the Counter-claim filed by the respondents was/is also not maintainable and more so when the respondent No.2 was not authorised by the other trustees to lodge the Counter-claim against

the appellant. It is submitted that the Ld. Court below failed to appreciate these vital aspects and ultimately arrived at the wrong finding dismissing the suit and decreeing the Counter-claim.

8. The Ld. Counsel for the respondents, on the other hand, argued that no illegality was committed by the Ld. Court below as alleged in as much as the respondent No.1 being the lawful owner of the trust property including the property which is under the possession of the appellant merely as permissive occupier, has every right to recover possession of the same from the appellant. It is submitted that merely by possessing property for a long time the permissive occupier does not acquire any right over the property belonging to its owner and more so when he has been specifically asked by issuing notices by the respondents to vacate the same. It is submitted that even after receiving notice to vacate, the appellant did not vacate the suit premises and has been occupying the same only as trespassers and is therefore liable to be evicted from the suit premises. It is accordingly submitted that the Ld. Court below did not commit any error by decreeing the Counter-claim and by passing a decree for recovery of suit premises. It is also argued that the argument of the Counsel for the appellant that the Counter-claim is not maintainable is not tenable as the appellant failed to file his written statement and failed to raise the said plea earlier and for the first time in appeal the said plea has been taken which can not be accepted. Moreover, it is submitted that it is settled law that even a lone trustee can maintain a suit against a trespasser, the said trustee being one of the co-trustees and therefore the appellant has no right to question the locus standi of the respondent No.2 to bring Counter-claim against the appellant. It is thus submitted that the Ld. Court below rightly dismissed the

suit and decreed the Counter-claim and therefore the same is required to be affirmed by this Court.

9. I revisited the pleadings of T.S. No.744/06(new)/127/2002(old) and have also considered the arguments put forward.
10. Perusal of the pleadings makes it abundantly clear that it is an admitted position that the respondent No.1 is the absolute owner of the land of Schedule-A (same as mentioned in Schedule-I of the Counter-claim) including suit schedule-B premises (as mentioned in Schedule-II of the Counter-claim) and that the appellant has been in possession of suit schedule-B premises as permissive occupier since long time. Now, the law in this regard is very clear that the permissive possessor or occupier of any property belonging to another is liable to vacate the same as and when he is asked to vacate the same by its rightful owner. The possession of the permissive occupier howsoever long it may be does not afford him any right against the owner of the property and permissive possession is in fact not an adverse possession and can be determined at any time by the rightful owner. It is settled law that mere possession for howsoever length of time does not result in converting permissive possession into adverse possession. This is so because permissive possession can not become hostile by long lapse of time so as to entitle the licensee to claim adverse possession. *In Rashbehari United Club v. Hazarilal Sharma AIR 1966 Cal 1984* it was held that *when the club is in possession of a portion of the suit property and does not prove such possession to be adverse, it must be presumed that its possession is permissive and can be terminated at any time.*

In Jwala Singh v. Basha Singh AIR 2007 P&H 123 it was held that *when there is specific plea of occupant in possession that it was in possession*

pursuant to a mutual exchange with true owner and they were cultivating the land with the permission of the true owner. Such possession was permissive and not adverse to the true owner and such possession even if long but with the consent of the true owner can not held to be adverse possession, howsoever, long the possession may be. In the instant case cross-examination of the plaintiff reveals that he categorically admitted that he was served with notice dt.17-02-99 & 13-12-99 to vacate the suit schedule-B premises by the defendants. It is also an admitted fact that even after receiving the said notices the plaintiff has been occupying the said premises. Situated so it is apparent his further stay over the suit premises even after receiving notice of eviction has changed his status from that of a permissive occupier to a trespasser over the suit schedule premises and that he is liable to be evicted from the suit premises of which admittedly the defendants are owners.

11. Now with regard to maintainability of the Counter-claim it appears that the same was filed by the respondent No.1 represented by its Secretary the respondent No.2. It appears from the record of T.S. No.744/06(new)/127/2002(old) that there is no written statement of the respondent challenging the maintainability of the Counter-claim on the ground that respondent No.2 was not authorised by other trustees either by way of power of attorney or by way of taking any resolution to lodge the Counter-claim on behalf of other trustees and this plea has been raised for the first time in appeal. However, this plea being the legal plea let us see how far the same is maintainable. In this context it is also pertinent to mention here that the Ld. Counsel for the appellant submitted that since the defendant trust is a private trust the Counter-claim preferred by the lone trustee is not maintainable whereas Ld. Counsel for the respondents argued

that there is specific averment in the plaint that the purpose of the defendant trust is promotion of *khadi*, health, village upliftment on the lines and manner inculcated by the ideals of Mahatma Gandhi and in the conception of Sarvodaya and from this it is apparent that the defendant trust is a public trust to which the provisions of Trust Act 1882 does not apply.

12. Ld. Counsel for the appellant cited following decisions viz. *AIR 1952 Cal 763(1)*; *AIR 1984 Delhi 145* and *AIR 1980 SC 17*. In *AIR 1952* it was held *inter alia* that no trustee can delegate his powers and duties to another trustee.....In *AIR 1984 Delhi 145* it was held that suit by one of the co-trustees authorising that trustee to file the suit would not be maintainable. The position of the trustees is exactly the same as of any other set of co-owners who must necessarily join together to file a suit. In *AIR 1980 SC 17* it was held that the trustees constitute one body in the eye of law and all must act together. In exercising power of sale or as in the exercise of other powers, a trustee therefore can not properly delegate the performance of the acts which he ought personally perform.
13. The Ld. Counsel for the respondents cited *(2005)1 SCC 457* wherein in para 15 it has been held that the Indian Trust Act as clear by its preamble and contents is applicable only to private trust and not to public trusts. In *2014 Bom CR 436;2014* it was held in para 13 that Section 47 & 48 of the Trusts Act 1882 are not applicable to a public trust. In *1990 42 DLT 35;1989 0 Supreme (Del) 365; VIDYARATNAM P.S. VARIERS ARYA VAIDYASAL KOTTAKAL VS. K.C. VIJAIKUMAR* it was held in para 17 that it is no doubt true that all trustees must join in a suit to maintain it and delegation is not permissible.....but

there is an exception to this rule that one of the several co-owners can maintain an action in ejectment against a trespassers without impleading the other co-owners as parties thereto. The reason obviously is that a co-sharer or co-owner having an interest in the property jointly with others is apparently a person with a better title than a trespasser. It was further observed that similar view has been taken by Division Bench in Shri Mahabir Prasad vs. Sukhdev Mongict and another (1983-3 Delhi Lawyer 250-DB) wherein it was held that the suit by co-owner of the property against the trespassers without impleading other co-owners is maintainable. It was further observed that since the suit has been filed by one of the trustees, that is, managing trustee who is placed in similar situation as that of a co-owner, the suit filed by him must be held to be maintainable. In (2007) 4 CHN 327 INDIAN CRAFT VILLAGE TRUST AND ANOTHER VS. CALCUTTA MUNINCIPAL CORPORATION AND OTHERS it was held in para 69 that when the public charitable trust is at a stake this Court as representative of the sovereign can certainly enquire into the cause of such litigation and dispose of the same on its own merit in accordance with law and that too even by ignoring the trivial issue regarding maintainability of this writ petition at the instance of the petitioner No.2 as he ceased to become a trustee during the pendency of this writ petition.

- 14.** Now what comes out is that firstly the appellant has failed to establish that the defendant trust is a private trust and it is apparent from the decisions cited by the respondents that the provisions of the Indian Trust Act is not applicable to public trust. Moreover, it has also been made clear from the decisions cited by the respondents as discussed above that so far as suit by one of the

trustees for recovery of possession from the trespasser or permissive possessor is concerned, the trustee who files the suit is placed on the similar situation as that of a co-owner having an interest in the property jointly with other co-trustees and is apparently a person with a better title than a trespasser and as such the suit filed by him without impleading other trustees is very much maintainable. That apart, from the decisions cited from the respondent side it also becomes apparent that when the public charitable trust is at a stake this Court as representative of the sovereign can certainly enquire into the cause of such litigation and dispose of the same on its own merit in accordance with law and that too even by ignoring the trivial issue regarding maintainability. Similar is the situation so far as this case is concerned where the defendant No.1 trust represented by its secretary and one of the trustees filed counter-claim inter alia for eviction of the plaintiff and for recovery of possession of the suit premises which is under the possession of the plaintiff which possession has now become illegal and the status of the plaintiff has become that of a trespasser since after he did not quit the suit premises after being asked to vacate the same by the rightful owner, that is, the defendants. Accordingly, there is no hesitation in holding that the counter-claim so filed is maintainable.

ORDER

15. In view of the fact that it has been found that the plaintiff is possessing the suit schedule premises presently as mere trespasser and further that the Counter-claim filed by the defendants is maintainable I am of the opinion that the Ld. Court below did not commit any error either of fact or of law in passing the impugned judgment and decree dismissing the suit and decreeing the Counter-claim and as such the same does not require any interference by this Court and needs to be affirmed and is accordingly so affirmed. The instant appeal is dismissed on contest with cost. Let a decree be prepared accordingly. Send back the LCR with a copy of this judgment to the Ld. Lower Court below.

Given under my hand and seal of this Court on this 14th day of March 2017 at Kamrup (M), Guwahati

(Rajesh Kumar Todi)

Civil Judge No.3

Kamrup(M), Guwahati