

FORM NO. (J) 2
HEADING OF JUDGMENT IN ORIGINAL SUIT/CASE

DISTRICT: MORIGAON

In the **Original** Court of the **CIVIL JUDGE** at Morigaon

PRESENT: - **Mrs. MILI HUSSAIN**, LL.M., A.J.S.
Civil Judge,
Morigaon.

Saturday, the **16th** day of **March**, 2019

Title Suit 27 of 2016

1. **Shri Rinku Das,**
2. **Shri Cheni Ram Das,**
3. **Smti. Chinu Das,**
4. **Smti. Rinu Das,**
5. **Smti. Aitee Das,**
All s/o, d/o, w/o Late Nanda Ram Das, respectively.
All r/o Tepuoni (Pub Dharamtul),
P.S. Jagiroad,
Morigaon (Assam). ... Plaintiffs

-versus-

1. **Sri Sri Bishnu Mandir,**
Represented by its President & Secretary -
2. **Shri Tilok Das @ Medhi,**
s/o Late Guluk Medhi,
r/o – Natun Bhalukaguri,
P.S. Dharamtul,
3. **Shri Habiram Hira,**
s/o Late Gunuram Hira,
r/o – Tepuoni (Pub Dharamtul),
P.S. Jagiroad,
Morigaon (Assam). ... Principal Defendants.
4. **The Deputy Commissioner,**
Morigaon.
5. **The Circle Officer,**
Morigaon Revenue Circle,
Morigaon. ... Proforma Defendants

This suit coming on for final hearing on 18-01-2019 in the presence of –

Mr. S. Deka & Mr. B. K. Bordoloi, Learned Advocate for the plaintiffs; and
Mr. N. K. Bora, Learned Advocate for the defendants.

AND having stood for consideration to this day, the Court delivered the following judgment.

JUDGMENT

1. This is a suit for declaration of right to use over suit schedule-A land and permanent injunction etc.

2. Plaintiffs' suit sans unnecessary details shows that a plot of land measuring 25 feet width and 20 feet length covered by Sarkari Dag No.221 of Pub-Dharamtul under Uttarkhola Mouza, Morigaon (here-in-after referred to Schedule-A). Plaintiffs' contention reveals that they are using Schedule-A land for more than 50 years as their only path for ingress and egress to the main NH 37 along with other users who resides nearby NH 37 or any other public road. Plaintiffs are poor schedule caste people running a temporary *Pan-Shop* measuring 6 ft. width x 8 ft. length on the road side of aforesaid NH 37 for more than 20 years and earning livelihood. That forefathers of plaintiffs as well as defendants with general public set up one Bishnu Mandir long ago for worship by villagers of Tepouni. Presently defendant No.2 and defendant No.3 are President and Secretary respectively of said Bishnu Mandir Management Committee. They along with other officer bearers of Bishnu Mandir is trying to occupy the suit land for the purpose of setting up a market. Plaintiffs' denied to vacate the suit premises, so defendants boycotted the plaintiffs and also filed a criminal case against them before the Executive Magistrate. Plaintiffs asserts legitimate user of aforesaid suit land for time immemorial. Defendants, on 15.09.16 and 16.09.16, threatened plaintiffs that they will evict plaintiff's *Pan-shop* with the help of proforma defendant No.4 & 5. Hence, this suit.

3. Written Statement of defendants No.1 to 3 filed jointly shows that suit is barred by National Highway Authority Act, as Schedule-A belongs to National Highway Authority of India. It is contended that Dag No.221 (suit dag) contains an area of 4 Bighas - 4 Kathas at Pub-Dharamtul Kissam and NH 37 has been running over said Dag No.221. A strip of land that remained by the side of the National Highway is the suit land. Defendants refuted that suit is hit by law of limitation and for non-joinder and mis-joinder of necessary parties. Defendants admitted setting up of Bishnu Mandir by public of greater Dharamtul village and that defendant No.2 and 3 are President and Secretary of said Mandir. Plaintiffs used their path to ingress and egress to National Highway before four lining of National Highway started. The other people resides with the plaintiff did not dispute during last 100 years, but plaintiffs are very rigid and they wanted to use Schedule-A land which is in used by Sri Sri Bishnu Mandir for about 100 years more. Defendants' case is that schedule-A land is in possession of Sri Sri Bishnu Mandir for last 100 years or more and covered by Sarkari Dag No.510. Original pattadar Nandeswar Das gave up said land for use by Sri Sri Bishnu Mandir which comprises in Dag No.510, which

was Dag No.274 earlier covering an area 1B-2K-4Ls covered by A.P.No.13(15). Out of said 1B-2K-4Ls, an area of 1B-10Ls was occupied by National Highway of India vide land Acquisition Case No. 41/1968. After said acquisition, 1K-14Ls in Dag No.274 of A.P.No.15 remained in possession of Sri Sri Bishnu Mandir. Thereafter, again vide NRQ.11/2006/304 dated 1.10.2008, said 1K-14Ls was acquired from possession of Sri Sri Bishnu Mandir. Thereafter, the remaining land of Dag No.274 was amalgamated with other Sarkari dag and 1Bigha – 8 Lessa under Dag No.510 became new Sarkari Dag.

Defendants' case is that plaintiff illegally and forcefully constructed his *Pan-shop* (measuring 6 ft. width and 4 ft. length) over Dag No.221, which is a Sarkari dag and is attached to National Highway with no gap in between. Actually Sri Sri Bishnu Mandir have been in occupation of land containing in Dag No. 510 for more than 100 years and Mandir received compensation for acquisition of land also. Plaintiff constructed the *pan shop* after filling the Schedule-A illegally and raised illegal construction. Hence, defendants prayed for dismissal of the suit.

4. Proforma defendants filed written statement contending that the suit is not maintainable due to relevant provisions of National Highway Authority Act. It is contended that the suit is hit by non-joinder of necessary party and that the suit has no cause of action and that the suit is hit by the law of limitation. Proforma defendants contended that the 25 ft. wide x 20 ft. length covered by sarkari dag no. 510 which was possessed by Sri Sri Bishnu Mandir since long back and the land acquisition compensation was awarded to Sri Sri Bishnu Mandir after the acquirement of land from it. Proforma defendants contended that the alleged pan shop was constructed illegally and that there is no path way as alleged. Proforma defendants denied the plaintiffs' allegations and prayed for dismissal of the suit with costs.

5. On perusal of pleadings, this Court framed the following issues on 17.08.2017:

ISSUES IN SUIT

1. *Whether there is cause of action for the suit?*
2. *Whether suit is barred by limitation?*
3. *Whether the suit is hit by non-joinder of necessary parties?*
4. *Whether plaintiff has right, title and interest over schedule-A land?*
5. *Whether plaintiff is entitled to a decree as prayed for? To what other relief(s) plaintiff is entitled to?*

6. Plaintiffs adduced evidence of Smti. Aitee Das as P.W.1, Shri Rinku Das as P.W.2, exhibited certain documents. Defendants also adduced evidence of Shri Tilak Das as D.W.1. All the witnesses were cross-examined by either side.

7. I have heard **Mr. S. Deka & Mr. B. K. Bordoloi**, learned counsel for the plaintiff and **Mr. N. K. Bora**, learned counsel for the defendants. I have also carefully and attentively gone through the evidence-on-record. My decision on the issues is as under.

DISCUSSION, DECISIONS & REASONS FOR SUCH DECISION

ISSUE No.3

8. The defendants have contended that the suit is hit by non-joinder of necessary parties as the Schedule 'A' land was acquired by the State Government for the purpose of National Highway. Though it has not been mentioned as to for whose absence, the constitution of the suit is defective, but the contention made in paragraph 3 of the written-statement implies that the suit is bad for non-joinder of National Highway Authority of India.

9. Non-joinder of parties refers to a situation in which those parties whose presence is essential and in whose absence no effective decree can be passed by the Court have not been impleaded. A perusal of the plaint reveals that the plaintiffs have not claimed any relief against the National Highway Authority of India. Plaintiff is the *dominus litis*. Plaintiffs cannot be forced to implead a party against whom he claims no relief. Moreover, the defendants have not led any cogent evidence to hold that the presence of NHAI is necessary for valid constitution of the suit. In such premises, I am of opinion that the suit is not bad for non-joinder of necessary parties. Issue No. 3 is decided in the negative and for the plaintiffs.

ISSUE No. 4

10. This is cardinal issue. Let me unfurl the relevant evidence. P.W.1 Aitee Das and P.W.2 Rinku Das have reiterated the contentions of the plaint in material particulars. P.W.2 has also identified the trace map as **Exhibit 1**, jamabandis as **Exhibits 2** and **3** and notice issued by Circle Officer as **Exhibit 4**.

11. In cross-examination, P.W.1 deposed that she has her myadi patta land 20 feet from the National Highway and that she has a shop on land five feet from the National Highway. P.W.1 deposed that her shop is on the land of National Highway. P.W.1 further deposed that when she set up her shop, she did not took any permission from the Panchayat authority.

12. P.W.2 deposed in cross-examination that the suit land is a government land situated besides the National Highway. P.W.2 deposed that he has received eviction notice in respect of the suit land where his shop stands.

13. D.W.1 Tilak Das deposed by substantiating the contentions made in the written-

statement. D.W.1 deposed in cross-examination that the plaintiffs' shop is situated 5-6 feet away from the National Highway.

14. It emerges out from the oral evidence that the Schedule 'A' land measuring 25 ft. wide and 20 ft. length is covered by sarkari dag no. 221 under Uttarkhola mouza. The plaintiffs through P.W.1 and P.W.2 have categorically admitted that their shop is on the land of National Highway and that they have not taken permission from any authority at the time of setting up the shop thereon.

15. The regulation of construction on Highway Land for public utilities, drains, etc. is governed by the **Control of National Highways (Land and Traffic) Act, 2002**. Section 38 of the said Act provides that *no person other than a Highway Administration or a person authorised by such Administration in this behalf shall construct, install, shift, repair, alter or carry any poles, pillars, advertisement towers, transformers, cable wire, pipe, drain, sewer, canal, railway line, tramway, telephone boxes, repeater station, street, path or passage of any kind on highway land or across, under or over any Highway except with the prior permission in writing of the Highway Administration for such purpose*. Admittedly, the plaintiffs have failed to show that they took prior permission in writing from the authority concerned while setting up the shop on National Highway land. Moreover, the plaintiffs have claimed the right over the suit land by virtue of purchase but there is no document to substantiate the said claim, as such, the plea of purchase fails.

16. The plaintiffs' reliance on **Exhibits 1 to 3** do no aid them so far as claiming a declaration of their right over the Schedule 'A' land. As the land is situated on sarkari dag no.221, the Circle Officer, a competent authority, has acted as per law by issuing an eviction notice **Exhibit 4** but a careful perusal of said eviction notice reveals that it pertains to two lechas land out of 1K-14L land under reconverted sarkari dag no. 510 of earlier eksona patta no. 13 dag no. 274 acquisitioned by the National Highway. Thus, it is clear that there is a variance between pleading and evidence and in such circumstances, the plaintiffs cannot claim an equitable relief of declaration when they have been unable to probalilise their right over the Schedule 'A' land either through documentary or oral evidence.

17. Plaintiffs having claimed decree for declaration of their right, burden is on them to establish that they have right over the suit land but they failed to discharge their burden. Situated thus, having failed to probalilise their right, the plaintiffs are not entitled to a declaration of their right over the suit land. Issue No. 4 is decided in the negative and against the plaintiffs.

ISSUE No. 2

18. The suit is for declaration and permanent injunction. Plaintiffs pleaded that the cause of action for the suit first arose on 03-09-2016, the date on which the principal defendants filed a case under Section 107 CrPC. Thus, the plaintiffs' right to sue first accrued on 03-09-2016. Needless to add, the present suit is governed by Article 58 of the Limitation Act. The suit was filed on 22-09-2016. Hence, the suit is within the period of limitation. This Issue is decided in the negative and for the plaintiffs'.

ISSUES No. 1 and 5

19. In the present suit, the plaintiffs have impleaded the Deputy Commissioner and the Circle Officer as proforma defendants who are public officials but the State of Assam has not been made a party defendant, which is contrary to the mandatory provision of Order XXVII Rule 5A of the CPC. Moreover, notice under Section 80 CPC was not served upon the said public officials, which is also mandatory and explicit. Considering the discussions made hereinabove, it can be inferred that the plaintiffs' suit has no cause of action.

20. The plaintiffs' suit is for declaration and permanent injunction. The relief of declaration and permanent injunction being consequential ones, is governed by Section 34 of Specific Relief Act. As the plaintiffs failed to obtain declaration, they will not be entitled to the other reliefs, as claimed by them. Therefore, granting of other reliefs depends upon the declaration sought. As the plaintiffs failed to probabilise their right over the suit land, hence, it is pellucid that the plaintiffs' are not entitled to the decree and reliefs as prayed for.

21. Both the Issues are decided in the negative and against the plaintiffs.

ORDER

22. The plaintiffs' suit is dismissed on contest with costs.

23. Prepare a decree accordingly.

GIVEN under my hand and seal of this Court on this 16th day of March, 2019 at Morigaon.

(MILI HUSSAIN)
Civil Judge,
Morigaon.

APPENDIX

T. S. 27/16

1. The plaintiff's side has examined the following witnesses:-
PW – 1 = Smti. Aitee Das.
PW – 2 = Shri Rinku Das
2. The plaintiff's side has exhibited the following documents:-
Exhibit – 1 = is Trace map issued by C/O, Morigaon.
Exhibit – 2 = is Jamabandi copy of Patta No.60.
Exhibit – 3= is Jamabandi for surveyed village of Patta No.235 (n).
Exhibit – 4 = is Notice issued by Circle Officer to Rinku Das.
3. Defendant side has examined the following witnesses:-
DW – 1 = Shri Tilak Das.
4. Defendant's side has Exhibited the following documents:-
Nil.

Civil Judge,
Morigaon