

Form No. (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT

District: Jorhat

IN THE COURT OF MUNSIFF NO.1, JORHAT*Present:* Shri Jaspal Singh, AJS.Friday, the 23rd day of December, 2011.**Title Suit No. 14 of 2010**Moinuddin Ahmed.....*Plaintiff*
*versus*Md. Samsul Hussain..... *Defendant*

This suit coming on for final hearing on 17.11.2011 and 16.12.2011 in presence of:-

Advocate for the Plaintiff: Shri P. P. Sarmah

Advocate for the Defendant: Shri Sanju Ganguly

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

J U D G M E N T**Plaintiff's case**

1. The plaintiff is the absolute owner of a plot of land measuring 1 (one) Katha, covered by Dag No.510 of P.P. No.183 (new) 138 (old), situated at Chowdang Gaon, Teok, Jorhat. The plaintiff, through his daughter Smt. Yasmin Begum, used to run a Beauty Parlour under the name and style "M/s Rani Ladies Beauty Parlour" in an R.C.C room measuring an area of 110.50 (approx.) square feet out of the said 1 Katha of land of the plaintiff, and the said R.C.C.

room is the subject-matter of this suit and is hereinafter referred to as the “suit premises”. The defendant is the own brother of the plaintiff. Due to the poor financial condition of the defendant, the plaintiff, out of brotherly affection, had allowed the defendant to run a bicycle repairing shop in an Assam Type room, measuring 110.50 Square feet, situated alongside the said Beauty Parlour towards the eastern side of the Beauty Parlour.

2. The said Beauty Parlour was subsequently closed due to some personal problems of the plaintiff’s daughter and the R.C.C. shop room housing the same was locked by the plaintiff. But, afterwards, the defendant without any legal authority put another lock at the door of the said shop (i.e. the suit premises) on 15.9.2008 without having any right, title and possession over the same. The plaintiff asked the defendant several times to unlock the suit premises, but the defendant refused to do so. The plaintiff, therefore, issued a pleader’s notice to the defendant on 29.12.2009, but the defendant neither unlocked the suit premises nor replied to the notice. Therefore, the plaintiff has instituted this suit *inter alia* seeking ejectment of the defendant from the suit premises and recovery of khas possession thereof.

Defendant’s case

3. The defendant has contested this suit by filing a written statement. Besides stoutly denying the averments made in the plaint, the defendant has asserted that the plaintiff is not the absolute owner of the land measuring 1 Katha covered by Dag No.510 of P.P. No.183 (new) 138 (old) at Chowdang Gaon, Teok. The land was in occupation of

both the plaintiff and the defendant and their other brother and sisters since their childhood. The defendant had no knowledge that the plaintiff had mutated his name over the said plot of land. The defendant has, therefore, prayed for dismissal of the suit.

ISSUES

4. On the basis of the rival pleadings, the following issues were framed in this suit:

Issue No.1: Whether there is cause of action for the suit?

Issue No.2: Whether the suit is maintainable?

Issue No.3: Whether the suit is bad for non-joinder and misjoinder of necessary parties?

Issue No.4: Whether proper court-fee has been paid?

Issue No.5: Whether the suit room is situated?

Issue No.6: Whether the plaintiff has right, title and interest over the suit premises/suit land?

Issue No.7: Whether the plaintiff is entitled to recover possession of the suit premises by evicting the defendant and breaking the lock and key?

Issue No.8: Whether the plaintiff is entitled to recover compensation as prayed?

Issue No.9: To what other relief/reliefs the parties are entitled?

5. The plaintiff has examined as many as three witnesses, including himself, in support of his case. The

defendant has, on the other hand, examined only himself in support of his case.

DISCUSSION, DECISION AND REASONS THEREFOR

6. I have gone through the pleadings of the parties and the evidence on record, and perused the relevant documents and also considered the submissions made by the learned advocates.

Decision on Issue No.1 with reasons

7. The averments made in the plaint *prima facie* disclose that there is a cause of action for the suit. It may be stated here that cause of action is nothing but a bundle of facts which a party has to prove to get a judgment in his favour. It is a different aspect altogether as to whether or not he succeeds in proving those facts. In the instant suit, the plaintiff has alleged that the defendant has put the suit premises, which is owned by the plaintiff, under lock and key. He has instituted this suit for ejection of the defendant from the suit premises and khas possession thereof. He has to prove the facts alleged by him to get a judgment in his favour. So there is a cause of action for this suit. This issue is, accordingly, decided in the affirmative.

Decision on Issue No.2 with reasons

8. The defendant has averred in para 1 of his written statement that the instant suit is not maintainable. But he has not raised any matter in his written statement which shows that the suit is not maintainable. The provision of Order VIII, Rule 2, CPC, states that the defendant must raise by his pleading all matters which show the suit *not to*

be maintainable. It was incumbent upon the defendant in view of the above provision of Order VIII, Rule 2, CPC, to raise all matters in his written statement in support of his plea that the suit is not maintainable. As he has not done so, the instant suit cannot be said to be not maintainable. This issue is, accordingly, decided in the affirmative and in favour of the plaintiff.

Decision on Issue No.3 with reasons

9. The defendant has averred in the written statement that the suit is bad for non-joinder and misjoinder of necessary parties. But he has not pleaded specific facts in his written statement to show as to how the suit is so bad for non-joinder and misjoinder of necessary parties. Even in the cross-examination of the plaintiff also, the learned counsel for the defendant has not put any suggestion to the plaintiff to the effect that such and such person should have been or should not have been joined in this suit. Therefore, the issue at hand is decided in the negative and in favour of the plaintiff.

Decision on Issue No.4 with reasons

10. This issue relates to the payment of proper court fees. Before I proceed to discuss this issue, I feel necessary to mention here that during the pendency of this suit, when the defendant had not yet filed the written statement, a petition bearing No.1257/2010 dated 2.7.2010 was filed on behalf of the defendant wherein it was alleged that the plaintiff had not paid proper court fee in this suit and a prayer was made for framing a preliminary issue on that point. After hearing both the sides, my learned predecessor,

vide order dated 9.9.2010, declined to frame any preliminary issue and observed that this point would be taken into account at the time of the framing of issues. Accordingly, an issue was framed by my learned predecessor in relation to payment of proper court fees.

11. In course of his arguments, learned counsel for the defendant has submitted that proper court fee has not been paid in this suit by the plaintiff, so the suit is liable to be dismissed on this ground alone. He has submitted that the plaintiff has wrongly paid the court fee on five times the land revenue of the suit land; rather he should have paid the court fee on the market value of the suit premises, that is, the R.C.C. room. The learned counsel for the plaintiff has, on the other hand, submitted that he has paid proper court fee in this suit. In order to conclusively determine as to whether proper court fee has been paid in this suit, a cursory look into the relevant provisions of the Court Fees Act, 1870, is necessary. For the sake of convenience, the provision of Section 7 of the Court Fees Act, 1870, is reproduced hereunder:

Section 7 - Computation of fees payable in certain suits

The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:--

(i) **for money**;-In suits for money (including suits for damages or compensation, or arrears of maintenance, of annuities, or of other sums payable periodically) – according to the amount claimed;

(ii) **for maintenance and annuities**;-In suits for maintenance and annuities or other sums payable periodically – according to the value of the subject-matter of the suit, and such value shall be deemed to be ten times the amount claimed to be payable for one year;

(iii) **for other moveable property having a market-value**;-In suits for moveable property other than money, where the subject-matter has a market-value – according to such value at the date of presenting the plaint;

(iv) In suits –

(a) **for moveable property of no market value**;-for moveable property where the subject-matter has no market-value, as, for instance, in the case of documents relating to title.

(b) **to enforce a right to share in joint family property**;-to enforce the right to share in any property on the ground that it is joint family property,

(c) **for a declaratory decree and consequential relief**;-to obtain a declaratory decree or order, where consequential relief is prayed,

(d) **for an injunction**.-to obtain an injunction,

(e) **for easements**.-for a right to some benefit (not herein otherwise provided for) to arise out of land, and

(f) **for accounts**;-for accounts-

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. In all such suits the plaintiff shall state the amount at which he values the relief sought;

(v) **for possession of land, houses and gardens**;-In suits for the possession of land, houses and gardens – according to the value of the subject-matter; and such value shall be deemed to be –

where the subject-matter is land, and –

(a) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue;

and such revenue is permanently settled – ten times the revenue so payable;

(b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid;

and such revenue is settled, but not permanently – five times the revenue so payable;

(c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue,

and net profits have arisen from the land during the year next before the date of presenting the plaint –

fifteen times such net profits;

but where no such net profits have arisen therefrom – the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood;

(d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above-mentioned – the market-value of the land:

Proviso as to Bombay presidency;-Provided that, in the territories subject to the Governor of Bombay in Council, the value of the land shall be deemed to be-

(1) where the land is held on settlement for a period not exceeding thirty years and pays the full assessment to Government – a sum equal to five times the survey-assessment;

(2) where the land is held on a permanent settlement, or on a settlement for any period exceeding thirty years, and pays the full assessment to Government – a sum equal to ten times the survey-assessment; and

(3) where the whole or any part of the annual survey-assessment is remitted-sum computed under paragraph (1) or paragraph (2) of this proviso, as the case may be, in addition to ten times the assessment, or the portion of assessment, so remitted.

Explanation. – The word "estate", as used in this paragraph, means any land subject to the payment of revenue, for which the proprietor or a farmer or ryot shall have executed a separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue;

(e) for houses and gardens;-where the subject-matter is a house or garden – according to the market-value of the house or garden;

(vi) **to enforce a right of pre-emption**;-In suits to enforce a right of pre-emption – according to the value [computed in accordance with paragraph (v) of this section] of the land, house or garden in respect of which the right is claimed;

(vii) **for interest assignee of land revenue**; In suits for the interest of an assignee of land-revenue – fifteen times his net profits as such for the year next before the date of presenting the plaint:

(viii) **to set aside an attachment**; In suits to set aside an attachment of land or of an interest in land or revenue – according to the amount for which the land or interest was attached:

Provided that, where such amount exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest;

(ix) **to redeem**;- In suits against a mortgagee for the recovery of the property mortgaged, to foreclose; and in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute – according to the principal money expressed to be secured by the instrument of mortgage;

(x) **for specific performance**;-In suits for specific performance--

(a) of a contract of sale – according to the amount of the consideration;

(b) of a contract of mortgage – according to the amount agreed to be secured;

(c) of a contract of lease – according to the aggregate amount of the fine or premium (if any) and of the rent agreed to be paid during the first year of the term;

(d) of an award – according to the amount or value of the property in dispute;

(xi) **between landlord and tenant.**-In the following suits between landlord and tenant:--

(a) for the delivery by a tenant of the counterpart of a lease,

(b) to enhance the rent of a tenant having a right of occupancy,

(c) for the delivery by a landlord to a lease,

(cc) for the recovery of immovable property from a tenant, including a tenant holding over after the determination of a tenancy,

(d) to contest a notice of ejectment.

(e) to recover the occupancy of immovable property from which a tenant has been illegally ejected by the landlord, and

(f) for abatement of rent –

according to the amount of the rent of the immovable property to which the suit refers, payable for the year next before the date of presenting the plaint.

12. Coming back to our case, it appears from the plaint that court fee has been paid on five times the land revenue of the suit land. Further, fixed court fee of Rs.22/- has also been paid for declaration. On going through the prayer/relief portion of the plaint, it clearly appears that the plaintiff has not sought any declaratory relief from this Court. As such, payment of fixed court fee of Rs.22/- on the part of the plaintiff for declaration is a mere surplusage. It also appears from the prayer/relief portion of the plaint that this suit is primarily for ejectment of the defendant from the suit premises, that is, the R.C.C room, and for khas possession thereof. As per Section 7(v)(e) of the Court Fees Act, 1870, the court fee payable in a suit for possession of a house is according to the market value of the house. In other words, court fee is payable *ad valorem* on the market value of the house. But the plaintiff has wrongly paid the court fee on five times the land revenue of the suit land as per Section 7(v)(b) of the Court Fee Act, 1870, as if the suit

is for possession of land. Rather, he should have paid the court fee on the market value of the suit premises as per Section 7(v)(e) of the Court Fees Act, 1870, for, the suit is for possession of a house.

13. A question now arises as to what the market value of the suit premises is. The plaintiff has nowhere stated the market value of the suit premises in the plaint. But he has stated in the plaint that the suit is valued for the purpose of jurisdiction at Rs.40,000/-. It is pertinent to mention here that in **Abdur Rahman v. Charag Din, 19 P.R. 1908 (FB) : AIR 1928 Lah 852 : 110 I.C. 319**, it was *held* that the values, both for the purposes of court fees and jurisdiction, under Section 7(v)(e) of the Court Fees Act, 1870, shall be the same. In view of this decision, the value of this suit for the purpose of court fees as well would be Rs.40,000/-. In other words, court fee is payable *ad valorem* on the said value of Rs.40,000/-.

14. In the premises, I have no hesitation in arriving at a conclusion that proper court fee has not been paid in this suit. This issue is, accordingly, decided in the negative and against the plaintiff.

Decision on Issue No.5 with reasons

15. As deposed by the plaintiff (PW1) in his evidence on affidavit and also reaffirmed in his cross-examination, the plaintiff had constructed, on the suit land, a pucca R.C.C. room measuring 110.50 square feet for his personal use and occupation and had started a ladies' Beauty Parlour in the name and style of "Rani Lady's Beauty Parlour" and had allowed the Beauty Parlour to be managed by his own

daughter Smt. Jesmin Begum. This fact has also been supported by Sri Jabulal Koiri (PW3), who is an old person of 80 years of age. PW3 has categorically stated in his cross-examination that he had seen the plaintiff construct the shop house.

16. In course of his arguments, learned counsel for the defendant has submitted that the said Beauty Parlour was not in existence as on 15.9.2008 on which the cause of action had allegedly arisen. He has argued that as per the Business Permit [Ext.4(1)] exhibited by the plaintiff, the Teok Town Committee had issued permission/licence for running the Beauty Parlour only on 3.12.2008, that is subsequent to 15.9.2008 on which date the plaintiff alleges that the defendant had put a lock on the suit room housing the said Beauty Parlour. According to the learned counsel for the defendant, as such, no such Beauty Parlour was in existence prior to the date of issuance of permit i.e. 3.12.2008. But I don't think the Beauty Parlour was not in existence as on 15.9.2008 on which date the cause of action had allegedly arisen. This view of mine gets fortified by the statement of the defendant (DW1) in his cross-examination to the effect that the plaintiff had himself (and not the defendant) locked the Beauty Parlour. The Beauty Parlour was very much in existence and it is in the knowledge of the defendant that the Beauty Parlour was locked by the plaintiff himself.

17. As regards the Business Permit, I would like to state that as it appears from the face of Ext.4(1), the same was issued on 3.12.2008. And Ext.4(2), another Permit, was issued on 12.7.2010. Ext.4(1) was to expire on 3.12.2009.

Therefore, what is apparent from both these exhibits is that from 3.12.2009 to 12.7.2010 there was no Business Permit for running the Beauty Parlour. Does it thereby mean that the Beauty Parlour was not in existence at all from 3.12.2009 to 12.7.2010? The answer should definitely be “no”. The Beauty Parlour was very much there but without permission from the concerned authority. In the same manner, the Beauty Parlour was, in all probability, also in existence prior to 3.12.2008, may be without permission from the concerned authority. I would like to reiterate that had the Beauty Parlour not been there as on 15.9.2008 on which date the cause of action had allegedly arisen, the defendant would not have deposed that the Beauty Parlour was locked not by him but by the plaintiff himself.

18. In view of the above discussion, I arrive at a conclusion that the suit room, i.e., the suit premises, was very much situated as on 15.9.2008 on which date the cause of action for this suit had arisen. This issue is accordingly answered in the affirmative.

Decision on Issue No.6 with reasons

19. The plaintiff has asserted in the plaint that he is the absolute owner of the suit land measuring 1K covered by Dag No.510 of P.P. No.183 (new) 138 (old), situated at Chowdang Gaon, Teok, Jorhat. The defendant has, however, denied this fact in his written statement and has asserted that the suit land was their ancestral property and the same was in the occupation of the father of both the plaintiff and the defendant and their other brothers and sisters from their childhood.

20. The defendant having challenged the absolute ownership of the plaintiff over the suit land, burden was upon the plaintiff to establish that he is the absolute owner of the suit land. In his evidence on affidavit, the plaintiff (PW1) has deposed that he had purchased the suit land from Sri Jonathan Brown on 19.4.1982 by a registered sale deed and his name was duly mutated in the record of rights on the basis of purchase and possession. In support of his claim, the plaintiff has exhibited the registered sale deed No.1688/1360 dated 19.4.1982 as Ext.1 and the Jamabandi in respect of the suit Patta as Ext.2. I have gone through these documents. I find from Ext.1 that the plaintiff had purchased the suit land from Sri Jonathan Brown on 19.4.1982 at a consideration of Rs.5000/-. I can also find in Ext.2 that there is a note showing mutation in the name of the plaintiff over the suit land on the basis of purchase and possession. In view of the said documents, the plaintiff has been successful in convincingly establishing that he is the absolute owner of the suit land. The defendant has not been able to rebut this evidence of the plaintiff. He has admitted in his cross-examination that he has not adduced any documentary evidence in this case in support of his claim that the suit land was the land of the days of his father (that is, belonging to his father).

21. Let me now dwell a bit on the suit premises. I have already concluded in my discussion on Issue No.5 that the suit premises is situated on the suit land. And, in view of my discussion in the preceding paragraphs on the instant issue, the plaintiff is the absolute owner of the suit land. This goes to show that the plaintiff should have right, title

and interest over the suit premises as well. In his evidence on affidavit, the plaintiff has deposed that he had constructed a pucca R.C.C. room measuring 110.50 square feet on the suit land and he started a ladies' Beauty Parlour in the said R.C.C. room and the said Beauty Parlour was allowed by him to be managed by his daughter, Smt. Jasmin Begum. In his cross-examination, the plaintiff has reaffirmed the said facts. Sri Jabulal Koiri (PW3), a witness for the plaintiff, who is an octogenarian, has categorically stated in his cross-examination that he had seen the plaintiff construct the shop house. All these facts appearing in the evidence for the plaintiff's side prove that the plaintiff has right, title and interest over the suit premises.

22. In view of the above discussion, I have no hesitation in arriving at a conclusion that the plaintiff has right, title and interest over the suit land/suit premises.

Decision on Issue No.7 with reasons

23. In view of my decision on Issue No.6, the plaintiff has right, title and interest over the suit land/suit premises, and, therefore, he is entitled to recover possession of the suit premises by evicting the defendant therefrom and breaking the lock and key put by the defendant on the suit premises. This issue is, accordingly, decided in the affirmative and in favour of the plaintiff.

Decision on Issue No.8 with reasons

24. The issue in question is as to whether the plaintiff is entitled to recover compensation as prayed for. The plaintiff has stated in para 8 of the plaint that as because the

defendant unauthorisedly locked the Beauty Parlour room since 15.9.2008, the plaintiff is claiming monthly compensation as rent of Rs.1000/- (rupees one thousand) per month till recovery of possession of the suit premises. But, to my considered view, this claim of the plaintiff is not acceptable. This is not a landlord-tenant suit for ejection of the defendant who is in unauthorized occupation of the suit premises without payment of rent. Had that been the case, the claim of the plaintiff for compensation as rent would have been worth considering. Further, it is an admitted fact from the plaintiff's point of view that prior to the locking of the Beauty Parlour room on the part of the defendant, the said room was already locked by the plaintiff himself, for, the Beauty Parlour was closed due to some personal problems of the plaintiff's daughter. Considering all the aspects, the plaintiff is not entitled to recover any compensation from the defendant, as prayed for. This issue is, accordingly, decided in the negative and against the plaintiff.

Decision on Issue No.8 with reasons

25. In view of the foregoing discussion, the plaintiff is entitled to a decree for ejection of the defendant from the suit premises and recovery of possession thereof by breaking the lock put thereon by the defendant. This apart, the plaintiff is also entitled to the costs of the suit.

26. But, there is a problem which needs to be addressed. To reiterate, it has already been observed by me hereinbefore that proper court fee has not been paid by the plaintiff in this suit. So the issue worth pondering is that on

one hand the plaintiff is entitled to the reliefs as I have mentioned in the preceding paragraph, but on the other hand the plaintiff has not paid proper court fee in this suit. A question that quickly comes to my mind is as to whether the suit is liable to be dismissed for non-payment of proper court fee on the part of the plaintiff. The answer should be a definite no. I say so as because as per the relevant provisions of the Code of Civil Procedure the plaintiff must always be given an opportunity to make up the deficit court fee (*see Order 7, rule 11 Proviso and Section 149*). Dismissal of the suit for such a technicality would tantamount to depriving the plaintiff of that opportunity. Another question that consequently creeps into my mind is as to how to decree the suit in favour of the plaintiff in such a situation then.

27. This query has taken me to a decision of our own High Court. In **Monabari Tea Co. Ltd. v. Amar Bahadur Khowas, (2004) 1 GLR 156 : MANU/GH/0273/2003**, it was observed by the Hon'ble Gauhati High Court that it is permissible in law to decree the suit conditionally subject to payment of requisite court fees on re-valuation within a time fixed by court. Dismissal of suit on such technical matter is neither desired nor is in consonance with proper administration of justice. In view of this decision, the suit of the plaintiff deserves to be decreed subject to the payment of requisite court fee by him.

ORDER

The plaintiff is entitled to a decree for ejectment of the defendant from the suit premises and recovery of

possession thereof by breaking the lock put thereon by the defendant. The suit of the plaintiff is, accordingly, decreed on contest with costs subject to the payment, by the plaintiff, of the requisite court fees *ad valorem* on the value of Rs.40,000/- within 30 days from the date of the decree.

A decree be prepared accordingly.

Given under my hand and the seal of this Court on this the 23rd day of December, 2011, at Jorhat.

APPENDIX

Witnesses examined by the Plaintiff:

1. Md. Mainuddin Ahmed (PW1)
2. Smt. Jesmin Begum (PW2)
3. Shri Jabulal Koiri (PW3)

Witnesses examined by the Defendant:

1. Md. Samsul Hussain (DW1)

Documents exhibited by the Plaintiff:

1. Sale Deed (Ext.1)
2. Certified copy of Jamabandi (Ext.2)
3. Revenue Receipts [Exts.3(1) to 3(18)]
4. Business Permit [Ext.4(1), Ext.4(2)]
5. Lawyer's Notice [Ext.5(1)]
6. Postal Receipt [Ext.5(2)]
7. Acknowledgement Receipt [Ext.5(3)]

Documents exhibited by the Defendant:

None

(SHRI JASPAL SINGH)

Munsiff No.1:: Jorhat

