
(2023) 01 GAU CK 0032

In the Gauhati High Court

Case No : Regular Second Appeal No. 159, 204 Of 2012

Dhaneswar Pathak And 3 Ors

APPELLANT

Vs

Durgeswar Pathak And Ors

RESPONDENT

Date of Decision : 17-01-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Section 100(4), Order 41 Rule 31, Order 41 Rule 31(a), Order 41 Rule 31(b), Order 41 Rule 31(c), Order 41 Rule 31(d)
Press and Registration of Books Act, 1967 — Section 4

Citation : (2023) 01 GAU CK 0032

Hon'ble Judges : Devashis Baruah, J

Bench : Single Bench

Advocate : G. N. Sahewalla, S. Todi

Final Decision : Disposed Of

Judgement

1. Heard Mr. G. N. Sahewalla, the learned Senior counsel assisted by Ms. S. Todi, the learned counsel appearing on behalf of the appellants in RSA No.159/2012 as well as respondents in RSA No.204/2012 and Ms. R. Choudhury, the learned counsel appearing on behalf of the respondents in RSA No.159/2012 and appellants in RSA No.204/2012.

2. Both the appeals i.e. RSA No.159/2012 and RSA No.204/2012 arises out of a common judgment and decree dated 10.05.2012 passed in Title Appeal No.02/2009 whereby appeal was allowed thereby setting aside the judgment and decree dated 19.12.2008 passed in Title Suit No.17/2007. Being aggrieved, the defendants in Title Suit No.17/2007 have preferred RSA No.159/2012 and this Court vide an order dated 29.08.2012 have admitted the said appeal by formulating two substantial questions of law which are:

(1) Whether the judgment of the learned Lower Appellate Court is vitiated because of perverse appreciation of the materials on record?

(2) Whether the judgment of reversal of the learned Appellate Court below is in

accord with Order XLI Rule 31 of the CPC.

3. The plaintiffs who were the appellants in Title Appeal No.02/2009 in spite of the fact that the said appeal was decided in favour of the plaintiffs thereby decreeing the suit in favour of the plaintiffs by declaring their right, title and interest over the suit land and there was a direction to the Revenue Authority to correct the revenue records in the name of the plaintiffs but however as the First Appellate Court did not grant the decree for recovery of possession granted in favour of the plaintiffs by evicting the defendants, their agents, servants, workmen etc. from the suit land, the Second Appeal being RSA No.204/2012 was filed.

4. This Court vide an order dated 09.10.2012 had admitted the said Second Appeal by formulating a substantial question of law which reproduced as hereinunder:

“Whether the judgment of the First Appellate Court is perverse for its not deciding the Issue No.5?”

5. For deciding as to whether the substantial questions of law so formulated by this Court vide the orders dated 29.08.2012 and 09.10.2012 are involved in the instant appeals, it is required to take note of the brief facts of the instant case. For the purpose of convenience, the parties herein are referred to in the same status as they stood before the Trial Court.

6. The appellants in RSA No.204/2012 as plaintiffs had instituted a suit claiming declaration of their right, title and interest over the suit land; for a decree for delivery of possession of the suit land in favour of the plaintiffs by evicting the defendants, their agents, servants, workmen etc. from the suit land; for permanent injunction restraining the defendant No.1, his agents, servants, workmen etc. from selling/transferring the suit land or any part of it during the pendency of the suit; for a declaration that the order of the S.O., Goalpara and Bongaigaon District passed on 08.04.2005 in Appeal Case No.2/05 is illegal and the same is not binding upon the plaintiffs, for cost of the suit etc.

7. From a perusal of the plaint, it transpires that the plaintiffs and the proforma defendants are the successor-in-interest of one Rameswar Pathak (since deceased). A plot of land measuring 0 Bigha 8 Kathas 0 Lechas covered by Tauzi No.210 of 1364 B.S. stood in the name of Late Rameswar Pathak under Khatian No.679, Dag No.1242 after the first settlement operation held in 1959-1962. It was the case of the plaintiffs that the said land was a self acquired land and was possessed by Late Rameswar Pathak by paying land revenue thereon. In the year, 1965-1967, Late Rameswar Pathak had constructed an Assam type house in the suit land. He had also rented out one of the houses to one Shri Krishna Marowary but in the year 1977, the tenant had vacated the house. In the year, 1978, Late Rameswar Pathak permitted the defendant No.1 to possess the rented house with a condition to vacate the land after completion of the construction of his own house. Unfortunately on 03.08.1983, Late Rameswar

Pathak had expired leaving behind the plaintiffs. It also appears from the plaint that in the year 1994, the suit land was mutated in the name of the plaintiffs and a kutchra patta was also issued in their favour and they had been paying the Government revenue. It was alleged in the plaint that subsequent to the death of Late Rameswar Pathak, the defendant No.1 had secretly mutated his name in the suit land in the year 1994. The plaintiffs upon coming to learn about the said mistake being done by the defendant No.1 filed an objection before the A.S.O. Srijangam. The A.S.O. Srijangam vide an order dated 07.09.2004 passed in Misc. Case No.01/04-05 had deleted the name of the defendant No.1 from the revenue records and thereupon re-inserted the name of the plaintiffs. Accordingly, the record of rights was rectified on 25.11.2004. It further appears that an appeal was preferred by the defendant No.1 before the S.O. Goalpara. The S.O. Goalpara vide an order dated 08.04.2005 in Appeal Case No.2/05 set aside the order dated 07.09.2004 passed in Misc Case No.1/04-05 and upheld the order dated 25.10.1994 passed by the Assistant Settlement Officer whereby the name of the defendant No.1 was inserted. It is under such circumstances, that the plaintiffs had instituted the instant suit claiming for the reliefs as above mentioned.

8. On the other hand, the defendants filed their written statement taking the various preliminary objections as regards the maintainability of the suit. On merits, the defendants had stated that originally the suit land was a Tauzi land of Late Dhireswar Pathak, predecessor-in-interest of the defendant Nos. 1 and 4 and he has been possessing the land till his death by constructing two storied Assam type house and other buildings. It was further stated that Late Dhireswar Pathak was running a printing press and a grocery shop there and was residing on the suit land with his family. Late Dhireswar Pathak died in the year 1943 and thereupon his wife alongwith his kids shifted her residence to Dharmapur. It was the case of the defendants in their written statement that at that time the properties of Late Dhireswar Pathak was looked after by Late Rameswar Pathak being the sole adult male member of the family. It was further stated that Late Rameswar Pathak taking advantage of the fact that he was looking after the properties had inserted his name against the Tauzi land and thereafter got the khatian issued in his favour thereby depriving the rights of the defendant No.1. It was the specific case of the defendants in their written statement that the suit land was not the self-acquired property of Late Rameswar Pathak rather it was the self-acquired property of Late Dhireswar Pathak.

9. On the basis of the above pleadings as many as 10 issues were framed which are reproduced hereinunder:

1. Whether the plaintiffs have cause of action to institute the suit?
2. Whether Late Rameswar Pathak, predecessors of the plaintiffs was the absolute owner and exclusive possessor of the suit land?
3. Whether the plaintiffs have acquired right, title, interest and possession over

the suit land?

4. Whether the defendants are permissive possessor of the suit land?
5. Whether the defendants are liable to be evicted from the suit land?
6. Whether the suit is barred by law of limitation?
7. Whether Late Dharmeswar Pathak constructed the two storied Assam Type building and other building on the suit land?
8. Whether the plaintiffs are entitled to get decree as prayed for?
9. Whether the suit is barred by law of waiver, estoppel and acquiescence?
10. What are relief(s) to which the plaintiffs are entitled to under law and equity?
10. On behalf of the plaintiffs, 4 witnesses were examined and 12 documents were exhibited. The details of the said exhibited documents are as hereunder:

Exhibit-1: Recording of Late Rameswar Pathak's name as Tauzi of Bijni State dated 10.02.1964.

Exhibit-2 & Exhibit-3: Land Revenue Receipts of payment of Tauzi, Mouza by Late Rameswar Pathak.

Exhibit-4: The final Khatian issued by the Assistant Revenue and Settlement Officer, Abhayapuri, Goalpara in favour of Late Rameswar Pathak.

Exhibit-5: Kutcha Patta issued in favour of the plaintiffs.

Exhibit-6: Jamabandi of Dag No.1243/247 of Patta No.916/337 wherein the name of the defendant No.1 was shown as struck off and the names of the plaintiffs were inserted.

Exhibit-7: The order dated 07.09.2004 passed in Misc Case No.1/04-05 whereby the name of the defendant No.1 was deleted and the name of the plaintiffs were inserted.

Exhibit-8: The certificate issued by the Assistant Settlement Officer in favour of the plaintiffs showing that their names have been recorded against the suit land.

Exhibit-9: Land Revenue paying receipt issued in favour of the plaintiffs.

Exhibit-10: Money Receipt issued in favour of Arun Jyoti Pathak, plaintiff No.4.

Exhibit-11: Certificate issued by the Sub-Divisional Officer, North Salmara, Abhayapuri certifying that the plaintiffs are the legal heirs of Late Rameswar Pathak.

Exhibit-12: Order passed by the Settlement Officer, Goalpara and Bongaigaon in Appeal Case No.2/05 whereby the order dated 07.09.2004 passed in Misc. Case No.1/04-05 was set aside thereby restoring the order dated 25.10.1994 by the Assistant Settlement Officer in favour of the defendant No.1.

11. On behalf of the defendants also there were 4 witnesses who adduced evidence. There was only one document which was adduced as documentary evidence and marked as Exhibit-A which is a declaration under Section 4 of the Press and Regulation of Books Act, 1967 by the defendant No.1 wherein he had mentioned that his father Late Dhireswar Pathak had started the press known as Abhaya Printing Press at Abhayapuri and after his father's death, his cousin Late Rameswar Pathak ran the press and as Rameswar Pathak was ill, he was running the press.

12. The Trial Court vide a judgment and decree dated 19.12.2008 dismissed the suit by deciding all the issues in negative except issue Nos. 1 and 7.

13. Being aggrieved and dissatisfied, the plaintiffs as appellants preferred an appeal before the Court of the District Judge, Bongaigaon which was registered and numbered as Title Appeal No.02/2009. The said appeal was sent to the Court of the Additional District Judge (FTC) Bongaigaon for disposal. The First Appellate Court upon framing the various points for determination, decided the appeal in favour of the plaintiffs thereby allowing the appeal and declaring that the plaintiffs have right, title and interest over the land and the Revenue Authorities were directed to correct the revenue records in the names of the plaintiffs. However, in doing so, the First Appellate Court did not pass any decree for delivery of possession as sought for in the plaint. In fact, an issue as to whether the defendants were liable to be evicted from the suit land i.e. Issue No.5 was framed which have not been taken into consideration by the First Appellate Court. It is under such circumstances, both the appeals have been preferred by the defendants as well as by the plaintiffs and this Court vide the orders dated 29.08.2012 and 09.10.2012 has formulated the substantial questions of law as quoted hereinabove. Let this Court first take up RSA No.159/2012 to ascertain as to whether the two substantial questions of law so formulated are involved in the instant appeal.

14. The first substantial question of law so formulated vide the order dated 29.08.2012 is as to whether the judgment of the learned Lower Appellate Court is vitiated because of perverse appreciation of the materials on record. On the face of it, the said substantial question of law so formulated in the opinion of this Court is vague inasmuch as there is no mention in the said substantial question of law so formulated as to on what basis it was contended that there was perverse appreciation of materials on records which have not been considered. Formulating a substantial question of law in terms with Section 100(4) of the Code is based upon a satisfaction that a substantial question of law is involved in the case and as such it is the opinion of this Court while formulating the substantial question of law, it is the requirement of law that the substantial question of law is specific to the case involved. With due respect to the order dated 29.08.2012, this Court would observe that the said substantial question of law formulated is too vague that too without mentioning which materials on record have not been considered for which it was contended that judgment of the

First Appellate Court suffers from perversity.

15. Be that as it may, during the course of the hearing, this Court made a specific query upon the learned Senior counsel appearing on behalf of the appellants in RSA No.159/2012 as to what materials have not been taken into consideration by the First Appellate Court which would have change the course of the decision, if the said material is taken into consideration.. The learned Senior counsel has submitted that the first Appellate Court failed to consider Exhibit-12 in the proper perspective inasmuch as vide Exhibit-12, the Settlement Officer has duly set aside the order dated 07.09.2004 passed in Misc. Case No.1/04-05 thereby restoring the order dated 25.10.1994. He submitted that if the said document would have been considered in the proper perspective, the decision would have been rendered in favour of the defendants. This Court has perused Exhibit-12. It is an order passed by the Settlement Officer in Appeal Case No.2/05 whereby the order dated 07.09.2004 passed by the Assistant Settlement Officer was interfered with on the ground of some irregularities. The reasons given in the said order were:

(i) The Appellate Authority can cancel a mutation during the appeal but the same ranking Officer should not cancel the order of his rank. He should refer the case matters to the Appellate Authority if any irregularities is observed in the proceedings of the Misc. Case.

(ii) The D/L is valuable land situated in Abhayapuri Town having a possession of the Appellant but not the respondent. The way of getting the D/L by the appellant is vivid one but not taken forcefully.

16. From a perusal of the grounds, the reasons for setting aside the said order, this Court is of the opinion that the Settlement Officer had merely on the ground that the A.S.O. has reviewed its earlier order and thereupon on the basis of possession, has restored the order dated 25.10.1994 thereby setting aside the order dated 07.09.2004. The affect of the said order is merely for granting of mutation and it is a well settled principle of law that granting of mutation neither confers nor takes away the rights of a person. Mutation is only done for the purpose of revenue. Under such circumstances, this Court is of the opinion that even non-consideration of Exhibit-12 would not have change the course of the decision thereby leading to perversity in the decision of the First Appellate Court. It is however, relevant to take note of that the First Appellate Court have duly taken note of the said order dated 08.04.2005 more particularly, in paragraph 14(h) and as such under no circumstances, the contention of therebeing any perversity in the judgment for not considering the order dated 08.04.2005 (Exhibit-12) in the proper perspective can be a substantial question of law involved in the instant appeal. Under such circumstances, the first substantial question of law as framed in the order dated 29.08.2012 cannot be said to be substantial question of law involved in the instant appeal.

17. The second substantial question of law so formulated vide the order dated

29.08.2012 is intrinsically connected with the substantial question of law as was framed vide the order dated 09.10.2012 in RSA No.204/2012. This is so for the reason that in terms with Order XLI Rule 31 of the Code, it is the duty of the First Appellate Court more particularly in terms with Order XLI Rule 31(d) that the Appellate Court shall state where the decree in appeal is reversed or varied, the relief to which the appellant is entitled to. From a perusal of the judgment passed by the First Appellate Court, it appears that Clause (a), (b) and (c) of Order XLI Rule 31 has been duly taken care of however while granting the reliefs in terms with Clause (d) of Order XLI Rule 31, the First Appellate Court in spite of coming to a finding and granting the relief that the plaintiffs are entitled to right, title and interest over the suit land did not without any reasons whatsoever grant the relief of recovery of possession to the plaintiffs which was consequential upon declaration so sought for by the plaintiffs that too when there was no reason that the defendants had a better claim to remain in possession. Under such circumstances, this Court holds that the substantial question of law so framed in RSA No.204/2012 dated 09.10.2012 is a substantial question of law involved in the instant appeal.

18. It is also relevant to take note of that though the second substantial question of law so framed on 29.08.2012 i.e. "Whether the judgment of the reversal of the learned Appellate Court is in accord with Order XLI Rule 31 of the CPC" is a substantial question of law involved in the instant appeal inasmuch Clause (d) of Order XLI Rule 31 was not followed. The same does not require any interference from this Court in favour of the defendants as the said substantial question of law would not alter the decision in favour of the defendants. However, the plaintiffs apart from being entitled to declaration of their right, title and interest over the suit land is also entitled to the recovery of khas possession of the suit land by evicting their defendants, their agents, servants, workmen etc. from the suit land.

19. Accordingly, the appeal namely RSA No.159/2012 stands dismissed as the substantial questions of law so formulated are not substantial question of law involved in the instant appeal except to the extent indicated hereinabove and the Appeal being RSA No.204/2012 is allowed thereby holding that the plaintiffs apart from the relief of declaration of their right, title and interest over the suit land is further entitled to recovery of khas possession of the suit land by evicting the defendants, their agents, servants, workmen etc. from the suit land. The plaintiff would further be entitled to a direction upon the Revenue Authority to correct the revenue records in the name of the plaintiffs.

20. With above observations and directions, both the Second Appeal stands disposed of.

21. The Registry shall prepare the decree accordingly.

22. Return the LCR.