

(2018) 07 GAU CK 0005
In the Gauhati High Court
Case No : MFA 305 of 2010

Dhanraj Surana

APPELLANT

Vs

Hiran Sen, Hiren Sen And Anr

RESPONDENT

Date of Decision : 10-07-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Section 10, 96, 151, Order 43 Rule 1(u), Order 40 Rule 23A, Order 40 Rule 24
Transfer of Property Act, 1882 — Section 52

Citation : (2018) 07 GAU CK 0005

Hon'ble Judges : KALYAN RAI SURANA, J

Bench : Single Bench

Advocate : O.P. Bhati, H.K. Bora, T.C. Das, D. Deka, S.S. Sharma, L. Sharma, B.J. Mukherjee, G. Jalan

Final Decision : Dismissed

Judgement

1. Heard Mr. O.P. Bhati, learned Advocate for the petitioner. Also heard Mr. S.S. Sharma, learned Senior Advocate, assisted by Ms. L. Sharma, and

Mr. B.J. Mukherjee, learned Advocates for the respondent No.1. None appears on call for respondent No.2.

2. By this application under Order XLIII Rule 1(u), read with Section 151 CPC, the appellant has challenged the First Appellate judgment and order

dated 13.10.2010, passed by the learned Additional District Judge (FTC), Bongaigaon in Title Appeal No. 4/2008, thereby remanding the proceedings

of Title Suit No. 17 of 2001 back to the learned trial Court i.e., the Court of learned Civil Judge, Bongaigaon for simultaneous trial with Title Suit No.

20/2001, after setting aside the judgment and decree dated 20.06.2008 passed by the learned trial Court in T.S. No. 17/2001.

3. The brief facts of the case are that the respondent No. 1 herein, namely, Sri

Hiren Sen is the plaintiff in Title Suit No. 20/2001. In the suit, the respondent No.1 had projected that by a written agreement for sale dated 03.11.2000, the respondent No. 2 herein, namely, Sri Lachand Lalwani had agreed to sell the suit land to the respondent No.1 at a sale consideration of Rs.8,25,051/-. Prior to the institution of the said suit, the appellant herein, namely, Dhanraj Surana had instituted Title Suit No. 17/2001 before the same learned Court i.e. Court of learned Civil Judge, Bongaigaon. In the said suit, it was projected that by an oral agreement made on 21.09.2000, the respondent No.2 had agreed to sell the suit land to the appellant at a sale consideration of Rs.3,50,000/- only. On 21.09.2000, a further of Rs.20,000/- was paid by the appellant in cash as part consideration. Thereafter, on 31.03.2001, a further sum of Rs.25,000/- was paid in cash to the respondent No.2 without any money receipt as the respondent No. 2 was undergoing treatment at Chennai, as such, the sale consideration was enhanced to Rs.4,50,000/-.

4. During the pendency of both suits, the appellant moved a petition No. 2235/2002 before the learned trial Court under section 10 read with section 151 CPC for staying the proceedings of T.S. 20/2001. The learned trial Court, by order dated 10.06.2005, passed in T.S No. 20/2001, inter alia, held that both suits, i.e., T.S. 17/2001 and T.S. 20/2001 are between the two same parties and the subject matter was same and the reliefs were also same, as such, the proceedings of T.S. 20/2001 was stayed till the disposal of T.S. 17/2001.

5. Both the respondents herein contested the suit by filing their respective written statements. The learned trial court framed as many as 12 issues of which are quoted below:-

1. Whether there is any cause of action for the suit?
2. Whether the suit is maintainable in its present form and manner?
3. Whether the suit is bad for mis-joinder of parties?
4. Whether the suit is properly valued?
5. Whether on 21.09.2000 there was an agreement for sale of the suit land between the plaintiff and defendant no. 1 and the defendant took an advance of Rs.20,000/- out of the consideration amount of Rs.3,50,000/-?
6. Whether on 18.8.01 there was another agreement for sale of the suit

land between the plaintiff and the defendant and the plaintiff has paid an amount of Rs.1,00,000/- as advance out of the consideration money?

7. Whether the defendant is bound to execute the registered sale deed in favour of the plaintiff in respect of the suit land as per agreement dtd.

18.8.2001?

8. Whether the Sale Deed No. 835 dated 17.12.2002 executed by the Attorney Holder of the defendant in the suit in favour of the plaintiff is binding upon the proforma defendant?

9. Whether the agreement for Sale dated 03.11.2000 executed between the defendant and the proforma defendant is null and void?

10. Whether the plaintiff is entitled to get registered Sale Deed executed by the defendant in favour of the plaintiff in respect of the suit land as per agreement for sale?

11. Whether the plaintiff is entitled to get the decree as prayed for?

12. Any other relieves to which the parties are entitled to?

6. In support of their respective pleadings, the appellant had examined four witnesses. The respondent No. 1 examined himself as DW-1. The respondent No. 2 did not examine any witness.

7. In respect of issue No. 1, the learned trial Court held that there was cause of action on the suit. In respect of issue 3, it was held that the suit was

not bad for non-joinder of necessary parties. In respect of issue No. 4, it was held that the suit was properly valued. In respect of issue No. 2, it was

held that the suit was maintainable. In respect of issue No. 5, it was held that the appellant had agreed to purchase the suit land at a consideration of

Rs.3,50,000/- by paying Rs.20,000/- as advance on 21.09.2000. In respect of issue No. 6, it was held that by an oral agreement for sale dated

18.08.2001 between the respondents No.1 and 2, for which the appellant had amended the plaint of TS No. 17/2001, the sale consideration for the suit

land was increased from Rs.3,50,000/- to Rs.4,50,000/- and on the same day, the appellant had paid a sum of Rs.1,00,000/- as advance on the

respondent No. 2. In respect of issue No. 7, it was held that the respondent No. 2 herein was bound to execute the Sale Deed in respect of the suit

land. In respect of issues No. 8, 9 and 10, it was held that Ext.-D being an unregistered document, did not establish the agreement and it was further

held that the DW-1 had admitted that the respondent No. 2 had sold the suit land in favour of the appellant, which was under continuous possession of appellant, further holding that Ext-D did not contain the signature of DW-1. It was held that the respondent No.1 herein, had instituted T.S. 20/2001 on 07.06.2001, after receipt of summons on 02.06.2001. It was held that the provisions under Section 52 of the Transfer of Property Act had got no application by way of defence of the respondent No. 1 herein, and accordingly, the issues No. 8, 9 and 10 were decided in the affirmative and in favour of the appellant. In respect of issues No. 11 and 12, on the basis of prayer made in petition No. 111/2008, the prayer statement made vide paragraphs 21(a), (b) and (c) of the plaint was struck out, considering the same as redundant and unnecessary. It was also held that in view of striking out the prayers in paragraphs 21(a), (b) and (c), the issues No. 5, 6, 7 and 10 was also required to be struck off, being redundant and unnecessary. The appellant was held to be entitled to relief as per para (d) and para (e) of paragraph 21 of the plaint. As a result, T.S. 17/2001 filed by the appellant was decreed and the same was held to be binding on the respondent No. 1 herein, further holding that the agreement for sale dated 03.11.2000, which was executed by the respondent No. 2 in favour of respondent No. 1 was not binding on the appellant.

8. The said judgment and decree dated 20.06.2008 passed by the learned trial Court in T.S. No. 17/2001 was assailed in appeal, which was registered as T.A. No. 4/2008. The learned first appellate Court, on the basis of the materials available on record and considering the issues decided by the learned trial Court, took up the issues No. 8, 9 and 10 as the basis of disposal of the appeal. By discussing the evidence on record, the learned first appellate Court formed an opinion that if the same suit land is/was involved in two separate transactions, vide (i) Bahena Patra dated 03.11.2000 (Ext.D), and (ii) Bahena Patra 18.08.2001 (Ext.1), as such both suits i.e. T.S. 17/2001 as well as T.S. 20/2001, should have been tried simultaneously by learned trial Court. The learned first appellate Court, did not concur that the finding recorded by the learned trial Court that the claim put forward by the respondent No.1 herein in T.S. 20/2001 could be termed as fictitious and collusive, without indicating that whom he had entered into such collusion and the learned Court was of the opinion that the said findings was required to be addressed while deciding T.S. 20/2001, which was stayed.

9. The learned first appellate Court also arrived at a finding that the respondent No. 1 herein, ought to set up his counter claim in T.S. 17/2001 to avoid multiplicity of cases, but in lieu, he had instituted T.S. 20/2001. Accordingly, the judgment and decree impugned in the appeal was set aside by the learned first appellate Court, directing the remand of T.S.17/2001 before the learned Civil Judge, Bongaigaon for being tried simultaneously along with T.S. 20/2001.

10. The learned advocate for the appellant, by referring to the factual matrix, had made his submissions to the effect that that the suit by the respondent No. 1 was stayed by order dated 10.06.2015 and as stay order attained finality without any challenge to the same, the learned first appellate Court ought not to have remanded T.S. 17/2001 for simultaneous trial with T.S. 20/2001. It is submitted that in view of the decree passed in T.S. No. 17/2001, Not only the said judgment is binding on the respondent No. 1 herein, but the said judgment also stands as a bar in agitating the same issue again in any subsequent suit and thus, the second suit would be hit by the principles of res-judicata/ constructive res- judicata.

11. It is further submitted that the order impugned herein, was an order of remand within the meaning of order XLI Rule 23A CPC, as such, it was the duty of the learned first appellate Court was to first examine the sufficiency of evidence as envisaged under order XLI Rule 24 CPC and the learned first appellate Court ought to have decided the matter in appeal without remanding the suit back to the learned trial Court. In this context, it is further submitted that the scope of this appellate Court, while dealing with an appeal under Order XLIII Rule 1(u) CPC that this Court ought not to adjudicate upon the merit of the matter but ought to restrain itself to examine the credence or otherwise, of the order of remand dated 13.10.2010, which is the subject matter of the present appeal.

12. It is further submitted that during the pendency of T.S. 17/2001, the respondent No.2 had executed sale deed dated 17.12.2002, in respect of the suit land in favour of the appellant. The said sale deed, which was brought on record by amendment of the plaint, having not been challenged, the said sale deed had attained finality and therefore, the order of remand was not justified.

13. Per contra, the learned Senior Advocate for the respondent No. 1, has made

his submissions in support of the impugned order. It is submitted that the conduct of the appellant before the trial court was apparently not bona fide. It is submitted that existence of the written agreement dated 18.08.2001 (Ext.1) was withheld from the learned trial court for three years to prevent any challenge to the said sale deed, to defeat the plea of the respondent No. 1 in T.S. 17/2001, as well as to frustrate his claim in T.S. 20/2001.

14. It is submitted that as per the statement in paragraph 17 of the claim, the appellant was aware of the agreement dated 03.11.2000 between the respondent No. 1 and 2 herein. According to the learned Senior Advocate for the respondent No. 1, it is not believable that the respondent No.2, who was aware that in T.S. 20/2001, the respondent No. 1 had expressed his readiness and willingness to pay a sum of Rs.8,25,051/- for the suit land, would agree to sell the same suit land, subsequent in point of time at a paltry sale consideration of Rs.4,50,000/-, as such, it is submitted that the existence of the oral agreement was a false case set-up by the appellant to defeat the suit filed as well as the claim set-up by the respondent No.1.

15. It is also submitted that the respondent No. 2, by filing a written statement through his constituted attorney had admitted the claim of the appellant.

However, neither the said written statement was verified in accordance with law and nor the respondent No.2 had examined himself or anyone else as witness in support of the statements made in the written statement by the respondent No. 2. Moreover, the Power of Attorney, based on which the sale deed was executed and the written statement was filed was not proved in accordance with law and moreover, instead of exhibiting the original sale deed, the appellant had merely exhibited a certified copy, which did not prove the contents as well as the signatures of the concerned parties in the said Power of Attorney as well as those contained in the said sale deed.

16. It is submitted that the learned first appellate Court had correctly held that in view of the separate agreements between the appellant and the respondent No. 2 as well as agreement between the respondent No. 1 and respondent No. 2, the issues raised in both the suits could not be same and identical and, as such, by remanding the proceedings of T.S. 17/2001 to be tried simultaneously with T.S. 20/2001, no illegality was committed by the learned first appellate Court.

17. It is further submitted that the order of remanding the suit, passed by the learned first appellate Court had no infirmity because of the fact that if

the learned trial Court was deciding the facts of T.S. 17/2001, the learned trial Court ought not to have made any comment on the merit of the T.S.

20/2001, which would have effect of non- suiting him in the event the proceeding of T.S. 20/2001 was to commence.

18. In reply, the learned advocate for the appellant submits that the learned senior advocate for the respondent No.1 had made his submissions on the

merit of the matter, which was not required to be gone into, in view of the limited challenge in this appeal was the order of remand.

19. Considered the materials available on record and also the submissions made by the learned advocate for the appellant as well as the learned senior

advocate for the respondent No.1.

20. This Court is conscious about the powers to be exercised in appeal under Order XLIII Rule 1(u) CPC, the Honâ??ble Apex Court in the case of

J. Balaji Singh Vs. Diwakar Cole, AIR 2017 SC 2402, has held that while examining the legality of the order of remand, the factual matrix ought not to

be decided on merit which could be done only if the Court was entertaining an appeal under section 96. Therefore, the only point of determination

which arises in appeal is â?

Â Â Â i. Whether the impugned order thereby remanding the proceedings of T.S. 17/2001, warrants interference by this Court?

21. It is seen that the learned senior advocate for the respondent has been successful in demonstrating that an attempt was being made to over-ride

the pre-existing written agreement dated 03.11.2000 between the respondent No.1 and 2 with a subsequent agreement dated 16.08.2001 between the

appellant and respondent No. 2, this is something which must be left to be decided in trial. The said disputed question is of some relevance because it

is seen that the learned trial court, while deciding TS No. 17/2001, had recorded a categorical finding that T.S. 20/2001 could be termed as fictitious

and collusive, without indicating that whom he had entered into such collusion. Such a finding ought not to have been recorded without hearing the

parties in TS No. 20/2001. Therefore, as the learned trial court had addressed T.S. 20/2001 while deciding TS 17/2001, it would meet the ends of

justice that both the said suits be tried analogously and/or together by the same

Court.

22. It is further seen that the learned trial Court had stayed the proceeds of Title Suit No. 20/2001 filed by respondent No. 1 against the respondent

No. 2 and therefore, the respondent No. 1 did not get reasonable opportunity to establish his case in trial and, as such, this Court is inclined to concur

with the finding recorded learned first appellate Court by holding that T.S. No. 17/2001 as well as T.S. 20/2001 should be tried simultaneously by the

trial Court and, as such, there is no infirmity in the impugned judgment by virtue of which the learned first appellate Court had set aside the judgment

dated 20.06.2008 allowing simultaneously trial along with T.S. No. 20/2001. In view of above, this Court is inclined to provide that the order dated

10.06.2005 passed by the learned trial court in connection with T.S. No. 20/2001 shall not be a bar for compliance with the directions contained in the

impugned judgment and order dated 13.10.2010 passed by the Additional District Judge, Bongaigaon in Title Appeal No. 4/2008.

23. This Court further finds that the learned First Appellate Court had rightly refrained from touching upon the various issues as decided by the

learned trial Court because the said learned Court was remanding the matter back to the learned trial court for a fresh decision in accordance with

law and therefore, the learned first appellate court had rightly observed in the order part of the judgment that the observations and discussions of the

said learned Court should have no impact in the fresh trial of the suits. For the same reasons, this Court has also not entered into the merit of the

respective cases of the parties as it would cause prejudice to either of the parties in course of a fresh trial. Any observation made herein is not

intended to influence the learned trial Court in any way.

24. In view of the discussions above, this Court is inclined to dismiss the appeal by affirming the impugned judgment and order dated 13.10.2010

passed by the Additional District Judge, Bongaigaon in Title Appeal No. 4/2008.

25. The parties are to bear their own cost for this appeal.

26. Return back the LCR.

27. The appellant as well as the respondent No. 1 who are duly represented by the learned advocate shall appear before the Court of learned Civil

Judge, Bongaigaon on 31.07.2018 in connection with T.S. No. 17/2001 and T.S. No. 20/2001 without any further notice of appearance and by

producing a certified copy of the order of this Court, parties shall seek further instructions from said learned trial Court.