

(2007) 11 GAU CK 0023
In the Gauhati High Court

Dolly Khonglah and Another

APPELLANT

Vs

Dilip Kumar Singhanian and Another

RESPONDENT

Date of Decision : 16-11-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31

Citation : (2008) 2 GLT 77

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Judgement

T. Vaiphei, J.—Both these revision petitions are directed against the judgment and order dated 21.2.2005 passed by the learned Addl. District Judge, Shillong, in RFA (TCA) No. 3(SH) of 2002 decreeing the suit filed by the respondent No. 1 by reversing the judgment and order dated 28.2.2002 passed by the learned Assistant District Judge, Shillong in Title Suit No. 10(H) of 1988. For the sake of convenience, I shall first take up CR(P) No. 3(SH) of 2005 and thereafter make an attempt to dispose of CR(P) No. 5(SH) of 2005 on the basis of my findings in the former case.

2. The material facts giving rise to the revision petitions are that the respondent No. 1 instituted Title Suit No. 10(SH) of 2002 before the learned Assistant District Judge against the petitioner and the respondent No. 2 for evicting them, their agents, employees, workmen and all others claiming through or under them from the suit premises described in Schedule to the plaint and for rent arrears, compensation and damages.

3. The case of the respondent No. 1 is that he rented out the suit room in the ground floor of his RCC building situate at Thana Road, Shillong to the respondent No. 2, who is his younger brother, on a monthly rent of Rs. 500/- with effect from 1.1.1993 (read, 1.1.1983) by executing the tenancy agreement bearing the same date. The tenancy agreement stipulated that the respondent No. 2 would pay the monthly rent to the respondent No. 1 regularly by the 7th day of every month in advance from the month of January, 1983 and that the

respondent No. 2 would never sub-let the suit room or any part thereof or induct any other person as his agent. According to the respondent No. 1, the respondent No. 2, contrary to the tenancy agreement transferred his tenancy right in favour of the petitioner and induced her as his agent/sub-tenant to the suit room. It is further pleaded by the respondent No. 1 that the respondent No. 2 stopped payment of the rent from the month of April, 1988 onwards and has, therefore, become a defaulter whereupon the issued quit notice to the respondent No. 2 on 12.9.1988 with a copy endorsed to the petitioner by registered post with A/D requiring the respondent No. 2 to vacate the suit room immediately after the expiry of the month of September, 1988, failing which they would be treated as trespassers and, therefore, liable to pay damages for their unauthorized occupation. On their failure to vacate the suit room, the suit came to be filed by the respondent No. 1.

4. Both the petitioner and the respondent No. 2 contested the suit by filing separate written statements. The stand taken by the respondent No. 2 in his written statement is that he admitted with the reservation that the monthly rent due and payable for the month of April, 1988 onwards were duly tendered month by month which were not accepted by the respondent No. 1 on the ground that the suit room was sub-let to the petitioner without his knowledge or consent. According to the respondent No. 2, on receipt of the said notice, he explained to him that the occupation of the suit room by the petitioner was on temporary basis and that he was seriously trying to recover the suit room for making it over to him (the respondent No. 1), for which he had already filed a suit for eviction against evicting the petitioner from the suit room, which is still pending before the learned Assistant District Judge, Shillong.

5. The case of the petitioner, as projected in her written statement, is that both the landlord and the respondent No. 2 are her business acquaintances, whom she used to help and that in recognition of her help on many occasions, she was allowed by the respondent No. 1 to occupy two rooms and a show case for running her business at a monthly rent of Rs. 600/-. It is also the pleaded case of the petitioner that as per their unwritten agreement, on the demand made by the landlord, she paid in cash a sum of Rs. 1,00,000/- to the respondent No. 2 as advance rent adjustable against the monthly rent of Rs. 500/-, which had been originally settled by her with the respondent No. 1 and that it had been clearly stated in the said receipt that none should disturb her peaceful possession of the suit rooms in any manner and in the event of disturbance of her possession, the money so advanced by her would be made good. According to the petitioner, on the basis of the said agreement, she took over possession of the two rooms, started her business under the name of "M/s Star Wine Store" on the ground floor and occupied the 3rd floor for residential purpose initially for a monthly rent of Rs. 600/-, which was subsequently increased to Rs. 600/-, the increment of Rs. 100/- being for provision of the show case attached to her shop on the ground floor, which came into effect from 2.6.1983.

6. It is further pleaded by the petitioner that on further demand made by the respondent No. 1, she paid another sum of Rs. 1.00,000/- in cash to him against the money receipt dated 2.6.1983 issued by the respondent No. 2 on his behalf (the landlord). It is contended by the petitioner that the respondent No. 2 had acted as the agent of the landlord for all practical purposes. In the receipt dated 2.6.1983, averred the petitioner, it was stated that the said advance money was to be adjusted against the monthly rent of Rs. 600/- with effect from 2.6.1983. It is thus the case of the petitioner she is very much the tenant of the landlord, who duly authorized the respondent No. 2, his own brother, to do all acts and things on his behalf for collection or rent from her. According to the petitioner, this modus vivendi had to be worked out by them to avoid income tax payment by the landlord.

7. It is contended by the petitioner that both the rooms on the ground floor and the third floor were rented out to her on a consolidated rent as aforesaid, the tenancy whereof got commenced together simultaneously according to English calendar and that she is the legitimate tenant of both the rooms under the landlord, but both the landlord and the respondent No. 2 split up the tenancy and separately filed this suit and Title No. 7 (H) of 1988 respectively against her. It is thus the case of the petitioner that the respondent No. 1 in collusion with the respondent No. 2 filed this suit on the plea of sub-tenancy on the basis of manufactured document annexed to the plaint. The suit is, therefore, liable to be dismissed.

8. On the basis of the pleadings of the parties, the trial court framed the following as many as eleven issues, which are as follows:

ISSUES

1. Whether there is any cause of action for the suit ?
2. Whether the suit is maintainable in its present form?
3. Whether the suit is bad for mis-joinder for want of notice and requisite court fee?
4. Whether the defendant No. 2 is a tenant under defendant No. 1 or under the plaintiff and whether the defendant No. 2 has been paying monthly rent and whether the defendant No. 1 received the advance rent against the receipt on behalf of the plaintiff?
5. Whether the defendant No. 1 who was a tenant sublet and transfer his tenancy right in favour of defendant No. 2 as per tenancy agreement dated 1.1.1983?
6. Whether the defendant No. 1 acted as an agent for and on behalf of the plaintiff in the matter of suit property belonging to the plaintiff?
7. Whether the defendant No. 2 was in possession of the suit property along with another room in the holding monthly rent paid or whether the tenancy can be

split into two parts?

8. Whether defendant No. 1 is a defaulter and failed to pay rent from the month of April, 1988 and whether he is liable to be evicted as he violated the terms of tenancy agreement dated 1.1.1983 and his sub-letting and defaulted in payment of rent?

9. Whether the defendant No. 1 is legally authorized to issue any receipt on behalf of the plaintiff.

10. Whether the defendant No. 2 is also a defaulter in payment of rent under the defendant No. 2 or plaintiff as the case may be?

11. To what relief/reliefs the parties are entitled to?

9. In the course of trial, the landlord examined himself and one other witness to prove his case, while the petitioner examined herself and another witness to defend her case. None was examined on behalf of the respondent No. 2. At the conclusion of the trial, the learned Assistant District Judge dismissed the suit. The trial court took up issue No. 4 first for discussion. According to the trial court, the petitioner is the tenant of the respondent No. 1 since the two receipts i.e. Ext-A and Ext.-B bearing dated 14.10.1982 and 2.6.1983 respectively were indicative of the payment by her of the consolidated rent in advance, and the respondent No. 2 acted as the agent of the respondent No. 1 in receiving the consolidated rents. The trial court reasoned that if the landlord had not actually received the rents, he would have instituted the suit long before; while the matter was of 1983, the suit came to be instituted only in 1988 i.e. after the lapse of almost five years. The trial court took the view that there was evidence that the respondent No. 2 accepted the rent on behalf of the respondent No. 1 and that the failure of the respondent No. 2 to adduce evidence reinforced the case of the petitioner that she paid the rent well in advance vide the two receipts at Ext.-A and Ext.-B adjustable against the monthly rents. As for issue No. 5, the trial court was of the view that it was absurd to assume that there could be tenancy agreement between the landlord and the respondent No. 2, who are brothers of the same parents and, therefore, concluded that the agreement at Ext.-1 had been made solely for the purpose of instituting this suit to evict the petitioner, who had been the tenant since 1982 on payment of rent in advance. The trial court accordingly held that the respondent No. 2 never sub-let the suit rooms to the petitioner, who was the direct tenant of the respondent No. 1 and that the respondent No. 2 acted as the agent in between them. In view of these findings, the trial court decided issue No. 6 against the landlord.

10. In so far as Issue No. 7 is concerned, which is, whether the defendant No. 2 (the petitioner herein) was in possession of the suit property along with another room in the holding or whether the tenancy can be split-up into two parts? the trial court came to the finding that the statement of the petitioner that she took the two rooms together for Rs. 600/-per month, which was not shaken in any manner in her cross-examination, has been fully corroborated by Ext.-A and Ext.-

B, which are the receipt issued by the respondent No. 2 on behalf of the respondent No. 1 for payment of advance rents for the said two rooms. The trial court on the basis of the deposition of the appellant recorded the findings that the tenancy began with the two rooms i.e. one room in the ground floor and the other room on the third floor, that the respondent No. 2 had filed eviction suit being T.S. No. 7(H) of 1988 against her while the respondent No. 1 instituted the instant suit against the respondent No. 2 and herself by splitting up the tenancy, which according to it, established a case of collusion between them. Relying upon the decision of the Apex Court in *Habibunnisa Begum and Others Vs. G. Doraikannu Chettiar (D) By Lrs. and Others*, , the trial court held that the tenancy could not be split-up in two parts when it began with a single tenancy agreement. The first part of the issue was thus decided in the affirmative while the second part decided in the negative. On the question of whether the respondent No. 2 is a defaulter, and is, ipso facto, liable for eviction, the trial court took the view that he could not have been a defaulter since he must have paid the rent received against Ext.-A and Ext.-B from the petitioner to the respondent No. 1, for whom he acted as his agent. The trial court was further of the view that had the respondent No. 2 not paid the rent to the respondent No. 1, the latter would not have waited for five long years to institute the instant suit. The trial court also noted that the respondent No. 2 did not adduce any evidence to rebut the contention of the respondent No. 1. On the basis of these findings, the trial court opined that the question of violation of the agreement dated 1.1.1983 did not arise.

11. Coming now to issue Nos. 9 and 10, the trial court recorded the finding that Ext.-A and Ext.-B i.e. the money receipts, were indicative of the fact that the respondent No. 2 acted as the authorized agent of the respondent No. 1 for accepting the advance rents from the petitioner. In coming to this finding, the trial court took into consideration the following facts : (i) the respondent No. 2 is his own brother, (ii) the contents of Ext.-A and Ext.-B were not challenged by the respondent No. 2, but were corroborated by DW 2, who is the attesting witness thereof. Accordingly, Issue No. 9 was decided in the affirmative while Issue No. 10 came to be decided in the negative. The trial court thus came to the conclusion that the petitioner is the tenant of the respondent No. 1, and not the sub tenant of the respondent No. 1 and that the respondent No. 2 is not the tenant of the respondent No. 1, but his authorized agent to deal with the petitioner.

12. The trial court also held that the tenancy agreement dated 1.1.1983 is an unregistered document and is, therefore, not admissible in evidence. It was under the aforesaid findings and conclusions that the trial court dismissed the suit.

13. The mother was taken in appeal by the respondent No. 1 before the learned Addl. District Judge, Shillong. It is also interesting to note that no appeal was preferred by the respondent No. 2. As noticed earlier, the appellate Court by the

impugned judgment and decree reversed the judgment and order of the trial court and accordingly decreed the suit. The appellate court was of the view that the trial court erred in taking up first Issue No. 4 and accordingly proceeded to discuss Issue No. 8 first and held that the respondent No. 2 is a defaulter, for which he was liable to be evicted. The appellate court found that the tenancy agreement dated 1.1.1983 had not been challenged by the respondent No. 2, who, rather, admitted the existence of this agreement in his written statement. It took the view that the petitioner herein had no right to challenge the validity and authenticity of this agreement as she had no connection with the same. On the question of sub-letting, the appellate court again took the view that as the petitioner was in possession of the suit room, she was either a trespasser or a tenant of the respondent No. 2 thereby establishing a clear case of sub-letting, which was violative of the terms and conditions of the said tenancy agreement. Coming to Issue No. 4, the appellate court was of the view that the petitioner was clearly a tenant of the respondent No. 2 inasmuch as the respondent No. 1 could not possibly rent out the suit room to her if the same was under the occupation and possession of the respondent No. 2 by virtue of the said tenancy agreement. According to the appellate court, the two receipts at Ext.-A and Ext.-B, which are the receipts for advance rents, could not be acted upon when the respondent No. 1 challenged the genuineness thereof and also when no evidence was led from the respondent No. 2. The appellate court reasoned that the trial court should have thus given the benefit of doubt to the respondent No. 1 and ought to have held that the respondent No. 1 had no knowledge of the payment of advance rent, even if the same had at all been tendered by the petitioner.

14. On the basis of the aforesaid findings and conclusions, the appellate court allowed the appeal, set aside the judgment and decree of the trial court and granted the reliefs claimed by the respondent No. 1. The validity of the impugned judgment and decree is now called into question in this revision petition.

15. Mr. A.M. Mazumdar, the learned senior counsel for the petitioner in CR(P) No. 3(SH) 2005, submits that the appellate court has completely gone overboard in holding that the trial court should have first taken up Issue No. 8 instead of issue No. 4 thereby making an unfounded assumption that the respondent No. 2 is the tenant of the respondent No. 1. According to the learned senior counsel, this amounts to non-application of mind as well as improper exercise of jurisdiction, which, in the process, has resulted in perverse findings. On the other hand, Mr. K.S. Kynjing, the learned senior counsel for the respondent No. 1, supports the impugned judgment and urges this Court not to interfere therewith. In my opinion, there is force in the contention of the learned senior counsel for the petitioner. The first and foremost point to be considered is as to whether the respondent No. 2 is the tenant of the respondent No. 1. It is only when there is just finding on this issue that the remaining issues can be properly decided. Without before coming to a finding on this issue, the question as to whether the respondent No. 2 is a defaulter or the respondent No. 2 is the sub-tenant of the respondent No. 1 cannot be gone into. This will amount to putting the cart before

the horse. The case of the respondent No. 1 is simple. He is the landlord of the suit room, and the respondent No. 2, who is his own brother is his tenant. This is so, because he executed the tenancy agreement dated 1.1.1983 with the respondent No. 2. The respondent No. 2 defaulted in payment of the monthly rent with effect from April, 1983. He also, contrary to the tenancy agreement, sub-let the suit room to the petitioner. Therefore, both the petitioner and the respondent No. 2 are liable to eviction forthwith. From the case set up by the respondent No. 1, it is incumbent upon him to first prove that the respondent No. 2 is his tenant or the petitioner is the tenant of the respondent No. 2. At this stage, it may be observed that once the appellate court did not formulate the important point for decision and proceeded to dispose of the same without discussing such point, unless there is material on record to show that such point is actually so covered notwithstanding the omission, the judgment will stand vitiated and the matter remanded to the appellate court for re-hearing. Unfortunately, the instant case is one in which the important issue apparent on the face of record, was not at all discussed by the learned appellate court. Nor is there anything in the impugned judgment to show that the appellate court nevertheless, has actually covered such issue/point.

16. In that connection, I am constrained to invite the attention of the appellate court to Order 41, Rule 31 of the Code of Civil Procedure, which are in the following manner:

R. 31. Contents, date and signature of judgment--The judgment of the Appellate Court shall be in writing and shall state--

(a) The points for determination;

(b) The decision thereon;

(c) The reasons for the decision; and

(d) Where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

The law thus imposes upon the court of appeal the imperative duty and obligation of giving an adequate and satisfactory judgment as is required by law and it is the duty of the court to explain its reasons for doing so, more so, when the court of first instance has gone so fully into the facts and reasons for the conclusions arrived at. This in effect means that the judgment of first appellate court has to set out the crucial points for determination, record the decision thereon and give its own reasons. The provisions are mandatory. It is the duty of an appellate court to properly dispose of an appeal and this necessarily involves dealing with the points raised by the appellant and looking into the record, so far as may be necessary, after making an effort to understand and appreciate the appellant's case. Where the appellate court fails to do so, its failure in these respects means either that there was no more than a colourable exercise of

jurisdiction by it or that it acted with material irregularity and in either event, the High Court has the power to interfere in revision (see *Moheshwari Prashad Bhagat Vs. Mahadeo Roy and Others*, Normally, in that event, the case should be remanded to the appellate court for rehearing of the appeal.

17. As indicated by me earlier, the first point for consideration in the suit is as to whether the respondent No. 2 is the tenant of the respondent No. 1 or the petitioner is the tenant of the respondent No. 2. The appellate court shall keep in mind that in the Evidence Act, the principle of law is that even where evidence adduced by both parties is imperfect, court has to decide on probability. Evidence of only one party even when no evidence of rebuttal is led by opposite party need not necessarily be accepted. In other words, in civil cases, the plaintiff can succeed in his suit only on the strength of his case, and not on the weakness of his adversary. A civil case is also decided on mere preponderance of probability, though a higher degree of proof is required in a criminal case. In assessing the value of evidence, Judges are bound to call in aid their experience in life and test the evidence on the basis of probabilities. In the instant case, as noted earlier, the appellate court without first recording its finding on the crucial issue, namely, whether the respondent No. 2 is the tenant of the respondent No. 1, jumped to the conclusion, or made unwarranted assumption that the former is the tenant of the latter and proceeded to hold that the former is a defaulter. This conclusion is unwarranted and, therefore, perverse, as will be evident hereafter. As noted earlier, the trial court has rejected the case set up by the respondent No. 1 that the respondent No. 2 is his tenant. Without examining the legality of his finding of the trial court, the appellate court proceeded to decide as to whether the respondent No. 2 is a defaulter and accordingly held that the respondent No. 2 is a defaulter and that the petitioner had no right to challenge the validity of the tenancy agreement dated 1.1.1983 and that as the petitioner was found to be in possession of the suit room, she was either a trespasser or the tenant of the respondent No. 2 thereby establishing a clear case of sub-letting. In my opinion, the appellate court ought to have turned its focus first on Issue No. 4 and thereafter decide the remaining issues. This omission has resulted in casting the burden of proof wrongly on the petitioner.

18. In the view that I have taken, I hold that the appellate court has committed non-application of mind and has in the process acted with material irregularity in the exercise of its jurisdiction. This certainly warrants the interference of this Court.

19. For what has been stated in the foregoing, this revision succeeds. The impugned judgment and order be and is hereby set aside. The case is remanded to the appellate court for fresh hearing in accordance with law and in the light of my observations indicated in the foregoing. Since the case is long pending and no adduction of evidence is likely to be required, the appellate court is, directed to hear and dispose of the appeal within three months from the date of receipt of the LC record. Transmit the LC record forthwith.

20. The parties are directed to bear their own costs.

CR(P)No. 5(SH) of 2005

In this case, the petitioner is also aggrieved by the same judgment and order dated 21.2.2005, but no appeal was preferred by him from the judgment and order of the trial court. In fact, apart from filing his written statement of defence, he did not adduce any evidence to substantiate his case. However, since I have already set aside the judgment and decree dated 21.2.2005 in the connected revision and remanded the case to the appellate court for fresh hearing of the appeal, it is not necessary to separately deal with the various contentions urged by him in this revision. On the contrary, suffice it to dispose of the revision petition by directing the appellate court to give an opportunity of hearing to the petitioner while taking up the appeal under remand. No costs. Order accordingly.