
(1999) 02 GAU CK 0037
In the Gauhati High Court
Case No : Second Appeal No's. 75 of 1990

Hayat Ali

APPELLANT

Vs

Hussammat Lalbanu and Others

RESPONDENT

Date of Decision : 18-02-1999

Acts Referred:

Assam Temporarily (Settled Area) Tenancy Act, 1971 — Section 5, 51(1)
Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (1999) 2 GLT 492

Hon'ble Judges : B.N. Singh Neelam, J

Bench : Single Bench

Advocate : C.K.S. Baruah, J.N. Sarma, R.C. Sancheti and M.K. Choudhury, for the Appellant; P.K. Baruah and A. Dasgupta, for the Respondent

Judgement

B.N. Singh Neelam, J.—This Second Appeal is so preferred u/s 100 of the CPC by the Appellant/Defendant being aggrieved and dissatisfied with the judgment followed by a decree so passed in Title Appeal No. 17/87 dated 30.3.90 which is a judgment of reversal and while allowing the appeal so preferred by the present Respondent/Plaintiff, the first appellate Court had set aside the judgment and Decree so passed by the court of the first instance in Title Suit No. 13/82 dated 31.7.84 by virtue of which, the court of the first instance had dismissed the suit.

2. It further transpires that the present Respondent/Plaintiff had filed the said Title Suit No. 13/82 for the ejectment of the present Appellant/Defendant from 12 Lecha of land out of Dag No. 344 of KP patta No. 18 situated at village Mohangaon, District; Sibsagar. Such ejectment was so sought for on two grounds, firstly, for recovery of the arrear of rent and mesne profit and also on bonafide requirement. It was also the case of the Plaintiff that initially a notice of such ejectment was so sent to the Defendant on 3.5.79 specifying a particular time as to vacate the premises but since the same was not done, the Plaintiff had no alternative but to take the shelter of the court by filing Title Suit No. 13/82. The Defendant's case so put before the court of the first instance in short, was

that as a matter of fact the tenancy was for 1 katha 12 lechas which was so given by Plaintiff's father and because of his retaining said piece of land for more than three years he had accured occupancy right u/s 5 of the Assam Temporarily (Settled Area) Tenancy Act, 1971 and if any ejectment was to be done, that was only to be done under the provisions of Section 51(1) of the said Act and not because of in any way becoming defaulter in paying the rent. In course of trial of the said proceeding T.S. No. 13/82 it further transpires that on behalf of the Plaintiffs two witnesses and on behalf of the Defendants four witnesses were so examined in chief and cross-examined and the court of the first instance though dismissed the suit but when the appeal was so preferred by the Respondent/Plaintiff the suit was so decreed in favour of the Plaintiff holding that as regards the 12 lechas of land, its nature being homestead (having-dwelling houses thereupon) the provisions of the said Act would not apply and taking that view, the first appellate Court had decreed the suit in favour of the Respondent/Plaintiff, hence the other side i.e. Appellant/Defendant has preferred this Second Appeal being aggrieved by the judgment of reversal so passed by the first appellate Court in Title Appeal No. 17/87.

3. At the time of admission of this SA, it further transpires that two substantial questions of law were so formulated and they are-as to whether the impugned judgment of reversal is in accordance with law and also as to whether the learned court below erred in law in not taking into consideration the provisions of Section 51(1) of the Assam Temporarily (Settled Area) Tenancy Act, 1971?

4. Mr. C.K.S. Baruah , the learned Counsel appearing on behalf of the present Appellant/Defendant in nut shell submits that the land was so settled by the Plaintiffs' father which was not only to the extent of 12 lecha out of dag No. 344 but it was to the extent of 1 katha 12 lechas out of which, 1 katha was cultivable and rest dwelling house. It is pointed out that the present Appellant/Defendant was/is entitled to protection under the Assam Temporarily (Settled Area) Tenancy Act, 1971 an ejectment can only be possible u/s 51(1) of the said Act if it is proved that the premises so given in tenancy was misused for which, in the instant case, the present appellant/Defendant has even accured occupancy right has in any way damaged the same and misused the same tenancy rights accruing. It is also pointed out that by over three years possession over the land and in the instant case it is admittedly for more than three years, he can't be ejected in this way. It is also submitted by Mr. C.K.S. Baruah that the present Appellant forcibly was dispossessed from the said piece of land for which, TS No. 12/79 u/s 6 of the Specific Relief Act was so filed which was disposed of on 25.1.82 in favour of the present Defendant and since against which no appeal lies, the present appellant/Defendant has no information with regard to any suit being preferred against the order so passed in Title Suit No. 12/79 in favour of the present appellant/Defendant by virtue of which, they also resumed possession over 1 K 12 L of land. It is submitted that as far as the facts of the case are concerned, the first appellate Court is the final court for appeal on facts and, in such circumstance, and particularly in the background that when the

impugned judgment in Title Appeal is a judgment of reversal, it was so incumbent on the part of the first appellate Court as to discuss the oral and documentary evidence threadbare and for also reversing judgment and decree so passed by the court of the first instance. In the present case it is pointed out that though the judgment of Title Suit No. 12/79 was very much on record which was so also even discussed by the court of the first instance, the first appellate Court did not take pain as to discuss the same while passing the impugned judgment on 30.3.99. Furthermore, out of the two P.Ws. 4, P.Ws. so examined by the close scrutiny of the judgment under challenge it will transpire that the first appellate Court has only discussed the evidence of D.W. 1 who was no one else but the Defendant for arriving at a decision. It was incumbent on the part of the appellate Court to take the evidence of the parties so adduced as a whole which has not so been done in this case. In such circumstance, it is pointed out that any conclusion so arrived at by the first appellate Court without consideration of the oral evidence adduced by the parties can well be said to have vitiated the ultimate conclusion so arrived at and in support of his this contention Mr. C.K.S. Baruah claimed himself to be fortified by a reported case Smt. Sawarni Vs. Smt. Inder Kaur and Others, particularly its para-7 is so referred in this context.

5. Mr. P.K. Baruah, the learned senior Counsel representing the Respondent/Plaintiff has, on the other hand, submitted that the suit initially was so filed for ejectment from that part of the land i.e. 12 Lechas which was not the agricultural land, rather, it was a piece of land on which dwelling house for residential purpose, stands therefore, it has rightly been held by the first appellate Court that the provisions of the said act does not apply in such cases. It is also submitted that only issues No. 4 and 5 were pressed into service and those issues were-whether the suit land was bonafide required or not, secondly, whether the Defendant figuring here as Appellant had in any way occupancy right. By referring to the impugned judgment dated 13.3.90 so passed in Title Appeal No. 17/98, Mr Baruah, the learned senior Counsel has submitted that on these two issues the learned first appellate Court has given its clear finding assigning reason firstly that the question whether the bonafide requirement is there or not is not a matter to be considered in this case which can only be considered if the matter relates to Urban Areas Rent Control Act, 1972. As regards the second issue so discussed and pressed into service by the parties for adjudication, reasons have been assigned by the learned appellate Court even particularly citing the oral evidence of D.W. 1 who is no one else but the Defendant himself. His admission of this piece of land i.e. 12 lechas. being used for residential purpose having houses over the same. That being the position, on no account it can be said that the evidence, oral has not been discussed by the court of the first instance. As regards the matter relating to T.S. No. 12/79 not being discussed by the first appellate Court. Mr Baruah, the learned senior Counsel has submitted that since it was not being felt necessary for discussing the same which was also in course of argument was not detailed to be discussed. The first appellate Court thus was perfectly justified in not discussing such

document which was not exhibited before the court of the first instance. This will not be out of place to mention that in the course of argument, while concluding, Mr C.K.S. Baruah, the learned Counsel appearing on behalf of the Defendant/appeallant had also made a prayer that because of the evidence so available oral not being discussed and a particular conclusion is arrived at prejudicial to the interest of the present Appellant/Defendant in the background of the reported case so cited, it is now a fit case for remand when after setting aside the impugned judgment under challenge so passed in Title Appeal No. 17/87 and remanding the matter, a direction be given to the first appellate Court as to give the parties opportunities to be heard afresh and decide the matter according to law, discussing the oral evidence available on the record particularly keeping in mind that the said court is the final court as far as matter of fact is concerned and dispose of the Title Appeal within a stipulated time. Also this argument made for remand is being controverted and objected by the learned Counsel appearing on behalf of the Respondent/Plaintiff.

6. To cut short the matter, after hearing both the sides lawyers I have carefully gone through the impugned judgment so passed by the learned court of the first instance also assessed the situation under which the parties have put their case and the reasons so assigned by the learned court below with that of the first appellate Court while deciding issue No. 3 and 4, I find much strength in the argument so advanced by the learned Counsel for the Appellant/Defendant particularly in the background of the reported case so cited that case is made out for remand because of non-consideration of the oral evidence so available on the record, while so deciding the issue Nos. 4 and 5 taking that view the impugned judgment and decree dated 30.3.90 so passed in Title Appeal No. 17/87 is thus hereby set aside and the matter is remanded to the first appellate Court for giving the parties opportunities to be heard afresh a decide the matter according to law particularly discussing the oral evidence available on the record as to arrive at the conclusion in connection with the adjudication of the matter relating to issue Nos. 4 and 5 which was so pressed into service for adjudication before the court of the 1st appellate court.

7. Matter stands accordingly dispensed of. LCRs so called for, be sent back to the court concerned i.e 1st appellate Court.

Parties to bear their own costs.