

(2023) 09 GAU CK 0051

In the Gauhati High Court

Case No : Regular Second Appeal No. 174 Of 2023

Md Kaushar Ali And 5 Ors.

APPELLANT

Vs

Md. Ramizul Haque Ahmed And Anr.

RESPONDENT

Date of Decision : 20-09-2023

Acts Referred:

Code of Civil Procedure, 1908 — Section 100, Order 1 Rule 9

Citation : (2023) 09 GAU CK 0051

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : O P Bhati, R K Bhuyan

Final Decision : Dismissed

Judgement

1. The present appeal has been preferred under Section 100 of the Code of Civil Procedure against a judgment and decree dated 30.08.2023, passed by the learned District Judge, Kamrup (M) at Guwahati, in Title Appeal No. 33 of 2019 whereby the appeal has been dismissed and the judgment and decree dated 21.09.2019 passed by the learned Civil Judge No. 2, Kamrup (M), Guwahati, in Title Suit No. 152/2015 has been upheld.

2. The appellants were the defendants in the aforesaid Title Suit which was instituted for a declaration of right, title, interest and for mandatory injunction for demolition. As indicated above, both the Courts below had accepted the case of the plaintiffs and had decreed the suit in their favour, which also includes a direction for demolition.

3. I have heard Shri OP Bhati, learned counsel for the appellants whereas Shri RK Bhuyan learned counsel has represented the respondents on the strength of a Caveat.

4. Shri Bhati, the learned counsel for the appellants has contended that in spite of the fact that the present appeal has been preferred against concurrent findings, there are substantial questions of law which would require adjudication.

He submits that the said substantial questions of law would include the question/issue of non-joinder of the Guwahati Municipal Corporation (GMC) and the Guwahati Metropolitan Development Authority (GMDA). He further contends that since the extent of unauthorised construction has not been ascertained, the learned Courts below could not have passed the impugned judgment.

5. The learned counsel for the appellants has submitted that while the demolition has been directed to be made by the GMC/GMDA, such directions could not have been made without those authorities are being made parties. He further submits that there is no exact description of that portion of the structure which has been alleged to be unauthorised and therefore no demolition could have been directed.

6. The learned counsel for the appellants has drawn the attention of this Court to the relief prayed for in the plaint, more specifically, against Sl. No. (b) in which, a decree for mandatory injunction for demolition has been prayed for. Reference has also been made to the judgment dated 21.09.2019 of the learned Civil Judge No. 2, Kamrup (M), who, in the order, had declared the structure to be illegal and unauthorised and liable to be demolished. The GMC and GMDA were, accordingly directed to demolish the unauthorised structure. Shri Bhati, the learned counsel has submitted that such direction could not have been given as there were no pleadings to that effect.

7. Reference has also been made to the judgment dated 30.08.2023⁵ passed by the First Appellate Court, more particularly, while deciding the Issue No. 3 pertaining to whether the suit was bad for defect of parties. It is contended that the discussion in holding the issue in favour of the plaintiff is not in accordance with law.

8. Shri Bhati, the learned counsel for the appellant in support of his submission has relied upon the case of *BSES Rajdhani Power Ltd. Vs. Delhi Electricity Regulatory Commission*, reported in (2023) 4 SCC 788. By referring to paragraph 31 of the said judgment, it is submitted that any order passed in absence of the pleadings or if it is based on no evidence, the same may be taken up in a second appeal.

9. The learned counsel for the appellants, accordingly submits that the appeal be admitted on the aforesaid two substantial questions of law.

10. Per Contra, Shri RK Bhuyan, learned counsel for the respondents has submitted that none of the contentions advanced on behalf of the appellants are tenable in law. He submits that both the questions which have been sought to be raised in this appeal have been elaborately dealt with and answered by the learned Trial Court which has been affirmed by the learned First Appellate Court and therefore, there is no scope for interference by this Court in exercising powers as the Second Appellate Court.

11. Shri Bhuyan, learned counsel submits that neither GMC nor GMDA are necessary parties and at best, can be treated as proper parties and their absence

would not make any material difference in the adjudication of this case. He further submits that the portion of unauthorised constructions was not only specifically pleaded but also admitted by the respondents in the trial. As regards, the case law cited, Shri Bhuyan, the learned counsel has contended that there is no application of the principles laid down under the facts of the instant case as the order is based on the pleadings and materials on record.

12. The rival submissions made by the learned counsel for the parties have been duly considered and materials available on records have been carefully examined.

13. With regard to the first question of law sought to be urged, this court has noticed that the learned Courts below had formulated a specific issue, namely, Issue No. 3 which reads as follows:

“Whether the suit is bad for defect of parties?”

14. The learned Trial Court had decided the issue in favour of the plaintiffs by making the following discussions:

“Issue No. 3

This issue is: whether the suit is bad for defect of parties?

6. The defendants took the plea that the suit is bad for non-joinder of necessary parties. The plaintiffs filed the suit for declaration that the construction made by the defendants over the schedule C land without keeping the side margin towards the schedule A land and schedule B path and extending the roof of the first floor of the building and the cantilever covering the schedule B path is illegal and unauthorized. It is seen that the construction was made by the answering defendant No.1 to 6 and on perusal of Ext.B which is the NOC for construction issued by the Commissioner, GMC it is seen that the same was issued in favour of the defendant No. 1, 4, 5 and 6. As the dispute is regarding illegal construction made by the defendants and the NOC for construction issued in favour of the answering defendant No. 1, 4, 5 and 6, the suit is not bad for non-joinder of necessary parties as the suit can be effectively disposed of without the presence of the other pattadars, legal heirs and successors.

However, the plaintiffs ought to have made GMDA and GMC parties to the suit as the building permission/NOC was given by the GMDA and GMC. Thus, GMDA and GMC were proper parties to the suit but the suit shall not be defeated due to the non joinder of GMDA and GMC as the suit, in the event of a decree can be effectively disposed of even in their absence.

This issue is decided in the negative and in favour of the plaintiffs.”

15. The First Appellate Court has also concurred with the said finding by making relevant observations, certain parts of which are extracted hereinbelow:

“ISSUE NO. 3:

15. This issue relates to the fact as to whether the suit is bad for defect of

parties and the Ld. trial court decided that the suit is not bad for non-joinder of GMDA & GMC who are the proper parties to the suit.

Hence, it is seen that the Ld. Trial Court opined GMDA and GMC as proper parties to the suit and answered the issue in negative and in favour of the plaintiffs/respondents. The Ld. Counsel appearing on behalf of the appellants during argument strenuously submitted before this court that GMDA and GMC are the necessary parties to the suit and in their absence no effective decree can be passed. The Ld. Counsel for the appellant further argued that the Ld. Trial court ought to have dismissed the suit due to non-joinder of necessary parties.

17. Here, the plaintiffs/ respondents have not impleaded the GMDA and GMC, since the plaintiffs have no claim against them and plaintiffs are also not aggrieved by any action of the aforesaid authorities. Further, the dispute in hand does warrants presence of the aforesaid authorities and plaintiff's secure attendance one witness from GMC as PW-3 who had clarified the facts in respect of the site plan vide Ext-10 and NOC vide Ext- 9. Considering the nature of dispute, this court finds that both the GMDA and GMC are not necessary parties, rather they are appears to be proper parties and the court is very much able to adjudicate the dispute in their absence.

18. In the light of all the aforesaid discussion, this court is of considered view that the learned trial court rightly decided that suit shall not be defeated due to non-joinder of GMDA and GMC. Further, Order-1 Rule-9 of CPC postulates that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every suit deal the matter in controversy so far as regards the right and interest of the parties before it: provided that nothing in this rule shall apply to non- Joinder of a necessary party. In the case of Pramod Kalita v. Anil Kalita, reported in (2020) 2 GLR 51, our Hon'ble High Court in paragraph No. 12 held as follows:-

"12. One must bear in mind the difference between "non- joinder of necessary party" and "non-joinder of party". Order 1 Rule 9 CPC CPC provides that no suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the court may in every suit deal with the matter on controversy so far as regards the rights and interests of the parties actually before it. Therefore, mere non-joinder or misjoinder of party is not fatal. What is fatal is the non-joinder of necessary parties and a necessary party is one without whom an effective decree cannot be passed or without whom the suit cannot legally proceed. Thus, it is not the absence or non-joinder of a party, rather the inability of the court to decide the dispute effectively. Therefore, whether a party is necessary party or a mere formal party, has to be looked into from the point of view of the court's ability to decide the lis effectively and not from the point of view of the party. When the court is in a position to decide the dispute or right of the parties effectively without the presence of a party or parties, though such party may be a formal party, the suit cannot be held to be bad for non-joinder of such party or parties. In view of the above facts and circumstances, in my considered view the finding

of the learned trial court that the suit was bad for non-joinder of necessary party was not proper and therefore, the issue No. 3 deserves to be decided in favour of the plaintiffs."

19. Hence, it appears to be settled proposition of law that suit is liable to be dismissed when the suit is bad for non-joinder of necessary party but where it is a case of simple non-joinder of a proper party, the suit does not defeat due to such fact. That being the settled provisions of law, this court finds that the Ld. trial court has not committed any error in deciding the issue No. 3 and accordingly, the decision of the Ld. Trial court in respect of this issue does not deserve any interference from this first appellate court and consequent to that same is upheld."

16. In the opinion of this Court, the discussions are based on sound legal principles and this court is also of the view that both the GMC and GMDA at best, can be proper parties and not necessary parties.

17. The Hon'ble Supreme Court, in the case of Udit Narain Singh Paharia Vs. Additional Member Board of Revenue, reported in AIR 1963 SC 786 had explained the concept of necessary parties and proper parties in the following manner:

"7. To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding."

18. In view of the aforesaid discussion and case law, this Court is of the opinion that the aforesaid question would not require any further adjudication by this Court.

19. With regard to the second question sought to be raised by contending that there was no proper description of the unauthorised construction, it would be relevant to again refer to the relief sought for at Sl. No. (b) which reads as follows:

"(b) A decree for mandatory injunction to demolish the said extended portion of the roof of the first floor as well as the canty-lever covering the Schedule-B path and towards the Schedule-A land and house."

20. The aforesaid relief clearly describes the extent of unauthorized construction by mentioning the schedules in the plaint. This Court has also been apprised that such unauthorised constructions were admitted by the defendants (present appellants) in the Trial Court. This Court has also noted the schedules in the plaint which give a vivid description of the properties in question.

21. In that view of the matter, the contention raised on behalf of the appellants with regard to lack of description cannot be accepted.

22. Though the appellants had relied upon the case of BSES Rajdhani Power Ltd. (supra), there is no dispute to the aforesaid proposition laid down that a second appeal would be maintainable if the order impugned is bad in law being de hors the pleadings, or it was based on no evidence or on misreading of evidence or it was recorded against the provision of law or the decision is one which no Judge acting judicially could reasonably have reached.

23. However, in the instant case, there is no application of the aforesaid principle of law inasmuch as the GMC and GMDA have been correctly held to be proper parties and not necessary parties and the unauthorised construction has been properly described. In fact, the Hon'ble Supreme Court in the aforesaid case has laid down the various conditions under which a High Court in exercise of its powers while deciding a second appeal can interfere which includes a finding based on no evidence or misreading of material documentary evidence or a decision which could not have been judicially arrived at. However, no such conditions appear to have been fulfilled in the present case.

24. With regard to Section 100 CPC, the Hon'ble Supreme Court in the case of Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, reported in (1999) 3 SCC 722 held as follows:

"4. ... It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact. ..."

25. Regarding application of a ratio of a judgment, the Hon'ble Supreme Court has elaborately explained the same in the case of Padma Sundara Rao Vs. State of T.N., reported in (2002) 3 SCC 533 in the following manner:

"9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington v. British Railways Board* [1972 AC 877 (HL)]. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

26. Accordingly, this Court is of the considered opinion that there is no merit in this appeal and accordingly, the same stands dismissed.