

(2013) 06 GAU CK 0059
In the Gauhati High Court
Case No : C.R. (P) No. 37 (SH) of 2012

Saljing A. Sangma and Another

APPELLANT

Vs

Bilmoni A. Sangma

RESPONDENT

Date of Decision : 06-06-2013

Acts Referred:

Citation : (2013) 06 GAU CK 0059

Hon'ble Judges : T. Nanda Kumar Singh, J

Bench : Single Bench

Advocate : A.H. Hazarika, for the Appellant; K.S. Kynjing and Mr. H. Kharmih, for the Respondent

Judgement

T. Nandakumar Singh, J.—This revision petition is directed against the judgment and order of the Judge, District Council Court, Garo Hills Autonomous District Council (for short "GHADC"), Tura dated 04.09.2012 passed in Misc. Appeal No. 4/2011, wherein and where-under, the learned District Council Judge dismissed the appeal without any reason. Heard Mr. AH Hazarika, learned counsel for the petitioners and Mr. KS Kynjing, learned Sr. counsel assisted by Mr. H Kharmih, learned counsel for the respondents.

2. This case has a chequered history and started from the village court of the GHADC. The Garo Hills Autonomous District (Administration of Justice) Rules, 1953 extend to the whole of GHADC. Rule 6 of Rules, 1953 provides the constitution of the Village courts within the areas of the GHADC. Under Rule 5, there are three classes of courts i.e.: (i) Village Courts; (ii) Subordinate District Council Courts; and (iii) District Council Court. Under Rule 30, appeal shall lie from the decision of the Subordinate District Council Court to the District Council Court.

3. Rule 48 provides that the applicability of the CPC (for short "CPC") in the civil cases before the District Council Court, Subordinate District Council Court and the Additional Subordinate District Council Court; and the procedure of the civil

cases before those Courts shall be guided by the spirit, but not bound by the letter of the CPC, 1908. The parties in the present civil revision petition are not disputing that the CPC is applicable to the civil cases before the Subordinate District Council Court as well as the District Council Court, but not to the strict rigour of the CPC, 1908,

4. Initially, the respondent/plaintiff viz. Smti. Bilmoni Marak and her husband (L) Precious Mark, filed the suit in the Village court of the Garo Hills District Council for declaration of ownership right and also for possessory title i.e. confirmation of possession of the suit land situated at 5th Mile near the road i.e. the part of the Akhing land against the present petitioners. The Village court had decided the suit in favour of the respondent/plaintiff vide order dated 21.04.1995. The petitioners/defendants being aggrieved by the said judgment and order of the Village court dated 21.04.1995, filed an appeal being Misc. Appeal No. 4/1995 in the Court of C.B. Chetry, Magistrate 2nd Class, Subordinate Court, Garo Hills District Council, Tura. The said Subordinate Court, Garo Hills District Council, Tura vide his judgment and order dated 16.06.1997, allowed the appeal and sent the suit for de novo trial to the Court of Judicial Officer, Sub-Ordinate District Council Court, GHADC, Tura, who in receipt of the record, registered the said civil case as Misc. Case No. 3/1997.

5. The suit land is situated within West Garo Hills District, Meghalaya and it is a part of the Akhing land. A Nokma being the custodian and guardian of Akhing Land of a particular ma-chong exercises the power both in Social and Administration. He also exercises the power to preserve and protect the interest of the ma-chong and the Akhing land. Nokma is to regulate the jhum cultivation of the villagers under his Akhing land. It is the case of the respondent/plaintiff in Misc. Case No. 3/1997 that they are the owner in possession of the suit land on the basis of the documents i.e. (i) dated 25.06.1972 (Ext. 1) executed by Nokma Kechang R. Marak (Predecessor-in-Interest of the petitioners/defendants) and (ii) dated 11.01.1987 (Ext. 2) executed by the petitioner/defendant himself for allowing the plaintiff to do gardening within the Akhing land. The English version i.e. translation in English of the said two documents read as follows:--

Ext. 1-Dated 25.06.1972:

I, Kechang R Marak, give this written document in favour of Smti. Bilmoni A Sangma to practice gardening, the land is 5th Mile away from the road. And I will not claim back the said land.

Sd/- Thump Impression Keichang R Marak Duragiri Nokma 25.6.72

Ext. 2-Dated 11.01.1987:

I, Saljing Sangma has given this written document to, Smti. Bilmoni A Sangma, allow her to do gardening within my A"king Land and I, shall not claim or take back the land from her in future.

Sd/- Thump Impression LTI of Sd/- Saljing A Sangma, Dragiri Nokma

10.01.87.

6. From the pleadings of the respondent/plaintiff in the plaint in the said civil suit, it is crystal clear that there is not even a whisper regarding the boundary and area of the suit land. Order VII of the CPC, provides that what are the particulars to be contained in the plaint. Rule 3 of Order VII, clearly provided that where the subject-matter of the suit is immovable property, such property can be identified by boundaries and numbers in a record of settlement or survey and the plaint shall specify such boundaries or numbers. In the present case, the respondent/plaintiff in the plaint did not mention anything about the area as well as the boundary of the suit land. In absence of the boundary and area of the suit land, it would not be able to identify the suit land and also the said two documents i.e. Ext. 1-dated 25.06.1972 and Ext. 2-dated 11.01.1987, did not mention the area and boundary of the suit land.

7. In such case, instead of solving the problems between the parties, there will be a multiplicity of proceedings in case the trial court passed the judgment and decree declaring the title as well as possessory right of the respondent/plaintiff over the suit land; and also how could there be execution of the decree for a suit land having no area and boundary. The case of the petitioners/defendants in the civil suit is that neither the petitioners/defendants nor their predecessor-in-interest Nokma Kechang R Marak executed the said two deeds i.e. dated 25.06.1972 (Ext. 1) and 11.01.1987 (Ext. 2) and also thumb impression of the petitioner/defendant Saljing A Sangma appearing in the document dated 11.01.1987 (Ext. 2) is a forged one.

8. The learned trial court i.e. the Subordinate District Council Court, Tura vide judgment and decree dated 02.08.2010, had decreed the suit i.e. Misc. Case No. 3/1997. This Court, after reading the judgment and decree of the learned trial court dated 01.08.2010, with great reluctant compelled to observe that the learned trial court while passing the judgment and decree had completely lost sight of the basic nature of the civil suit. As stated above, it is the basic requirement of the plaint of the civil suit for immovable property that the plaint shall contain a description of the property sufficient to identify it Importance of the pleadings in the civil suits had been considered by the Apex Court in a number of cases and observed that:--

(i) The object and purpose of pleading and the issue are to ensure that the litigant came to the trial court with all the issues clearly defined and to prevent the cases being expanded or grounds being shifted during the trial. Its object is also to ensure that each side is fully alive to the questions that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. In the absence of appropriate pleading on the particular issue, there can be no adjudication of such issue. Adjudication of a dispute for a civil court is significantly different from the exercise of powers of judicial review in a writ proceeding by the High Court

It is well settled law that in the absence of any pleading, no amount of evidence led in relation thereto can be looked into and in the absence of any plea, no evidence is admissible.

(ii) The Apex court also held in Bondar Singh and Others Vs. Nihal Singh and Others, observed that:

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It is settled law that in the absence of a plea no amount of evidence led in relation thereto can be looked into. Therefore, in the absence of a clear plea regarding subtenancy (shikmi), the defendants cannot be allowed to build up a case of sub-tenancy (shikmi). Had the defendants taken such a plea it would have found place as an issue in the suit. We have perused the issues framed in the suit. There is no issue on the point.

(iii) It is not open to give up the case set out in the pleadings and also cannot reprobate a new pleading. The Apex Court in Vinod Kumar Arora Vs. Surjit Kaur, held that:

Further, the tenant averred in his written statement that the hall was let out for his residential use as well as for running a clinic but took a categoric stand during the enquiry that he had taken the hall on rent only for running his clinic and not for his residential needs as well. The pleadings of the parties form the foundation of their case and it is not open to them to give up the case set out in the pleadings on propound a new and different case. Moreover, having taken up such a stand, the appellant again contended that the lease of the hall was of a composite nature and as such the benefit of the enlarged definition of a nonresidential building given in the EP Rent Restriction (Chandigarh Amendment) Act, 1982 would ensure to his aid in the case. The appellant cannot so reprobate.

(iv) Importance and object of the pleadings had been discussed by the Apex Court in Bachhaj Nahar Vs. Nilima Mandal and Another, held that:

The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the Court for its consideration.

Provisions relating to pleadings in civil cases are meant to give to each side intimation of the cases of the other so that it may be met, to enable Court to determine what is really at issue between the parties, and to prevent deviations from the course which the litigation on particular causes of action must take.

(v) The plaintiff has to succeed his case on the basis of the pleaded case. Burden of proof of his pleaded case lies on the plaintiff.

9. It is fairly well settled law that the weakness of the defence or the failure of

the defendants to establish the title set up by them, would not enable the plaintiff to a decree. Regarding this settled law, it would be enough to refer to one decision of the Apex Court in Ramchandra Sakharam Mahajan Vs. Damodar Trimbak Tanksale (D) and Others, of the SCC in Ramchandra Sakharam Mahajan's case (Supra) reads as follows:--

13. The suit is for recovery of possession on the strength of title. Obviously, the burden is on the plaintiff to establish that title. No doubt in appreciating the case of title set up by the plaintiff, the Court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by them would not enable the plaintiff to a decree. There cannot be any demur to these propositions.

10. The reasons for passing the judgment and decree dated 02.08.2010 by the learned trial Court, who had misunderstood the basic nature of the civil suit, procedure of the civil suit and the burden of proof, are quoted herein under:--

.....The plaintiffs had been doing gardening on the suit land since 1969 and it had been under their possession over since then. And the plaintiffs has produced and submitted Nokma documents of both Kechang Marak and the defendant Saljing Sangma to corroborate their claim of ownership over the suit land. There is no sufficient proved other than the statements of the defendant Saljing Sangma and Tangson Marak who is not an independent witness to nullify the genuineness of the documents. The boundary of the suit land though not specifically mentioned in the suit is more or less the same as described by the plaintiffs, the defendant Tangson Marak in their statement.

In 1969 when the plaintiffs started their gardening on the suit land the defendant Saljing Sangma was not a Nokma. He became Nokma only in 1987 (as stated by the plaintiffs and two witnesses). During the period from the date the written consent was given by Kechang Marak, Nokma to the plaintiffs till then case was instituted in the Dobasipara Village Court, there was no claim from anybody nor was instituted in any of the village court or other courts with regards to the suit land. In the written document dated 25.6.1972, Kechang Marak the then Nokma had specifically mentioned that he was giving the land situated at 5th Mile near the road to Smt. Bilmoni A Sangma for gardening and further mentioned that he would not take or claim back the land in future. Also in document dated 11.1.1987, Saljing Sangma the defendant who is also the Nokma had specifically mentioned that he had given consent to Smti Bilmoni Sangma to plant and cultivate under his A"Khing and further mentioned that he would not claim or take it back.

Both the written documents do not mentioned the area and the boundary of the suit land. However, the plaintiffs and the defendant had described the location and the boundary of the suit land in their statement. In regards to the claim that the plaintiffs had been given sufficient land for homestead and gardening mere is no proved to show how much sufficient land had been given to the plaintiffs as

there is no mention about the area of the land in both the documents given by Kechang Marak and Sailing Sangma respectively.

11. The petitioners/defendants filed an appeal i.e. Misc. appeal No. 4/2011 against the judgment and decree of the learned trial court dated 02.08.2010 in the Judge, District Council Court, (Shri. HA Sangma), GHADC, Tura. The learned first appellate court vide judgment and order dated 04.09.2012, which is a cryptic one, allowed the appeal. The cryptic judgment and decree of the first appellate Court dated 04.09.2012 is quoted completely.

IN THE COURT OF SHRI. H.A. SANGMA, JUDGE DISTRICT COUNCIL COURT, GHADC, TURA Case No. Misc. Appeal No. 4/2011

Shri. Saljing A. Sangma.....Appellant Vs. Smti. Bilmoni A. Sangma....Respondent

04.09.2012

Judgment and Order

The appellant under rule 30 of the Garo Hills Autonomous District (Administration of Justice) Rules "1053 has filed petition dated:-19.08.2010 against the order dated 02.09.2010 passed by the learned Court below.

That Shri. Saljing A Sangma has filed appeal petition dated:- 22.05.1995 in the learned court below against the Impugned. Order Passed by the Dobasipara Village Court on 21.04.1995.

That the learned Court below had tried the case de-novo and has passed the Order dated 02.08.2010 in Misc. Case No. 3/1997 in favour of present Respondent, Smti. Bilmoni A Sangma. Hence, this Appeal case.

BRIEF HISTORY OF THE CASE

On perusal of the material available in the records, it appears that the Respondents Shri. Precious Marak and his wife are claiming the suit land to be their land which is part of Nokma A"Khing Land according to the present respondents. The suit land was occupied since 1968 with the knowledge and consent of Nokmas of Duragre. It is claimed that the present appellant forcibly tried to take the Suit Land after he became male A"Khing Nokma.

That the present appellant, Shri. Saljing A Sangma has filed appeal petition before the Subordinate District Council Court and the Learned Court below tried the case de-novo and passed final order dated:- 02.08.2010 in favour of the present respondents.

After considering all facts and circumstances of the case, I am of the opinion that the respondents have occupied land prior to the appellant becoming a male A"Khing Nokma, his predecessor and other Co-A"Khing Nokmas did not object to the occupation and possession of the suit land by the present respondent. It may be mentioned that Shri. Precious Marak, husband of present respondent, Smti.

Bilmoni A Sangma expired during the trial in the Lower Court and his wife who is also a party to the case continued as defendant.

In my considered view, the A"Khing Nokma cannot take back the already occupied and possessed by the resident of the A"Khing. If, the plea of the A"Khing Nokma, Shri. Saljing A Sangma is allowed to take the land which was occupied and possessed by the resident of the A"Khing, any new A"Khing or successor A"Khing Nokma can claim back the land as per his whim and will open flood gate of the case.

I have heard both the parties and perused their written arguments, I have also perused the case records.

I have also perused the order passed by the learned Judicial Officer, Subordinate District Council Court in Misc. Case No. 3 of 1997, dated:- 02.08.2010. The learned Judicial Officer of Subordinate District Council Court in its order has been elaborately discussed the facts and circumstances of the case which I do not want to disturb the findings of the Lower Court below.

Therefore, I do not want to disturb the findings of the Lower Court below and uphold the Order, dated:- 02.08.2010 passed by the Learned Judicial Officer, Subordinate Court, GHADC, Tura. Therefore, appeal stands dismissed, I pass no order as to cost.

Sd/- Shri. H.A. Sangma Dt. 04/09/2012 Judge, District Court, GHADC, Tura.

12. The first appellate court while passing the impugned judgment and order dated 04.09.2012, had completely lost sight of Order XLI Rule 31 of the CPC, which reads as follows:--

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

(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.

13. The Gauhati High Court, incidentally this very Bench, Justice T. Nandakumar Singh, in Jutika Paul and Others Vs. Bhubaneswari Sheel and Others, held that judgment of the first appellate court must display conscious application of mind and record finding on all issues supported by reasons. Para 14 of the GLT in Jutika Paul's case (supra) read as follows:

14. The Apex Court in Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., held that the judgment of the 1st appellate court must display conscious application of

mind and the record findings supported by reasons on all issues. The 1st appellate court being a final court of facts, the pure findings of fact by the 1st Appellate court shall remain immune from challenging before the High Court in Second Appeal, the Apex Court in Santosh Hazari (*supra*) observed that:

The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court, expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (see *Girijanandini Devi v. Bijendra Narain Choudhury*). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authored the judgment. This certainly does not mean that when an appeal lies, on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the findings of fact. (See *Madhusudan Das v. Narayanibai*). The rule is and it is nothing more than a rule of practice- that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See *Sarju Pershad Ramdeo Sahu v. Jwaleshwai Pratap Narain Singh*). Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from

challenging before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High court in second appeal because the jurisdiction of the High court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one.

14. The Apex Court in *H. Siddiqui (dead) by L.Rs. Vs. A. Ramalingam*, , after taking into consideration of the provisions i.e. Order XLI Rule 31 of the CPC which provides the guidelines for the appellate court as to how the court has to proceed and decide the case, held that it is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of evidence on those points. Being the final Court of fact, the First Appellate Court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Paras 20, 21 and 22 of the SCC in *H. Siddiqui's* case (supra) held as follows:--

20. The High Court failed to realise that it was deciding the First Appeal and that it had to be decided strictly in adherence with the provisions contained in Order 41 Rule 31 of the Code of Civil Procedure, 1908 (hereinafter called CPC) and once the issue of alleged power of attorney was also raised as is evident from the point (a) formulated by the High Court, the Court should not have proceeded to point (b) without dealing with the relevant issues involved in the case, particularly, as to whether the power of attorney had been executed by the respondent in favour of his brother enabling him to alienate his share in the property.

Order 41 Rule 31 CPC

21.....It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide: *Thakur Sukhpal Singh Vs. Thakur Kalyan Singh*, ; *Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury*, ; *G. Amalorpavam and Others Vs. R.C. Diocese of Madurai and Others*, ; *Shiv Kumar Sharma Vs. Santosh Kumari*, ; and *Gannmani Anasuya and Others Vs. Parvatini Amarendra Chowdhary and Others*,).

22. In *B.V. Nagesh and Another Vs. H.V. Sreenivasa Murthy*, .

"4. The appellate Court has jurisdiction to reverse or affirm the findings of the

trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., and Madhukar and Others Vs. Sangram and Others,)

15. The Apex Court in B.V. Nagesh and Another Vs. H.V. Sreenivasa Murthy, , held as follows:--

3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court 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.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with, the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal it was the duty of the High Court to deal with all fee issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of findings. (Vide Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., and Madhukar and Others Vs. Sangram and Others,).

5. In view of the above salutary principles, on going through the impugned judgment, we feel mat the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has

been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law.

16. For the foregoing reasons and discussions, this Court is of the considered view that both the courts below while passing the impugned judgment and order had exercised their jurisdiction illegally and with materials irregularity. Accordingly, the impugned judgments and orders dated 02.08.2010 and 04.09.2012 are hereby set aside.

17. The revision petition is allowed. Return the LCR forthwith.