
(2015) 03 GAU CK 0079
In the Gauhati High Court
Case No : Regular Second Appeal 162 of 2004

Secretary, Sadar Patty Masjid Committee	APPELLANT
Vs	
Wahida Begum and Others	RESPONDENT

Date of Decision : 24-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 41 Rule 31, Order 6 Rule 17
Evidence Act, 1872 — Section 103, 106, 109, 114(g), 115

Citation : (2015) 2 GLD 414

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : K. Agarwal, Senior Advocate and D.K. Chomal, for the Appellant; T.J. Mahanta, Senior Advocate and P. Bhattacharya, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Arup Kumar Goswami, J—This Second Appeal is preferred by the plaintiff against the judgment dated 15.06.2004 and decree dated 17.06.2004 passed by the learned District Judge, Tinsukia, in Title Appeal No. 7 of 2004 allowing the appeal of the defendants and settling aside the judgment dated 10.06.2003 and decree dated 18.06.2003 passed by the learned Civil Judge (Junior Division) No. 1, Tinsukia, Assam, in Title Suit No. 43 of 1998.

2. By an order dated 14.10.2004, the appeal was admitted to be heard on the following substantial questions of law:

"1. Whether in view of clear admission by the defendants with regard to landlord-tenant relationship between the plaintiff and the defendants, the defendants were estopped by virtue of the provisions of Section 115 and 116 of the Indian Evidence Act, 1872 to deny the right, title and interest of the plaintiff over the suit land as well as the landlord-tenant relationship?

2. Whether the lower Appellate Court committed substantial error of law in not drawing adverse presumption under Section 114(g) of the Indian Evidence Act,

1872 against the defendants for not examining key witness to show that Ext. 4 was not written by the defendants?

3. Whether the lower Appellate Court while appreciating the evidence with regard to Ext. 4 failed to take into consideration the mandatory provisions of Sections 103, 106 and 109 of the Indian Evidence Act, 1872 and also misinterpreted and misconstrued the principles underlying the aforesaid provisions of law?

4. Whether the lower Appellate Court committed substantial error of law in assuming charge of Handwriting Expert in comparing the handwriting and signature of defendant No. 2 in Exts. 4 and 6?

5. Whether the lower Appellate Court could have put himself in position of a Handwriting Expert as under Section 45 of the Indian Evidence Act and could have compared the handwriting and signature of defendant No. 2 in Exts. 4 and 6?

6. Whether the lower Appellate Court while passing the impugned Judgment and Decree misinterpreted and misconstrued the documentary evidence, namely, Ext. 1, Ext. 2, Ext. 4, Ext. 5, Ext. 6 and Ext. "Ka" and did not consider Ext. 10 at all and thereby came to perverse findings?

7. Whether the lower Appellate Court while reversing the judgment and decree of the trial Court acted illegally and perversely?

8. Whether the judgment dated 15.06.2004 of the lower Appellate Court can be construed as a judgment in accordance with the provisions of Order 41 Rule 31 of the Code of Civil Procedure, 1908?"

3. The pleaded case in the plaint, filed on 02.11.1998, is that the Sadar Patty Masjid is a place of worship and it has houses, which are let out on rent to different persons for the benefit of the Masjid. On an approach being made by the predecessor-in-interest of the defendants, namely, Dildar Hussain, to accommodate him, a written agreement was executed on 14.04.1959 and, accordingly, said Dildar Hussain came in occupation of a plot of land measuring 15 Lechas covered by Dag No. 278 and 279 (Old), under Periodic Patta No. 48, situated at Doom Dooma Town, and he constructed a house consisting of five rooms made of bamboo-wall, Kachha floor, C.I. sheet roof on a part of the land measuring 6 Lechas and remaining 9 Lechas of the said land remained vacant. Yearly lease rent was fixed at Rs. 10/- and the plaintiff was to pay the construction cost of the suit premises at the time of vacating the house. On 05.08.1983, rent of the suit land and house was enhanced to Rs. 60/- per year. Dildar Hussain having expired, the present defendants being his legal heirs, continued to occupy the suit land and house. The defendants were very irregular in payment of rent and rent was lastly paid on 26.11.1992, covering rent up to December, 1992.

4. It is further pleaded that the defendants had caused serious inconvenience and annoyance to the Namajees as they resided within the premises of the

prayer hall and, that apart, number of Namajees are increasing day by day, which comes to about 250/300 per day, and it was not possible to accommodate all of them in the prayer hall of the Mazjid, as it could accommodate only about 120 persons. As a result, the plaintiff is required to construct rooms for the purpose of Masjid and unless the suit land and house, occupied by the defendants is vacated, it is not possible to accommodate the Namajees and, therefore, there is a bona fide requirement, on the part of the plaintiff, to get the suit land and house vacated. On 17.04.1997, a legal notice was issued upon the defendants requiring them to vacate the possession of the land and house, but, on their failure to vacate the land and the house, the suit was filed by the plaintiff with the following prayers:

"(i) A judgment and decree against the defendants for the recovery of Khas possession of the suit land and house by ejecting/evicting the defendants with their dependents and belongings therefrom.

(ii) For recovery of arrear of rents of Rs. 180.00 (1996, 1997 and 1998) and future rent from the year 1999 onwards till realization.

(iii) Cost of the suit.

(iv) Any other relief or reliefs to which the plaintiff is found to be entitled as per law, equity and justice."

5. Written statement was filed by the defendants on 15.07.1999, wherein, apart from the plea of maintainability of the suit, it was also urged that the suit was hit by the provision of Order 1 Rule 8 of the CPC. It was specifically pleaded that Late Dildar Hussain never executed any agreement on 14.04.1959, as alleged, and he never took any land from the plaintiff at any point of time. Payment of rent was also denied. At the same time, a plea was taken that the suit was hit by the provisions of the Assam Non-Agricultural Urban Areas Tenancy Act, 1955. The specific case set out in the written statement was that the suit land was covered by T.B. Patta No. 54 of Doom Dooma Revenue Circle, which measures more or less 14 Lechas, standing in the name of Wahida Khatun, defendant No. 1 and that she has a house consisting of several rooms over that plot of land and she pays holding taxes in respect of the house, being holding No. 64 of "A" Ward, which was earlier in the name of her husband Dildar Hussain.

6. After the written statement was filed by the defendants, the plaintiff filed an application on 16.09.1999, under Order 6 Rule 17 CPC, seeking to insert a prayer that the plaintiff is having right, title and interest over and in respect of the suit land. The amendment was allowed and, therefore, in addition to the prayers, which were earlier in the plaint, the following prayer was also included:

"For declaration that the plaintiff is having right, title and interest over and in respect of the suit land."

7. The learned trial Court, on the basis of the pleadings, framed the following issues for consideration:

- "(i) Whether the suit is maintainable in law and facts?
- (ii) Whether the plaintiff has right to sue?
- (iii) Whether the suit is hit by Order 1 Rule 8 of CPC?
- (iv) Whether the plaintiff has the right to the interest over the suit land and house?
- (v) Whether Dildar Hussain, the predecessor of the defendants was a tenant under the plaintiff in respect of the suit land and house and thereafter the defendants continued the tenancy under the plaintiff?
- (vi) Whether the suit is hit by the provision of Assam Non-Agricultural Urban Areas Tenancy Act?
- (vii) Whether the suit land is covered by T.B. Patta No. 54 and defendant No. 1 is the owner of the same?
- (viii) Whether the defendants are defaulter?
- (ix) Whether the suit premises is bonafidely required by the plaintiff?
- (x) Whether the plaintiff is entitled for a decree?"

8. During trial, the plaintiff examined two witnesses and the defendants examined three witnesses.

9. Considering the materials on record, the learned trial Court decreed the suit deciding the Issue Nos. (i), (iv), (v), (viii), (ix) and (x) in favour of the plaintiff. Issue Nos. (iii), (vi) and (vii) were decided in the negative.

10. An appeal was carried to the Court of the learned District Judge, Tinsukia, which was registered as Title Appeal No. 7/04. The learned Appellate Court allowed the appeal by setting aside the impugned judgment and decree passed by the learned Civil Judge (Junior Division) No. 1, Tinsukia.

11. Mr. K. Agarwal, learned Senior counsel for the appellant has submitted that he would like to draw the attention of the Court basically to substantial question Nos. 1, 2 and 3. He has submitted that the plaintiff had proved the Jamabandi as Ext. 1, Mutation Certificate as Ext. 2 and a letter dated 26.03.1988, issued by the Defendant No. 2, as Ext. 4, in order to establish that the plaintiff has right, title and interest over the said land. The defendant No. 2 in Ext. 4 had acknowledged that on 14.04.1959, by virtue of execution of an agreement, his father, Dildar Hussain, was permitted to occupy a plot of land behind the Masjid, on rent, at the rate of Rs. 10/- per month and that they were paying revenue regularly. Learned Senior counsel has submitted that the learned Lower Appellate Court, on the basis of surmises and conjectures opined that the signature of defendant No. 2, appearing in Ext. 4, did not tally with his signature appearing in Ext. 6, the rent receipt, and that the possibility of fabricating both Ext. 4 and Ext. 6 to create a case of tenancy cannot be ruled out. Mr. Agarwal has also

submitted that assuming that the plaintiff had failed to prove its case by adducing cogent and reliable evidence that the plaintiff has right, title and interest over the said land and house, then also, on the strength of Ext. 4, the plaintiff is entitled to a decree for ejectment. He has submitted that the author of Ext. 4 did not come forward to adduce evidence and so long as Ext. 4 continues to hold the field, the plaintiff being in a better position to have possession, is entitled to a decree for ejectment. He has further submitted that apart from the fact that the author of Ext. 4 did not stand in the witness-box, the evidence of PW1 with regard to Ext. 4 was also not seriously assailed by way of cross-examination.

12. Mr. Agarwal, by relying on the judgments of the Apex Court rendered in the case of Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others, AIR 1968 SC 1165 : (1968) 3 SCR 163 , has submitted that a party ousted by a person, who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title.

13. Mr. Agarwal has also placed reliance in the case of Iswar Bhai C. Patel @ Bachu Bhai Patel Vs. Harihar Behera and Another, AIR 1999 SC 1341 : (1999) 88 CLT 308 : (1999) 2 JT 250 : (1999) 2 SCALE 108 : (1999) 3 SCC 457 : (1999) 1 SCR 1097 : (1999) AIRSCW 1039 : (1999) 3 Supreme 121 to contend that if a party abstains from entering the witness-box it must give rise to an inference adverse against him. On the aspect of drawing adverse inference on account of non-examination of a witness by the defence, whose examination was vital and essential, by placing reliance in the case of Rajappa Hanamantha Ranoji Vs. Sri Mahadev Channabasappa and Others, (2000) 6 JT 597 : (2000) 4 SCALE 692 : (2000) 6 SCC 120 : (2000) AIRSCW 4398 : (2000) AIRSCW 2165 : (2000) 7 Supreme 728 : (2000) 4 Supreme 591 , Mr. Agarwal submits that, in the present case, the lower Appellate Court ought to have drawn adverse presumption against the defendants for not examining defendant No. 2, author of Ext. 4 letter.

14. Mr. Agarwal has also emphasized that Ext. "ka", "kha", "ga", "gha" and "unga" exhibited by the defendants were all subsequent to the notice, Ext. 7, issued by the plaintiff asking them to vacate the suit land and house and, therefore, no reliance can be placed on them.

15. Mr. T.J. Mahanta, learned Senior counsel, appearing for the defendants has submitted that the plaintiff has miserably failed to prove its right, title and interest over the suit land and house. By placing reliance on the judgments of the Apex Court in the cases of Smt. Sawarni Vs. Smt. Inder Kaur and Others, (1996) 6 AD 728 : AIR 1996 SC 2823 : (1996) 7 JT 580 : (1996) 6 SCALE 333 : (1996) 6 SCC 223 : (1996) 5 SCR 165 Supp and Balwant Singh and another etc. Vs. Daulat Singh (dead) by L.Rs. and others, AIR 1997 SC 2719 : (1997) 5 JT 703 : (1997) 4 SCALE 388 : (1997) 7 SCC 137 : (1997) 2 UJ 96 : (1997) AIRSCW 2690 : (1997) 6 Supreme 385 , he submits that mutation of a property in the revenue record does not create or extinguish title and that it only enables

the person in whose favour mutation is ordered to pay the land revenue. It is submitted by Mr. Mahanta that the only document introduced by the plaintiff, in the instant case, to establish right, title and interest is Ext. 1, which is Jamabandi of revenue record. It is submitted by him that if the plaintiff had known that the defendants were in occupation on the basis of the document executed on 14.04.1959, then there should have been no occasion for the plaintiff to issue letter dated 08.03.1998 (Ext. 3) whereby the plaintiff had requested the defendant No. 2 to contact him as the defendants were possessing the land without execution of any agreement. It is further submitted by Mr. Mahanta that though the entire case, as projected in the plaint, was based on written agreement dated 14.04.1959, the plaintiff did not exhibit the so-called document dated 14.04.1959. It is in the aforesaid context that the learned Lower Appellate Court, by comparing the signatures, had come to the conclusion that the possibility of Ext. 4 being fabricated for the purpose of the case could not be ruled out and, in doing so, Mr. Mahanta submits, the learned Lower Appellate Court committed no illegality. It is also submitted by Mr. Mahanta that there was no whisper in the plaint with regard to the sending of the letters dated 08.03.1988 (Ext. 3) and 26.03.1988 (Ext. 4). He has pointed out the evidence of PW1 to show that PW1, who was the plaintiff, had himself admitted that there was no written agreement for rent. If that be so, the entire edifice of the plaint falls flat, he submits. It is also on record that the house stands in the name of the defendant No. 1, which is also admitted by the plaintiff. Same was also reiterated by PW2. He submits that when the defendants had denied depositing any rent as well as issuing Ext. 4, it was incumbent on the part of the plaintiff to establish the authenticity of Exts. 4 and 6, as it is the burden of the plaintiff to prove the case.

16. I have heard the submissions of the learned counsel for the parties and have considered the materials on record.

17. It is an accepted proposition of law that entries in the revenue records do not confer title, as has been held by Apex Court in the cases referred to above. The said revenue record, even otherwise, do not indicate that the land was allotted to the Masjid Committee and the only reference made in Ext. 1 is that the land was reserved for Masjid Committee. The learned Lower Appellate Court also noted that Ext. 2, which was issued by the Circle Officer, Doom Dooma on 19.09.1996, also fortifies the position that the land in question was "Sarkari" land. Therefore, there is no acceptable evidence on record to hold that the plaintiff has right, title and interest in respect of the said property in question. The learned trial Court, on the basis of Ext. 1, held that as the land was kept reserved for the Masjid, the plaintiff has right, title and interest in absence of any evidence produced by the defendants with regard to the contention advanced by them that the land is government land. The learned trial Court is apparently wrong as the land had not been allotted to the Masjid, though reserved, and that itself demonstrates that the land in question was government land.

18. A perusal of the pleadings would go to show that the entire structure of the plaint was founded on the assertion that there was a written agreement entered into by the plaintiff and the predecessor-in-interest of the defendants on 14.04.1959 on the basis of which the defendants had entered into possession of the land. This stand was, later on, abandoned. When confronted, PW1 in his cross-examination, had stated that there was no written agreement. There was no mention in the plaint with regard to issuance of Ext. 3 letter dated 08.03.1988, Ext. 4 letter dated 26.03.1988 and Ext. 6, rent receipt. This assumes significance in the context of the case when the plaintiff shifted its stand and sought to establish landlord-tenant relationship solely based on Ext. 4 and Ext. 6, when Ext. 4 and 6 were disputed by the defendants during cross-examination. Having regard to the fact that there was no foundation laid in the plaint, a question arises as to how far that evidence could have been laid in absence of any pleadings? In *Siddik Mahomed Shah vs. Mt. Saran and Others* AIR 1930 57 (Privy Council) , the Privy Council had laid down that no amount of evidence can be looked into on a plea not taken.

19. Even otherwise, when Ext. 4 was disputed by the defendants at the time of examination of PW1, it was the plaintiff who should have, if at all, requested the Court for sending the document to handwriting expert for examination, and not the defendants. But the plaintiff did not do so. Ext. 5, rent receipt, contains no signature. So far as Ext. 6, rent receipt, is concerned, rent was allegedly received from Mustaq Ahmed, i.e., defendant No. 2. The learned lower Appellate Court may not be correct in holding that the signature appearing in counterfoil of Ext. 6 is distinctly dissimilar to the signature of Mustaq Ahmed appearing in Ext. 4, as it was not Mustaq Ahmed who, according to PW1, signed on the counterfoil but Sheikh Faqrul Ahmed, another defendant. Ext. 6 is the only rent-receipt where there is any signature and, in the plaint, there was no indication about the payment of such rent by Sheikh Faqrul Ahmed. Ext. 6 was also disputed and the same reasoning, as in Ext. 4, holds good for Ext. 6 as well. Only on the basis of Ext. 4 and Ext. 6, veracity of which is open to doubt, it will be hazardous to record a finding that there was landlord-tenant relationship between the plaintiff and the defendants, when the learned Appellate Court had taken the view that there was no other acceptable evidence on record to prove that there was landlord-tenant relationship between the plaintiff and the defendants.

20. Reliance placed by Mr. Agarwal in *Nair Service* (supra) is not applicable in the facts and circumstances of the case as the present case is not founded on ouster but a case where eviction is sought on the basis of tenancy. The other cases cited by him also do not attract the fact situation in the present case.

21. To attract substantial question No. 1, it will be necessary to first record a positive finding with regard to landlord-tenant relationship between the plaintiff and the defendants. The plaintiff has miserably failed to do so and, therefore, substantial question No. 1, which pre-supposed clear admission by the defendants with regard to landlord-tenant relationship, is answered in the

negative. For the reasons assigned earlier, in the facts and circumstances of the case, drawing of adverse presumption under Section 114(g) of the Indian Evidence Act, 1872, also does not arise against the defendants. There is also no error in appreciation of Ext. 4 by the learned first Appellate Court.

22. On a totality of the facts and circumstances of the case and the evidence on record, I am of the considered opinion that no occasion arises for interference with the judgment and decree rendered by the first Appellate Court. Taking that view, the appeal is dismissed. No cost.

23. Send back the LCR.