

(2013) 11 GAU CK 0050

In the Gauhati High Court

Case No : Regular Second Appeal No. 95 of 2003

Shri Jitendra Kumar Das alias Dipal Das

APPELLANT

Vs

Karimganj Municipal Authority, The Chairman, Karimganj
Municipal Board, The Assam State Electricity Board and The
Sub-Divisional Officer

RESPONDENT

Date of Decision : 21-11-2013

Acts Referred:

Assam Municipal Act, 1956 — Section 326

Citation : (2013) 11 GAU CK 0050

Hon'ble Judges : Brojendra Prasad Katakey, J

Bench : Single Bench

Advocate : B.R. Dey, Mr. J. Roy and Mr. D. Choudhury, for the Appellant; M.H. Rajbarbhuiyan, H.K. Sarma, R. Goswami and Mr. J. Das, for the Respondent

Final Decision : Dismissed

Judgement

Brojendra Prasad Katakey, J.—This appeal by the plaintiff is directed against the judgment and decree dated 10.04.2003 passed by the learned Addl. District Judge (Adhoc), Karimganj, in Title Appeal No. 51/2000, dismissing the appeal of the plaintiff by affirming the judgment and decree dated 27.09.2000 passed by the learned Civil Judge (Jr. Division), Karimganj in Title Suit No. 258/1991, whereby and whereunder the suit of the plaintiff has been dismissed. The appellant as plaintiff instituted the said suit praying for declaration of landholder's right over the suit land described in Schedule-II to the plaint and for recovery of khas possession by removing the electric post erected on the land, contending inter alia that in a former suit, being Title Suit No. 36/1989, filed by the appellant was decreed declaring the landholder's right as well as decree confirming the possession was passed by the Civil Court on 30.05.1990, in respect of Schedule-IV land in the said suit, measuring 1 powa 5 pans and 14 gandas. It has further been pleaded that on the suit land, which was the Schedule-IV land in title Suit No. 36/1989, an electric post was erected, taking advantage of the absence of the plaintiff from Karimganj and though the

Karimganj Municipal Authority assured the plaintiff to remove such electric post, they did not do so, for which the suit has to be instituted. In the said suit the Assam State Electricity Board and its officials were also made respondents, who, however, did not contest the suit.

2. The defendant Nos. 1 and 2, namely, Karimganj Municipal Board and its Executive Officer contested the suit by filing a joint written statement, denying the claim of the plaintiff and contending inter alia that the suit is bad for want of notice u/s 326 of Assam Municipal Act (in short the Act). It has also been contended that the electric post was not erected over the Schedule-IV land in Title Suit No. 36/1989.

3. Based on the pleadings of the parties, following issues were framed by the Trial Court for determination:-\\

(i) Whether there is cause of action for the suit?

(ii) Whether the plaintiff has right, title and interest and possession over the suit land?

(iii) Whether the suit is maintainable?

(iv) Whether the plaintiff is entitled to a decree as prayed for?

(v) To what relief is the plaintiff entitled?

4. The Trial Court upon appreciation of the evidence on record, dismissed the suit of the plaintiff on the ground that the material particulars are not pleaded. The plaintiff being aggrieved preferred the aforesaid appeal, which has been dismissed on two other grounds, namely, (i) the land described in Schedule-IV of Title Suit No. 36/1989 is not the land described in Schedule-I to the plaint of the present suit and (ii) the suit is bad for want of notice u/s 326 of the Act.

5. This appeal was admitted for hearing vide order dated 20.06.2003 on the following substantial questions of law:-

Whether the learned court below while dismissing the suit of the plaintiff-appellant left out of consideration as material evidence on record i.e. Ext.-9 (Survey Commission Report) and Ext.-11 (Notice dated 24.10.1991)?

6. I have heard Mr. B.R. Dey, learned Sr. counsel for the appellant/plaintiff; Mr. M.H. Rajbarbhuiyan, the learned counsel appearing for the respondent Nos. 1 and 2 and Mr. H.K. Sarma, the learned counsel appearing for the respondent Nos. 3 and 4.

7. Mr. Dey, the learned Sr. counsel referring to the notice dated 24.10.1991 (Ext.-11) issued by the plaintiff to the Karimganj Municipal Authority has submitted that since the plaintiff could prove issuance of notice as required u/s 326 of the Act, the appellate Court ought not to have dismissed the appeal preferred by the present appellant on the ground that the suit is bad for want of notice u/s 326 of the said Act. It has also been submitted that it is evident from

the Survey Commission's report (Ext.-9) that the electric post, as described in Schedule-II to the plaint, erected within Schedule-I land belonging to the appellant and in respect of which land the appellant's landholder's right has been decreed in Title Suit No. 36/1989 vide judgment dated 30.05.1990 and hence the first appellate Court ought not to have held that the Schedule-I land of the present suit is not the Schedule-IV land in Title Suit No. 36/1989.

8. Mr. Rajbarbhuiyan, the learned counsel appearing for the respondent Nos. 1 and 2, on the other hand, supporting the judgments and decrees passed by the Courts below has submitted that it is evident from Ext.-C(8) i.e. the sketch map prepared by the Survey Commissioner that the electric post was erected over Schedule-I land of Title Suit No. 36/1989, in respect of which no decree has been passed in favour of the present appellant, though decree in respect of the land covered by Schedule-IV of that suit was passed. The learned counsel, however, has fairly submitted that the finding recorded by the first appellate Court that no notice u/s 326 of the Act was issued is not the correct finding of fact, in view of the notice dated 24.10.1991 (Ext.-11).

9. Mr. Sarma, the learned counsel appearing for the respondent Nos. 3 and 4 has submitted that since the plaintiff has not claimed any relief against the respondent Nos. 3 and 4 in the suit, no written statement was filed by the defendant Nos. 3 and 4. The learned counsel, however, has submitted that since the plaintiff has failed to prove that Schedule-I land in the present suit was the Schedule-IV land in Title Suit No. 36/1989, the first appellate Court has rightly dismissed the appeal by affirming the decree pass by the Trial Court.

10. I have considered the submissions advanced by the learned counsel for the parties and also perused the judgments and decrees passed by the Courts below including Exts:- C(8), 9 and 11.

11. It appears from the record that the plaintiff before institution of the suit issued notice dated 24.10.1991 (Ext.-11) u/s 326 of the Act to the respondent Nos. 1 and 2. Issuance of such notice has been proved by the plaintiff by adducing cogent evidence. The first appellate Court, therefore, ought not to have held that the suit of the plaintiff is bad for want of notice u/s 326 of the Act, which finding is perverse, being contrary to the evidence on record and having been recorded without considering the notice dated 24.10.1991 (Ext.-11).

12. As noticed above, the first appellate Court dismissed the appeal and also the suit on another ground, namely, that the plaintiff could not prove that Schedule-I land of the present suit was the Schedule-IV land in Title Suit No. 36/1989. To ascertain as to whether Schedule-I land of the present suit and Schedule-IV land of the former suit is the same, the Survey Commission was appointed who submitted a report (Ext.-9) together with the sketch map [Ext.-C(8)], wherefrom it appears that Schedule-IV land in Title Suit No. 36/1989 is different from Schedule-I land of the present suit and the electric post was erected in Schedule-I land of Title Suit No. 36/1989, in respect of which land no decree was passed.

13. In view of the above, I do not find any merit in the appeal and hence the appeal stands dismissed. The parties are directed to bear their own cost throughout. The Registry is directed to send down the records forthwith.