

(2013) 05 GAU CK 0040
In the Gauhati High Court
Case No : WP (C) No. 169 of 2006

Sri Sushil Sarma

APPELLANT

Vs

Sri Ram Narayan Sarma, Sri Nara Narayan Sarma and Sri
Rabin Chandra Basumatary

RESPONDENT

Date of Decision : 17-05-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 7 Rule 10, Order 7 Rule 10A, 114
Constitution of India, 1950 — Article 226, 227
Limitation Act, 1963 — Section 3

Citation : (2013) 05 GAU CK 0040

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Advocate : N.N. Karmakar and Ms. B. Swargiary, for the Appellant;

Final Decision : Disposed Off

Judgement

Ujjal Bhuyan, J.—Heard Mr. N.N. Karmakar, learned counsel for the petitioner. None appears for the respondents. This is an application under Article 226 of the Constitution of India challenging the legality and validity of order dated 12.12.2005 passed by the learned Civil Judge (Senior Division) No. 2, Guwahati rejecting the petition filed by the petitioner for dismissal of the suit.

2. A brief narration of the facts may be necessary.

3. A suit was filed by respondent No. 1 as plaintiff, wherein the petitioner was the defendant, in the Court of Civil Judge (Junior Division) No. 1, Guwahati for declaration of right, title, interest and recovery of possession of the suit land by evicting the defendant (petitioner) and for permanent injunction. The suit was registered as Title Suit No. 182/2003. Defendant entered appearance on receipt of notice and filed written statement. Stand was taken that the suit land was purchased by the defendant by a sale deed.

4. Plaintiff i.e. respondent No. 1 thereafter filed an application for amendment of the plaint. It was contended that after filing of written statement by the defendant, plaintiff came to know that the proforma defendant had executed a registered sale deed in favour of the defendant (petitioner). The said sale deed was, therefore, also required to be challenged. The application for amendment was objected to by the defendant on the ground that it would lead to enhancement of the valuation of the suit and the Court would not have the pecuniary jurisdiction to try the suit. Learned Civil Judge (Junior Division) No. 1, Guwahati passed an order dated 31.03.2004 returning the plaint to the plaintiff to be filed before the proper Court. It was held that a perusal of the sale deed indicated that the land had been valued at Rs. 75,000/- and the plaintiffs had sought for cancellation of the sale deed. In such a case, the plaintiff would have to pay ad valorem Court fee of Rs. 75,000/- which would be beyond the pecuniary jurisdiction of the Court.

5. Plaintiff filed an application under Order 47 Rule 1 CPC read with Section 114 thereof for review of the order dated 31.03.2004 stating that the order for return of plaint was erroneous on the face of the record. On an application for amendment, Court had returned the plaint. Court had the jurisdiction either to allow the petition for amendment of the plaint or to reject the same, but not to return the plaint. Objection was filed by the petitioner to the aforesaid application for review. In paragraph 4 of the objection, petitioner stated that the Court was correct in passing the order returning the plaint with a direction to file the same in proper Court.

6. Learned Civil Judge (Junior Division) No. 1, Guwahati thereafter passed an order dated 12.07.2004 rejecting the said petition by holding that the order sought to be reviewed was an appealable order.

7. Thereafter, respondent No. 1 filed the plaint in the Court of Civil Judge (Senior Division) No. 2, Guwahati with enhanced suit value on the same subject matter. The suit was registered as Title Suit No. 353/2004.

8. Petitioner submitted an application u/s 3 of the Limitation Act for dismissal of the suit which was registered as Misc. Case No. 223/2005 and objection was filed by the plaintiff to the said petition.

9. Learned Civil Judge, (Senior Division) No. 2, Guwahati thereafter passed an order dated 12.12.2005 rejecting the said petition.

10. Aggrieved, petitioner has filed the present petition challenging the legality and validity of the said order.

11. Before proceeding further, it may also be relevant to note that after rejection of the review petition, the plaintiff again filed a petition in the Court of Civil Judge (Junior Division) No. 1, Guwahati for passing necessary order as per provision of Order VII Rule 10 CPC. Learned Civil Judge (Junior Division) No. 1 passed an order dated 04.08.2004 allowing the said petition by directing the

parties to appear before the Court of Civil Judge (Senior Division) No. 1, Guwahati on 11.08.2004. Again, a notice dated 20.08.2004 was issued to the learned advocates for the defendants by the learned Civil Judge (Junior Division) No. 1 stating that plaintiff would file the plaint of Title Suit No. 182/2003 in the Court of the learned Civil Judge (Senior Division) No. 1, Guwahati and 04.09.2004 was fixed for appearance of the defendant.

12. Mr. Karmakar, learned counsel for the petitioner submits that the procedure adopted by the learned Court below is unauthorized in law. He submits that learned Civil Judge (Junior Division) did not follow the procedure prescribed under Order VII Rule 10 and 10A of the CPC while returning the plaint. He further submits that the plaintiff was aware of the position and, therefore, he sought for review of the order returning the plaint. After rejection of the review, he could not have obtained another order from the same Court under Order VII Rule 10 of the Civil Procedure Code. The said Court without adhering to the procedure prescribed in the aforesaid two provisions, passed the order dated 04.08.2004. This aspect was not gone into by the learned Civil Judge (Senior Division) No. 2 when the order dated 12.12.2005 was passed. The issue before the Court was not whether the suit was barred by limitation but whether without following the procedure prescribed, the plaint could have been re-filed in a higher Court. Referring to the documents placed on record, learned counsel for the petitioner submits that after the order dated 31.03.2004, the plaintiff filed the same plaint in a different/higher Court by only changing the valuation of the suit. No challenge was made to the sale deed for which amendment was sought for, which resulted in the return of the plaint.

13. Despite service of notice, respondents have not appeared. This Court by order dated 25.01.2006 had admitted the writ petition and had requisitioned the case records.

14. This petition though filed under Article 226 of the Constitution, should have been filed under Article 227. Having regard to the long pendency and the subject matter of the case, the Court is of the view that the petitioner should not be non-suited on this Court. Accordingly, this petition is being treated as a petition under Article 227 of the Constitution of India and decided accordingly.

15. Provision relating to return of plaint is contained in Order VII Rules 10 and 10A of the Civil Procedure Code. Rule 10 is subject to the provisions of Rule 10A. It provides that the Court may at any stage of the suit return the plaint to be presented to the Court in which the suit should have been instituted. On returning the plaint, the Judge should endorse thereon the date of its presentation and return, the name of the party presenting it and a brief statement for returning the plaint.

16. Before proceeding to Order VII Rule 10A, it may be relevant to note, as already noticed earlier, that the defendant had appeared in the suit and filed written statement. On the basis of the written statement, the application for

amendment was filed on the ground that the defendant claimed possession over the suit land on the strength of a sale deed. The learned Court below took the view that if the amendment was allowed, it would lead to increase in the valuation of the suit and, therefore, the Court would not have the pecuniary jurisdiction to try the suit. Accordingly, the plaint was returned. But neither the amendment was allowed nor rejected.

17. Rule 10A provides that in a suit where the defendant had appeared and the Court is of the opinion that the plaint should be returned, it should intimate its decision to the plaintiff before doing so. When an intimation is given, the plaintiff may make an application to the Court, specifying the Court in which he proposes to present the plaint after its return and also for fixing a date of appearance. If such an application is made, the Court shall before returning the plaint and notwithstanding the fact that the order for returning of plaint was made because of the ground that it had no jurisdiction to try the suit, fix the date of appearance of the parties in the Court in which the plaint is proposed to be presented and give notice to the plaintiff and the defendant of the date for appearance. The said procedure is necessary to obviate the requirement of serving summon on the defendant afresh by the Court in which the plaint is presented after return.

18. A perusal of the orders dated 31.03.2004 and 04.08.2004 would indicate that the said procedure was not followed while returning the plaint. On the contrary, learned counsel for the petitioner has pointed out that without making any change in the plaint by incorporating the challenge to the sale deed, plaintiff simply filed it before another Court by just changing the valuation of the suit.

19. This Court finds that the learned Civil Judge (Senior Division) No. 2 while passing the impugned order dated 12.12.2005 did not consider the aforesaid aspect of the matter. The issue was not about the discretion of the plaintiff to file an appeal or suit or whether the suit was filed within time. Question for consideration was whether without following the procedure prescribed in Order VII Rules 10 and 10A, the plaint could have been refiled. Prima facie, there is substance in the submission of the petitioner, which appears to have been overlooked by the learned Civil Judge (Senior Division) No. 2, Guwahati.

20. Beyond this, the Court would not like to make any comment on merit in view of the order that is proposed to be passed.

21. Thus, considering the above, the order dated 12.12.2005 is hereby set aside and quashed.

22. Matter is remanded back to the learned Civil Judge (Senior Division) No. 2, Guwahati to take a fresh decision on the petition filed by the petitioner which was registered as Misc. Case No. 223/2005 in Title Suit No. 353/2004.

23. Petitioner shall appear before the learned Court below on 29.07.2013.

24. Office to send down the case record immediately. Petition is disposed of.