GAHC010162032008

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/84/2008

ON THE DEATH OF HEM CHANDRA SHARMA(ANIL) HIS LEGAL HEIR
SMTI NILU CHOUDHURY
W/O LT. HEM CHANDRA SARMAH(ANIL), RESPONDENT OF KUNDERBARI,
MOUZA-HALESWAR, DIST. SONITPUR, ASSAM.

VERSUS

AUNIATI SATRA
REP. BY PITAMBAR GOSWAMI, PO. AUNIATI, MAJULI, DIST. JORHAT,
ASSAM.

2:MANUL SARMAH

3:RATUL SARMAH

4:DEBEN SARMAH

5:NIPUL SARMAH
ALL SONS OF LATE DEVADHAR SARMAH
DOKARGAON
KUNDERBARI
MOUZA-HALESWAR
DIST. SONITPUR
ASSA

Advocate for the Petitioner : MR.S K GOSWAMI

Advocate for the Respondent : MR.S SAHU

B E F O R E

HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY

Advocates for the appellant : Mr. SK Goswami
Mr. PK Sharma, Advocates

Advocates for the respondent : Ms. B Choudhury
Mr. S Sahu
Ms. P Borah
Ms. J Das
Ms. D Chowdhury, Advocates

Date of hearing & Judgment : **20.04.2023**

JUDGMENT & ORDER (ORAL)

1. Heard Mr. SK Goswami, learned counsel for the appellant. Also heard Mr. S Sahu, learned counsel for the respondent.

2. The present second appeal under Section 100 of the Code of Civil Procedure, 1908 is directed against the judgment and order dated 30.08.2007 passed in Title Appeal No.07/2006 by the learned Civil Judge (Sr. Div) Sonitpur, Tezpur affirming the judgment and decree of dismissal dated 29.05.06 passed in Title Suit No.20/1997.

3. The present appeal was admitted by this Court in its order dated 16.07.2008

on the following substantial questions of law:

1. Whether the learned Court below erred in law in construing the Sub-Section (17) of Section 3 of the Assam (Temporary Settled Areas) Tenancy Act, 1971 vis-à-vis the explanation appended to the said Section?

2. Whether on the basis of evidence on records, the learned Court below ought to have decided the right of the appellant on the basis of explanation to the Sub-section (17) of Section 3 of the Assam (Temporary Settled Areas) Tenancy Act, 1971?

4. During the course of hearing another substantial question of law was framed to the following effect and the learned counsel for the parties also advanced argument on that substantial question of law:

3. Whether the learned courts below committed perversity by ignoring the provision of Order VII Rule 5 of the CPC, 1908 and insisted upon proof of tenancy even after when the defendant no.1 landlord did not specifically deny such claim of tenancy in its written statement?

5. Before determining whether any substantial question of law as framed are involved, let this Court first record the brief history of the present lis:

6. <u>Plaintiff's Case</u>:

(I) The plaintiff filed the Title Suit No.20/1997 for declaration and permanent injunction. The declaration sought for was to the effect that the father of the plaintiff be declared as a tenant under defendant No.1 in respect of the scheduled land and that

the plaintiff is also a tenant under the defendant No.1 in respect of the suit land by inheritance from his deceased father as well as by virtue of the service rendered by the plaintiff to the temple under defendant No.1.

(II) According to the plaintiff, his forefathers i.e. his great grandfather, grandfather and father were appointed as pujaris of 'Basudev Than' by the Satradhikar of the defendant No.1Satra.

(III) It is the further case of the plaintiff that the Satradhikar gave the land described in the schedule to the predecessor-in-interest of the plaintiff and accordingly, the predecessor-in-interest of the plaintiff i.e., the great grandfather and father were in possession of the said land as Privileged Rayats under the defendant No.1 as defined under Section 4(1)(a) of the Assam (Temporarily Settled District) Tenancy Act, 1935 (in short, the Act of 1935), and thereafter as occupancy tenants under Assam (Temporary Settled Areas) Tenancy Act, 1971 (in short the Act , 1971).

(IV) It is the further case of the plaintiff that the plaintiff besides inheriting the tenancy right of his father was also holding the said land as tenant under defendant No.1 being appointed as Pujari of the temple in question after the death of his father on 24.09.1985.

(V) It is also pleaded that since the date of appointment as Pujari, the plaintiff has been regularly rendering his service as a Pujari of the temple and has been regularly performing the Puja, for which he is to be treated as tenant under explanation to

Section 17(3) of the Act' 1971.

(VI) It is the further case of the petitioner that the defendant No.2 tried to dispossess and encroach upon the suit land on 07.05.1997. Though, the defendant No.2 was resisted with the help of police, however, the defendant No.2 had been threatening the plaintiff to dispossess him from the schedule land and accordingly, the relief of permanent injunction was sought.

7. <u>Case of defendant No. 1</u>:

The defendant No.1 is Auniati Satra, under whom the Temple in question is managed. Satra denied the appointment of the father of the plaintiff as Pujari by the Satradhikar, for the reason that no record is traceable relating to such appointment. It also took a stand that the plaintiff has not given any document to show that his father was appointed by defendant No.1 as Pujari. It was also the stand of the defendant No.1 that no record of appointment has been produced by the plaintiff regarding his appointment as Pujari. A specific plea was taken to the effect that mere performance of puja in the temple cannot entitle a person to be called "duly appointed pujari". It was also the stand of the defendant No.1 that the defendant No.2 was appointed as a Pujari of the temple by issuing letter.

8. <u>Case of Defendant Nos. 2 to 5</u>:

(I) The defendant Nos.2 to 5 by filing a joint written statement specifically took a stand that plaintiff is neither the Pujari of the temple nor he is a tenant of the said Satra. It was also denied

that the defendant No.1 had given the suit land to the predecessor-in-interest of the plaintiff in consideration of rendering services to the temple as a Pujari.

(II) A specific stand was taken that the predecessor-in-interest of the plaintiff i.e. the great grandfather, grandfather and father of the plaintiff were not privileged rayats under the Act of 1935 or the Act, 1971. It was also their stand that defendant No.1 never appointed the plaintiff as Pujari of the temple.

(III) It was pleaded that defendant No.2 was appointed as Pujari of the temple by the Satradhikar of defendant No.1 Satra and since then, the defendant No.2 has been regularly performing his duties as Pujari.

(IV) Regarding the attempt of dispossession, it was the specific stand that there is no cause for apprehension of eviction of the plaintiff in the hands of the defendant No.2 *inasmuch as,* defendant No.2 had never attempted any such eviction.

(V) Both the families of the plaintiff and the defendants are jointly cultivating their own PP land after the death of their respective fathers, and they are regularly cultivating the suit land through other persons except the land under dag No.530/643 and 531/820 and getting crops divided between the families till the last year of the filing of the suit.

9. **Issues framed by the Trial Court:**

The learned Court below framed as many as six issues which are as follows:

(I). Whether the suit is maintainable under Section 34 of Specific Relief Act?

(II). Whether the suit is barred by limitation?

(III). Whether there is a cause of action for the suit?

(IV). Whether the plaintiff is a tenant under defendant No.1?

(V). Whether the plaintiff is entitled to a decree for permanent injunction?

(VI). To what relief or reliefs if any the plaintiff is entitled to?

The primary issue was the issue No.4 i.e. Whether the plaintiff is a tenant under defendant No.1.

10. <u>The evidence</u>:

(I) The plaintiff examined five witnesses and exhibited certain documents. The defendant Nos. 2 to 5 examined six witnesses and exhibited certain documents and the defendant No.1 also examined one witness i.e. the DW-1 and had not exhibited any document.

11. <u>The findings of the learned Trial Court</u>:

(I) Through the exhibits 2, 4, 6, 8, 9 and 10, which are correspondence of the Satradhikar of defendant No.1 Satra, it is established that the Satradhikar had addressed those letters to the father of the plaintiff, namely, Kirti Ch. Sarmah as Pujari of

the temple and therefore, it is proved that the father of the plaintiff was a Pujari of the temple under the defendant No.1 Satra.

(II) There is no evidence on record to show that the suit land was given to the father of the plaintiff for rendering services as Pujari of the temple.

(III) Contrary to that, it has been established that Pujari of the temple is only a care-taker of the property of the Satra.

(IV) From the evidence, it is clear that the father of the plaintiff was not a privileged rayat under the defendant No.1 as defined under Section 4(2)(a) of the Act of 1935.

(V) The plaintiff had failed to prove his father's tenancy right over the suit land by adducing evidence, therefore, the plaintiff cannot claim any right either as a privileged rayat or a tenant under the Act of 1971.

12. <u>Finding of the First Appellate Court</u>:

The learned appellant court after hearing the parties and on perusal of the materials available on record also affirmed such finding of facts as well as of law by the learned trial court below and the appellant Court came to the following findings:

(I) The plaintiff has failed to adduce documents showing that his father has been holding the suit land and thus was a privileged rayat under the defendant No.1.

(II) The exhibit 4, exhibited by the plaintiff, a rent paying receipt to

the defendant No.1, cannot be relied upon for the reason that the said rent paying receipt discloses no dag number or patta number of the land and also do not disclose as to against which land the rent has been paid.

(III) The exhibit 25 series of documents are the revenue paying receipts to the Government. Although such revenue was paid by the father of the plaintiff, however, the exhibit discloses that such revenue was paid on behalf of the defendant No.1 Satra.

(IV) Accordingly, the Court came to the conclusion that the Pujari being care-taker of the temple paid land revenue to the Government on behalf of the defendant No.1 i.e. the Auniaty Satra and thus upheld the decision of the learned trial Court.

(V) The other argument that as the defendant No.1 Satra has not specifically denied the relationship of landlord and tenant between the defendant No.1 and predecessor-in-interest of the plaintiff in its written statement, therefore, in term of Order VIII Rule 5 such statements are required to be treated as admitted one and no further proof was required regarding tenancy, was also rejected by the learned appellate Court and held that in terms of proviso to Order VIII Rule 5 (1)the learned trial court rightly insistedupon proof of tenancy right by the plaintiff inasmuch as the plaintiff is to proof such right he has claimed.

13. <u>Submission on behalf of the appellant/plaintiff</u>:

Mr. SK Goswami, learned counsel for the appellant argues the following:

(I) That the plaintiff has specifically pleaded that the

predecessor-in-interest of the plaintiff were privileged Rayat under the provisions of the Act of 1935 and the plaintiff and his father continued to remain as tenants in terms of the Act,1971 under the Auniaty Satra, however, such pleadings has not been specifically denied by the defendant No.1 landlord and therefore, the Courts would not have insisted upon further proof and would not have dismissed the suit holding that no evidence has been laid. In support of such contention, Mr. Goswami, learned counsel for the appellant relies upon the judgment of the Hon'ble Apex Court in the case of ***Badat and Co. Vs. East India Trading Co*** reported in ***AIR 1964 SC 538***.

(II) The Explanation to Sub-Section 17 of Section 3 clearly provides that the person who holds land on condition of service to a temple or religious institution shall be deemed to be a tenant of the Manager of such temple or the tenant of the religious institution. That being so, the learned Court below has erred in law in misconstruing such provision and held that the plaintiff has failed to prove his tenancy right *inasmuch as*, the fact that the father of the plaintiff offered services to the temple as Pujari has been established and the specific plea of the relationship of landlord and tenant has not been denied by the defendant No.1.Therefore, it has been established that the plaintiff is a tenant in terms of the explanation so given to the aforesaid provision of law. Accordingly, on the basis of the aforesaid evidence on record, i.e., the proved fact that the father of the plaintiff was a Pujari rendering services to the temple and non-

denial of the relation of landlord and tenant between defendant No. 1 and the predecessor-in-interest of the plaintiff, the Courts ought to have decreed the suit by declaring the plaintiff as tenant.

14. Argument of the learned counsel for the respondents/ defendants:

(I) Per contra, Mr. S Sahu, learned counsel for the respondents submits that to claim a right as occupancy tenant under the provisions of the Act, 1971, certain particular facts are required to be pleaded and proved, such as, that the person who claims to be a tenant has been cultivating under the landlord and paying rent. However, no iota of evidence has been laid by the plaintiff to show that the predecessor-in-interest of the plaintiff was a tenant. No rent paying receipts in terms of the Act of 1971 were also established. Therefore, the learned Courts below has rightly held that in the absence of proof, the plaintiff cannot be declared to be an occupancy tenant.

(II) Coming to the point of admission, the learned counsel for the respondents submits that even if there is no specific denial by the defendant No.1, the Proviso to Order VIII Sub rule (1) of Rule 5 clearly shows that a discretionary power has been conferred upon the Court to insist on additional evidence even in case of a specific admission. Therefore, such insistence and decision which is a finding of facts cannot be reversed at the stage of second appeal.

(III) Relying on the judgment of this Court in the case of ***Watir Ali & Ors. Vs. Hayatun Nessa (Mustt.) & Ors.,*** reported in ***2017 (1) GLT 429***, Mr. Sahu learned counsel for the respondents contends that the records of right prepared under the tenancy Act ought to have been brought on record and ought to have been proved by the plaintiff. In absence of such evidence and only on the basis of a purported non-denial of tenancy right, cannot be the basis of creating a title by virtue of such tenancy upon the plaintiff. The learned counsel also places reliance upon the judgment of the Hon'ble Apex Court in ***Avtar Singh and Others Vs. Gurdial Singh and Others*** reported in ***(2006) 12 SCC 552***.

15. <u>Determination made by this Court</u>:

(I) This court has given anxious consideration to the arguments advanced by the learned counsel for the parties. And perused the materials on record.

(II) The first two substantial questions of law formulated involves interpretation and determination of the tenancy right of the plaintiff in terms of the Explanation to Sub-Section 17 to Section 3 of the Act of 1971.

(III) The Tenancy Act, 1971 creates two classes of tenants i.e. occupancy tenant and non-occupancy tenant. Occupancy tenant has been defined as a tenancy held immediately under a proprietor, land holder, or settlement holder other than land holder, and having a right of occupancy in the lands held by him.

(IV) Sub-Section 2 of Section 4 provides that from the commencement of the Act of 1971, those persons who were recorded as Privileged Tenant under the provisions of the Act of 1935 be recorded as an occupancy tenant under the Act of 1971 subject to the condition that the said tenant continue to pay the rent at the same rate as before the commencement of the Act of 1971.

(V) A privileged rayat as defined under the Act of 1935 is a person who held land for continuous period of not less than 12 years on payment of rent, never exceeding the revenue rate or at half revenue rate in addition to service to be rendered or on payment of 'Bhog'.

(VI) Chapter X of the Act of 1971 provides for preparation and maintenance of record of rights of tenants. The said chapter empowers the State Government to order for preparation of record of rights of tenancy through the Settlement Officers. Such record of rights is to be prepared by following the procedure as laid down under the Rules framed under the aforesaid Act of 1971.

(VII) It is further mandated that the record of rights is required to be created by showing the name of the tenant, the class to which the tenant belongs, the area and position of the land held by the tenant, the name of each tenant's landlord, the rent payable, the mode of payment of rent etc.

(VIII) After collection and preparation of such record of rights which

is mandated under Section 57, there must be preliminary publication of such record of rights seeking objection and after making such amendment, if so necessary, the State is mandated to publish such record of rights. It is also provided under Section 57 that where the record of right is finally published by the Settlement Officer and a certificate is issued to that effect, the certificate shall be a presumption as to the final publication and presumption as to correctness of record of rights. The Act also provides for an appeal and revision and for setting aside any registration by aggrieved parties.

(IX) The Rules framed under the aforesaid Act of 1971 also provides for a detailed procedure for preparation of the record of rights and the finalization thereof. Rules 30 and 31 clearly depicts and provides for creation of Khatian for keeping such record of rights of the tenants.

(X) Thus from the aforesaid, it is clear that a specific procedure has been laid down under the Act of 1971 to incorporate and maintain the record of rights of the tenants under the Act of 1971. Such, record of rights includes disclosure of names of the tenant and land lord, quantum of land, mode of payment of rent, nature and area of land situated etc. Such, discloser also includes the rent and mode of payment of rent as Privilege Rayat under the previous Act of 1935, which was repealed and replaced by the Act of 1971 in as much as the Act of 1971 also protects the right of Privilege Rayats, subject to continuous payment of rent.

(XI) The Section 3 (17) of the Act of 1971 defines a tenant as a

person who cultivates or holds the land of another person under a special contract, expressed or implied and pays rent for that land to the other person, including by way of delivery of share or quantity of the produce of such land. The person who holds land immediately under State Government is excluded from the definition of such tenant.

(XII) An explanation has been given in the aforesaid Section to the effect that when a person holds land on the condition of service to a temple or a religious institution, he shall be deemed to be a tenant of the manager of such temple or the religious institution.

(XIII) Thus, from the aforesaid, it is clear that a person who renders service in a temple or a religious institution and holds land in lieu of such service, shall be covered under the definition of tenant under the Act, 1971. Therefore, to claim a tenancy right under the aforesaid provision, the plaintiff is to discharge the burden that land has been given by the manager of the institution as return to the service to the institution. A basic minimum pleading to that effect shall also be necessary.

(XIV) Further, an alternative plea has been taken that the plaintiff has become a tenant under the defendant No. 1 Satra by virtue of service rendered. However, nothing has been brought on record to substantiate that the plaintiff was rendering service to the temple and that for such service, land has been given and such land is held by the plaintiff.

(XV) The documents exhibited by the plaintiff, firstly are

communication of the Satradhikar of the defendant No. 1 Satra, addressed to the father of the plaintiff wherein the father of the plaintiff was addressed as 'Pujari.'

(XVI) The rent paying receipt by the father of the plaintiff exhibited was not relied on by both the courts for the reason that such rent receipt does not disclose the land against which such rent paying receipt are issued. Further, under the explanation to Section 3 (17), as discussed hereinabove, the rent is paid by rendering service and not by any cash of crop.

(XVII) The other set of exhibits exhibited by the plaintiff relates to payment of land revenue to the Government by the father of the plaintiff on behalf of the defendant No. 1, Satra and accordingly, the learned courts below rightly held that though it was proved that the father of the plaintiff was a 'Pujari' of the temple but nothing was available on record to come to a conclusion that the plaintiff or his predecessor-in-interest were tenants under the Satra.

(XVIII) The Courts below, in the considered opinion this court, arrived at such conclusion on the basis of the exhibits as discussed hereinabove and appreciation of the said exhibits as well as appreciation of other evidences. This court do not find any material irregularity in appreciation of such evidence. Therefore, this court is having very limited power to re-appreciate the evidence and to interfere with the finding of fact that the plaintiff has failed to prove his tenancy in Second Appellate Stage. Accordingly, this court finds that the first two substantial question

of law formulated can be said to involve any substantial question of law.

(XIX) The other aspect of the matter is the issue relating to provision of Order VIII Rule V. The plaintiff has seriously contended that as the Owner of the suit land, the defendant No. 1 has not denied the pleading that since the days of predecessor-in-interest the plaintiff has been tenant, no further proof was required to hold that plaintiffs are not tenant under the defendant No. 1.

(XX) Order VIII Rule V of the Code of Civil Procedure mandates that if every allegation of fact in the plaint is not denied specifically or by necessary implication by the defendant, such allegation pleaded in the plaint shall be taken to be admitted. Proviso to Sub-Rule (1) of Rule V confers a discretionary power to require any fact so admitted to be proved otherwise than by such admission. Therefore, such Rule cannot be said to be an absolute one.

(XXI) In the case of ***Badat and Co.(supra)***,relied on by the learned counsel for the appellant, the Hon'ble Apex Court came to a specific conclusion that to do justice between two parties for which Courts are intended, the rigor of Rule 5 has been modified by the introduction of the proviso thereto and accordingly had given a discretion upon the court to insist upon any fact so admitted to be proved, otherwise, than by such admission.

(XXII) It was also a finding in ***Badat (supra)*** that such discretion

under the proviso must be exercised by a Court having regard to the justice of a cause with particular reference to the nature of the parties. In the case in hand, the learned appellate court has taken a view that it was the onus on the part of the plaintiff to prove the case and the non-denial will not give any right to the plaintiff and insisted on the evidence.

(XXIII) Such insistence in the considered opinion of this Court cannot be a subject matter of a second appeal and such finding and determination cannot be interfered by this Court until and unless such findings are perverse.

(XXIV) It is also well settled that burden of proof under section 101 and 102 of the Indian Evidence Act'1872, though persuasive burden, the same lies upon the plaintiff and shall not shift to the defendant. When the plaintiff discharges such burden, the same may shift to the defendant in a given case. The plaintiff is to plead and proof the foundational fact.

(XXV) In the case in hand, though the defendant No. 1 has not denied the tenancy, however, in the considered opinion of this court even admission of a party shall not automatically create any title or right of tenancy under the Act' 1971. In case the tenancy under the 1971 Act the plaintiff is to plead and prove the certain fact such as that the plaintiff or his predecessor-in-interest were holding or cultivating land of the defendant No. 1 and that the plaintiff has been paying rent by delivering a share or quantity of the produce of such land to the defendant No. 1

(XXVI) Therefore, in the given fact, the learned trial court has exercised its discretion conferred under Proviso to Sub-rule 1 and insisted on other evidence. Exercise of such discretion has been affirmed by the learned first appellate court and therefore, this court should not upset such discretion in the second appellate stage.

(XXVII) While coming to the present case, the plaintiff except pleading that his forefathers were tenants under the defendant No.1 and by virtue of such tenancy right, the plaintiff has also become a tenant, nothing is discernible including existence of any record of rights (khatiyan) prepared under the Act' 1971.

(XXVIII) The plaintiff also alternatively made a pleading that by virtue of giving services to the temple, the plaintiff on his own right has become a tenant. However, only on the basis of such pleading the decree declaring the plaintiff to be a tenant under defendant No. 1 cannot be passed.

(XXIX) To claim to be a tenant and to get a declaration of a tenancy right, the plaintiff has to specifically plead as to for how many years he has been a tenant, and what is the rate and what is the mode of payment of rent that he has been paying, but nothing is stated except the aforesaid statement to claim tenancy under the explanation to Section 3 (17). The Khatian would have disclosed such materials inasmuch as the plaintiff claims to be a tenant under the Act of 1971. A minimal pleading that the plaintiff has been given the land for rendering service to the Temple.

(XXX) Therefore, in view of the aforesaid facts, in the considered opinion of this Court, both the Courts below have rightly held that the plaintiff has failed to establish and to adduce any proof in support of his tenancy right inasmuch as the mandate of Order VIII Rule 5 is not absolute.

(XXXI) As discussed herein above, both the Courts below after perusal of the evidence and records came to a definite finding of facts that though the father of the plaintiff was proved to be a Pujari in the temple in question, however, nothing has been brought on record to prove a further right of tenancy or of giving the land to the father of the plaintiff by the defendant No.1. Such finding of fact cannot be interfered in a second appellate stage not being perverse. The 3rd Substantial question of law is answered accordingly.

(XXXII) In the above view of the matter, this second appeal involves no substantial question of law and lacks merit. Accordingly, the same is dismissed. Prepare the decree accordingly. Parties to bear their own cost.

JUDGE

Comparing Assistant