NOT OFFICIAL
GAUHATI HIGH COURT, GUWAHATI
E-COURTS SERVICES
WEB COPY

GAHC010042382017

THE GAUHATI HIGH COURT

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

Case No: **CRP 268/2017**

MD. WAZUL HUSSAIN
S/O JAMSAD ALI, R/O KALIBARI ROAD, NEAR ICE FACTORY, P.O., P.S. and DIST. DIBRUGARH, ASSAM.....Appellant/Petitioner

-Versus-

SIRAJUDDIN AHMED
S/O LATE RAHIMUDDIN AHMED, R/O KALIBARI ROAD, P.O., P.S. and DIST. DIBRUGARH, ASSAM, PIN 786001.....Respondent

:: BEFORE ::

HON'BLE MR. JUSTICE DEVASHIS BARUAH

For the Appellant/Petitioner : Mr. P.J. Saikia

For the Respondent : Mr. G.N. Sahewalla. (Sr. Adv.)

Date of Hearing : **09.12.2021**

Date of delivery of Judgment and Order : **09.12.2021**

NOT OFFICIAL
GAUHATI HIGH COURT, GUWAHATI
E-COURTS SERVICES
WEB COPY

JUDGMENT & ORDER (*Oral*)

Heard Mr. P.J. Saikia, learned counsel for the petitioner as well as Mr. G.N. Sahewalla, learned Senior Counsel assisted by Mr. H.K. Sharma appearing for the respondents.

1. This is the petition under Section 115 of the Code of Civil Procedure challenging the judgment and decree dated 10.04.2017 passed by the Court of Civil Judge, Dibrugarh, in Title Appeal No. 48/2011, whereby the judgment and decree dated 28.09.2011 passed by the Munsiff No. 1, Dibrugarh in Title Suit No. 150/06 was reversed.

2. The brief facts of the instant case is that the respondents herein filed a suit for ejectment of the defendant; for perpetual injunction, etc. The case of the plaintiff in the suit that he is the absolute owner of the plot land measuring 0 Bigha, 1 Katha, 10 Lechas covered by Dag No. 491 under P.P. Patta No. 62 situated at Kalibari, Dibrugarh town Mouza, Marwari Patty, PO & Dist- Dibrugarh. Upon the said land, their stand a house covered by Holding No. 193 of Ward No. 9 and other properties. The plaintiff further case is that on 01.01.1995, the defendant came into occupation and possession of the house premises described in the schedule to the plaint on a monthly rent at the rate of Rs. 2,000/- per month, on the condition that the defendant would pay the house rent to the plaintiff within the 1st week of each succeeding English Calendar month; that the defendant would vacate and deliver the house premises to the plaintiff as an when asked; that the defendant would not sub-let or hand over the possession of the same to any other persons and that the defendant would not cause any nuisance and disturbance to the plaintiff as his other family members under any circumstances. Thereafter, since January, 2005, the defendant had not paid the rent for which

NOT OFFICIAL GAUHATI HIGH COURT, GUWAHATI E-COURTS SERVICES WEB COPY

the plaintiff has send a Legal Notice dated 11.09.2006 asking the defendant to vacate and deliver peaceful vacant possession of the house. However, the defendant did not pay any heed to the said notice. Apart from the said the plaintiff also claims that he bonafidely requires the suit premises for his own use. It is on the basis of the said averments, the plaintiff filed the suit seeking the reliefs as above mentioned. The said suit was filed on 14.11.2006 and was registered and numbered as Title Suit No. 150/2006.

3. The defendant who is the petitioner herein filed his written statement on 28.02.2007 denying to the statements and allegations made in the plaint and also challenged the maintainability of the said suit. In the written statement filed by the defendant, it was his specific case that he came to occupy a vacant portion of land measuring 35x10 ft for storing Tyres materials on annual lease rent of Rs. 2,400/- in the year 1980 and thereafter, the defendant constructed two C.I. Sheets Roof house with Pucca Wall and Pucca Floor by spending a sum of Rs. 35,000/- and the same has been reduced to ashes on account of fire in the year 1991. It is the further case of the defendant that on 13.06.1985, 21.03.1989 and 29.03.1989, the plaintiff by executing mortgage deeds had taken from the defendant an amount of Rs. 10,000/-, 36,600/- and 36,600/- respectively. It is also mentioned that on 23.12.1991 after devastating fire in the year 1991 another amount of Rs. 36,600/- was taken by the plaintiff from the defendant. In total the plaintiff took a sum of Rs. 1,19,800/- but the plaintiff failed to execute and neglected to execute the Deed of Sale in favour of the defendant after the expiry of 8 (eight) years as per the conditions/ stipulation contained in the mortgaged deeds. It was the further case of the defendant that the plaintiff had only mortgaged the vacant land and the defendant by spending a huge amount constructed four C.I. Sheets Roof house for the Tyre godown purpose and also install Tyre Retreading machine

NOT OFFICIAL GAUHATI HIGH COURT, GUWAHATI E-COURTS SERVICES WEB COPY

thereon and have been enjoying peaceful possession thereof. It may be relevant to take note that from a perusal of the written statement there was no mention whatsoever that there was any construction carried out by the defendant pursuant to the fire as alleged to be happened in the year 1991. Further to that the defendant also pleaded that the defendant had acquired a good right, title and interest over the said plot of land by the law of prescription, adverse and other provision of law.

4. On the basis of the said pleadings as many as 6(six) issues were framed which for the sake of convenience is quoted herein below:-

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

(ii) Whether the suit is maintainable in law and in facts?

(iii) Whether the defendant is tenant of the suit premises under the plaintiff?

(iv) Whether defendant is a defaulter in paying rent to the plaintiffs since January, 2005 thereby making himself liable for eviction?

(v) Whether the suit premises are required by the plaintiff bonafide?

(vi) Whether the plaintiff is entitled to the relief's claimed for.

The plaintiff adduced evidence of two witnesses and exhibited as many as 12(twelve) documents. The defendant also adduced two witnesses and exhibited Exhibit-A to Exhibit-G.

5. The trial Court vide the judgment and decree dated 28.09.2011 dismissed the suit. In doing so, the issue No. 3 which is the most pertinent issue in the instant proceedings between the plaintiff and the defendant i.e. as to whether the defendant is a tenant of the suit premises under the plaintiff, decided the said issue against the plaintiff. The trial Court took into account Exhibit-A, B and C which purportedly were mortgaged deeds. But strangely

NOT OFFICIAL GAUHATI HIGH COURT, GUWAHATI E-COURTS SERVICES WEB COPY

enough the provisions of Section 17, 48 and 49 of the Registration Act, 1908 were not applied by the Trial Court in appreciating Exhibit- A, B & C. As regards the issue No. 4, as to whether the plaintiff was the defaulter the said issue also held in the negative against the plaintiff on the ground that the plaintiff failed to show for which the particular month the plaintiff was the defaulter. Again strangely enough the Trial Court did not take into consideration the admitted case of the defendant himself that he being not a tenant, the question of payment of rent did not arise. As regards, the issue no. 5 which pertained to bonafide requirement, it was also decided against the plaintiff.

6. Being highly aggrieved, the plaintiff as an appellant preferred an appeal before the Court of the Civil Judge, Dibrugarh which was registered and numbered as Title Appeal No. 48/2011. The First Appellate Court vide the judgment and decree dated 10.04.2017 set aside the judgment and decree passed by the Trial Court. In doing so, the First Appellate Court came to a finding that the suit premises belonged to the plaintiff and thereupon went to pass the following order:-

"*(A) That the plaintiff and the defendant shall enter into a tenancy agreement in writing afresh narrating the terms and conditions, mode of payment and amount of the rent etc. within a period of 15 days from today.*

(B) If the parties failed to negotiate the amount of rent, then the standard rent will be calculated in accordance with Section 2 (e) of the Assam Urban Areas Rent Control Act, 1972.

(C) If the defendant wants to discontinue the tenancy with the plaintiff, the plaintiff will allow him to take back the materials used for construction over the extended shed of 15 ft. near the original shop premises.

(D) If the plaintiff wants to re-construct the premises standing over his own land the defendant will co-operate him to his best ability. "

In terms of the said judgment, the First Appellate Court directed the plaintiff and the defendant to enter into a tenancy agreement in writing afresh narrating the terms and

NOT OFFICIAL GAUHATI HIGH COURT, GUWAHATI E-COURTS SERVICES WEB COPY

conditions, mode of payment and amount of rent etc., within the 15 days of the said judgment and decree. Further to that the First Appellate Court went to the extent of directing that if the parties failed to negotiate the amount of rent, then the standard rent will be calculated in accordance with Section 2(e) of the Assam Urban Rent Control Act, 1972. It was further directed that if the defendant wanted to discontinue the tenancy with the plaintiff, the plaintiff will allow him to take back the materials used for construction over the extended shed of 15 ft. near the original shop premises and if the plaintiff wanted to re-construct the premises standing over his own land the defendant will co-operate him to his best ability. It may be relevant to take note that the First Appellate Court did not at all deal with the question of defaulter in payment of rent which it was obliged to do on the basis of the statutory duty obligated upon it by virtue of. Order XLI Rule 31 of the Code of Civil Procedure, 1908. Further to that the above quoted portion of the Judgment of the First Appellate Court would reveal that the First Appellate Court stepped into the shoes of a mediator thereby directing the parties to enter into a fresh contract of tenancy which is not within the purview of the First Appellate Court. To enter into an agreement of tenancy or not is absolutely within the wisdom and volition of the parties, the Court cannot direct ever in exercise of the powers under Order XLI Rule 33 of the CPC.

7. Feeling aggrieved and dissatisfied the defendant who is the tenant has approached this Court challenging the appellate judgment and decree. There is no challenge by the plaintiff to the said Appellate Court's Judgment and decree.

8. Mr. P.J. Saikia, learned counsel appearing on behalf of petitioner submits that the First Appellate Court while passing the impugned judgment and decree failed to take into consideration that the petitioner had constructed the suit premises and as such, the petitioner

NOT OFFICIAL GAUHATI HIGH COURT, GUWAHATI E-COURTS SERVICES WEB COPY

was not a tenant in respect of the suit premises and consequently, the instant eviction proceedings was not maintainable. He seeks to substantiates his arguments on the basis of Exhibit- A, B and C which are the mortgaged deeds, which as per the said counsel would clearly go to show that the petitioner had a right to construct and in terms of the said mortgaged deed the petitioner had constructed the suit premises which were not taken into account by the First Appellate Court. He further submits that the First Appellate Court while arriving at the finding that the plaintiff was the owner of the suit premises had based its decision on probabilities which could have been done in the instant case.

Mr. P.J. Saikia further submits that the First Appellate Court in its impugned judgment have clearly held that the parties have failed to produce any evidence to decide on the question of defaulter. It is his submission that as per the decision of the Trial Court the petitioner is not a defaulter and the said findings has not been reversed by the Appellate Court and that could be seen from the perusal of the impugned judgment and decree inasmuch as there is no discussion or any observation that the petitioner is the defaulter. He further submits in that regard that the respondents have not assailed those findings and consequently those findings have attained finality in so far as that the petitioner is not a defaulter. He further submits that the suit was filed primarily on two grounds; one was defaulter and other one was bonafide requirement of the plaintiff. The cross-examination of the PW-1, who is the plaintiff would also go to show that he has himself stated that if he get back possession of the suit premises he would be renting out the same to some other tenants which clearly shows that there was no bonafide requirement and as such, the Appellate Court had also rightly come to a decision that the plaintiff did not have any bonafide requirement in respect of the suit premises.

9. On the other hand, Mr. G.N. Sahewalla, learned Senior Counsel appearing on behalf of

NOT OFFICIAL GAUHATI HIGH COURT, GUWAHATI E-COURTS SERVICES WEB COPY

the respondents submits that the findings of fact by the First Appellate Court that the plaintiff is the owner of the suit premises is based upon the evidence which were available on record. The evidence which have been adduced by the defendant cannot substantiate that the defendant constructed the suit premises. As regards the question of defaulter in payment of rent, Mr. Sahewalla submits that the petitioner being a defaulter is an apparent on the face of it and he having admitted that he is the not the tenant and as such payment of rent did not arise and the Appellate Court ought to have held that the Defendant was a defaulter as nothing further is required to be shown that the defendant is defaulter in payment of rent. He further submits that in terms with the appellate judgment and decree there was a direction given to the petitioner as well as the respondent to enter into an agreement within the period of 15 days. However, the petitioner did not avail the opportunity and as such, the petitioner possession as of now is nothing but a permissive occupier and as such the plaintiff is entitled to a decree of eviction of the petitioner/defendant from the suit premises.

10. I have heard the learned counsel for the parties at length.

From the pleadings, it is apparent that the plaintiff claims that the plaintiff is the owner of the suit premises and on the basis thereof the plaintiff had adduced evidence that the plaintiff has the patta as well as the suit premises has been assessed to the Dibrugarh Municipal Board as holding No. 193 in the name of the plaintiff and he has been regularly making payment of the taxes to the Dibrugarh Municipal Board. On the other hand that the defendant who is the petitioner herein claims that the defendants had taken a plot of land on annual lease rent of Rs. 2,400/- in the year 1980 and thereafter, the defendant constructed two C.I. Sheets Roof house with Pucca Wall and Pucca Floor by spending a sum of Rs. 35,000/-. In the written statement, there is no mention of any date or within what period the

NOT OFFICIAL GAUHATI HIGH COURT, GUWAHATI E-COURTS SERVICES WEB COPY

said construction was carried out. It has been mentioned in the writ statement that in the year 1991, there was a fire but there is no evidence led to the effect that there was fire. As regards the mortgaged deeds which have been exhibited as Exhibit-A, B and C these are all un-registered documents, which cannot create or extinguish any right upon the immovable property.

11. The counsel for the petitioner had submitted that on the basis of these mortgaged deeds the petitioner had constructed the suit premises. Right to construct is a creation of right in respect of the immovable property and that right cannot be looked into by the Court unless the said documents are registered. In the written statement, has already stated hereinabove, though there was mention of fire in the year 1991 but there is no mention that after the fire, the petitioner had constructed the 4(four) C.I. Sheets Roof house after the fire. As regards the evidence of the defendant, the evidence on affidavit which was filed by the defendant No. 1, who is the defendant has not been supported by him at the time of his cross-examination, inasmuch as he have categorically stated at the time of cross-examination that he does not know what has been written in the evidence on affidavit. Moreover, it being trite that there can be no evidence without pleadings, the evidence which the defendant submitted by way of an evidence on affidavit to the effect that after the fire the defendant constructed the suit premises, cannot be looked into.

Similarly, the evidence of the DW-2, who is one Shri Ramlal Shah, his evidence on affidavit is also not supported by him at the time of cross-examination inasmuch as he states at the time of cross-examination that he does not know what has been written in the evidence on affidavit. Now let me take into consideration, Exhibit-A, B and C upon which the counsel for the petitioner relies upon to submit that the petitioner had constructed the suit

NOT OFFICIAL GAUHATI HIGH COURT, GUWAHATI E-COURTS SERVICES WEB COPY

premises. Arguendo, assuming that the Exhibit-A, B and C, the Court can look into it, the said documents would show that the petitioner need not pay the rent during the period of 8 years as mentioned therein, meaning thereby that he continues to be a tenant of the suit premises. Further to that the said documents shows the existence of suit premises. As already stated, the statement made in the evidence on affidavit that in the year 1991 after the fire, the defendant constructed the suit premises cannot be looked into in absence of any pleadings in support thereof. There has been no other evidence brought on record to show that the defendants had constructed the suit premises. Consequently, I do not find any error in the findings of the learned First Appellate Court to the effect that the plaintiff is the owner of the suit premises.

12. The next question which arises therefore is as to whether the plaintiff is entitled to a decree for eviction. Section-5 of the Assam Urban Area Rent Control Act, 1972 stipulates the limited grounds on which a tenant can be evicted of which a defaulter in payment of rent and a bonafide requirement of the suit premises are the grounds on which the landlord can seek of ejectment of the tenant.

13. The suit has been filed by the plaintiff on two grounds; one that it has a bonafide requirement of the suit premises and the other that the defendant who is the tenant is a defaulter in payment of rent since Jaunary, 2005.

As regards the grounds of bonafide requirement, the evidence of the plaintiff witness No. 1, who is the plaintiff himself and more particularly his cross-examination wherein, he duly admits that he would rent out the suit premises to other tenants if the plaintiff gets a decree for ejectment in respect to the suit premises, the said admission on the part of the

NOT OFFICIAL GAUHATI HIGH COURT, GUWAHATI E-COURTS SERVICES WEB COPY

plaintiff disentitles him for a eviction on the ground of bonafide requirement of the suit premises.

As regards the question of defaulter in payment of rent, the Trial Court after holding that the defendant is not a tenant arrived that the conclusion that the question of defaulter in payment of rent did not arise in respect of the issue No. 4. The Appellate Court in the impugned judgment and decree did not at all take into consideration that aspect of the matter and there is no observations to decide as to whether the defendant was a defaulter in payment of rent, although, it was under the statutory obligation under Order XLI Rule 31 to decide the said aspect of the matter. It is also relevant at this stage to take note of that the defendant have categorically denied that the plaintiff is the owner of the suit premises and have also stated that the question of making payment of rent does not arise to the plaintiff which on the face of it is a apparent that the defendant have not paid the rent to the plaintiff in respect of the suit premises.

14. Now the question therefore arises that can this Court in exercise of its powers under Section 115 of the CPC grant a decree for eviction in absence of a challenge to the impugned judgment and decree by the plaintiff/respondent herein. It is no longer *res-integra* that the Court exercising its jurisdiction under Section 115 of CPC is akin to the appellate jurisdiction of the Superior Court though there are certain essential differences between the two powers. The revisional jurisdiction is conferred upon this Court to keep the Subordinate Courts within the bounds of jurisdiction and once any flaw of jurisdiction is found, this Court while exercising the revisional jurisdiction need not quash and remit the case, it can exercise the jurisdiction which the Appellate Court could have done, meaning thereby that this Court while exercising the revisional jurisdiction can also invoke the appellate powers. Any illegality,

NOT OFFICIAL GAUHATI HIGH COURT, GUWAHATI E-COURTS SERVICES WEB COPY

material irregularity coming to the notice of this Court can be corrected by this Court by passing such appropriate orders or direction as required for the interest of justice.

15. Be that as it may, taking into account that there was no decree for eviction being passed rather an order was passed directing both the parties to enter into an agreement of tenancy and without a decree for eviction no tenant can be evicted being the mandate of section 5 of the Act of 1979, can this Court in absence of a challenge to the said impugned judgment and decree grant a decree for eviction. The answer to the same can be found from a perusal of the Order XLI Rule 22 of the Code of Civil Procedure, wherein, as has been held by the various judicial pronouncements, a party in whose favour a decree or an order has been passed, in order to support or sustain the decree an order can without filing an appeal challenge some of the findings which are adverse to him. However, if the party in whose favour a decree or order has been passed and the party seeks a larger and or bigger relief that what has been passed, it is the requirement of the law that the party has to approach by filing an appeal or a revision as the case may be against the order or decree appealed against I draw support of the above observations made in the judgment of the Supreme Court in the case of *Nalakath Sainuddin Vs. Koorikadan Sulaiman reported in (2002) 6 SCC* I. The relevant paragraphs is quoted herein below.

> "17. We agree with the view taken by the High Courts of Madhya Pradesh and Madras. We are of the opinion that -
>
> (i) There is no reason to read and interpret Section 20 of the Kerala Buildings (Lease and Rent Control) Act, 1965 narrowly and limit the scope of revisional jurisdiction conferred on the High Court thereby.
>
> (ii) Once a revision petition is entertained by the High Court, whichever be the party invoking the revisional jurisdiction, the High Court acquires jurisdiction to call for and examine the records of the authority subordinate to it. The records relating to "any order" and/or any proceedings, are available to be examined by the High Court for the purpose of satisfying itself as to the (a) legality, (b) regularity, or (c) propriety of the impugned order, including any part of the order, or proceedings. The only limitation on the scope of High Court s jurisdiction is that the order or proceedings sought to be scrutinized must be of the subordinate authority. Any illegality, irregularity or impropriety coming to its notice is capable of being corrected by the High Court by passing such appropriate order or direction as the law requires and justice demands.
>
> (iii) "Any aggrieved party" , the expression employed in Section 20(1), means a person feeling aggrieved by the

NOT OFFICIAL
GAUHATI HIGH COURT, GUWAHATI
E-COURTS SERVICES
WEB COPY

> ultimate decision, that is, the operative part of the order. A party to the proceedings, who has succeeded in securing the relief prayed for, is not a party aggrieved though the order contains a finding or two adverse to him. The respondent can support the order and pray for the ultimate decision being sustained, without filing a revision of his own, and for achieving such end he may seek reversal of any findings recorded against him. However, if the non-petitioning party feels entitled to a more beneficial or larger order in his favour but was allowed a lesser or smaller relief then to the extent of claiming the more beneficial or larger relief he should have filed a revision petition of his own as he was "an aggrieved party" to that extent."

16. In view of what has been held above by this Court coupled with the observations made by the Supreme Court in its Judgment in the case of Nalakath Sainuddin (supra), this Court cannot pass a decree for eviction in favour of the plaintiff in absence of a challenge to the impugned Judgment and Decree. However taking into consideration that the Appellate Court having completely failed to exercise the jurisdiction conferred upon it by law under Order XLI Rule 31 of the CPC, the case is remanded back to the First Appellate Court to decide the issue No-4 i.e. issue of defaulter in payment of rent on the basis of the observations made hereinabove which includes the confirmation of the decision in respect to the issue No. 3 to the effect that plaintiff is the landlord of the defendant in respect to the suit premises.

Taking into account that this is a long pending litigation relating to landlord and tenant, the Appellate Court is requested to dispose of the Appeal within a period of 3 (three) months from the date of appearance of the parties. The parties are directed to appear before the Appellate Court on 18.01.2022.

17. With the above observations, the petition stands disposed of. No costs.

Send Back the LCR.

JUDGE

B.Dey

Comparing Assistant

Order downloaded on 18-05-2024 03:13:22 PM