



GAHC010310322019

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

Case No. : CRP(IO)/415/2019

PRAKASH BHAGAWATI
S/O LT. BINOD BHAGWATI, R/O DEKARGAON, MOUZA, HOLESWAR, DIST.
SONITPUR, ASSAM,

VERSUS

ON THE DEATH OF PHANIDHAR BORA HIS LEGAL HEIRS AND 2 ORS.
LEGAL HEIRS

1.1:HEM CHANDRA BORA
S/O. LT. PHANIDHAR BORA
R/O. PATIA CHUBURI
MOUZA- HALESWAR
DIST. SONITPUR
ASSAM
PIN-784001.

1.2:BORMOINA BORA
D/O. LT. PHANIDHAR BORA
R/O. PATIA CHUBURI
MOUZA- HALESWAR
DIST. SONITPUR
ASSAM
PIN-784001.

1.3:SARUMOINA BORA
D/O. LT. PHANIDHAR BORA
R/O. PATIA CHUBURI
MOUZA- HALESWAR
DIST. SONITPUR
ASSAM
PIN-784001.



1.4:ON THE DEATH OF DHIREN CHANDRA BORA HIS LEGAL HEIRS
RINA BORA
W/O. LT. DHIREN CH. BORA
R/O. PATIA CHUBURI
MOUZA- HALESWAR
DIST. SONITPUR
ASSAM
PIN-784001.

1.5:LATUMONI BORA

D/O. LT. PHANIDHAR BORA
R/O. PATIA CHUBURI
MOUZA- HALESWAR
DIST. SONITPUR
ASSAM
PIN-784001.

2:PHANIDHAR DAS
S/O. LT. BOGAI DAS
R/O. PUTHIKHATI
MOUZA-HALLESWAR
DIST. SONITPUR
ASSAM
PIN-784001.

3:TANKESWAR DAS
S/O. LT. BOGAI DAS
R/O. PUTHIKHATI
MOUZA-HALLESWAR
DIST. SONITPUR
ASSAM
PIN-784001

Advocate for the Petitioner : MR. A K SAHU

Advocate for the Respondent : MR. S BISWAS

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT & ORDER (ORAL)

Date : 24-11-2021

Heard Mr. S Sahu, the learned counsel appearing on behalf of the petitioner. Also heard Mr. S Biswas, learned counsel appearing on behalf of the respondents no. 1(i), 1(ii), 1(iii) and 1(v).

2. The instant application under Article 227 of the Constitution of India is filed challenging the order dated 27.11.2018 passed in Misc (J) Case No. 217/2018 arising out of Title Suit No. 28/1997. For the purpose of appreciating the question in controversy, it would be relevant to take note of the following facts which arises.

3. The plaintiff had filed a suit registered and numbered as Title Suit 28/1997 whereby the plaintiff sought for his right, title and interest over the suit land and also for recovery of khas possession and for mesne profit etc. It is the case of the plaintiff that the suit land is the land that he had purchased by the registered sale deed no. 1122 in the year 1996. It is the further case of the petitioner as plaintiff that pursuant to the purchase of the suit land, the defendant no. 1 filed a proceeding under Sections 145/146 of Code of Criminal Procedure (CrPC) in respect to the suit land wherein the suit land was attached. Subsequent thereto, a revision was filed under Section 397/399 of Code of Criminal Procedure before the Sessions Judge, Sonitpur, Tezpur and the said order of attachment was stayed. Thereupon, when the plaintiff took steps for ploughing in the suit land, the defendant disturbed the same. Consequently, the suit was filed claiming the reliefs as aforementioned. The defendant no. 1 filed his written statement to the plaint wherein in paragraph 4 it was specifically mentioned that no proceeding under Section 145 of the CrPC was instituted in respect to the suit land and the same was never attached under Section 146.

4. Pursuant to the issues being framed, evidence being led, the said suit was dismissed by the judgment and decree dated 30.09.2000.

5. Being aggrieved, the petitioner herein filed an appeal before the Civil Judge, Tezpur, Sonitpur and the said appeal was also dismissed by the judgment and decree dated



13.12.2006.

6. Thereupon, an appeal was preferred before this Court under Section 100 of the Code of Civil Procedure. The said appeal was registered and numbered as RSA No. 35/2007. This Court vide its judgment and order dated 15.02.2017 set aside the judgment and decree of the first Appellate Court for non-compliance to the provisions of Order XLI Rule 31 of the Code of Civil Procedure and remanded the appeal for rehearing in terms with the provisions of Order XLI Rule 31.

7. In this regard, paragraphs 16, 17 and 18 being relevant is quoted hereinbelow:

“16] Perused the case record and the judgment and decree passed by both the courts below, the findings arrived by the trial court as already discussed hereinabove. On the other hand, the first appellate court instead of discussing the issues so framed failed to consider the same and decided on its own. The Hon’ble Apex court in a catena of decisions had held that the provision of Order XLI Rule 31 of the CPC has to be complied with by the first appellate court. The first appellate court being the final court of facts has the responsibility to appreciate the findings on record in its proper perspective and should give its independent judicious view, but in the present case in hand, the first appellate court without any discussion of issues independently/ simply narrated the findings of the trial court without any discussion of the evidence of witnesses on record and the exhibits thereof. The first appellate court simply came to the finding that as the plaintiff never enters the witness box, there is no merit in the suit. However, there was evidence on record of the father of the plaintiff. It is true that a person who is party to the suit has a duty cast upon him to appear as a witness so that other side could test the veracity of the pleadings made by the said party. But that cannot be sole ground in rejecting the other piece of evidence inasmuch as there were various issues triable between the parties to the suit.

17] Considering the same, this court decide the substantial question of law in favour of the plaintiff/ appellant and accordingly set aside the judgment and decree passed by the first appellate court and remand the same for passing fresh judgment and decree within the parameter of order XLI Rules 31 and 33 of the CPC.

18] The learned first appellate court shall dispose of the said matter after hearing

the parties afresh preferably within a period of three months from the date of receipt of the LCR. It is also pertinent to mention herein that the learned first appellate court will issue notice to the parties concerned fixing a date for hearing."

8. Pursuant to the remand to the first Appellate Court, the Appellate Court after hearing the parties was of the opinion that it was essential to determine whether the suit land and the land which was under consideration in the proceeding u/s 145/146 CrPC are one and the same or not and thereby framed an issue, numbered as issue no. 7, which is as to whether the suit land is one and same to the land attached in the proceeding under Sections 145/146 CrPC. It was also observed in the said order passed by the first Appellate Court that the Trial Court shall adjudicate the suit afresh by "*giving opportunity to both the sides to lead evidence on this issue and to direct Survey Commission, if required*" and thereupon to pass a fresh judgment in the suit in view of the new issue and the additional evidence led.

9. Paragraphs 6 and 7 of the said judgment and order passed by the first Appellate Court being relevant for the purpose of determining the present controversy is quoted hereinbelow:

"6) I have heard argument forwarded by both sides closely and have gone through the evidence on record (both oral and documentary) and also decision of the Id. Trial Court. What could be understood from the plaint is that the plaintiff purchased the suit land from Sri Phanidhar Das and Tankeswar Das in 1996 by registered sale deed and took possession. However, subsequently, the suit land was attached by the police and paddy was sold in auction based on a proceeding u/s 145/146 CrPC instituted by defendant Phanidhar Bora and proforma defendant No. 2 and 3. Plaintiff preferred a revision and the Learned Sessions Judge, Sonitpur set aside the order in the proceeding u/s 145/146 CrPC. Afterwards, when the plaintiff went to plough the suit land, the defendant did not allow him to do so and therefore the suit was filed praying for declaration of the plaintiff's right, title and interest over the suit land and for eviction of the defendant No. 1 Phanidhar Bora from the same. On the other hand, the defendant from the day one stated that the suit land and the land attached u/s 145/146 CrPC are not the same land. After due consideration, I am of the opinion that for judicious decision, it is essential to determine whether the suit land and the land

which was under consideration in the proceeding u/s 145/146 CrPC are one and the same or not & therefore, the following new issue is settled –

***“Issue No.7: Whether the suit land is one
and the same as the land
attached in the proceeding
u/s 145/146 CrPC?”***

7. Thus, for proper adjudication it is essential to **remand back** this case to Id. Trial Court for giving opportunity to both sides to lead evidence on this issue & to direct Survey Commission, if required. The Trial Court will then pass a fresh judgment in the suit in view of the new issue & additional evidences lead. The appeal is disposed of.

Send a copy of this judgment along with the LCR to the learned Trial Court.

Give under my hand & seal of the Court on the 20th April'2018.”

10. It may also be relevant herein to note that there was no challenge to the said judgment and order passed by the first Appellate Court for which the remand order as well as the observations made therein had attained finality in so far as the present lis is concerned. Thereupon, the plaintiff filed an application under Order XXVI Rule 9 of the CPC for appointment of a Commissioner to make a local investigation of the suit land for the purpose of determining the issue no. 7 as freshly framed by the first Appellate Court. The defendant no. 1 however did not file any written objection against the said application.

11. The Trial Court vide the impugned order dated 27.11.2018 rejected the application at that stage of the trial in view of the fact that no evidence was led by the plaintiff. It is against the said order, the plaintiff has approached this Court under Article 227 of the *Constitution of India*.

12. I have heard learned counsel for both the parties at length.

13. Mr. S Sahu, learned counsel appearing for the petitioner submits that the issue no. 7 being primarily an issue regarding the identification of the land, it is necessary that a Commissioner needs to be appointed for elucidating the dispute in controversy and he further

submits that the judgment and order passed by the first Appellate Court would also go to show that the first Appellate Court had directed the Trial Court to "give opportunity to both sides "to lead evidence on this issue and to direct Survey Commission, if required". But the Trial Court had read the words "to lead evidence on this issue" and "to direct Survey Commission, if required" separately, although it was the intention of the first Appellate Court that either or both is conceptualized in the Appellate order. In this regard he refers to two judgments of this Court in the case of *Pranab Kr. Gogoi v. Khagen Gogoi. reported in (1993) 1 GLR Supp 81* and *Moti Kumari and others v. Md. Habibur Rahman reported in (2003) 2 GLR 66* to canvas the point that when it is a case of identification of land, the issuance of Commission under Order XXVI Rule 9 of the CPC ought to be directed by the Courts below.

14. On the other hand, Mr. S Biswas, the learned counsel appearing for the respondents as aforementioned submits that the Trial Court did not reject the application under Order XXVI Rule 9 of the CPC altogether, but the Trial Court had only rejected the application at that particular stage while still permitting the plaintiff to adduce the evidence of his other witnesses in respect to that issue. He further submits that the provisions of Order XXVI Rule 9 of the CPC could not have been invoked in the fact of the instant case inasmuch if the said provisions are invoked, it would lead to filling up lacunas in the case of the plaintiff and moreso, the provisions of Order XXVI Rule 9 of the CPC can only be invoked in a case where the Court requires for elucidating the dispute and it is not to be used as a tool by the plaintiff to gather evidence. He further submits that the Court below while passing the order dated 27.11.2018 had done so in consonance with the Order XVIII Rule 3 which stipulates that it is the plaintiff who requires to adduce evidence first unless the Court otherwise directs. He further submits that the Court had not granted the leave as is required under Order XVIII Rule 3 for which it was the duty of the plaintiff to adduce evidence first and thereupon, if necessary, the question of issuance of Commission would be looked into. He further submits that a perusal of Rule 213 of the Civil Court Rules and Orders would go to show that the impugned order dated 27.01.2018 was in compliance with Chapter 11 of the Civil Courts Rules and Orders. In this regard, he draws my attention to the following judgments in support of his case:

(i) *Swastik Assam Real Estate Pvt. Ltd. And Ors. v. Ratan Raha and ors. reported in*

2018 4 GLT 505,

(ii) *Fawzunissa v. Indian Hotels Co. Ltd. Reported in 2021 1 MLJ 267,*

(iii) *K. Raghunath Rao v. Tumula Jailaxmi reported in 1988 0 AIR (Ori) 30.*

15. I have heard the learned counsel at length and have also perused the judgments placed before this Court.

16. A perusal of the provisions of Order XXVI Rule 9 of the CPC would go to show that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or to ascertain the market value of any property, or the amount of any mesne profits or damages of annual net profits, the Court may issue a commission to such person as it thinks fit directing to make such investigation and to report thereon to the Court.

16. This provision categorically shows that the discretion is conferred upon to the Court on its satisfaction that it is requisite and proper for the purpose of elucidating any matter in controversy or otherwise to issue a Commission. The manner in which the Commission is to be issued has been provided in Chapter 11 of the Civil Courts Rules and Orders. But the issue which is important for the purpose of the instant case is to how the Courts should exercise its discretion in the case of issuance of a Commission. It is no longer *res-integra* that for the purpose of making a fishing or roving enquiry at the behest of the party or parties to the suit, the Court cannot issue a Commission. It can only do so, when for its satisfaction it is required for elucidating any matter in dispute or other aspects as stipulated in the said Rule. This discretion has to be exercised keeping into account the facts of each case. In the instant case, a perusal of the order of the Appellate Court quoted hereinabove, would clearly go to show that it is the case for identification as to whether the suit land is the same land which was the land attached in the proceeding under Section 145/146 of CrPC and in that regard a fresh issue was formulated. Moreso, it is also to be taken note of that the plaintiff had categorically stated in its plaint that the suit land was attached whereas the defendant no. 1 had in paragraph 4 of the written statement categorically denied this aspect to the matter.

17. At this stage one also needs to take into consideration that the suit land in question is assessable to payment of revenue to the Government and the revenue authority has the means and resources to identify the land in question. Be that as it may, it is also well settled

that by virtue of the provisions of Order VII Rule 3 as well as Order XX Rule 9 of the Code of Civil Procedure, 1908, it is not only the duty of the plaintiff to properly identify the immovable property in respect of which the suit has been filed but it is also the duty of the Court to put at rest the question of identification of the land. In this regard, the judgment of the Supreme Court in the case of *Pratibha Singh & anr. v. Shanti Devi Prasad and anr.* reported in (2003) 2 SCC 330 and more particularly paragraph 15 is quoted hereinbelow:

“15. Order 7 Rule 3 CPC requires where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it. Such description enables the court to draw a proper decree as required by Order 20 Rule 3 CPC. In case such property can be identified by boundaries or numbers in a record for settlement of survey, the plaint shall specify such boundaries or numbers. Having perused the revenue survey map of the entire area of RS Plot No. 595 and having seen the maps annexed with the registered sale deeds of the defendant judgment-debtors we are clearly of the opinion that Sub-plots Nos. 595/I and 595/II were not capable of being identified merely by boundaries nor by numbers as sub-plot numbers do not appear in records of settlement or survey. The plaintiffs ought to have filed the map of the suit property annexed with the plaint. If the plaintiffs committed an error the defendants should have objected to it promptly. The default or carelessness of the parties does not absolve the trial court of its obligation which should have, while scrutinizing the plaint, pointed out the omission on the part of the plaintiffs and should have insisted on a map of the immovable property forming the subject-matter of the suit being filed. This is the first error.”

18. Further to the above, it would also be relevant to take note of the directions passed by the Supreme Court in the case of the *Rahul S. Shah v. Jinendra Kumar Gandhi & ors.* reported in (2021) 6 SCC 418 and more particularly to paragraph 42 & 43 of the said judgment which is quoted herein below:

42. All courts dealing with suits and execution proceedings shall mandatorily follow the below mentioned directions:

42.1. In suits relating to delivery of possession, the court must examine the parties to

the suit under Order 10 in relation to third-party interest and further exercise the power under Order 11 Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third-party interest in such properties.

42.2. In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the court, the court may appoint Commissioner to assess the accurate description and status of the property.

42.3. After examination of parties under Order 10 or production of documents under Order 11 or receipt of Commission report, the court must add all necessary or proper parties to the suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same suit.

42.4. Under Order 40 Rule 1 CPC, a Court Receiver can be appointed to monitor the status of the property in question as custodial legis for proper adjudication of the matter.

42.5 The court must, before passing the decree, pertaining to delivery of possession of a property ensure that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property.

42.6. In a money suit, the court must invariably resort to Order 21 Rule 11, ensuring immediate execution of decree for payment of money on oral application.

42.7. In a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The court may further, at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.

42.8. The court exercising jurisdiction under Section 47 or under Order 21 CPC, must not issue notice on an application of third party claiming rights in a mechanical manner. Further, the court should refrain from entertaining any such application (s) that has already been considered by the court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.

42.9. The court should allow taking of evidence during the execution proceedings only

in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.

42.10. The court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide, resort to sub-rule (2) of Rule 98 of Order 21 as well as grant compensatory costs in accordance with Section 35-A.

42.11. Under Section 60 CPC the term "... in name of the judgment-debtor or by another person in trust for him or on his behalf" should be read liberally to incorporate any other person from whom he may have the ability derive share, profit or property.

42.12. The executing court must dispose of the execution proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.

42.13. The executing court may on satisfaction of the fact that it is not possible to execute the decree without police assistance, direct the police station concerned to provide police assistance to such officials who are working towards execution of the decree. Further, in case an offence against the public servant while discharging his duties is brought to the knowledge of the court, the same must be dealt with stringently in accordance with law.

42.14. The Judicial Academies must prepare manuals and ensure continuous training through appropriate mediums to the court personnel/staff executing the warrants, carrying out attachment and sale and any other official duties for executing orders issued by the executing courts.

43. We further direct all the High Courts to reconsider and update all the Rules relating to execution of decrees, made under exercise of its powers under Article 227 of the Constitution of India and Section 122 CPC, within one year of the date of this order. The High Courts must ensure that the Rules are in consonance with CPC and the above directions, with an endeavour to expedite the process of execution with the use of information technology tools. Until such time these Rules are brought into existence, the above directions shall remain enforceable."

19. The above quoted paragraph of the judgment in the case of *Rahul S. Shah (supra)* and more particularly to paragraph 42.2 and 42.5, it would show that a duty has been entrusted

upon the Court in a suit for immovable property so that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property and to do that the Court may appoint a Commissioner to assess the accurate description and status of the property.

20. It is also relevant to note that in terms with the directions passed in Paragraph 43 of the judgment in *Rahul S. Shah (supra)*, the Gauhati High Court had vide a notification bearing no. HC.XI-04/2021/128/RC dated 26th August, 2021 brought in certain amendments to the Civil Court Rules and Orders. Rule 134A and Rule 214 (5) being relevant for the purpose of the instant proceeding is quoted hereinbelow:

“134 A. The Court must, before passing the decree, pertaining to delivery of possession of a property ensure that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property.”

“214 (5). In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the Court, the Court may appoint Commissioner to assess the accurate description and status of the property. The cost of the Commission is to be borne by the parties.”

21. Thus, from the above, it would be seen that in respect to a suit where the question of possession is involved, it is the requirement of law that the four boundaries of the suit property are clearly defined while passing a decree and in that regard it is also the duty of the Court to appoint a Commissioner to assess the accurate description and status of the property in appropriate cases.

22. In the backdrop of the above and taking into consideration that the revenue authority is most apt to identify and give an accurate description as regards whether the suit land is the same land as was attached in the proceeding under Sections 145/146 of the CrPC, it would have been the proper course adopted by the Court below rather than insisting upon the petitioner or the parties to lead evidence and to decide as regards the issuance of a Commission. The said conclusion of mine is also based upon the judgment of the Supreme Court rendered in the case of *Haryana Waqf Board v Shanti Sarup and ors. reported in (2008) 8 SCC 671* wherein the Supreme Court held that in view of the nature of the dispute between



the parties as regards the demarcation of the disputed land and the High Court having not addressed that issue by appointment of a local Commission for demarcation of the suit land, remanded the matter to the High Court to decide afresh the second appeal.

23. It is also further relevant to take note of that if on the basis of the report submitted by the local Commissioner, so appointed, the land can be identified in terms with the freshly framed issue no. 7, there would be no necessity to adduce any further evidence by the parties. In that view of the matter, I am of the opinion that the Court below had erred in exercising its jurisdiction conferred upon it by not issuing a Commission as sought for by the petitioner and rather waiting to do so after the parties lead evidence.

24. Accordingly, the impugned order dated 27.11.2018 is interfered with and the Court below is directed to issue a Commission to identify as to whether the suit land is the land which was attached under Sections 145/146 CrPC by appointing a Commissioner as it thinks fit in accordance with the Chapter 11 of the Civil Court Rules and Orders.

25. With the above observations, this instant petition allowed. No costs.

JUDGE

Comparing Assistant