GAHC010084552020

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

Case No. : CRP/54/2020

1. Zulfiquar Ali,
2. Ehtesan Ali,
3. Farhan Ali,

All are sons of Late Sahid Ali,

Resident of House No.5, New Town Sarania,

Guwahati-781007, District-Kamrup(M),
Assam.

.....**PETITIONERS**.

Versus

1. Raju Chaudhury,

Son of Late Asrak Ali Chaudhury,

Resident of Col. J. Ali Road, Lakhtokia,

Guwahati-781001, District-Kamrup (M),

Assam

2. Smt. Babli Chaudhaury,

Wife of Late Dambarudhar Pathak,

Resident of Bye Lane No.1, House No.1,

Sankardev Nagar Path, Hengrabari,

Ganeshguri, Dispur, Guwahati,

District-Kamrup(M), Assam.

.....**RESPONDENTS**.

3. Malaima Khatun,
Wife of Late Sahid Ali,
4. Armaan Ali,
5. Gulrej Ali,
6. Sarfaraz Ali,
Respondent nos. 4 to 6 are sons of Late Sahid Ali,
Resident of House No.5, New Town Sarania,
Guwahati-781007, District-Kamrup(M), Assam.

……**PROFORMA-RESPONDENTS**.

BEFORE

HON'BLE MR. JUSTICE DEVASHIS BARUAH

For the petitioners : Mr. S. Sharma …. Advocate.

For the respondents : Mr. A. Sattar … Advocate.

Date of hearing and judgment : 03.12.2021

JUDGMENT AND ORDER

Heard Mr. S. Sharma, learned counsel for the petitioners. Also heard Mr. A. Sattar, learned counsel appearing on behalf of the respondents.

2. This is an application under Section 115 of the Code of Civil Procedure challenging the judgment and decree dated 12.03.2020 passed by the Civil Judge No.2, Kamrup(M) at Guwahati in Title Appeal No.66/2017, whereby the judgment and decree dated 22.08.2017 passed by the Munsiff No.2, Kamrup(M) at Guwahati in Title Suit No.214/2014 was affirmed.

3. The brief facts of the case is that the respondents herein as plaintiffs had instituted a suit against the petitioners along with the proforma-respondent nos.3, 4, 5 and 6 for ejectment and recovery of possession and realisation of the arrear and future rent.

4. For the purpose of convenience, the parties herein are referred to in the same status as they appeared in the suit.

5. The predecessor-in-interest of the plaintiffs had entered into an agreement dated 10.10.1985 with one Sahid Ali, the predecessor-in-interest of the defendants for construction of a R.C.C. building in the form of Schedule-B and christened the said agreement as "agreement to construct a building". The said premises was erected over the existing structure of Holding No.8 of Ward No.30B, as per the approved plan of the GMC. In terms of with said agreement, the predecessor-in-interest of the defendants was permitted to construct the Schedule-B premises within a period of 2 years from the date of the agreement and to keep the account of the money spend therein which would stand as advance to be duly acknowledged by the predecessor of the plaintiffs. The structures were completed on 01.03.1987 and in terms with the agreement dated 10.10.1985, the said Schedule-B premises was let out for a period of 30 years, wherein the monthly rent was fixed at Rs.6,000/- per month, payable as per English calendar month, subject to an adjustment of 50% of the rent from the advance amount i.e. the amount incurred by the predecessor-in-interest of the defendants in construction and on calculation was Rs.9,48,378.77. This amount of advance was duly acknowledged by both the parties to be the cost for construction of the Schedule–B property. The said construction upon being

completed was assessed by the GMC authorities as Holding No.8A and 117 initially in the name of Hasna Ara Choudhury (mother of the plaintiffs) and subsequently in the name of the plaintiff no.1 vide an order dated 20.01.2003. It was the case of the plaintiffs that in terms with Clause 3, 4 & 5 of the agreement dated 10.10.1985, the stipulated monthly rent should be paid by the tenant to the landlord preferably at the end of every English calendar month after deducting by adjusting 50% from the advance and the period of tenancy was 30 years and after expiry of 30 years the lease shall be renewed if the second party i.e. the tenant desires to continue the same. In terms of with the plaintiffs the said amount of Rs.9,48,378.77 stood adjusted as on 30.06.2013 leaving a sum of Rs.378.77 paisa due to be adjusted in the monthly rent of the month of July, 2013. It is the further case of the plaintiffs that only Rs.378.77 paisa was the remaining outstanding advance and as such the defendants were liable to pay an amount of Rs.5621.23 as the rent for the month of July, 2013 and thereafter @ Rs.6,000/- per month from the month of August 2013. But as the defendants failed to make such payment the suit was filed for eviction of the defendants on the ground that they have become defaulters in payment of rent. It was also pleaded in the plaint that the defendants since the month of July 2013 not only failed to make payment of the monthly rent to the plaintiffs but had also let out one portion of the tenanted premises to one Mrinal Dhar, who is running a restaurant at the second floor and consequently the defendants were liable to be evicted on the ground of sub-letting. Furthermore, the plaintiffs also pleaded that they had a bonafide requirement in respect to the suit premises as the children of the plaintiffs have grown and they required the said place to establish themselves. Accordingly the said suit was filed for ejectment of the defendants from the Schedule-B premises and as well as also for recovery of

arrear rent and future rent.

6. The defendants filed their written statement challenging the maintainability of the suit on various grounds as well as also denied the statements and allegations made in the plaint. It was the specific case of the defendants in their written statement that the actual cost of construction was not Rs.9,48,378.77 but was actually Rs.10,41,537.52 to which the predecessor-in-interest of the plaintiffs had duly acknowledged as the cost for construction. It was also the further case of the defendants that the plaintiffs' predecessor-in-interest had duly acknowledged in the challans and the cash ledger maintained by the predecessor-in-interest of the defendants the cost of construction of the Schedule-B premises. Further to that the plaintiffs had failed to pay an amount of Rs.19,319/- which was the expenditure incurred by the predecessor-in-interest of the defendants and a further amount of Rs.69,180/- towards as interest and thus an amount of Rs.88,499/- was outstanding as on July 2013 and not Rs.378.77 as alleged by the plaintiffs. As regards the allegations that the defendants had let out one portion of the tenanted premises to one Mrinal Dhar the same was denied. It was also denied that the suit premises was required by the plaintiffs for their own use. In paragraph 25 of the written statement, it was also mentioned that the defendant no.3 through his employee and also personally approached the plaintiffs on several occasions to offer rent but the plaintiff no.1 kept deferring receipt of the rent with some ulterior motive and consequently from the month of July 2013 onwards, the defendant no.3 had tendered rent before the Court by filing various rent deposit cases.

7. On the basis of the pleadings the Trial Court had framed as many as 6 (six)

Issues which for the sake of convenience is quoted hereinbelow:

"*1. Whether the suit is maintainable in its present form?*

2. Whether there is any cause of action for the suit?

3. Whether the defendant is defaulter in payment of rent to the plaintiffs since month July, 2013 till today?

4. Whether the tenanted premises is bonafide required by the plaintiffs for themselves as well as their children's use and business?

5. Whether the plaintiffs are entitled to the decree as prayed for?

6. To what other relief(s) the parties are entitled to?"

8. The plaintiffs adduced evidence of one witness and exhibited documents from Exhibit-1 to Exhibit-8B. The defendants had also adduced evidence of one witness and exhibited documents from Exhibit-A to Exhibit- P31.

9. The Issue No.3 which was the issue as regards whether the defendants were defaulter in payment of rent since the month of July, 2013, the Trial Court held that as the defendants have failed to prove that they have been regularly depositing the rent since July, 2013 in the manner stipulated under Section 5(4) of the Assam Urban Areas Rent Control Act (hereinafter referred to as "the Act of 1972") and as such the defendants were defaulter in payment of rent.

10. As regards the Issue No.4 as to whether the plaintiffs required the suit premises for bonafide purpose, the Trial Court held that as the plaintiffs who are

the landlords, are the best judge for their requirement of the premises which was let out to the defendants as tenant, the plaintiffs had a bonafide requirement. At this stage it may also be relevant herein to mention that the suit was filed on 05.08.2014, as could be seen from the affidavit filed in support of the plaint. A perusal of the judgment of the Trial Court in so far as the Issue No.3 is concerned, there is no finding as to whether the amount which was to be taken as an advance was Rs.9,48,378.77 or Rs.10,41,537.52. The said finding was very much necessary to decide as to whether the defendants were defaulters as on July, 2013 or defaulters after filing the suit.

11. Be that as it may, the suit was decreed in favour of the plaintiffs vide judgment and decree dated 22.08.2017, whereby it was directed that the defendants are to be evicted from the suit premises within a period of 2 (two) months and the defendants were further to pay an amount of Rs.77,621.33 along with the cost of the suit.

12. Feeling aggrieved and dissatisfied with the said judgment and decree dated 22.08.2017, the defendants as appellants preferred an appeal before the Court of the Civil Judge No.1, Kamrup(M) at Guwahati which was endorsed to the Court of the Civil Judge No.2, Kamrup(M) at Guwahati for disposal and the said appeal was registered and numbered as Title Appeal No.66/2017. The First Appellate Court framed 2 (two) points for determination which for the sake of convenience is quoted hereinbelow :

> "*1. Whether the discussion made in Issue No.3 and 4 in TS No.214/2014 is bad and interference of this Court is required?*
>
> *2. Whether the judgment and decree dated 22.08.2017 in TS*

No.214/2014 is perverse and needs interference of this court?"

13. The above points of determination so framed was as to whether the Issue Nos.3 & 4 were wrongly decided and interference as such is called for and as to whether the judgment and decree dated 22.08.2017 in Title Suit No.214/2014 is perverse and needs interference of the Appellate Court. The First Appellate Court also while deciding the first point of determination did not take into consideration as to whether the advance amount was Rs.9,48,378.77 as claimed by the plaintiffs or was it Rs.10,41,537.52 inasmuch as, the said consideration is a very relevant factor for deciding the *lis* between the parties. Further to that, it also appears that the First Appellate Court as well as the Trial Court had come to a finding that the defendants were defaulters in payment of rent for the period after the filing of the suit on the ground that the deposits of rent before the Court which were being done were not in accordance with Section 5(4) of the Act of 1972 for the period after the filing of the suit. Further to that as regards the question of bonafide requirement, the First Appellate Court held that it is without doubt that the party pleading bonafide requirement is not to prove the said aspect in a strict manner because a landlord has the liberty to state his own need regarding the requirement of his tenanted premises. On the basis of the above conclusions reached by the First Appellate Court, the first point of determination framed was decided in favour of the plaintiffs and against the defendant/appellants. As regards the second point of determination which was in respect to perversity in the judgment of the Trial Court, the First Appellate Court did not make any endeavour to look into the evidence or anything but in a most mechanical manner held that in view of the decision in point number one "it is clear that there is no infirmity in the judgment and

decree passed on the discussions made in the specific issues and so the interference of this Court is not required".

14. Consequently the appeal having been dismissed the defendants are before this Court by invoking the revisional jurisdiction under Section 115 of the Code of Civil Procedure.

15. Mr. Sharma, learned counsel for the petitioners submits that both the Courts below did not take into consideration the questions as regards how much was the advance whether it was Rs.9,48,378.77 as alleged by the plaintiffs or was it Rs.10,41,537.52 as claimed by the defendants and both the Courts having not discussed the said aspect while deciding the Issue No.3, the decision as regards the question that the defendants are defaulters in payment of rent is perverse. He further submits that this is very aspect of the matter was pointed out before the First Appellate Court. But the First Appellate Court as could be seen from the decision in point number two did not at all addressed the said point which was in complete violation to the provisions of Order XLI Rule 31 of the CPC. He further submits that the question of bonafide requirement is a fact which needs to be proved by the plaintiffs who are the landlords as settled by the various judgments of the Supreme Court as well as by this Court. He submits that from a perusal of the plaint as well as the evidence adduced, the plaintiffs have completely failed to substantiate the claim of bonafide requirement. However, the First Appellate Court in complete disregard to the well settled principles gave a complete go bye to the fact that it is the plaintiffs who have to prove the bonafide requirement. He further submits that if Exhibit-A was duly taken into consideration the defendants would not have been

defaulters as on the date of filing of the suit, which is a very relevant piece of evidence was not taken into consideration by both the Courts below.

16. Mr. Sattar, learned counsel for the respondents/plaintiffs submits that it is apparent from the judgment and decree passed by both the Courts below that it had taken into consideration the relevant evidences which is required for arriving at the conclusions in respect to Issue No.3 and 4 and accordingly had arrived at that the defendants were defaulters in payment of rent as well as the plaintiffs had a bonafide requirement of the suit premises. Those being findings of facts arrived at, it would not be proper for this Court exercising the jurisdiction under Section 115 of the CPC to re-appreciate the evidence and to disturb the said findings of facts. He further submitted that though the First Appellate Court's judgment in so far as regards the issue of bonafide requirement may not have been properly dealt with but the Trial Court had dealt with the same in the proper manner and consequently no interference is called for in the instant proceedings.

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

18. Before going into the merits of the case, it would be relevant to observe as to what are the duties and obligations of the First Appellate Court. First Appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for re-hearing both on questions of fact and law. The judgment of the Appellate Court must therefore reflect its conscious application of mind and record findings supported by reasons, on all the issues arisen along

with the contentions put forth, and press by the parties for decision of the Appellate Court. The task of an Appellate Court affirming the findings of the Trial Court is an easier one. The Appellate Court agreeing with the views of the Trial Courts need not be state the effect of the evidence or reiterate the reasons given by the Trial Court; expression of general agreement with reasons given by the Court, decision of which is under appeal would ordinarily suffice. However, the said observation is with a caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be device of camouflage adopted by the Appellate Court for not exercising the duty cast on it. While writing a judgment of reversal the Appellate Court must remain conscious of two principles. Firstly the finding of facts based on conflicting evidence arrived at by the Trial Court must weigh with the Appellate Court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the Appellate Court is not competent to reverse a finding of fact arrived at by the Trial Judge. As a matter of law if the appraisal of evidence by the Trial Court suffers from material irregularity or is based on inadmissible evidence or on conjectures and surmises the Appellate Court is entitled to interfere with the finding of fact. The First Appellate Court continues, as before to be a final court of facts and pure finding of facts remain immuned from challenge before the High Court in Second Appeal. A great obligation is therefore cast upon the Appellate Court being the final court of fact in view of that its decision on a question of law even if erroneous may not be vulnerable before the High Court in a Second Appeal because the jurisdiction of the High Court is limited only on substantial questions of law. Apart from that in terms with the Act of 1972, the jurisdiction of the First Appellate Court under Section 8

of the said Act is the final authority in the matter and the scope of revisional jurisdiction is limited. Under such circumstances, it is the requirement of law that the First Appellate Court while exercising its jurisdiction decides so in the manner envisaged under Order XLI Rule 31 which mandates that the First Appellate Court shall state the points for determination, the decision thereon, the reasons for the decision, as well as when the decree appeal from is reversed state the relief(s) to which the appellant is entitled to.

19. Now coming back to the merits of the case, a perusal of the judgment and decree passed by the Appellate Court it shows that the First Appellate Court had in a very cryptic manner affirmed the judgment and decree passed by the Trial Court and the same would be apparent from the fact that the First Appellate Court did not take into consideration the question of perversity at all which was framed as a point for determination. The ground of perversity which has been alleged was Exhibit-A was not taken into consideration by the Trial Court and if Exhibit-A would have been taken into consideration the decision of the Issue No.3 would have materially effected inasmuch as, if the amount of advance was as claimed by the defendants and upon such adjustment made, the defendants may not be defaulters as on the date of filing of the suit.

20. Further to that the mechanical manner in which the First Appellate Court had exercised it's jurisdiction is also apparent from the fact that the Issue No.4 which is the question of bona fide requirement of the plaintiffs was not taken into consideration in the manner as well settled by various judgment of the Supreme Court as well of this Court, which mandates that it is the burden upon the plaintiffs (landlord) to prove the bonafide requirement of the suit premises.

The judgments of the Supreme Court have been clear that for the purpose of bonafide requirement of a landlord what is required is it must be something more than a mere desire but need not certainly be a compelling or absolute or a dire necessity. The bonafide requirement is something in between a mere desire or a wish on one hand and the compelling or dire or absolute necessity on the other. However, the First Appellate Court did not make any endeavour to look into the same on the basis thereof. However the First Appellate Court decided the said issue on a basis of a misconceived proposition of law to the effect that whenever a landlord requires the suit premises irrespective of being bonafide or not it becomes a ground of eviction and it is on the basis thereof have decided the question of bonafide requirement.

21. A perusal of both the judgments of the Appellate Court as well as the Trial Court reflect that the defendants have been held to be defaulters in respect to certain events pursuant to the filing of the suit. At this stage reference to the judgment of the Division Bench of this Court in case of *Sobha Biswas vs. Ranjit Lodh*, reported in *2006 (1) GLT 479* is relevant and at paragraph 15 and 16 being relevant is quoted hereinbelow:

> "*(15.) It is always open to a party to a civil litigation to bring to the notice of the Court any subsequent fact or event having relevance to the issue involved in a lis for just, proper, and effective disposal of the dispute and to do complete justice between the parties. There is an underlying public policy behind it that a litigation must come to its finality resolving the disputes raised in the litigation. An ejectment suit under the Assam Rent Control Act is tried as civil suit as per the procedure prescribed by the Code of Civil Procedure and there is no specific Rent Control Court in the State of Assam. Court is defined under Section 2(a) of Act as court of ordinary civil jurisdiction. As discussed herein above, the scheme of the Act provides that it is the duty and obligation of a tenant to pay the lawful rent due to the landlord so long as the tenant occupies the premises.*

During the continuation of the eviction proceeding the tenant is not absolved from paying the rent due. Accordingly, in the event there occurs any default at such stage, it is always open to the land lord to bring this fact to the notice of the court by proper application and manner, for its due consideration. On putting on record such subsequent facts or events the land lord (tenant sic) will certainly get an opportunity to rebut the same. The decision of the learned Single Judge rendered in Mahadeo Prasad Agarwala (supra) to the effect that the cause of action of the suit on default in payment of rent for a particular period having been pleaded specifically, default for subsequent period cannot be taken into consideration for characterizing the tenant as a defaulter, is a finding per in curium, the learned Single Judge came to the said finding inter alia on the basis that the land lord of that case having claimed damage @ 25/- per day for subsequent period such a plea will not be available to him and the non payment of monthly rent for such period is not to be considered for determining the point of defaulter. In our considered opinion, the said decision does not lay down any specific law to the effect that subsequent events cannot be considered. Accordingly, the said decision has no binding force as a precedent or otherwise.

(16.) The other decision of this court as rendered in Abdul Matin Choudhury and another (supra) to the effect that the liability to pay the rent by a tenant shall subsist all through the proceeding even when the matter is pending before the highest court and if at any point of time the land lord by prudent manner can bring to the notice of the court that even during the pendency of the proceeding the tenant has failed to discharge his liabilities and right to pay rent in favour of the land lord to get the decree for ejectment under the Act, is arrived at gaining support from the decisions rendered in L.P.A.11/76 (R.C. Basak Vs. D.N. Pandit). In our considered opinion the said principle declared by the learned Single Judge is in consonance with the scheme and object of the Act and has laid down the correct proposition of law in this regard. Accordingly, answering the referred question, we hold that a land lord can bring on record by proper method the subsequent event or facts such as default in payment of rent by the tenant during the pendency of the eviction of proceeding against him and on making such prayer the tenant would be entitled to object the same, if so desire. If the learned court finds that the tenant has defaulted in payment of such rent during the pendency of the ejectment proceeding, the

court would be within its jurisdiction to pass an order of ejectment treating the tenant as a defaulter and pass appropriate orders thereon in the same suit. The land lord cannot be subjected to file successive suits for ejectment on the occasion of every default of the tenant, committed during the pendency of the eviction proceeding."

22. A perusal of the said judgment of the Division Bench of this Court would categorically go to show that if subsequent events pursuant to the filing of the suit as regards non-payment of rent during the pendency of the suit is to be taken into account by the Trial Court for the purpose of eviction, a proper application is required to be filed bringing on records such subsequent events/facts which then shall enable the tenant to controvert the said allegations. In absence of the same, the Court cannot take into consideration the subsequent events pursuant to the filing of the suit as a ground for default in payment of rent which entitles the landlord to eviction. From the records available before this Court and a perusal of the judgments by both the Courts below does not show that any such application was filed in the manner as stated in the case of *Sobha Biswas (supra).* This aspect to the matter was also not taken into consideration by the First Appellate Court.

23. The decisions arrived at by the First Appellate Court in the opinion of this Court is not a judgment within the meaning of Order XlI Rule 31 of CPC and consequently the said judgment and decree passed by the First Appellate Court is liable to be interfered with. Taking into consideration that the First Appellate Court having not exercised the jurisdiction in the manner envisaged by law, this Court is of the opinion that it would be in the interest of justice that the case be remanded back to the First Appellate Court for a *de novo* decision of the appeal

in terms of the observations made hereinabove.

24. Further taking into consideration that an appeal is continuation of the suit, the plaintiffs who are the respondents in the said appeal would be at liberty to file appropriate application (if such application has not yet been filed before the Trial Court) thereby bringing into the notice of the First Appellate Court about the fact of non-payment of rent or non-adherence to the provisions of Section 5(4) of the Act of 1972 by the defendants for the period from the date of filing of the suit and during the eviction proceedings.

In terms with the judgment of the Division Bench of this Court in *Sobha Biswas (supra),* if such application is filed, the Appellate Court shall provide an opportunity to the defendants to controvert the allegations contained in the said application and to adduce evidence in respect thereof to substantiate that the defendants have been making payment/tendering rent pursuant to the filing of the suit and during the eviction proceedings. The First Appellate Court shall duly take into consideration of the said aspect of the matter while deciding the question of defaulter in payment of rent during the eviction proceedings.

25. The First Appellate Court shall further also take into account the question as regards what was the advance amount whether it was Rs.9,48,378.77 as claimed by the plaintiffs or Rs.10,41,537.52 as claimed by the defendants and the impact it would have in respect to decide the Issue No.3.

26. The Issue No.4 which is the issue pertaining to bonafide requirement would also be decided by the Appellate Court afresh in terms with the

observations made hereinabove.

27. With the above observations, the instant petition stands disposed of and taking into account that this being a landlord tenant dispute the First Appellate Court is requested to dispose of the appeal within a period of 6 (six) months from the date of appearance of the parties. The parties are directed to appear before the First Appellate Court on 14.02.2022.

JUDGE

Comparing Assistant