Abdul Samed @ Kalai Bepari Vs Anilibiislam and Others

Court: Gauhati High Court

Date of Decision: March 29, 2000

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 100

Citation: (2000) 2 GLT 544

Hon'ble Judges: A.P. Singh, J

Bench: Single Bench

Advocate: C.K.S. Barua, D. Bora, B.K. Bora, M.U. Mahmud and S.C. Nandi, for the Appellant; B.K. Goswami, T. Goswami and I. Goswami, for the Respondent

Final Decision: Allowed

Judgement

A.P. Singh, J.
Present Second Appeal has been filed u/s 100 of the CPC by the Plaintiff/Appellant impugning the judgment and decree

dated 13.3.95 passed by the learned Assistant District Judge, Nagaon in TA. No. 23/94 thereby allowing the appeal of the Respondents and

reversing the judgment and decree dated 16.7.94 passed by the learned Munsiff No. 1, Nagaon in T.S. No. 173/93 for the relief inter alia for the

grant of declaration that he is the owner of the land described in Schedule-A of the plaint and also for the delivery of khas possession of the suit

land to him as the Defendant No. 1 had sold the said land to the Appellant/Plaintiff.

2. The case of the Plaintiff/Appellant is that he purchased the suit land measuring 6 1/6 lechas covered by Dag No. 1688 of P.P. No. 1381 from

the Defendant No. 1 by a registered sale deed No. 1198 of 1988 with a stipulation that the Defendant No. 1 will deliver its khas possession after

removing the chali standing thereon and also vacating a portion of the said chali which was in the occupation of the Defendant No. 2 who

occupying a portion of the chali as licensee under the Defendant No. 1. However, after partition and mutation of the suit land in Appellant''s name

its area was reduced to 6V6 lechas and the land which was subject matter of sale deed executed by the Defendant No. 1 in his favour was thus

subjected to some change. It was further alleged that it was stipulated at the time of sale of the land by Defendant No. 1 that he will deliver its

vacant possession after evicting therefrom Defendant No. 2 who was in occupation of the part thereof as licensee. The Defendant No. 1, however,

did not honour the stipulation, hence the suit.

3. Defendant Nos. 1 and 2 both entered appearance in the suit and filed written statement. Defendant No. 1 inter alia contended that the land was

sold by him to the Appellant had been duly delivered over possession but the suit land was never sold out by him to the Appellant. The Defendant

No. 2 claimed that he was the tenant of a portion of the suit land whereon his building was situated. Both of them accordingly resisted the suit.

Defendant No. 1 totally denied the existence of any chalighar on the suit land. Defendant No. 2 further stated that even if the Appellant/Plaintiff be

presumed to have purchased the land then too by operation of law, he has automatically become tenant under the Plaintiff as per provision of

Assam Urban Areas Rent Control Act, 1972. Both the Defendants and the Appellant adduced evidence in support of their respective plea. The

learned Munsiff after examining the matter in the light of the evidence on record decreed the suit in favour of the Plaintiff/Appellant He held that the

Appellant/Plaintiff had purchased the suit land from the Defendant No. 1 and that Defendant No. 2 was licensee of Defendant No. 1 in the chali

standing thereon. The Plaintiff was accordingly held entitled to decree in his favour and further that the Defendant Nos. 1 and 2 are liable to be

evicted from the suit land.

4. Defendant No. 1 alone filed appeal being No. T.A. 23/94 against the judgment and decree dated 16.7.94 passed by the learned Munsiff No. 1,

Nagaon which was heard by the Assistant District Judge, Nagaon. The lower appellate Court has allowed the appeal holding that the suit land is

not the land which was sold out vide Ext. 1 by Defendant No. 1 the Plaintiff. Further that Defendant No. 2 was not a licensee under Defendant

No. 1 but was his tenant The present second appeal has been filed by the Plaintiff with the prayer for setting aside the judgment and decree passed

by the lower appellate Court.

5. Mr. B.K. Goswami, learned senior advocate assisted by Smti T. Goswami raised a preliminary point. According to him under the provisions of

Section 100 of the Code of Civil Procedure, 1908 an appeal can be heard only on the substantial questions of law so formulated by the Court at

the time of admission of the Second Appeal and or on any other substantial question of law if one is formulated during the course of hearing of the

appeal obviously with the prior permission of the Court. He contended that at the admission stage of this appeal since no substantial question of

law was framed by the Court the appeal itself is incompetent and for the reason it cannot be heard.

6. From perusal of this Court''s order dated 28.6.95 (by which the appeal was admitted by a learned judge of this Court) it appears that no

substantial question of law was framed by the Court itself when the appeal was admitted. To make the thing clear the relevant portion of this

Court"s order admitting the appeal needs to be quoted:

The appeal is admitted and will be heard on the law point as enumerated in the Memo of Appeal. Appellant is further allowed to raise any other

substantial question of law at the time of hearing.

In view of the objection Mr. M.U. Mahmud, learned Counsel for the Appellant/Plaintiff was called upon to frame a substantial question of law

which may be involved in the appeal. However, instead of doing so learned Counsel for the Appellant insisted that the question of law disclosed in

the memo of appeal are the substantial questions of law on which the appeal was admitted and he has right to argue the appeal. Having seen the

grounds I do not agree that those grounds constitute substantial question of law as they are more by way of criticism of the impugned judgment on

facts and on legal informaties than raising of substantial questions of law. Though shorn of facts, no question of law or for that matter substantial

question of law can be raised but every defect from which a judgment under appeal is said to suffer does not come within the purview of

substantial question of law u/s 100 Code of Civil Procedure.

7. In my considered opinion the main purpose for putting imbargo on the power of the High Court to entertain an appeal cannot be defeated by

labelling every factual or legal objection against the impugned judgment as substantial question of law. The question men would arise as to what

amounts to substantial question of law on which the High Court can assume its power to admit and hear a second appeal. There cannot be fixed

norms for determining a question to be or not a substantial question of law. Determinative factor in this regard shall however be the overall

sustainability of the impugned judgment. In case it has been passed in utter disregard of the well accepted judicial norms or in utter disregard of

well established principles of law the High Court will interfere to set aside such a judgment. Therefore a judgment by first appellate Court which is

against the established judicial norms of against the established principles of law cannot be allowed to hold the field only because the Appellant or

his counsel who represents his case in the Court or for that matter the Court has not been able to frame the substantial question of law which may

actually be involved in the appeal at the time of its admission. Failure on this score of either of them would not operate as a bar against the power

of the Court to hear the appeal on merits, however such hearing has to be confined on the question which in the satisfaction of the Court is a

substantial question of law.

8. Though, as rightly argued by Shri Goswami, it was the imperative duty of this Court as well as the learned Counsel for the Appellant at the

admission stage to have formulated the substantial questions of law which was found involved in the appeal so that the Respondent decree holder

could have the opportunity to demonstrate to the Court at the stage of final hearing that the appeal did not involved that question but omission on

this score on their part cannot prevent the Court from hearing the appeal on merits in case the Court at the hearing stage on its own finds such a

question being involved in the appeal.

9. Other purpose for which the duty has been cast on the Appellant and the Court respectively to formulate, in the memo of appeal and in the

order of admission, the substantial question of law which may be involved in the appeal is for minimising the number of cases which are brought to

the Court for its review. The purpose however is not to deny hearing of genuine appeals in which though substantial question of law is found

involved but has not been stated either in the memo of appeal or in the order of the Court which is passed at the stage of preliminary hearing of the

appeal. A litigant having a genuine case for hearing must not be denied hearing because of the fault or negligence of his lawyer or for the mistake of

the Court. I, therefore, reject the preliminary contention of Mr. Goswami.

10. Upon hearing of the impugned judgment and also of the judgment of the learned Munsiff by which the suit of the Appellant was decreed and

upon perusal of the available evidence on the record of the case I feel highly convinced that the learned Assistant District Judge has divorced to the

prejudice of the Appellant, the well established norms of justice by setting aside the decree of the trial Court on a lame excuse which is not at all

tenable in view of the available evidence on the record. The learned Assistant District Judge has set aside trial Court"s decree only on the ground

that in his opinion the suit land was not the land which was subject matter of the sale deed No. 1198/88. This conclusion has been arrived at by

him on the basis of some difference minor discrepancy occurring in the description of the suit land on its western boundary which was slightly

different from the description of the western boundary of the land sold by Defendant No. 1 to the Appellant as was given in the schedule of the

Sale Deed No. 1198/88. The approach of the learned Assistant District Judge will be better appreciated if his own observations appearing in the

impugned judgment are quoted; his observations read as follows:

Para 2 of the plaint mentions that the Plaintiff has obtained mutation and perfect partition in respect of his plot of land. The partition has slightly

reduced the area obtained under the sale deed, Ext 1 to 6 1/6 lechas and placed it entirely under Dag No. 1688. The plaint does not explain as to

why there has arisen a dissimilarity as regards western boundary as shown in the schedule to Ext 1 and schedule to the plaint This difference in the

western boundary is suggestive to an inference that the suit land is not the land sold by the Defendant 1 to the Plaintiff vide Ext. 1. On this inference

it can be held that the sale deed, Ext. 1 could not confer any title upon the Plaintiff in respect of the plot of land as shown in the schedule the plaint

The schedule to the plaint makes it reveal that the Plaintiff is the owner of separate strip of land between the suit land the land of one Abdur Rob

along with western boundary of the suit land, whereas as per schedule mentioned in Ext. 1 the suit land must be strip of land which is situated

between the land of the Plaintiff and Abdur Rob. This being the position, the suit land cannot be the plot of land which was sold out by the Plaintiff

vide Ext. 1. On perusal of the impugned judgment, I find mat the learned Court below without going through the boundaries show in the schedule

to Ext. 1 and that shown in the plaint and without properly comparing the same arrived at a decision that the land purchased by the Plaintiff vide

Ext. 1 is the suit land. I find that the learned Court below has committed grave error of fact as well as law and also did not appreciate the evidence

on record in its power perspective while deciding issue Nos. 6 and 8 in favour of the Plaintiff. On the basis of this decision alone, the impugned

judgment and decree is found to be liable to be dismissed.

The above observations of the learned Assistant District Judge, have been made bereft of the facts which were noted by himself at the very outset

to the effect that due to the mutation of his name after the transfer of the land in his favour by Dag No. 2 and partition of that land there occurred

some variation in the area of the land from 6 1/4 lechas to 6 1/4, lechas and also that instead of the land earlier being covered partly in Dag Nos.

1687 and 1688 after partition fell exclusively in Dag No. 1688. This is most crucial factual assertion of the Appellant in the plaint which was fully

substantiated by evidence and was not denied by the Defendants. Though the Appellant had fully explained the reasons for the slight difference

occurring in the western boundary of the land as it was described in the plaint and in the sale deed, he same was however omitted from Courts

consideration. The reason that some land of the Plaintiff intervened between the land in suit and the land of Abdul Rob on the western border of

the suit land did not by itself legally justify for drawing the inference that the suit land was different from the land which was subject of sale deed

No. 1198/1988 when the description of the suit land in North, South and Eastern boundaries was the same both in the plaint and in the sale deed.

From the above it would clearly appear that the lower appellate Court has coined up a technicality to deny to the Plaintiff of the fruits of the sale

deed which he had obtained from the Defendant No. 1 for valuable consideration even though the said Defendant had not denied its execution.

11. Therefore for the above reasons in my opinion following substantial question of law is found involved in the appeal which deserves to be heard

by this Court on that question, viz:

Whether for a minor and inconsequential discrepancy (difference) occurring in the description of the suit land which is not exactly the same as in the

evidence of title (sale deed) of that land can lead to the inference that the suit land was not the same as is reflected in the evidence of title (sale

deed) when description of the boundary on all other sides is the same and discrepancy occurring on one side too has been explained.

The above question was framed in the course of hearing of the appeal after due discussion and upon consideration of the arguments made by the

learned Counsel for the Respondents who was given and had availed the opportunity to show to the contrary.

12. Mr. B.K. Goswami, learned Counsel for the Respondents contended that the discrepancy pointed out by the lower appellate court in the

description of the land in the schedule of the plaint and in the sale deed is a material discrepancy which the trial Court had failed to notice hence,

the appellate Court was fully justified in setting aside the decree on that ground of discrepancy. I do not find merit in the above contention of Mr.

Goswami. It is surprising that the lower appellate Court has tried to fish out virtually a nonexistence discrepancy in the description of the boundary

of the suit land at the western side to set aside trial Court''s judgment Though the said Court had noticed in its statement the facts of the case

including the reasons for the occurrence of the said discrepancy, but the said reason was not evaluated by him while arriving at the finding which

was ultimately recorded by him. The first appellate Court therefore was wholly wrong in its observation that the Plaintiff has not given the reasons

for the difference occurring in the description of the western boundary of the suit land though in the plaint such a reason had been given by the

Appellant which has not been disbelieved by either of the two Courts below. To further elucidate the position in this regard it is necessary to

extract the boundaries of the suit land and the land covered by the sale deed. The boundary of the land as given in the Schedule A of plaint reads

as follows:

Schedule-A

One plot of land measuring 6 1/2 lechas covered by Dag No. 1688 under the P.P. No. 1301 of the town Nagaon Kissam in the town mouza of

the Nagaon district, Assam. Boundaries of the plot are as follows:

North - Land of Haji Sirajuddin (Previously of the Defendant No. 1, Nazrul Islam).

South - Land of the Plaintiff Abdul Samed

East - Majid Road.

West - Land of the Plaintiff Abdul Samed and men the land of Abdul Rouf and Ors. .

Whereas the description of the land covered" by the sale deed is as follows:

North - Defendants land, vendors grand father Floor Mill and vendors land.

South Plaintiff and

East Ã¯Â¿Â½ Majid Road

West Ã¯Â¿Â½ Abdul RoufÃ¯Â¿Â½s land.

Lower appellate Court found difference in the description of the suit land from the land covered by sale deed on the only ground that some area of

Plaintiffs land intervened between the suit land and Abdul Rouf"s land on the western boundary whereas Plaintiffs land was not shown in that

direction where Abdul Rouf"s land was shown adjacent to the land under sale. This in my opinion amounts to hair splitting exercise by the first

appellate Court for denying justice to the Appellant hi my opinion existence of a minor discrepancy in the description of the suit land as regards its

western boundary is fully explained by the Plaintiff in his assertion and in his oral testimony which had not been denied by the Defendant therefore

in the light of Plaintiffs explanation that after purchase of the suit land by him he obtained mutation and also got demarcation of the suit land as a

consequence thereof some discrepancy was bound to occur in the situation of the suit land. The boundary of the land both in the plaint and the sale

deed as seen above on other 3 sides remains the same hence there was no ground for the view as was taken by the lower appellate Court.

13. I, therefore, set aside the findings of the lower appellate Court to me effect that the land in suit was not the same which was purchased by me

Appellant from Defendant No. 1 and enforce the finding of the Munsiff that the suit land and land covered by the sale deed executed by Defendant

No. 1 in favour of the Appellant was the same.

14. On me next question also the first appellate Court has committed grave illegality. The finding of me trial Court to the effect that Defendant No.

2 was licensee in part of the suit land under Defendant No. 1 had not been challenged by Defendant No. 2. In this view of the matter that finding

could not be disturbed nor it could be re-evaluated by me lower appellate Court at the instance of Defendant No. 1 because after transferring the

land m favour of the Plaintiff, Defendant No. 1 had lost every right or interest thereon. Admittedly, Defendant No. 2 did not file appeal against me

decree passed against him by the trial Court. By that decree of the trial Court, Defendant No. 2 was ordered to be evicted from the suit land on

me ground that he was a licensee of Defendant No. 1 and the licence granted to him by Defendant No. 1 came to an end on the transfer of that

land by Defendant No. 1 in favour of the Plaintiff. Thus, in the absence of appeal from Defendant No. 2, the decree passed by the trial Court

against the said Defendant became final which could not be disturbed by the first appellate Court at the behest of Defendant No. 1.

15. As a result of the above discussion, the impugned judgment and decree passed by the learned Assistant District Judge, Nagaon, is set aside

and that of the trial Court is restored. The appeal is allowed with costs.