

(2004) 11 GAU CK 0029

Gauhati High Court

Case No: C.R.P. No. 300 of 2000

Premomay Basu

APPELLANT

Vs

On the Death of Sudip
Purkayastha, his Legal heirs and
Others

RESPONDENT

Date of Decision: Nov. 17, 2004

Acts Referred:

- Assam Urban Areas Rent Control Act, 1972 - Section 2
- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 24, Order 9 Rule 9

Citation: (2005) 2 GLR 577 : (2005) 1 GLT 407

Hon'ble Judges: H.N. Sharma, J

Bench: Single Bench

Advocate: B.K. Goswami and T. Goswami, for the Appellant; N.M. Lahiri, N. Choudhury, SC Koyal, S.P. Choudhury and R. Das, for the Respondent

Final Decision: Allowed

Judgement

H.N. Sarma, J.

By this petition the plaintiff landlord has challenged the judgment and decree dated 25.5.2000 passed by the learned Civil Judge (Sr. Divn.), Karimganj in Title Appeal No. 30/99 setting aside the judgment and decree dated 14.6.1999 passed by the learned Civil Judge (Jr. Divn.) No. 2, Karimganj in Title Suit No. 326/92.

2. The plaintiff landlord filed the Title Suit No. 326/92 in the Court of the learned Civil Judge (Jr. Divn.) No. 2, Karimganj for eviction of the defendants from the suit holding and confirmation of possession of the plaintiff over the same with other consequential relief. The pleaded case of the plaintiff, in brief, is that the plaintiff acquired ownership over the land described in the 1st Schedule of the plaint and the suit holding as described in the 2nd Schedule of the plaint. The defendants have been running a hotel business in the name and style of Aryabash Hotel on the suit

holding since the time of their predecessor in interest. The suit holding consists of an old Assam Type house. It is further pleaded that the suit house is necessary for the plaintiff for his bona fide requirement for his own use and occupation. The plaintiff was an employee of the Railway Department at the time of institution of the suit who retired in the year 1996 and as such it would be necessary for him for his own occupation and he has on other alternative property except the suit holding. The further case of the plaintiff was that the defendants were also defaulter in payment of the rent. It has also been pleaded that the defendants have illegally constructed and extended suit holding without obtaining any permission from the plaintiff. The defendants also sub lets one portion of the suit holding to the defendant No. 5. The defendants contested the suit by filing written statement wherein they have stated, inter alia, that there was no cause of action for institution of the suit, the suit is not maintainable, the suit is bad for defect of parties, the plaintiff has no right to institute the suit, the defendants are not defaulter, the defendants are regularly paying the rent, the predecessor in interest of the defendants constructed some houses on the suit holding with due permission of the plaintiff, the defendants have not sub let any portion of the suit holding to the defendant No. 5 and the plaintiff is not entitled to get any relief in the suit.

3. The defendants have further made a counter claim stating that the predecessor in interest of the defendants have constructed some houses on the suit holding at his costs on being requested by the plaintiff and the said cost of construction are not paid by the plaintiff. There were some vacant lands and on being requested by the plaintiff the defendants have constructed some houses thereon at the costs of the defendants. The defendants have constructed two sanitary latrine, toilet and bathroom at their costs and the defendants also constructed the kitchen house. The defendants have installed one tube well and also got water supply connection at their costs. Thus the defendants are the owner of the aforesaid part of the suit holding and the plaintiff is not entitled to get khas possession over the said part of the suit holding. The defendants have admitted that there was a lease agreement between the plaintiff and the defendants and as per the said agreement the monthly rent was fixed at Rs. 300/- per month for the suit holding. Accordingly the defendants deposited monthly rent in the name of the plaintiff in the S/B Account No. C/2273 of the State Bank of India which stands in the name of the plaintiff.

4. The plaintiff also filed written objection against the counter claim made by the defendants denying the counter claim and prayed for dismissal of the said claim. The learned trial Court framed the following issues in the suit: -

1. Is there any cause of action for the suit ?
2. Is the suit maintainable in its present form ?
3. Whether the defendants are defaulter in respect of payment of the rent in respect of the suit house ?

4. Whether the suit house is bona fide required by the plaintiff?
5. Whether the defendants have made illegal construction within the premises of the suit holding ?
6. To what relief or reliefs, if any, the plaintiffs are entitled to ?

5. During the course of trial the plaintiff examined two witnesses, including himself, in support of his case whereas the defendants examined one. Both the parties exhibited some papers and documents in support of their respective cases. The learned trial Court after hearing the parties and on consideration of the materials and evidence on record decided Issue No. 1 in the affirmative. So far as the issue of maintainability of the suit, which was framed as Issue No. 2, the learned trial Court held that under the provisions of Section 2(iv) of the Assam Urban Areas Rent Control Act the plea of not impleading the other co-owners of the suit property is not acceptable inasmuch as when the property belongs to co-owners whether the land lord who is only one of the co-owners can file a suit for eviction of his tenants is covered by the decision of the Apex Court reported in [Sri Ram Pasricha Vs. Jagannath and Others](#), In paragraph 15 of the said judgment the Apex Court, inter alia, held that "under the general law, in a suit between landlord and tenant the question of title to the leased property is irrelevant. It is, therefore, inconceivable to throw out the suit on account of non-pleading of other co-owners as such". Accordingly the learned trial Court held that the suit is maintainable. Regarding Issue No. 3, that is the issue of defaulter, the learned trial Court on consideration of the evidence of the parties as well as the exhibits, namely, Ext-C(1) to C(22) and Ext.-D(1) to D(7) came to a finding that the defendants deposited money in the Bank Account of the plaintiff upto 12.1.1979 and vide Ext-D(1) to D(7) the defendants deposited some amount through R/D case from 3.6.1998 to 11.2.1999. It has also been held that the defendants have not paid any rent from 12.2.1979 to 3.6.1998 which is a long period of about 18 years. Further, after filing of the case the defendants have deposited some amount of rent through RD case. Considering the facts and circumstances and the materials on record the learned trial Court held the said issue in the affirmative and held the defendant to be defaulter. Regarding the issue of bona fide requirement, that is, Issue No. 4 the learned trial Court also decided the issue in favour of the plaintiff. Similarly, in deciding Issue No. 5 the learned trial Court held that the defendants have undertaken construction work without permission of the plaintiff which amounts to illegal construction and decided the issue in the affirmative and the learned trial Court ultimately passed the judgment and decree dated 14.6.1999 for ejectment of the defendants from the suit premises and directed the defendants to vacate the suit premises within a period of three months. The defendants challenged the said judgment in Title Appeal No. 30/99 before the learned Civil Judge (Sr. Divn.), Karimganj. The learned Civil Judge (Sr. Divn.) vide judgment and decree dated 25.5.2000 set aside the judgment and decree passed by the learned trial Court and remanded the matter to the learned

trial Court by framing three more issues as additional issues with direction to decide those issues also in the said suit after remand. Those additional issues, as framed by the learned appellate Court are as follows :

"1. Whether the suit is bad for non-joinder of necessary party ?

2. Whether the suit is barred by the principle of resjudicata ?

3. Whether the suit is barred under Order 9, Rule 9 of the CPC ?"

6. I have heard Mr. BK Goswami, learned senior counsel assisted by Ms. T. Goswami, for the petitioner and Mr. NM Lahiri, learned senior counsel assisted by Mr. N. Choudhury, for the respondents.

7. Mr. BK Goswami, learned senior counsel submits that while passing the impugned judgment and decree the learned appellate Court failed to consider the power of the appellate Court in remanding a case for re-determination, under the provisions of CPC, more particularly the provisions of Order 51, Rule 24, and submitted that when the evidence and materials on record are sufficient, the appellate Court ought to have decided the case finally instead of remanding the matter back and that not having done the learned appellate Court committed jurisdictional error in passing the impugned judgment. It is further submitted that while setting aside the judgment and decree passed by the learned trial Court the learned appellate Court did not at all consider the findings arrived at by the learned trial Court and did not address his mind as to why those findings are illegal or perverse or bad in law. It is also submitted that the additional issues framed by the learned appellate Court are un-necessary and the issues framed by the trial Court covers the dispute between the parties. Accordingly, Mr. Goswami submits, the learned appellate Court committed jurisdictional error and in this view of the matter the impugned order is liable to be said aside and quashed. Refuting the arguments of the petitioner, Mr. NK Lahiri, the learned senior counsel appearing for the respondents has submitted that this Court under its revisional jurisdiction is not entitled to grant any relief to the petitioner. It is further submitted by the learned counsel that no case has been decided in the instant case and that the learned lower appellate Court committed no error in framing the additional issues and those additional issues are very much necessary for just decision of the case. Supporting the additional issues it has been submitted by the learned counsel that since there are several claimants claiming to be the owners of the suit property, who are claiming the rent, all the co-owners should be impleaded as party and that having not been done the suit is bad for non-joinder of necessary party. Regarding the additional issue on the point of resjudicata it is submitted that one Sukhomoy Bose who is the brother of the present plaintiff and eldest son of the original landlord having filed the Title Suit No. 51/89 on or about 29.3.1989 impleading the present petitioner as one of the co-defendants and that suit having been dismissed for default the present suit is barred under the principles of Order 9 Rule 9 and hence

this issue of resjudicata is necessary. It has also been submitted that although the additional Issue Nos. 2 and 3 have been separately framed for resjudicata and legal bar under Order 9 Rule 9, it has been submitted that in fact, there ought to have been one such additional issue on the point of maintainability in view of the principles laid down under Order 9 Rule 9. In reply, Mr. Goswami, learned counsel for the petitioner has drawn my attention to the order dated 17.12.1998 passed by the learned trial Court in the title suit which is annexed as Annexure-1 to the Revision Petition. By the said order the learned trial Court rejected the prayer of the petitioner for framing a preliminary issue on the point of resjudicata. Further while passing the said order it was also observed by the learned trial Court that as this is a suit for eviction on the ground of defaulter and bona fide requirement under the provision of Assam Urban Areas Rent Control Act the question of resjudicata does not arise in the absence of same cause of action. Further the learned trial Court kept the issue regarding maintainability open to be decided at the final hearing of the suit. It has also been submitted that the said order has attained finality and is not challenged and that being the position the question of framing an issue on the point of resjudicata does not arise.

8. I have carefully considered the rival contentions made by the learned counsel for the parties. On perusal of the judgment and order passed by the learned appellate Court setting aside the judgment and decree passed by the learned trial Court, it is found that the learned appellate Court did not address his mind as to why the judgment and decree passed by the learned trial Court was set aside and did not give reasons for that. The learned trial Court passed an elaborate judgment considering all the aspects of the matter properly appreciating oral and documentary evidence and materials. In this case the tenancy is not denied by the defendant. It is the admitted case of the defendants that they deposited the monthly rent in the Bank Account in the name of the present plaintiff and as such I have no hesitation to hold that the defendants have all along accepted the present plaintiff as their landlord and it being a suit between the landlord and the tenant is regulated and guided by the Assam Urban Areas Rent Control Act, 1972. The question of framing an issue on the point of resjudicata or under Order 9 Rule 9, in my considered view, in the facts of the present case, does not arise. If the learned appellate Court finds that any decision rendered by the learned trial Court is not in accordance with law or perverse or illegal, certainly it is open for him to set aside the same and pass appropriate order in exercise of his power as an appellate Court as provided under the law, but that was not done in the instant case. The framing of additional issues whether the suit is bad for non-joinder of necessary parties or other co-owners is not necessary in the instant case in view of the principles of law enunciated by the Apex Court in [Sri Ram Pasricha Vs. Jagannath and Others](#). Further, it is noteworthy that when the materials and documents were available before the learned appellate Court, instead of remanding the matter in exercise of its power under Order 41 Rule 24 he ought to have decided the matter by himself, in view of

the facts and circumstances of the present case, and remand in such a case is not necessary. Based on pleadings of the parties the learned trial Court has framed the necessary issues which are relevant for the purpose of decision of this case. In such cases filed under the provisions of Assam Urban Areas Rent Control Act the two main issues, namely, the issues regarding the default and bona fide requirement are the grounds for ejectment of a tenant and if the plaintiff landlord succeeds on such grounds the plaintiff landlord is entitled to get a decree of eviction under the Act which is a Special Act in the State. Order 41 Rule 24 provides that where the evidence upon the record is sufficient to enable the appellate Court to pronounce judgment, the appellate Court may, after resetting the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the appellate Court proceeds. Accordingly I hold that those additional issues are not necessary for just decision of the case and in framing those issued the learned appellate Court acted illegally and/or with material irregularity.

9. Such an issue came up for consideration before this Court in the case of Lalit Mohan Nath, v. Mohan Nath (AIR 1974 Gau 68) took up such an issue and in paragraph 10 of the said judgment it has been held thus -

"Rule 25 gives power to the appellate Court to remand a case where a trial Court has omitted to frame or try any issue or has omitted to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit on merit; it may frame issue, if necessary, and refer the same to the trial Court for trial of the same. In this connection consideration of Rule 24 is essential. Rule 24 enjoins on an appellate Court to determine a case finally where the evidence on record is sufficient to enable the appellate Court to pronounce the judgment. An appellate Court cannot, obviously exercise powers simultaneously under Rules 24 and 25. When there is sufficient evidence to enable the appellate Court to pronounce judgment, it is its duty to do it under Rule 24; it cannot pass on to Rule 25 to make a remand. Remand means delay in the disposal of the suit, and delay defeats justice."

10. In view of the aforesaid discussions and decisions it is found that the learned appellate Court failed to exercise jurisdiction vested on him under Order 41 Rule 24 and acted illegally and with material in passing the impugned judgment which is liable to be set aside. Accordingly the impugned judgment and order passed in Title Appeal No. 30/99 by the learned Civil Judge (Sr. Divn.), Karimganj is set aside and the case is remanded back to the said lower appellate Court for fresh disposal on consideration of the entire aspects of the matter including the evidence and materials on record.

11. The parties are directed to appear before the learned lower appellate Court on 20.12.2004 for getting further instruction from the said appellate Court. It is expected that the learned Court below will dispose of the matter expeditiously.

12. The revision petition is allowed. No order as to costs.