

(1994) 08 GAU CK 0004**Gauhati High Court****Case No:** Civil Revision No. 297 of 1988

Babulal Bawri

APPELLANT

Vs

Om Prakash Sarmah

RESPONDENT

Date of Decision: Aug. 8, 1994**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 115

Citation: (1994) 2 GLR 413**Hon'ble Judges:** A.K. Patnaik, J**Bench:** Single Bench**Advocate:** R.L. Yadav and K. Yadav, for the Appellant; G.N. Sahewalla and A.K. Goswami, for the Respondent**Judgement**

A.K. Patnaik, J.

This Civil Revision is directed against the judgment and decree, dated 25.5.1988 of the learned Assistant District Judge, Dibrugarh in Title Appeal No. 18/86. By the said judgment and decree; the learned Assistant District Judge Dibrugarh upheld the judgment and decree of the learned Munsiff No. 2, Dibrugarh in Title Suit No. 17/84 dismissing the suit of the Plaintiff-Petitioner for ejectment and khas possession in respect of the suit premises against the Defendant-opposite party.

2. The case of the Plaintiff-Petitioner in the said Title Suit No. 17/84 before the learned Munsiff No. 2, Dibrugarh was that the Plaintiff is the landlord and the Defendant is the tenant in respect of the suit premises, and in course of time the Defendant defaulted in payment of rent, the Plaintiff bonafide required the suit premises and the Defendant caused damage to suit premises. On the aforesaid grounds, the Plaintiff prayed for ejectment of the Defendants and khas possession, of the suit premises. By judgment and decree dated 2.4.86, the learned Munsiff No. 2, Dibrugarh found inter-alia that there was no default in the payment of rent by the Defendant and that the Plaintiff has not established a Case of bonafide requirement

of the suit premises and no damage of suit premises has been caused by the Defendant and on the bails of the said findings dismissed the suit. Aggrieved by the said judgment and decree dated 2.4.86 of the learned Munsiff No. 2, Dibrugarh, the Petitioner filed Title Appeal No. 18/86 before the learned Assistant District Judge, Dibrugarh. But by the impugned judgment dated 25.5.88 the learned Assistant District Judge, Dibrugarh dismissed the said appeal.

3. Mr. Yadav, learned Counsel for the Petitioner submits that in the impugned judgment the learned Assistant District Judge, Dibrugarh proceeded on an error of law that it was the Plaintiff who was under the burden to prove default on the part of the Defendant in payment of rent for the period upto October, 1981 and refused to interfere with the judgment and decree of the learned Munsiff. In this context Mr. Yadav submits that" the Plaintiff himself was examined and in course of examination has stated that he has not received rent for the month of September 1981 onwards. Mr. Yadav further stated that the Plaintiff has also various counter foils of rents receipts granted by him for the different months of tenancy (exhibits 1 to 10) as well as the receipt book and no receipts have been granted for the months of Sept 81 onwards showing the payment of rent by the Defendant-Plaintiff. According to Mr. Yadav if the Defendant"s case was that he has paid the rent to the Plaintiff for the entire period of tenancy it was for the Defendant to show by evidence that he had in fact paid the rent.

4. Mr. Sahewalla, learned Counsel on the other hand, took me through the judgment of the learned Munsiff No. 2, Dibrugurh to show that the Defendant had produced a note book marked as Ext-kha in which the Defendant had made entries that the rent for the months for September and October, 1981 have been paid at the of Rs. 25/- on 7.5.1981 and 3.11.1981 respectively. These entries in the note book Ext-kha had also been corroborated by the Defendants himself in his examination by the court.

5. As it appears from the impugned judgment of the learned Assistant District judge Dibrugarh in title Appeal No. 18/86, the learned Assistant District Judge held that by documentary and oral evidence "the Plaintiff failed to prove that he in fact did not receive rent from the Defendant/Respondent upto Oct 81" and thereafter came to the conclusion that the Defendants cannot be held to be a defaulter.

6. In the present case parties have led evidence. While the Plaintiff has examined himself on the question of default of payment of rent by the Defendant and has produced the counterfoil of the receipts Ext-1 to 10 as well as the rent receipts books maintained by the Plaintiff, the Defendant has also examined himself and has produced an exercise book Ext-kha to show that the rent for the months of September and October 81 have in fact been paid. Since the parties have led evidence, the question of burden of proof is no longer relevant and becomes academic and the court has to assess the evidence led by the parties and come to its own conclusion as to whether the Defendant was in default in the payment of rent

for the months of September and October 81. It has been held by the Supreme Court in the case of [Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and Others,](#)

The expression burden of proof really means two different things. It means sometimes that a party is required to prove art allegation before judgment can be given in its favour it also means that on a contested issue one of the two contending parties has to introduce evidence. Whichever way one looks, the question's really academic in the present case, because both parties have introduced their evidence on the question of the nature of the deity & the properties and have sought to establish their own part of the case. The two Courts below have not decided the case on the abstract question of burden of proof, nor could the suit be decided in such a way. The burden of proof is of importance only where by reason of not discharging the burden which was put upon it, a party must eventually fail. Where, however parties have joined issue and have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic.

7. Since the appellate court has lost sight of the aforesaid proportion of law and has proceeded on an error of law that even where parties have led evidence, the question of burden of proof was relevant and has held in an impugned judgment that the Plaintiff had not discharged his burden of proving that the Defendant had defaulted in the payment of rent for September 81 onwards and on that ground had failed to exercise its jurisdiction, in my opinion the impugned order is liable to be interfered with in a revision u/s 115 of the Code of Civil Procedure.

8. In the circumstances therefore the Civil Revision is allowed and the impugned judgment and order dated 25.5.1988 of the learned Assistant District Judge in Title Appeal No. 18/86 is set aside with the direction that the Assistant District Judge, Dibrugarh shall apply his mind afresh to the evidence on record and decide as to whether the judgment and decree of the learned Munsiff No. 2, Dibrugarh in Title Suit No. 17/84 on the quest ion of default in payment of rent was justified on the evidence on record.

9. In view of the fact that the matter is remanded back to the appellate court, it shall be open for the Appellant to raise other contentions before the appellate Court regarding damages to the suit premises and the bonafide requirement of the suit premises and the appellate court shall apply its mind to the evidence on record and record his finding as to whether the findings of the trial court were justified on the evidence on the record on the aforesaid issues.

With the aforesaid direction the Civil Revision is disposed of, The parties are directed to appear before the learned Assistant District Judge, Dibrugarh on 26th Sept 94 to enable him to fix a date of hearing.