

(2002) 07 GAU CK 0020

**Gauhati High Court****Case No:** Second Appeal No. 123 and 139 of 1996

Brij Ratan Kothari

APPELLANT

Vs

Aklesh Sahu

RESPONDENT

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**Date of Decision:** July 23, 2002**Acts Referred:**

- Assam Urban Areas Rent Control Act, 1972 - Section 2

**Citation:** (2003) 1 GLT 598**Hon'ble Judges:** J.N. Sharma, J**Bench:** Single Bench**Advocate:** B.R. Dey, for the Appellant; B.K. Goswami and P.K. Kalita, for the Respondent**Final Decision:** Allowed

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**Judgement**

J.N. Sarma, J.

Both the appeals have been filed against the same judgment and decree dated 4th April, 1996 passed by the Asstt. District Judge, Jorhat, in T.A. No. 20 of 1990. By the impugned judgment the learned Judge set aside the earlier judgment and decree dated 3.4.1990 passed by the Munsiff No. 2, Jorhat in T.S. No. 8 of 1981 and he partly decreed the plaintiffs suit, namely decree praying for restoration of the possession of the portion of the land (5 lessas) to the plaintiff and rejected the other claim of the plaintiff.

2. Second appeal No. 123/96 has been filed by the defedant against the decree for restroation of possession of 5 lechas of land and Second Appeal No. 139/96 has been filed by the plaintiff against the rejection of the plaintiff's prayer for restoration of other 5 lechas of land. Both the appeals have been heard together and this common judgment shall dispose of both the appeals.

3.1 have heard Mr. B.K. Goswami, Learned Advocate for the appellant in S.A. No. 123/96 and respondent No. 1 in other appeal and Mr. B.R. Dey, Learned Advocate for the appellant in S.A. No. 139/96 and respondent No. 1 in S.A. No. 123/96.

Following are the substantial questions of law involved in these appeals :

(i) Whether the learned Assistant District Judge was right, in holding that the suit has not barred by the principle of Res-judicata ?

(ii) Whether Learned Assistant District Judge was justified in holding that the plaintiffs suit was not barred by Sec. 47 C.P.C. ?

(iii) Whether the learned Assistant District Judge was justified in not considering the effect of the provisions of Rules 99, 101 and 103 of Order 21 CPC.

4. In S.A. No. 139/96 at the time of admission it was specifically stated that no substantial question is law of involved and this aspect of the matter shall be decided at the time of hearing. Mr. B.R. Dey, Learned Advocate for the appellant failed to satisfy that any substantial question of law is involved in this appeal. In that view of the matter, this appeal shall stand dismissed as it does not involve any substantial question of law.

5. Let us take up the other appeal, i.e. S.A. No. 123/96. A suit was filed by the plaintiff being T.S. No. 8/87 or declaration and possession and the prayers made in the plaint are as follows :

(i) Declaring that the defendant is neither the purchaser of the possession of the suit land as described in the Schedule "B" hereto nor he has acquired any right, title and interest over the suit land by virtue of the Sale-deed dt. 19.6.1982 and/or rectification deed dated 6.9.1982.

(ii) Declaring that the defendant has acquired no right, title and interest in the suit house as described in the Schedule "A" hereto by virtue of sale-deed dated 19.6.1982 and/or rectification deed dated 6.9.1982.

(iii) Declaring that the defendant illegally made himself a party to T.S. No. 38/78, T.A. No. 34/82 and Civil Revision 225/83 and illegally executed the decree in T. Ex. 3/86 and obtained possession of the suit house with the suit land.

(iv) Restoring possession of the suit house and the suit land to the plaintiff."

6. It may be mentioned herein that earlier there was a suit against the plaintiff being T.S. 38/78 and that suit was filed by Asia Khatoon and others for ejectment of the plaintiff from the suit house on the ground of default in the payment of rent and arrear rent as well. That suit was decreed. As against that the plaintiff preferred a T.A. No. 34/82 in the Court of the Assistant District Judge, Jorhat, During the pendency of that appeal the present appellant, i.e., Shri Brij Ratan Kothari filed an application as respondent alleging that he purchased the portion of the land and house. The appellate court allowed that application and added him as respondent No. 7 treating him as purchaser of the suit land and the house. The appeal filed, by the respondent No. 1 was dismissed and as against that there was Civil Revision being Civil Revision No. 225/83 and that revisions was also dismissed. It must be

stated herein that at the time disposal of the revision, the present respondent took time for six months to vacate the house and that was allowed. As he did not vacate the house during the period of six months an execution case being Title Execution case No. 3/ 86 was filed and in execution of that decree the respondent was ejected from the suit house as well as suit land and thereafter this suit was filed by the plaintiff with the prayers as indicated above. The suit was contested by the appellant and the Learned Munsiff dismissed the suit holding that the plaintiff has no right and interest to the land and he was a tenant in respect of the house and that tenancy came to an end as soon as he was ejected from that house and also came to a finding that the suit was barred by Section 47 of the C.P.C. As against that a Title Appeal was filed and the Learned Asstt. District Judge took a curious view of the matter. He came to the finding that the suit under appeal is not hit by law of res-judicata in respect of the part of the land measuring 5 lechas other than the part of the holding No. 115 as alleged to have stood and he set aside the finding of the court below on this point. The Learned Asstt. District Judge in deciding that question failed to consider the definition of house as given in the Assam Urban Areas Rent Control Act, 1972. That definition is quoted below :

"Sec. 2(b). "house" means any building, hut or shed, or any part thereof, let or to be let separately for residential or non-residential purposes, and include --

(i) the garden, ground and out house, if any, appurtenant to such building hut, shed or part thereof;"

Holding is defined under the Assam Municipal Act as follows :

"(14) "Holding" means land held under one title or agreement and surrounded by one set of boundaries :

Provided that where two or more adjoining holding form part and parcel of the site or premises of a dwelling-house, manufactory, warehouse, or place of trade or business, such holdings shall be deemed to be one holding for the purpose of this Act;

Explanation : Holding separated by a road or other means of communication shall be deemed to be adjoining within the meaning of this proviso :

Provided also that where land has been let out to occupants in separate parcels paying rents separately, each such parcel shall be treated as a distinct holding in spite of such parcels of land being held under one title ;

(15) Any plot of land having clear boundaries and lying entirely vacant, if fit for building purposes or if yielding any income, shall, when not appurtenant to any buildings and not used for any agricultural purpose, be regarded as a "holding" ;"

7. So, it must be held that whenever house is standing and the vacant land by side annexed to such house if not excluded shall form a part of house. Once a decree for

ejectment is passed the tenant must vacate not only the house he has occupied but also from the vacant land annexed thereto or from such holding and that was done in the instant case. So, the finding of the Learned Judge that the decree shall be executable only with regard to the 5 lechas of land under the house and not from vacant land as it does not include the vacant land is absolutely untenable and this part of the finding shall stand set aside and quashed, Once this finding is quashed, there is no need to go to the other points but even in respect of it Mr. Goswami, Learned Advocate for the appellant relies on a decision reported in [N.S.S. Narayana Sarma and Others Vs. Goldstone Exports \(P\) Ltd. and Others](#), wherein in paragraph 16 the Supreme Court pointed out as follows :

"Presumably, to tackle such a situation and to allay the apprehension in the minds of litigant public that it takes years and years for the decree holder to enjoy fruits of the decree, the Legislature made drastic amendments in provisions in the aforementioned Rules, particularly, the provision in Rule 101 in which it is categorically declared that all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application shall be determined by the court dealing with the application and not by a separate suit and for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions. On a fair reading of the Rule it is manifest that the Legislature has enacted the provision with a view to remove as far as possible, technical objections to an application filed by the aggrieved party whether he is the decree-holder or any other person in possession of the immovable property under execution and has vested the power in the executing court to deal with all questions arising in the matter irrespective of whether the court otherwise has jurisdiction to entertain a dispute of the nature. This clear statutory mandate and the object and purpose of the provisions should not be lost sight of by the courts seized of an execution proceeding. The court cannot shirk its responsibility by skirting the relevant issues arising in the case,

8. So, a separate suit is also not maintainable. In view of the decision of the Apex Court by holding both the grounds in favour of the appellant and deciding the question of law as pointed out earlier this appeal is allowed and the part of the judgment restoring 5 lechas of land shall stand quashed and the judgment of the Learned Munsiff shall be restored to file.