
(1990) 2 GLJ 74

Gauhati High Court

Case No: Second Appeal No. 194 of 1981

Sarju Prasad Singh

APPELLANT

Vs

Ram Biswas Singh and
Ors.

RESPONDENT

Date of Decision: June 25, 1990

Acts Referred:

Civil Procedure Code, 1908 " Order 21 Rule 2, 47#Civil Procedure Code, 1908 (CPC) " Order 21 Rule 2, 47

Citation: (1990) 2 GLJ 74

Hon'ble Judges: S.N.Phukan, J

Bench: Single Bench

Advocate: B.K.Goswami, R.Barua, P.G.Barua, D.Goswami, A.K.Sharma, N.C.Das, Advocates appearing for Parties

Judgement

1. Having lost in two Courts below the plaintiff have filed this second appeal.

2. The suit land was purchased by the predecessor of the plaintiffs and defendants, who are the members of the joint family, took the land of lease

from 12th July'50 to 11.7.51. The lease was however extended from 1.1.7.51 to 10.7.52. Thereafter the defendants failed to pay rent and

accordingly the plaintiff filed a suit before the learned Subordinate Judge, Jorhat which has registered as Title Suit No. 2 of 1954. The suit was

decreed exparte on 26.11.54. The plaintiffs have alleged that the womenfolk implored the plaintiffs not to execute the above decree and permit

them to occupy the land till they could acquire another plot of land which was duly granted. Thereafter the plaintiffs sold a plot of land to the

defendants and they agreed to shift to the said land and as the defendants did not shift to the newly purchased land the present suit has been filed

for a declaration of right, title and interest over the suit land measuring 1 K 10 L and also for recovery of khas possession of the said land.

3. The suit was contested by the defendants and two written statements have been filed the first one has been filed by four defendants and the other

by defendant No. 5. It has been pleaded, inter alia, that the suit is barred by resjudicata. Defendants have denied all the allegations and have

further urged that the earlier exparte decree was obtained by suppression of facts. According to the defendants as the exparte decree was barred

by limitation, the plaintiffs have filed the present suit and as such it is not maintainable.

4. On the pleadings the learned trial Court framed 10 issues which are quoted below ;

1. Is the plaintiff's suit barred by resjudicata ?

2. is the suit bad for non joinder of necessary parties ?

3. Did the defendants occupy the suit land, 1K7L of land shown in Schedule A(2) as licence of the plaintiff ?

4. Did the plaintiff's predecessor late Sew Sahai Singh sold 1K1CL shown in Schedule "B" to the defendants and did the defendants promise to

shift their house to the said land of Schedule and vacate the suit land of Schedule A(I) ?

5. Have the defendants unlawfully occupied 2K7L land of Dag No. 4616 as shown in Schedule A(I) ?

6. Are the plaintiff entitled to decree for title and khas possession in respect of 2K7L f dag No. 46i 6 as shown in Schedule A(I) and for

confirmation of possession of 2 Lessees of land of Schedule A(2) in dag 4616 ?

7. Whether the plaintiff is entitled to compensation claimed in the suit from the date and for future compensation ?

8. Is the suit barred by limitation ?

9. Whether the defendants are protected from eviction under the Assam Non Agricultural Urban Areas Tenancy Act, 1955 ?

10. Whether the defendants are in occupation since the time of late Ram Barai Singh with permanent structures ?

5. The only point urged by Mr. P. O. Baruah, learned counsel for the appellant is that the question is that the suit is barred by resjudicata was not

properly decided by the learned Courts below. In this connection learned counsel tried to urge that the records of the earlier suit was not available.

That suit was decreed exparte and the plaint of the suit has been exhibited and marked as Ext. 7 and the decree is also available. According to Mr.

Baruah the issues of the earlier suit were not considered. As in the earlier suit exparte decree was passed and that too due to nonappearance of the

defendants after service of summons, the question of framing issues could not arise in absence of any written statement. I am therefore not

impressed by the submission of Mr. Baruah.

6. Mr. Baruah has further urged that while considering this point the suit land of the earlier suit and also the present suit was not compared by the

learned Courts below. In this connection Mr. Baruah has urged that in the decree of the earlier suit the suit land was not described. This point was

duly considered by the learned Courts below and the Courts were of the opinion that the plaint of the earlier suit was sufficient to disclose the

identity of the land. Mr. Baruah has drawn my attention to the judgment of the learned trial Court. While considering Issue No. 1 learned trial

Court observed that the land could not be identified. However, the learned trial Court after taking into consideration all the facts including report of

the Commissioner clearly held that ""it would appear that in the earlier suit also the same Schedule A (1) as amended was the suit land."" This being

the finding of the fact is binding on this Court in this second appeal. I am, therefore, of the opinion that the contention of Mr. Baruah has on force.

7. Mr. B. K. Goswami, learned counsel for the respondents has urged various points but the main point which has got considerable force is that

the suit is barred under section 47 C. P. C. Though in the written statement the plea taken the suit is barred by resjudicata, actual point is whether

the suit is barred under the said section. I am, therefore, of the opinion that the question of resjudicata is not applicable to the present suit and as

such the finding of the learned Courts below on this point is not at all relevant. Though I have affirmed the finding of the learned Court below as

stated above this may have to be ignored as the main question is whether the present suit is hit by section 47 C. P. C. In my opinion the Court

below ought to have framed an issue of this point and thereafter proceed with the trial.

8. Though the learned appellate Court has observed that the suit is barred by section 47 C.P.C. This observation is not based on any proper

finding. That apart, as no issue was framed on this particular point so the parties were taken by surprise by the above finding.

9. Regarding section 47 C. P. C. Mr. Baruah has drawn my attention to a decision of Apex Court in Mr. M. P. Shreevastava vs. Mrs. Veena,

AIR 1967 SC 1193. In paras 6 & 7 of the report their Lordships held that Order 21, Rule 2 C.P.C. prescribes a special procedure for recording

adjustment of a decree, or for recording payment of money paid out of Court under any decree. However section 47 C. P. C. confers plenary

power on the Court executing decree to determine of all questions relating to execution, discharge or satisfaction of the decree arising between the

parties to the suit in which the decree was passed and this power is not affected by Order 21 Rule 2 C.P.C.

10. In the case in hand there is no dispute that the suits are between the same parties and the dispute is regarding adjustment of the decree and as

such section 47 clearly applies. Their Lordships further held in the above case that the principle of section 47 C.P.C. is that all the questions

relating to execution, discharge or satisfaction of a decree and arising between the parties to the suit in which the decree was passed, shall be

determined in the execution proceeding and not by a separate suit and it follows as a corollary that a question relating to the execution, discharge

or satisfaction of a decree may be raised by the decree holder or by the judgmentdebtor in the execution proceeding and that pendency of an

application of execution by the decreeholder is not a condition of its exercise. It was further held that an application made by the judgmentdebtor

which raises a question relating to execution, discharge or satisfaction of a decree in a suit to which he, or the person of whom he is a

representative, was a party in an application before the Court executing the decree, and must be tried in that Court.

11. In the case in hand, reading the written statement as a whole the plea of the defendant is that the decree was adjusted and stood satisfied for

nonexecution within time and as such the present suit is not maintainable. This question has to be decided by the learned lower appellate Court and

for this purpose the following issue is necessary :

Whether the suit is barred under section 47 C. P. C. ?

12. It is very unfortunate that I have to remand the suit which was filed in the year 1966. I have to do so as sitting in second appeal it is difficult to

go into this question, more particularly as no issue was framed.

13. In view of the fact that the dispute is pending since long the learned lower appellate Court shall dispose of the matter within a period of 6

months from the date of appearance of the parties. I direct the parties to appear before the learned lower appellate Court during the week of July

commencing from 23rd July and ending with 28th July. Office to transmit the records immediately.

In the result the appeal is allowed, with the above direction, by setting aside the impugned judgment and decree. Parties to bear their own costs,