

(2014) 05 GAU CK 0024

Gauhati High Court

Case No: RSA No. 61 of 2003 and RSA No. 117 of 2006

Shri Abraham Chall

APPELLANT

Vs

Shri Dubraj Hemram
 Shri
Dubraj Hemron Vs Sri Abraham
Chall

RESPONDENT

Date of Decision: May 8, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 10, 100, 11
- Criminal Procedure Code, 1973 (CrPC) - Section 145

Hon'ble Judges: Abhay Manohar Sapre, C.J

Bench: Single Bench

Advocate: P. Bhattacharya, Advocate in RSA 61/2013 and Mr. K. Agarwal, Advocate in RSA 117/2006, Advocate for the Appellant; A. Begum, Advocate in RSA 61/2013 and Ms. P. Bhattacharya, Advocate in RSA 117/2006, Advocate for the Respondent

Judgement

Abhay Manohar Sapre, C.J.

The decision rendered in this second appeal shall also govern the disposal of other connected Second Appeal being SA No. 117 of 2006 because-firstly, both these appeals arise between the same parties, secondly: both relates to same suit property (land), thirdly: it is based on more or less same cause of action and lastly: this court has directed tagging of the aforementioned two appeals for their disposal analogously.

2. This is a second appeal filed by the defendant u/s 100 of the CPC against the judgment dated 16.11.2002 and Decree dated 14.1.2003 passed by Ad-hoc Additional District Judge No. 1, Tinsukia which in turn arise out of judgment/decreed dated 6.9.2001 passed by Civil Judge (Sr. Division) No. 1, Tinsukia in Title Suit No. 29 of 1994.

3. By impugned judgment/decreed, the first appellate court dismissed the defendant's first appeal and in consequence confirmed the judgment/decreed passed by the trial court which had decreed plaintiff's suit for declaration of his ownership rights over the suit land, confirmation of his possession and for permanent injunction against the defendant restraining them from interfering in plaintiff's possession over the suit land in any manner.

4. This appeal was admitted for final hearing on following substantial questions of law

Whether the findings of the Court below on the point of delivery of possession of the suit land to the plaintiff respondent by his vendor were perverse?

5. In order to appreciate the controversy involved in both the appeals, it is necessary to state the facts.

6. The appellant is the defendant whereas the respondent is the plaintiff in the suit out of which this second appeal arises.

7. The respondent to begin with filed a civil title suit being TS No. 29 of 1994 against the appellant in the Court of Munsif No. I, Tinsukia for a declaration and possession of the suit land measuring 4 B-I K-I L under Dag No 208 of PP No. 145 of Holotup Gaon, Hapjan Mauza, District Tinsukia on 8.8.1994. The respondent claimed a declaration and confirmation of his possession over the suit land on the basis of his title/ownership on the strength of the registered sale deed no 436 of 1994 dated 29.4.1994 executed by its owner for consideration in plaintiff's favour. It was alleged that he purchased the suit land from proforma defendant no. 2 and 3 as its owners for consideration and accordingly placed him in possession of the suit land. It was alleged that when in May 1994 and July 94, the plaintiff (respondent) started some construction activity; the appellant (defendant) obstructed in his possession and claimed himself to be in its possession.

8. This led to initiation of proceedings u/s 145 of Cr.P.C. between the parties by the district Magistrate. The parties carried the matter in criminal revision being 21(2)/94 before the District Judge Tinsukia where the revisionary court stayed the order of the District Magistrate. The respondent therefore alleged that he being the owner of the suit land on the basis of registered sale deed dated 29.4.1994 and a cloud having been cast on his title over the suit land due to illegal interference of appellant over the suit land, he was entitled to seek a declaration of his title/ownership over the suit land and to seek a declaration of confirmation of his possession over the suit land and further permanent injunction against the defendant/appellant not to interfere in his possession over the suit land. On these averments, the respondent (plaintiff) filed a suit against the appellant (defendant).

9. The appellant (defendant) denied the averments made in the plaint and claimed that he had been in possession of the suit land through his predecessor in title since

last five decades. He therefore denied plaintiff's ownership contending that no title had been vested in the plaintiff by virtue of the sale deed dated 29.4.1994 and nor such sale deed could be made basis to claim better title over the suit land.

10. The trial court framed following issues for adjudication in the suit.

1. Whether there is any cause of action for the suit?
2. Whether the suit is maintainable both in law and in facts?
3. Whether the suit land is in physical possession of the defendant Shri Dubraj Hemran since 1957?
4. Whether the proforma defendant No. 2 and 3 have delivered the possession of the suit land to the plaintiff as alleged in the plaint and whether the plaintiff is in physical possession of the suit land?
5. Whether the defendants has got right, title, interest and possession over the suit land?
6. Whether the plaintiff is entitled to the decree as prayed for?
7. To what relief the parties are entitled?

11. Parties adduced the evidence. The Trial court by judgment/decreed dated 6.9.2001 decreed the respondent's suit. All the issues were accordingly answered in respondent's (plaintiff's) favour. It was held that firstly: plaintiff's purchased the suit land by sale deed dated 29.4.1994 and became owner of the suit land, secondly: the defendant failed to prove his title over the suit land, thirdly: the plaintiff had a better title as compared to the defendant over the suit land and fourthly: the plaintiff was entitled to claim possession and seek its confirmation against the defendant over the suit land. With these findings, the trial court decreed respondent's suit.

12. The appellant as defendant felt aggrieved filed the first appeal being civil first appeal no. 9 of 2001. The first appellate court by judgment/decreed dated 24.12.2002 dismissed the appeal and upheld the judgment/decreed of the trial court on all the issues mentioned above. It is against this judgment and decree; the appellant (defendant) felt aggrieved and filed this second appeal u/s 100 ibid. This appeal was admitted for final hearing on aforementioned substantial question of law.

13. It is with this background and during pendency of the aforesaid civil suit no 29/94 out of which S.A. No 61/2003 arises, the appellant also filed one civil suit being T.S. No. 40/96 on 27.9.96 against the respondent in the court of Munsiff No. 1 out of which connected Second Appeal no. 117/2006 arises.

14. In this suit, the appellant claimed ownership over the same suit land on the strength of adverse possession. He also claimed that the sale deed dated 29.4.94 in favour of respondent be declared null and void. The respondent, who was

defendant in this suit, contested this suit. He denied the appellant's claim and asserted his right, title and interest in the suit land on the strength of the registered sale deed dated 29.4.94. Parties adduced evidence.

15. The trial court by judgment/decreed dated 27.2.2003 dismissed the appellant's suit (TS 29/94). The appellant (plaintiff in this suit) felt aggrieved filed first appeal being no. 5 of 2003. The first appellate court however, by impugned judgment/decreed dated 7.6.2005 allowed his appeal and while setting aside the judgment/decreed of the trial court, decreed his suit and granted the reliefs claimed by the appellant in his suit against the respondent in relation to the suit land.

16. It is against this reversing judgment/decreed, the respondent felt aggrieved and filed Second Appeal No. 117/2006. It was admitted for final hearing on the following substantial question of law:

1) Whether the defendant Nos. 2 and 3 were entitled to inherit the property of Late Jewel Christian, the original owner of suit land, as his nephew, in absence of the Lineal descendant in view of the provisions of Indian Succession Act, 1925?

2) Whether right, title and interest in respect of the suit land can be declared in favour of the plaintiff/respondent merely on alleged possession when he failed to prove his possession adverse to the real owner?

3) Whether the principles of Res Judicata will apply in the present case in view of the fact that the issues which were directly and substantially in issue in the present case were directly and substantially in issue in a former suit, namely, Title Suit No. 29 of 1994 between the same parties and with regard to the same suit land and in the former suit it was finally decided that the appellant/defendant No. 1 is the absolute owner and in possession of the suit land?

17. It is with this factual background of two litigations arising between the same parties and in relation to the same suit property, the question arises for consideration is as to which judgment impugned in these two second appeals should be upheld or/and reversed.

18. Having heard the learned counsel for the parties and on perusal of the record of the case, I am inclined to dismiss the Second Appeal no. 61 of 2003.

19. Indeed, as a result of the dismissal of the Second Appeal No. 61 of 2003, the other connected Second Appeal No. 117/2006 will have to be allowed as being the natural consequence flowing from the decision rendered in S.A. No. 61 of 2003 by setting aside the judgment/decreed of the first appellate court impugned in SA 117 of 2006 and restoring that of the trial court which had dismissed the civil suit. In other words, as a result of Second Appeal no. 61 of 2003 being dismissed, two consequences follow-first: civil suit no 29/94 filed by the respondent herein stands decreed against the appellant and second: civil suit no 40/96 filed by the appellant against the respondent stand dismissed.

20. In my considered view, the need to decide the Second Appeal no. 61 of 2003 as a lead second appeal has arisen because firstly: the said appeal arose out of the civil suit no 29/1994 which was filed first in point of time as against the other civil suit no TS 40/1996 out of which Second Appeal no. 117/2006 arises. The TS no. 29/1994 was filed on 8.9.1994 whereas the TS no. 40/1996 was filed on 27.9.1996 and secondly: the TS suit no 29/94 was decided again first in point of time on 6.9.2001 whereas TS No. 40/1996 was decided on 27.2.2003.

21. In a situation like the one arising in the present case, the law is rather well settled. In fact, I am constrained to observe that neither parties to the two suits nor the Courts, took recourse to applying the well-settled principle of law, which unfortunately, led to passing of two conflicting decisions on the same subject matter between the same parties.

22. The undisputed facts would go to show that the decision rendered in the first suit (TS No. 29/1994) operated as res judicata as defined u/s 11 of CP Code while trying the subsequent suit i.e. T.S. 40/96. It was for the reason that firstly parties to both the suits were the same, secondly, the suit property involved in both the suits was the same, thirdly, material issues framed in both the suits were the same and lastly even the cause of action arising between the parties was also the same.

23. Under these circumstances, the second civil suit (TS No. 40/96) should have been stayed by the trial court at the instance of the defendant of the said civil suit (who was plaintiff in earlier suit-29/94) by taking recourse to Section 10 of the CP Code or in the alternative, the defendant of TS 29/94 should have filed his counter claim in the earlier suit instead of filing a separate suit (TS 40/96) and lastly, if earlier two options could not be resorted to, then, both the civil suits should have been clubbed together for their disposal by allowing the parties to have common trial in both the suits.

24. Unfortunately, none of the three alternatives, were resorted to in as much as no such pleas were taken either in the written statement or by filing an application at any stage of proceedings in both the civil suits with the result, the trial in both the civil suits were held independent of each resulting in passing two conflicting decrees.

25. Coming to the merits of SA No 61 of 2003, mere perusal of the substantial question of law framed would go to show that firstly: it is general in nature, secondly: no specific perversity whether on facts or in law has been pointed out, thirdly: the general expression "perversity" used in substantial question of law cannot enable the second appellate court to examine "perversity" in findings of the two courts below like the first appellate court.

26. It is not in dispute that two courts below decreed the plaintiff's suit for declaration and possession in relation to the suit property against the defendant. This being a concurrent finding of facts, it was binding on the Second appellate

court. It is apart from the fact that the concurrent finding did not appear to be against the pleadings, nor against the evidence nor against any provisions of law nor de hors the evidence on record and nor was so perverse to an extent that no judicial man of average capacity could ever record. In other words, the finding recorded by the two courts in their respective jurisdiction was such that it was capable of being recorded on one set of evidence on its appreciation and once recorded by the trial court and upheld by the appellate court, it was binding on the second appellate court. Such is the case here.

27. The appellant did not make any application u/s 100 seeking to frame any additional question of law, which according to him, was also arising in appeal and yet not framed at the time of admission of appeal. The learned counsel was unable to point out as to which finding and on which specific issue of the two courts was perverse and if so why? As mentioned above, without there being any specific question on the perversity, this court cannot embark upon the de novo appreciation of the whole evidence in its second appellate jurisdiction to find out the perversity in the finding. It is not permissible and restricts this court's jurisdiction to examine only the question framed.

28. I have perused the findings of the two courts and find that two courts rightly relied on the registered sale deed dated 29.4.94 for giving declaration in plaintiff's favour that he was the owner of the suit land. There was no defense of the defendant in this suit (29/94). His only defense was that since he was in possession of the suit land and, hence, had right to defend his possession. He, however, failed to prove his possession as to under which right whether as lessee, or owner, he was in possession. It was for this reason, the courts below preferred to rely upon the registered sale deed dated 29.4.1994 and held that plaintiff had a better title as against the defendant over the suit land.

29. In view of foregoing discussion, I answer the question framed therein against the appellant and in respondent's favour. As a consequence, the appeal is found to be devoid of any merit. It thus fails and is accordingly dismissed.

30. No cost.

31. As a result of dismissal of the second appeal no 61/2003, the connected second appeal no 117/2006 has to be allowed resulting in setting aside the judgment and decree impugned therein. It is accordingly allowed. Impugned judgment/decrees are set aside and that of the trial court is restored.

32. No cost.