

GAHC040000402020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

R.F.A. No.01(AP)/2020

Smti. Lobsang Pema,
W/o- Shri Lobsang Penjor,
Vill- Manpat, P.O/P.S.-Lumla,
District Tawang, Arunachal Pradesh.

...APPELLANT

-VERSUS-

Shri Chombey Kesang,
S/o- Lt. Dorjee Tsering,
Vill- Manpat, P.O./P.S.-Tawang District,
Arunachal Pradesh.

....RESPONDENT

Advocates for the petitioner : Mr. T. T. Tara, Id.Adv.

Advocates for the respondent : Mr. D. Soki, Id. Adv.

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 09.08.2023
Date of Judgment & Order : 29.09.2023

JUDGMENT & ORDER (CAV)

Heard Mr. T. T. Tara, learned counsel for the appellant. Also heard Mr. D. Soki, learned counsel representing the respondent.

2. This appeal is filed under Section 96 *read with* Order 21 Rule 26 of the Code of Civil Procedure, 1908, challenging the impugned Judgment and Order dated 20.12.2019 passed by the learned District Judge, West Kameng District, Bomdila, Arunachal Pradesh in Title suit No.03/2017 (WSD/BDL).

3. The brief facts leading to the filing of the present appeal is that; the appellant as a plaintiff had filed the Title Suit being T.S. No.03/2017(WSD/BDL) before the learned District & Session Judge under Order VII Rule 1 and Section 26 of the Code of Civil Procedure praying, 1908 praying for declaration of the title, interest and confirmation of the possession of RCC residential building located at Manpet Bazar under Lumla Circle, Tawang District, Arunachal Pradesh. After final hearing of the aforesaid title suit, the learned Trial Court passed the Judgment & Order dated 20.12.2019, whereby; the suit of the plaintiff/present appellant was dismissed on some technical grounds.

4. Further, it has been stated that the plaintiff/present appellant was married to one Shri Lobsang Penjor, son of Lt. Dorjee Tsering in the year 1999 and two

daughters were born out of their wedlock. But, the husband of the appellant left home in the year 2001 when the two daughters were small and purportedly have settled in Italy and he never provided any maintenance to the them. The appellant somehow maintained her two daughters as a single mother. Nevertheless, in the month of 2017 the appellant's husband suddenly appeared in the matrimonial house and without her knowledge he purportedly executed an agreement dated 05.07.2017, and on the basis of which, the respondent has surreptitiously plan to divide the matrimonial house which has been in peaceful possession of the appellant since 19 years.

5. The respondent being the elder brother of the appellant's husband in the instant RFA started mental harassments by asking his share from the said building, even though, he does not have any share in the suit property as he was already given his share of properties before the death of his father Lt. Dorjee Tsering in the year 2014. Thus, the appellant had preferred the T.S. No.03/2017(WSD/BDL) for declaration of ownership right, title and interest and confirmation over the RCC building. However, the learned District Judge had dismissed the title suit vide Judgment & Order dated 20.12.2019 basing on some technical grounds that the agreement dated 05.07.2017 has not been challenged by the plaintiff/present appellant and also on the ground of non-joinder of the party as the appellant did not made her husband as a party in the said suit.

6. Being highly aggrieved and dissatisfied with the Judgment and Order dated 20.12.2019 passed by the learned District Judge, West Division, Bomdila in T.S. No.03/2017(WSD/BDL), the present appeal has been preferred on the

following grounds:-

6.1. The learned Trial Court has erred in law as well as in facts by dismissing the title suit of the appellant and as such the impugned Judgment & Order dated 20.12.2019 is liable to be set aside and quashed.

6.2. The learned District Judge failed to appreciate the evidence on record, wherein, it has been stated that during the existence of Lt. Dorjee Tsering all the properties were divided amongst all the brothers as per the customary law. Also, the disputed property in question of Lt. Dorjee Tsering, which is the share of the present appellant's husband, where, the appellant along with her two daughters is residing since her marriage with Shri Lobsang Penjor. However, the husband of the appellant deserted the appellant and his two daughters, who are also entitled for the said property in-question as per customary law. But, the learned Trial Court had passed the order without considering the evidence and thus, the impugned Judgment and Order dated 20.12.2019 is liable to be set aside and quashed.

6.3. The learned Trial Court also failed to appreciate the entire facts of the case and dismissed the suit on some technical grounds and the same is liable to be set aside and quashed.

6.4. The learned District Judge failed to appreciate the fact that the husband of the appellant deserted the appellant and his two daughters in the year 2001 and since then, he has not provided any maintenance to them, and therefore, he has no right over the disputed property and the agreement dated 05.07.2017 being void *ab-initio*, no adverse inference could had been attributed upon the appellant for not assailing legality/validity of the agreement dated 05.07.2017.

Hence, learned Trial Court erroneously came to a conclusion and passed the Judgment and Order dated 20.12.2019 which is liable to be set aside and quashed.

7. Mr. T. T. Tara, learned counsel for the appellant has submitted that the plaint filed by the appellant was rejected by the learned Trial Court on technical grounds stating that the learned engaged counsel in the Title suit have not challenged the agreement dated 05.07.2017 and for non-joinder of the plaintiff's/present appellant's husband as a party during the course of the proceedings. He also submitted that the appellant had engaged her counsel to represent her suit but due to lack of advice on the part of her engaged counsel, the appellant was deprived of an opportunity to submit her written statement against the counter claim filed by the respondent. He further submitted that it is a settled law that the party must not suffer on account of the negligence on the part of her engaged counsel. The learned Trial Court instead of dismissing the suit should have provided adequate opportunity to the appellant to rectify the same. But, without considering the entire aspect of the matter, the learned District Judge passed the order arbitrarily and dismissed her suit on some technical grounds.

8. He also submitted that the respondent is claiming the right over the disputed property by virtue of the agreement dated 05.07.2017, whereby, the respondent has stated that the husband of the appellant has the right to execute any agreement on the disputed property. Further, the learned Trial Court also applied the customary law while deciding the judgment, whereby, it has been held that entire suit property is still under possession of the present

appellant but only on some technical grounds, the suit was dismissed by the said Court. Thus, the learned counsel for the appellant has prayed for quashing and setting aside the T.S. No.03/2017(WSD/BDL) and remand back the matter to the Trial Court by granting liberty to the appellant to make necessary amendment in the plaint and adjudicate the matter afresh for the end of justice.

9. In support of his submission, he relies on the decision passed by ***the Hon'ble Apex Court in the Case of D. Ramachandran Vs. R.V. Janakiraman & others reported in 1999 3 SCC 267***, and the paragraph-10 of the said judgment read as under;

“Para-10, On the other hand, Rule 11 of Order VII enjoins the Court to reject the plaint where it does not disclose a cause of action. There is no question of striking out any portion of the pleading under this rule. The application filed by the first respondent in O.A. No. 36/97 is on the footing that the averments in the election petition did not contain the material facts giving rise to a triable issue or disclosing a cause of action. Laying stress upon the provisions of Order VII, Rule 11 (a), learned senior counsel for the first respondent took us through the entire election petition and submitted that the averments therein do not disclose a cause of action. On a reading of the petition, we do not find it possible to agree with him. The election petition as such does disclose a cause of action which if unrebutted could void the election and the provisions of O.VII R.11(a) C.P.C. can not therefore be invoked in this case. There is no merit in the contention that some of the allegations are bereft of material facts and as such do not disclose a cause of action. It is elementary that under O.VII R.11 (a) C.P.C., the Court cannot dissect the pleading into several parts and consider whether each one of them discloses a cause of action. Under the rule, there cannot be a partial rejection of the plaint or petition. See Roop Lal Sathi Versus Nachhattar Singh Gill (1982) 3 S.C.C. 487. We are satisfied that the election petition in this case could not have been rejected in limine without a trial.”

10. He also relies on the decision passed by ***the Hon'ble Supreme Court in the Case of Sejal Glass Limited Vs. Navilan Merchants Private Limited reported in 2018 11 SCC 780***, wherein, it has been stated that under Order

VII Rule 11 and Order VI of Rule 16 are applicable only when the plaint as a whole did not disclose the cause of action.

11. In the instant case, it is seen that suit of the appellant was dismissed purely on the ground of technicality. As per the principles laid down by the Hon'ble Apex Court wherein, it has been stated that, "*the technicalities should not defeat rendering of complete justice to the litigant*". In addition to this submission, he also relies on the decision passed by ***the Hon'ble Supreme Court in the Case of Aurangabad Electricals Private Limited vs. Commissioner of Central Excise and Customs, Aurangabad reported in AIR 2011 (1) SCC 121***, wherein, he mainly stressed on paragraph 14 of the said judgment which read as under;

“Para-14, The appellant had produced the Certificate along with the other papers filed before the Tribunal, may be after the appeals were heard and reserved for judgment. In the normal course, we would not have accepted either the submission of the learned senior counsel or we would have taken note of the Certificate. Keeping in view the well settled principles laid down by this Court that technicalities should not defeat rendering of complete justice to a litigant, we think it appropriate to remand the matter to the Tribunal to verify and consider whether the Certificate which is already placed on record by the appellant, would assist them in support of their defence.”

12. Accordingly, it is submitted by the learned counsel for the appellant that it a fit case to remand back the matter before the learned Trial Court to decide the case afresh by discussing all the issues in question and also by providing an opportunity to the appellant.

13. *Per contra*, Mr. D. Soki, the learned counsel for the respondent has submitted that the learned Trial Court had rightly passed the Judgment and Order dated 20.12.2019 and dismissed the suit solely on the grounds of

technicality and thus, the present appeal is not maintainable under Section 96 of CPC. Accordingly, it is submitted that there is no reason to make any interference by this Court in the impugned Judgment and Order passed by the learned District Judge in Title Suit being T.S. No.03/2017(WSD/BDL).

14. After hearing the submissions made by the learned counsel of both sides, I have perused the case records and also the impugned Judgment and Order passed by the learned Trial Court. It is seen that the instant appeal has been preferred by the appellant under Section 96 of CPC against the impugned Judgment and Order passed by the learned District & Sessions Judge in Title Suit No.03/2017(WSD/BDL), whereby, said Court had dismissed the suit of the appellant on some technical grounds.

15. For ready reference, Section 96 of CPC read as under;

“Section 96, (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

¹[(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed ² [ten thousand rupees.]”

16. Here in the instant case, the suit was rejected or dismissed purely on technical grounds. From the Judgment and Order dated 20.12.2019 it has been revealed that the issues number i, iii, v & vi was decided in the favour of the appellant, however, the issues number iv & vii was decided in favour of the respondent.

17. Considering the entire facts of the case the learned Trial Court held that appellant was not entitled to any relief of the property in-question. Though, there was discussions on issues, but, from the discussions it has been seen that no rights of the parties was discussed by the learned Trial Court and suit was dismissed only on some technical grounds.

18. The Judgment dated 20.12.2019 passed by the learned District & Sessions Judge (WSD/BDL) in T.S.No.03/2017, wherein paragraph-19 of the said judgment read as follows;

”19. In view of the aforesaid discussion on issues, I find that the instant suit has got a merit to file a case against the defendant and her husband, however, the suit is suffering from legal infirmities as describe under:-

a) First of all, the plaintiff has not challenge the agreement dated 05.07.2017 as illegal in the plaint for declaring it to be null and void.

b) Secondly, the plaintiff has not made her husband as a party to the suit for illegally transferring the suit property in favour of the defendant against the wisdom of her father-in-law late Dorjee Tsering.”

19. Thus, in paragraph-19 of the said Judgment and Order 20.12.2019, it has been held that the suit is suffering from legal infirmities and thus, due to the technical issues the suits cannot be decided on merit. Also, it has been stated that the appellant’s husband had executed the agreement dated 05.07.2017 without her knowledge. Thereafter, the appellant filed the Title suit claiming her right over the suit property through her husband. However, the same was rejected as she has not made her husband as a party and on some technical grounds.

20. Considering the entire aspect of the case, it has been observed that the learned Trial Court had dismissed the title suit without going by the merit of the case. The Hon'ble Apex Court in the Case of ***R. Rathinavel Chettiar & Anr. Vs. V. Sivaraman & others*** reported in ***1999 4 SCC 89*** has held in paragraph Nos.8, 9 & 10 of the said judgment which read as under:-

“8. The question in the present case is, however, a little different. If the suit has already been decreed or, for that matter, dismissed and a decree has been passed determining the rights of the parties to the suit, which is under challenge in an appeal, can the decree be destroyed by making an application for dismissing the suit as not pressed or unconditionally withdrawing the suit at the appellate stage? It is this question which is to be decided in this appeal.

9. Every suit, if it is not withdrawn or abandoned, ultimately results in a decree as defined in Section 2(2) of the Code of Civil Procedure. This definition, so far as it is relevant, is reproduced below:-

"2(2). "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

- (a) Any adjudication from which an appeal lies as an appeal from an order, or
- (b) Any order of dismissal for default.

Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

10. Thus a "decree" has to have the following essential elements, namely,

- (i) There must have been an adjudication in a suit.
- (ii) The adjudication must have determined the rights of the parties in respect of, or any of the matters in controversy.
- (iii) Such determination must be a conclusive determination resulting in a formal expression of the adjudication."

21. But, here in the instant case it is seen that the learned Trial Court had

dismissed the suit on some technical grounds without going by the merit of the case and also not decided the rights of the parties over the suit property.

22. In view of the above, I find that the present appeal is not maintainable under Section 96 of CPC. However, the appellant is at liberty to file a fresh suit seeking proper relief before the appropriate forum. Accordingly, the learned Trial Court has not committed any error or mistake while passing the dismissal order dated 20.12.2019 in T.S. No.03/17 (WSD/BDL) and thus, I do not find any reason to make any interference in the order passed by the learned Trial Court.

23. In terms of above observation, this appeal stands dismissed. No order as to cost.

24. Send down the LCR.

JUDGE

Comparing Assistant