

GAHC010004002009



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

Case No. : RSA/37/2009

RADHESHYAM DAS
S/O- LATE GOPAL CH. DAS VILLAGE-CHARAKURI, P.O. KARIMGANJ, DIST-
KARIMGANJ ASSAM

VERSUS

AJIT KUMAR DAS AND ORS
S/O- LATE ASHWINI KUMAR DAS VILLAGE-CHARAKURI P.O. KARIMGANJ
DIST-KARIMGANJ, ASSAM.

2:RINA DAS
D/O-LATE ASHWINI KUMAR DAS
VILLAGE-CHARAKURI
P.O. and DIST-KARIMGANJ
ASSAM

Advocate for the Petitioner : MR.S BHUYAN

Advocate for the Respondent : MR.R DEV

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant

:Mr. A Dasgupta, Senior Advocate
Ms. B Das, Advocate

For the Respondents : Md. MH Rajbarbhuiyan, Advocate

Date of Hearing : 09.05.2023

Date of Judgement : 09.05.2023

JUDGEMENT & ORDER (ORAL)

1. Heard Mr. A Dasgupta, learned Senior counsel assisted by Ms. B Das, learned counsel for the appellant. Also heard Md. MH Rajbarbhuiyan, learned counsel for the respondents.
2. The present second appeal is directed against the judgment and order dated 14.10.2004 passed by the learned Civil Judge, Senior Division, Karimganj in TA No. 103/2002 whereby the judgment and decree dated 22.07.2002 dismissing the TS No. 207/2000 was affirmed.
3. The present second appeal was admitted by this court on the following substantial questions of law:

“1. Whether the first appellate court erred in dismissing the appeal by making out a new case not pleaded by the parties?

2. Whether the suit of the plaintiff/ appellant could be dismissed for not inserting any relief of recovery for khas possession in the prayer portion although the plaintiff claimed the same in the alternative manner?”
4. The appellant as plaintiff instituted a Title Suit being TS No. 207/2000 before the learned Civil Judge, Junior Division No. 2,

Karimganj for declaration and consequential relief. The plaintiff sought for declaration of right, title and interest over the suit property on the basis of purchase and a prayer was made that the defendants be directed to hand over the possession of the suit land and alternatively the plaintiff is entitled to get the possession of the suit property through court of law. The other prayer was for declaration that the plaintiff is entitled to use one homestead path of the defendants to come and go elsewhere and to use the water of the pond in pursuance of term of condition of document No. 245 dated 06.02.1987 and document No. 3146 dated 30.10.1986.

5. It was the plaintiff's case that the suit land was purchased originally by one Chitta Ranjan Das (vendor of the plaintiff) from the original owner by a registered sale deed No. 3146 dated 30.10.1986. The defendant No. 1 was one of the executors of the aforesaid sale deed being legal heirs of one of the original land owner. Subsequently, the plaintiff purchased the suit land from his vendor vide registered sale deed No. 245 dated 06.02.1987 and obtained possession of the said land with the right to use homestead path of the defendants for egress and ingress like his vendor.
6. It was also pleaded that there was a title suit being TS No. 171/1991 between the plaintiff and defendant No. 1 and the said suit was disposed of on compromise by a judgment and decree dated 14.09.1993, wherein the defendants had admitted the purchase and possession of the plaintiff over the suit land.
7. It was also pleaded that the defendants are threatening to dispossess the plaintiff and finally with a motive to grab the suit land

removed the bamboo fencing of the plaintiff from the suit land. It was also pleaded that the defendants are threatening that they would forcibly construct house over the suit land. Accordingly, permanent injunction was sought for along with declaration.

8. The defendants contested the suit by filing written statement and denied the allegation as pleaded in the plaint. They specifically denied the execution of the two sale deeds and pleaded that the heirs of Ambika Charan Das or Aswini Kumar Das never sold the suit land to the vendor of the plaintiff.
9. The plaintiff adduced four witnesses and exhibited two documents. However, the defendants did not lead any evidence in support of their pleading. Subsequently, the learned trial court did not believe the registered sale deeds on the ground that the attesting witness (PW2) deposed that the deed was not written in his presence and the executants also did not put signature in his presence.
10. Being aggrieved, the plaintiff preferred an appeal under Section 96 of the Code of Civil Procedure, 1908 which was registered as TA No. 103/2002. The learned Appellate Court also dismissed the appeal on the ground that the plaintiff has not specifically pleaded any date of dispossession though they have stated in their evidence that on 28.02.2000 the defendants forcefully and illegally removed the bamboo fencing of the plaintiff and therefore such evidence is beyond the ambit of the plaint and such evidence is having no evidentiary value. Accordingly, the learned Appellate Court held that the suit was not maintainable. The other issues raised and decided in the trial court's judgment, however, not discussed at all.

11. The Hon'ble Apex court in ***B.V. Nagesh and another vs HV Sreenivasa Murthy*** reported in ***(2010) 13 SCC 530*** held that it is mandatory upon the first appellate court to frame the point of determination and consider both facts and law and to decide such appeal on the basis of such determination inasmuch as the Order XLI Rule 3 mandates such procedure of determination. It is equally well settled that the first appellate court in exercise of power under Section 97 of CPC, 1908 is duty bound to deal with all the issues and the evidence led by the contesting parties and thereafter, record such finding.
12. However, from the judgment it is abundantly clear that ignoring such settled proposition of law the learned Appellate Court dismissed the appeal by taking a new case regarding the pleading and evidence of the possession and not even discussed the evidentiary value of the exhibits and the evidence of PW2, which was the basic ground for dismissal by the learned trial court.
13. The learned appellate court while disposing of the appeal has not even raised the point of determination as required and discussed hereinabove. The learned appellate court even has not discussed the issues framed in detail and did not discuss at all the evidences laid before the learned trial court not to say any appreciation of such evidence. Rather the appellate court went into a different tangent not raised or pleaded by parties and held that suit is not maintainable as there was no pleading regarding dispossession. Furthermore, from the prayer of the plaint and from the paragraph 7A, which is the prayer portion of the plaint, it is clear

that the plaintiff has specifically prayed that defendants be directed to handover the possession of the suit land and an alternative prayer was also made that plaintiff is entitled to get the possession of the suit property through court law. Thus, in the considered opinion of this court such prayer will mean that the plaintiff sought for a direction to the defendants to handover the possession and on failure to comply with such direction, even if passed, alternatively it was prayed that the plaintiff is entitled to get recovery of the possession through court of law. Therefore, the finding of the learned Appellate Court that the plaintiff has not inserted any relief of recovery of khas possession is in the considered opinion of this court is a perverse finding.

14. In view of the aforesaid, it is held that the Appellate Court committed serious error by dismissing the appeal by making out a new case not pleaded by the parties. Further this court is also of the considered opinion that the finding of the learned Appellate Court in dismissing the suit on the ground that the plaintiff did not insert any relief of recovery of khas possession in the prayer portion is perverse. Accordingly, the substantial questions of law framed are answered.

15. In view of the aforesaid, this court is of the view that the matter be remanded back to the learned Appellate Court to take a fresh decision on the basis of the material available on record. Accordingly, the order dated 14.10.2004 passed by the learned Civil Judge, Senior Division, Karimganj in TA No. 103/2002 is set aside and quashed and the matter is remanded back to the learned

Appellate Court to take a fresh decision on the basis of material on record.

16. Parties to appear before the learned Appellate Court on 12.06.2023.
17. Registry to send back the LCRs.
18. As the suit pertains to the year 2004, this court requests the learned Appellate Court to make an endeavor to dispose of the appeal expeditiously subject to its convenience.

JUDGE

Comparing Assistant