

GAHC010004282009



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

Case No. : RSA/57/2009

ENAYATUR RAHMAN
S/O LATE ZAHOOR HASSAN, RAHMAN GARAGE, JORHAT, ASSAM.

VERSUS

CHHATRAMAL PINCHA
KARTA OF THE HINDU UNDIVIDED FAMILY CHHATRAMAL PINCHA and
SONS HUF, MARWARIPATTY, WARD NO. 6, JORHAT, ASSAM.

Advocate for the Petitioner : MR.MD ASLAM

Advocate for the Respondent : MR. O P BHATI

Linked Case : CO/3/2009

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S/O LT. ZAHOOR RAHMAN
RAHMAN GARAGE
JORHAT
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CHHATRAMAL PINCHA AND SONS
HUF
MARWARIPATTY
WARD NO. 6

JORHAT
ASSAM.

Advocate for : MR.O P BHATI
Advocate for : appearing for CHHATRAMAL PINCHA

**BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY**

ORDER

Date : 29-08-2023

1. Heard Mr. G. N. Sahewala, learned Senior Counsel assisted by Ms. S.Todi, learned counsel for the appellant. Also heard Mr. O.P. Bhati, learned Counsel for the respondent/Cross Objector.

2. The present appeal is directed against the judgment and decree dated 27.8.2008 passed by learned Munsiff No.2, Jorhat in Title Suit No.14/2007 whereby the suit of the plaintiff for a decree of eviction was decreed and appellate judgment and decree passed by the learned Civil Judge, Jorhat in Title Appeal No. 30/2008 dated 12.2.2009 whereby the judgment and decree dated 27.8.2008 passed by the learned Munsiff No.2,Jorhat was upheld with certain modifications. This appeal was admitted by this court under its order dated 1.4.2009 with the following substantial questions of law:

(i) Whether the judgment of appellate court below particularly finding on Issue No.4 is in accordance with Order 41, Rule 31 of the Code of Civil Procedure, 1908

(ii) Whether the appellate Court committed

illegality in relying on a decision relating to Urban Areas Rent Control Act while deciding issue of bonafide requirement in the instant case.

(iii) Whether the judgment of the appellate court is perverse in not considering the alternative plots and other accommodation available to plaintiff while deciding Issue No.4 inasmuch as plaintiff himself admitted in cross examination regarding the other availability of accommodation and plots?

3. Thereafter the plaintiff respondent appeared in this case and filed cross objection assailing the part of the judgment of the learned appellate Court whereby it was held that the suit was under the *Assam Non Agricultural Urban Areas Tenancy Act, 1955* (the Act, 1955). Such cross objection was admitted by this court and one additional substantial questions of law was formulated to the following effect:

“Whether the learned Lower Appellate Court is justified in holding that the suit filed by the plaintiff is not governed by and under the Assam Urban Areas Rent Control Act, 1972 but is governed by and under the provisions of the Assam Non-Agricultural Tenancy Act, 1955?

4. Before determining the existence of aforesaid substantial questions of law, let this court a in nutshell summarize the facts of the case of the parties in a nutshell.

Plaintiff's case:

The plaintiff pleaded that the defendant is a tenant in respect of one open space measuring about 1 katha 13 lechas under Jorhat Town and same was described in Schedule –A. It is the pleaded case of the plaintiff that the defendant has been running a motor garage for repairing of vehicle from the said land. It is also pleaded that a small C.I Sheet roof *Sali* with bamboo post was there in the middle portion of the said land. The rent was Rs. 2,250/- at the time of filing of the suit and was payable in the first week of the month following next. However the defendant illegally and without permission of the plaintiff raised a *kutchra* go-down with C. I. Sheet roof and bamboo wall and post in the month of March ,2003. It is yet another pleading of the plaintiff that the defendant was very irregular in payment of monthly rent and even after request of the plaintiff, the defendant was not paying any heed to pay the rent. Situated thus the plaintiff issued a notice raising objection regarding the construction of C.I.Sheet house and asked to dismantle the same. After receipt of the notice the defendant is paying the rent regularly. Yet another pleadings was that the defendant while entering into the suit premises / land, promised that he would vacate the land as and when plaintiff required the land. However, the plaintiff refused to hand over the possession of the same and accordingly the plaintiff issued a notice on 29.10.2004

through his lawyer and requested the defendant to hand over the possession of the land by dismantling the *kutchha* go down constructed by the defendant. It was also pleaded that the land was required for construction of commercial building inasmuch as the plaintiff wants the suit land for business of his two sons and plaintiff wants to establish them in business. It was also stated that existing business premises of the plaintiff is not enough to enable the plaintiff's two sons to carry out their own business. A specific plea was taken that thereafter, last notice was issued on 20.3.2006 by terminating the tenancy w.e.f. from midnight of 30.4.2006. However as the premises was not vacated, the suit was filed.

5. **The case of the defendant :**

The defendant appeared in the suit and admitted the tenancy by filing written statement. The defendant though by filing written statement admitted the tenancy however it is pleaded that the defendant came into the occupation of suit land on and from June, 1971 at monthly rent of 150/-. Subsequently, the rent was enhanced to Rs. 300/- and currently he was paying the rent of Rs. 2250/- per month for the suit land. It was denied by the defendant that the rent was to be paid within the first week of the following month of rent becoming due inasmuch as there is no stipulation regarding mode of payment of rent. It was pleaded by the defendant that structure standing on the suit land were in existence from the commencement of the tenancy and the go-down is ancillary to the trade of the defendant and go-

down has been used for storage of different motor parts required by the defendants. Regarding bonafide requirement it was pleaded that the plaintiff is having land other than the suit land and the plaintiff has already constructed six storied building thereon for business purpose. It was also pleaded that the defendant has already vacated a plot of land out of the suit premises measuring 22 x 62 feet in favour of the plaintiff in the year 1978. The plaintiff constructed go-down over the said plot of land and let out the same on rent to some other parties. The plaintiff has not made any demand of the said premises for alleged accommodation of his two sons. It is also pleaded that separate electric meter was supplied and provided by the Assam Electricity Board in the name of the defendant since inception of the tenancy with knowledge and consent of the plaintiff and the plaintiff has never raised any objection to such electricity connection.

6. **The Issues:**

The learned trial court framed as many as five issues which are as follows

- 1. Whether the suit is properly valued and stamped?*
- 2. Whether the defendant raised any illegal construction over the suit land in the month of March, 2003?*
- 3. Whether the defendant is a defaulter?*
- 5. Whether the suit land is required to the plaintiff for his bonafide purpose?*
- 5. To what relief or reliefs the parties are entitled for ?*

7. **The Evidence.**

The plaintiffs examined six witnesses including notice issued through lawyers and exhibited six documents. The defendant examined three witnesses and exhibited some documents.

8. **Findings of the learned trial court:**

I. Relying on Ext.A 1 to Ext.33 exhibited by defendant which were rent receipts, the learned trial court came to a conclusion that the said rent receipts stipulate payment of rent by first week of every month and therefore receiving rent by the plaintiff for months together shall not take away the right of the landlord plaintiff to demand for regular payment of rents from his tenants and therefore the defendant as tenant can never take undue advantage of the landlord for years after years. Accordingly, it was held that the defendant was a defaulter in payment of rent.

II. Regarding bonafide requirement, the learned court below, relying on certain decision of the Honourable Apex Court, held that if a landlord pleaded his case naturally, sincerely and honestly, he is entitled for his rented premises even though he has his other premises or businesses in other areas.

III. The plaintiff in his pleadings as well as evidence has clearly disclosed that he is having other lands and building and also his business. The plaintiff also admitted the stand of the defendant that a portion of the land was vacated and

on the said land vacated by the defendant and, plaintiff constructed house and rented it out. It was also the finding of the learned trial court that the defendant in his cross-examination disclosed that the suit land was situated in Fancy Ali and same is suitable for business.

IV. The pleadings of the plaintiff that he wants to settle his two sons and for this purpose requests for the land has also not been rebutted by the defendant rather the defendant No. 2 admitted that plaintiff's son have no separate business.

V. Accordingly learned trial court concluded that the plaintiff's son are having no independent business and also held that share marketing and other investment business are nothing but flying business and same cannot be considered as permanent business.

VI. Relying on the judgment of the Hon'ble Apex Court, the learned trial court held that in the present first moving world everyone is running after further and larger development particularly in the field of economy. Therefore such high ambitious landlord cannot be guided or instructed by tenant. Therefore, mere existence of another tenant under the plaintiff cannot debar the plaintiff for initiating any action of eviction against another tenant from different premises who is otherwise defaulter in payment of rents. Accordingly it was decided that the suit land is required by the plaintiff for bonafide requirement.

9. **Finding of learned Appellate Court:**

(i) The learned appellate court held that the parties in the suit erroneously relied upon the provision of law i.e. Assam Urban Areas Rent Control Act, 1972. However, the suit is governed by the Act 1955.

(ii) Relying on the paragraph 1 of the plaint the learned Appellate court came to a conclusion that the appellant is a tenant in respect of open space and said open space is having a thatched room with bamboo post. Therefore there cannot be second opinion that the case is governed by the 1955, Act.

(iii) Referring to the notices dated 20.3.2006 the learned appellate court came to a conclusion that such notice is to be treated as a notice under the provision of the Act, 1955 and there was a compliance of Section 11 of the Act of 1955 while terminating the tenancy under the Act of 1955.

(iv) It was also a conclusion of learned appellate court that in the context of the suit, the court can take up the subject of bonafide requirement of the suit land by landlord.

(v) It was also concluded that there are certain defense for a tenant under the Act of 1955, such as tenant can be evicted only on execution of decree of Civil Court for non payment of rent and there are protection that if

such arrears of rent are paid within a period stipulated in the Act, the tenant cannot be evicted. Accordingly the learned Appellate Court took up the point of bonafide requirement.

(vi) While dealing with the bonafide requirement relying on the decision of hon'ble Apex Court that the landlord is the best judge to decide the bonafide requirement and though the Act of 1955 is silent about the bonafide requirement, the court has applied the principle of bonafide requirement as enunciated in the aforesaid judgment and concurred with the decision of learned trial court and accordingly, the appellate court has held that the suit was under the provision of the Act, 1955. However even if the Act 1955 is silent regarding bonafide requirement of the landlord, the court can decide the issue of bonafide requirement.

(vii) The learned Appellate court also held that as the suit was under the Act of 1955, the issue No. 5 is wrongly framed.

(viii) While dealing with the issue No. 3, the learned Appellate court came to a conclusion that learned trial court has committed a Himalayan error by deciding the issue in favour of the respondent. Accordingly the appellate court held that the construction raised /erected by defendant cannot be termed as illegal construction.

(ix) While coming to the issue of non payment of rent, the court came to a conclusion that as the tenancy was under the Act, 1955 therefore there was no scope for the tenant to deposit rent in terms of Section 5 of the *Assam Urban Areas Rent Control Act, 1972*.

(x) The learned court also came to a conclusion that there are no pleadings alleging as the defendant appellant as defaulter. Though it was pleaded that defendant appellant is irregular in paying monthly rent, however it was not disclosed as to from which month the appellant stopped paying rent. Accordingly it was held that the defendant cannot be held to be a defaulter in terms of the Act, 1955

10. Arguments of Learned Counsel for the Appellant:

Deliberating on the substantial question of law, Mr. G. N. Sahewalla, learned Senior Counsel contends as follows:

While defending the determination of the appellate court that the suit was under the provision of the Act, 1955, Mr. Sahewalla, learned Senior Counsel submits that the determination of the appellate court that there was a bonafide requirement is nothing but an excess of power of jurisdiction. He contends that once it is held that suit is under 1955 Act, the court cannot endeavor to the availability of the bonafide requirement of the landlord inasmuch as there is no scope under the Act, 1955 to make such a determination. Therefore on the face of it, the decision made by the learned appellate court is

perverse. He further contends that the learned Appellate court has rightly decided the issue of defaulter inasmuch as admittedly no specific date was given for which period the defendant did not pay rent in time. He further submits that the provision of payment of rent within the first quarter u/s 5 Assam Urban Areas Rent Control Act, 1972 is also not available in the case of the Act, 1955. Therefore, the learned Appellate court has rightly held that the defendant is not a defaulter. Therefore if the perversity of bonafide requirement is set aside, the decree passed in favour of the respondent is required to be set aside.

11. Arguments on behalf of Respondent/cross objector:

Per contra Mr. Bhatti, learned counsel submits that it is not a pleaded case of any of the party but it is a case under the Act of 1955. Therefore the learned First Appellate Court has committed perversity by taking out an absolute new case without there being any pleadings or evidence. Mr. Bhatti further contends that from the bare perusal of the pleadings, it is disclosed that even if it was a land, land was given for running a garage with a house. Therefore all meaning and purport such land cannot come under the definition of land as given in the Act of 1955 inasmuch as under the Act, land means a land which is let out or occupied for residential purposes or purposes incidental thereto. In the present case it is an absolute admitted position that the rent was taken with a thatched house for the purpose of garage, defendant himself admitted that he is running a garage and the house was used for the purpose of ancillary to his business. Therefore it cannot be said that land was let out for any

residential purpose and or ancillary thereto. Therefore it cannot be applicable.

12. The learned counsel further contends that in the aforesaid view of settled position of law, the pleadings of the parties i.e. pleaded case of the plaintiff and defendant, it is apparently clear that suit was for eviction and recovery of rent under the provision of *Assam Urban Areas Rent Control Act, 1972*. However the appellate court without any time being framed any issue or without any pleadings, has concluded on its own that the suit is under 1955 Act Thereafter substantial question of law No. 4 is required to be answered in favour of the respondent plaintiff and the appeal of the defendant is required to be allowed.

13. In support of such contention Mr. Bhatti, learned counsel relied on a judgment of Honourable Court in the case of ***Uma Kanta Das Mahajan Vs. Tribeni Prasad Kalwar*** reported in ***(1974) AIR 1970.***

14. **DECISION**

This court has given anxious consideration to the arguments advanced.

15. From the discussion hereinabove, it is clear that the learned trial Court below came to a definite finding of fact that land lord was in bona fide requirement of the tenanted premises inasmuch as the tenant himself admitted that plaintiff's son did not have separate business and it was the case of the plaintiff that the tenanted premises was required for settling the son's of the plaintiff.

16. The learned Trial Court also concluded that the tenant was a defaulter. Such finding was based on the Exhibit-A(1) to Exhibit-33 (rent receipts) which discloses that the rents were paid for the months together though, it was stipulated that the rent is to be paid within the first week. The plaintiff also pleaded his bonafide requirement on the aforesaid ground. Therefore, such determination made by the court is determination of fact and accordingly, this court is of the considered opinion that the question of law (No.iii), cannot be a substantial question of law.

17. It is well settled that power of High Court to interfere in second appeal under section 100 is very limited and the court is to decide only substantial question of law, if at all arises. Finding of facts reached by the learned courts below cannot be interfered or reversed in a second appeal without coming to a conclusion that the said finding of fact is either perverse or not based on materials on record. In this regard, this court can gainfully rely on the judgment of the Hon'ble Apex Court in the case of **Karnataka Board of Wakf Vs. Anjuman-E Islamia** reported in **1999 6 SCC 343**. It is equally well settled that even when from the evidence two inferences are possible, then the one drawn by the courts below should be opted. Such finding of facts and decision can only be interfered in a second appeal when such decision is based on inadmissible evidence or arrived at without evidence or recorded based on misreading of material on records and documents.

18. There is no pleading in the written statement which is required to establish the fact of treating the plaintiff as non evictable tenant

under section 5 of the Act, 1955. There is also no pleading in the plaint that in terms of the contract entered into between the plaintiff landlord and the defendant, the defendant tenant was made entitled to built a permanent construction in pursuance of such term within a period of 5 (five) years from the date of contract. It is also not pleaded that though the defendant/tenant was not entitled to raise such construction of structure on the land, however, same has been constructed with the knowledge and accrescence of the landlord. Rather, it is the pleaded case of the plaint that when the landlord refused to accept the rent, he deposited the rent in the court taking recourse to the provisions under Assam Urban Areas Rent Control Act. Therefore, in absence of any pleading involving the fact that the tenancy was in respect of land with the permission to raise permanent construction and such construction has been raised within 5 years from the date of commencement of tenancy and/or that though there was no permission to raise such construction, the defendant had infact raised such permanent construction within the knowledge and accrescence of the plaintiff landlord, the findings of the learned Appellate court is that the suit under the provisions of the Act of 1955 is nothing but a perverse finding. In the aforesaid backdrop, the decision of the learned appellate court that the suit was under the Act, 1955 and also the finding that there was no scope for the defendant tenant to deposit rent under the provision of Assam Urban Areas Rent Control Act is nothing but a perverse finding inasmuch as the substantial question of law framed in the cross-objection filed by the landlord respondent is answered in favour of the

plaintiff/respondent/cross-objector.

19. From the pleading and materials available on record, it is no body's case that the tenanted premise is covered under Assam Non Agricultural Urban Areas Tenancy Act, 1955. In fact the plaintiff himself deposited rent in terms of Section 5(4) of the Assam Urban Areas Rent Control Act. The defendant in his written statement has not raised any defence that the lease/tenancy was for land and he constructed the house within the period stipulated under the Assam Non Agricultural Urban Areas Tenancy Act, 1955.

20. In view of the aforesaid determination, this Court hold that the suit was covered under Assam Urban Areas Rent Control Act, 1972 and the plaintiff has been established to prove the bonafide requirement.

21. This Court is of the considered opinion that the leaned appellate court has formulated the point of determination in the appeal and therefore, there were substantial compliance of Order 41 Rule 31 of the Code of Civil Procedure.

22. Accordingly, the present second appeal stands dismissed with the aforesaid findings and observations. Prepare a decree accordingly. Parties to bear this own cost.

JUDGE

Comparing Assistant