

GAHC010092282009



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

Case No. : RSA/155/2009

DIVINE ACADEMY SCHOOOL and ANR
REPRESENTED BY ITS STEERING, COMMITTEE CONSISTING OF 1. SRI
SIBNATH BARUAH, R/O PANITOLA TOWN, P.O. PANITOLA, DIST.-
TINSUKIA, ASSAM.

2: SRI BOLINDRA NATH RAJKHOWA

R/O PANITOLA TOWN P.O. PANITOLA
DIST.- TINSUKIA
ASSAM

VERSUS

THE MANAGER PANITOLA TEA ESTATE
P.O.- PANITOLA, DIST.- TINSUKIA, ASSAM. AN UNIT OF ROSSELL
INSUSTRIES LIMITED. A COMPANY REGISTERED UNDER THE COMPANIES
ACT. 1956, HAVING ITS REGISTERED OFFICE AT HINDUSTAN LIVER
HOUSE, 165/166, BACKBAY RECLAMATION, MUMBAI-400 040

Advocate for the Petitioner : MSS CHANGKAKATI

Advocate for the Respondent : MR. D NATH

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 13.10.2023

Heard Mrs. P. Barman, learned counsel for the appellants and Mr. D.

Mazumdar, learned senior counsel, assisted by Mr. D. Nath, learned senior Govt. advocate for the respondent.

2. The appellant herein is the defendant in the suit. By filing this appeal under Section 100 CPC, the appellants have assailed the first appellate judgment and decree dated 24.07.2009 passed by the learned Civil Judge, Dibrugarh in TA 50/2006 by which the appeal was allowed and the judgment and decree dated 21.07.2006 passed by the learned Civil Judge (Junior Division) No. 1, Dibrugarh in TS No. 108/2002 by which the suit was dismissed, was set aside.

3. This appeal was admitted for hearing by order dated 16.11.2009 on the basis of the following substantial question of law.

“Whether the learned lower appellate Court was justified in decreeing the suit solely on the basis of presumption of a letter dated 07.11.2000 written by the defendant to the plaintiff to prove that the land was encroached upon by the defendant?”

4. The respondent plaintiff had filed a suit against the appellant praying for decree of declaration that the plaintiff had right, title and interest over the suit land and for a declaration that the defendant-appellant had no right and authority to cause disturbance/ interference or to infringe the right, title and interest over the possession of the respondent-plaintiff in respect of suit land and for recovery of *khas* possession by evicting the appellant-defendant, decree for permanent injunction and other reliefs. The suit land is a plot of land measuring 4B-0K-0L covered by Dag no. 355, 391 and 392 of NLR Grant No. 26 under Bogdung Mouza PO- Panitola in the district of Dibrugarh along with a room made out of bamboo wall and CI sheet roof definite with boundaries as

described in the schedule to the plaint. On 07.11.2000, a letter was written by Sibanath Baruah, Balindra Nath Rajkhowa and Kamal Talukdar as representative of public and members of a Steering Committee of the Divine Academy School to the Senior Personal Manager of the respondent to inform a meeting was arranged to be held on 02.09.2000, to establish a English Medium School from session 2001 and to request the Panitola Tea Estate for releasing a plot of land measuring 8 bigha covered by Dag no. 354 of Nalini Hulla Bengali Gaon. Thereafter, in the month of April, 2002, an attempt was made by those persons to encroach upon the suit land, which was reported at the police and proceeding under Section 145 CrPC was drawn up. However, a bamboo wall room with CI sheet roof was erected by the respondents and affixed a sign board in the name of Divine Academy School. On 15.12.2002 another attempt was made to raise construction over the suit land and therefore, the respondent-plaintiff had filed the suit.

5. The appellants-defendants had contested the suit by filing a written statement, and it was claimed that they are in occupation of the suit land with consent of the original owners i.e. M/s. Parshuram T.E. of M/s. Chunnilal Pannalal and Co. since long and openly. It was also claimed that the land did not belong to the respondents nor it was a play ground or a grazing ground and it was claimed that the residential quarters were standing on some other land near the suit land. It was also projected that the letter dated 07.11.2000 was not in respect of the suit land, but some other land. It was denied that any construction was set up and any attempt was made to encroach the land and accordingly, the prayer was made to dismiss the suit. In course of trial, the learned trial Court had framed seven issues as well as an additional issue no.8 as follows.

- 1. Whether there is cause of action in the suit?*
- 2. Whether the suit is maintainable in law and facts?*
- 3. Whether the defendants encroached the suit land in the month of April, 2002 illegally and erected bamboo fencing around the suit land?*
- 4. Whether the plaintiff has right, title and interest over the suit land?*
- 5. Whether the defendants have been possessing the suit land since long?*
- 6. Whether the plaintiff is entitled to decree as prayed for?*
- 7. What other relief or reliefs the parties are entitled to?*
- 8. Whether suit is bad for non-joinder of necessary parties?*

6. The plaintiffs examined one witness, namely, Deepak Sarma and he had exhibited 6(six) documents being defendants letter dated 07.11.2000 (Ext.1), certificate of the Circle Officer dated 12.06.2002 (Ext.2), revenue payment challan (Ext.3, 4 and 5), and map of the plaintiffs' land showing the suit land (Ext.6). The appellants-defendants had examined two witnesses, namely, Balindra Nath Rajkhowa (DW-1) and Mohin Gogoi (DW-2) and no document were exhibited. However, it appears from the order dated 07.06.2006 that after cross-examination of DW-1, the stage of defendants' witness was closed by the learned trial Court and the case was fixed for argument.

7. In respect of issue no.1, the learned trial Court had decided the same in the affirmative and it was held that there was cause of action for the suit. In respect of additional issue no. 8 as to whether the suit is bad for non-joinder of parties, it was held that the due to non-impleadment of M/s. Chunnilal Pannalal and Co., the suit was bad for non-joinder of necessary parties because in the

opinion of the Court, the suit could not be proceeded and decided in the absence of the said joint owner of the land.

8. In respect of issue no.4, it was held that the PW-1 had clearly admitted that Panitola Tea Estate is not the absolute owner of the land measuring 1602B-1K-0L, which include the suit land and accordingly, it was held that the plaintiffs were not the absolute owner of the suit land and the issue was decided against the respondents-plaintiffs. In respect of issue no.3, it was held that the PW-1 does not know when the appellants-defendants had occupied the suit land and therefore, his plea in the plaint that the suit land was occupied by the appellant in April 2002 was found not acceptable and accordingly, the issue was decided against the respondent-plaintiff.

9. In respect of issue no.5, the learned trial Court had held that the appellants-defendants had been occupying the suit land prior to April 2002. However, it was observed that that the appellants-defendants had failed to prove the vague term "since long". In respect of issue no.2, in view of the discussion and decision on issue no.6, it was held that the suit was not maintainable. In respect of issue no.6, in view of the discussion and decision on issue nos. 3, 4 and 8, it was held that the plaintiff was not entitled to decree as prayed for and accordingly, in respect of issue no.7, the Court held that the parties are not entitled to any other relief and accordingly, the suit was dismissed without cost.

10. The appeal against the judgment and decree passed in the title suit was preferred. The learned first appellate Court had failed to formulate any point of determination as required under Order XLI Rule 31 (a), which is otherwise unacceptable. Nonetheless, all the issues were revisited by discussing the evidence. As this appeal was filed on 05.11.2009 and admitted for hearing on

the substantial question of law referred above, without intending this to be a precedent, it is observed that in this case, the non-framing of points of determination could not vitiate the first appellate proceeding in view of the discussions on all the issues and revisiting the same with discussion on evidence.

11. The learned first appellate Court considered the submission of PW-1 to the effect that the records of rights discloses the name of Panitola Tea Estate as the owner of the land in question and also referred to the averments made in the written statement by the appellants-defendants that the suit land belonged to M/s. Parshuram Tea Estate of M/s. Chunnilal Pannalal and Co., coupled with the fact that the appellants-defendants did not produce any document which proved that the suit land was belonged to M/s. Parshuram Tea Estate of M/s. Chunnilal Pannalal and Co., held that the respondents-plaintiffs had successfully established by oral and documentary evidence that the suit land belonged to the plaintiff and accordingly, it was held that the suit was not bad for non-joinder of necessary party. Resultantly, issue no. 4 was also decided in the affirmative and in favour of the respondent-plaintiff by arriving at a finding that the plaintiff company was the owner of the land. In this regard, reliance was placed by the learned first appellate Court on letter dated 07.11.2000, by the defendants to provide a land for establishing a English Medium School and therefore, the said letter was also accepted as an admission on part of the defendants so as to affirm the title of the plaintiffs over the suit land. In respect of issue no.3, the learned appellate Court had relied on the map of the suit land (Ext.6) to arrive at a conclusion that the suit land including the encroached area was described therein and accordingly, it was held that the documentary evidence will prevail over the oral evidence. On the basis of Ext.3 and 4, it was held that the

documents proved that the suit land belonged to the Panitola Tea Estate and the first appellate Court had also referred that the DW-1 did not exhibit any documentary evidence to show that they were lawfully holding the suit land.

12. In this connection, reliance was also placed on the 145 proceeding drawn up by the Executive Magistrate being Case no. 162/2002 and in view of the statement made by the PW-1 that the suit land was encroached by the defendant and they had illegally constructed a house on the suit land with bamboo fencing, bamboo wall and CI sheet roof with sign board of Divine Academy School, it was held that the appellants were in possession of the suit land. Moreover, in this regard, reliance was also placed in the cross examination of DW-1 where he had admitted that he had not mentioned in his evidence-on-affidavit that on which date the Divine Academy School was established. Accordingly, it was held in respect of issue no.3 that the defendants were operating the suit land since April, 2002 and not since long. In view of the discussion on the other issue no.3, it was held that in respect of issue no.5, defendants had been in possession of suit land since April, 2002 and not earlier. Accordingly, in respect of issue nos. 6 and 7, it was held that the suit was liable to be decreed and the defendants were liable to be evicted from the suit land in terms of prayer made in the plaint.

13. The learned counsel for the appellant had submitted that the learned trial Court had erred on facts and in law in decreeing the suit and it was submitted that the judgment and decree passed by the learned trial Court was liable to be upheld because of non-joinder of necessary party and in absence of tendering any proof of ownership, the suit land could not have been declared in favour of the plaintiff and decreed for eviction. In support of her submissions, the evidence of PW-1 and D-1 was also referred to.

14. Per contra, the learned senior counsel for the respondent has also made his submission to support the first appellate Court judgment and decree.

15. As the question to be decided in this appeal is limited to finding of whether the appellate court was justified in decreeing the suit solely on the basis of presumption of a letter dated 07.11.2000 written by the defendant to prove that the land was encroached upon by the defendant.

16. In this regard, the Court finds that there is no dispute that the land which is stated to be encroached by the appellant-defendant belongs to Panitola Tea Estate. The ownership of the land in the name of M/s. Chunnilal Pannalal & Co. was a question of fact to be determined by the learned trial Court. Notwithstanding that M/s. Chunnilal Pannalal & Co., as projected by the appellant, was the owner of the land, but the question to be adjudicated is whether the manager of Panitola Tea Estate could have filed a suit for eviction. In this connection, it is noted that it is not in dispute that the representatives of the appellants whose names are reflected hereinbefore had written a letter dated 07.11.2000 to the Senior Personal Manager, Panitola Tea Estate. Therefore, having written to the Panitola Tea Estate to provide land, the appellants have admitted that the Panitola Tea Estate had the authority to deal with the land under its tea estate. The appellants had not taken step to summon representatives from the M/s. Chunnilal Pannalal & Co. to establish that the respondents-plaintiffs had no right to sue the appellants for eviction. Under such circumstances, the Court finds that the decision of the learned first appellate Court in decreeing the suit on the basis of letter dated 07.11.2000 (Ext.1) cannot be faulted with. Notwithstanding who was the owner of the land, the suit land was demonstrated to be land within the Panitola Tea Estate and that the Panitola Tea Estate being a firm and in possession of the land would

have a right to evict an encroacher i.e. appellant, although it may not be the true owner of the land. Therefore, the Court is of the considered opinion that the learned trial court had committed grave error in not considering the fact that even a person who is not a title holder, but having a right over the property in question, will have a right to sue an encroacher as such encroachment has affected his right over the suit land. Therefore, the finding of the learned first appellate Court on additional issue no.8 as well as issue no.4 cannot be faulted with, and is affirmed.

17. There appears to be no perversity in the finding of the learned first appellate Court because in the said case the appellant has not been able to establish its right to stay on the suit land. Hence, the Court is of the further considered opinion that the issue relating to interpretation of the letter dated 07.11.2000 is a issue of fact and not a issue relating to perversity in the finding of the learned first appellate Court and therefore, finding of fact cannot be interfered with in the absence of any perversity in the finding of the first appellate Court.

18. In view of the discussions above, the Court finds that the learned first appellate court had rightly held that there was a cause of action for the suit which was maintainable as the appellant had encroached the suit land, the appellant was liable to be evicted.

19. In respect of issue no.4, the Court is inclined to clarify that in view of the contents of Ext.2, the certificate of the Circle Officer dated 12.06.2002, the Court is inclined to provide that the declaration of right, title and interest as provided by the learned first appellate Court would be operative *qua* the defendant-appellant, namely, Divine Academy School.

20. Accordingly, the substantial question of law is answered by holding that the first appellate Court had not committed any error to decree the suit solely on the basis of the letter dated 07.11.2000 (Ext.1). Accordingly, this appeal fails and the same is dismissed. However, under the circumstances, the parties are left to bear their own cost for this appeal.

21. Let the appellate decree be drawn up and the LCR be sent back.

JUDGE

Comparing Assistant