

GAHC010239622018



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

Case No. : RSA/105/2019

ON THE DEATH OF YEAR ALI, HIS LEGAL HEIRS SAKHINA KHATUN AND 6
ORS

W/O- LATE YEAR ALI, R/O- KABAR KHANA ROAD, WARD NO. 6, TEZPUR
TOWN, MOUZA- MAHABHAIRAB, DIST.- SONITPUR, ASSAM.

2: ASRAF ALI
S/O- LATE YEAR ALI
R/O- KABAR KHANA ROAD
WARD NO. 6
TEZPUR TOWN
MOUZA- MAHABHAIRAB
DIST.- SONITPUR
ASSAM.

3: AMAN ALI
S/O- LATE YEAR ALI
R/O- KABAR KHANA ROAD
WARD NO. 6
TEZPUR TOWN
MOUZA- MAHABHAIRAB
DIST.- SONITPUR
ASSAM.

4: ARJAN BEGOM
D/O- LATE YEAR ALI
R/O- KABAR KHANA ROAD
WARD NO. 6
TEZPUR TOWN
MOUZA- MAHABHAIRAB
DIST.- SONITPUR
ASSAM.

5: MUBINA AHMED
D/O- LATE YEAR ALI

R/O- KABAR KHANA ROAD
WARD NO. 6
TEZPUR TOWN
MOUZA- MAHABHAIRAB
DIST.- SONITPUR
ASSAM.

6: TASLIMA BEGUM
D/O- LATE YEAR ALI
R/O- KABAR KHANA ROAD
WARD NO. 6
TEZPUR TOWN
MOUZA- MAHABHAIRAB
DIST.- SONITPUR
ASSAM.

7: NAZMA AHMED
D/O- LATE YEAR ALI
R/O- KABAR KHANA ROAD
WARD NO. 6
TEZPUR TOWN
MOUZA- MAHABHAIRAB
DIST.- SONITPUR
ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS
REP. BY THE COMMISSIONER AND SECRETARY, MUNICIPAL
ASMINISTRATION, DISPUR, GUWAHATI- 781006.

2:DISTRICT MAGISTRATE/DEPUTY COMMISSIONER

SONITPUR
TEZPUR- 784001.

3:TEZPUR MUNICIPAL BOARD

REP. BY CHAIRMAN AND VICE CHAIRMAN
TEZPUR- 784001.

4:MD. MURAD AHMED
S/O- LATE RIFIQUE AHMED
R/O- NEPALI PATTY
TEZPUR TOWN
P.O. AND P.S. TEZPUR
DIST.- SONITPUR
ASSAM

PIN- 784001

Advocate for the Petitioner : MR. L R MAZUMDER

Advocate for the Respondent : GA, ASSAM

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

JUDGMENT

Date : 21-07-2023

- 1.** Heard Mr. I Hussain, learned counsel for the appellants. Also heard Mrs. R Choudhury, learned counsel for the respondents.
- 2.** The instant appeal has been preferred against the judgment dated 20.07.2018 and decree dated 21.07.2018 passed by the learned Civil Judge, Tezpur in Title Suit No. 12/2016. By the impugned Judgment, the Judgment and Decree dated 30.09.2015 passed by the learned Munsiff No. 1, Tezpur in Title Suit No. 96/2006 has partly been reversed.
- 3.** The present appellant was the plaintiff in the suit and the learned Munsiff, vide the impugned order dated 30.09.2015, had dismissed the suit, mainly on the ground that the provisions of Section 326 of the Assam Municipal Act, 1956 was not complied with insofar as, the Tezpur Municipal Board was concerned, the learned Court had held that though the plaintiff was able to make out a case on merits, the same was dismissed mainly on the ground that notices under Section 326 was not issued prior to filing of the suit.
- 4.** Against the aforesaid judgment and decree, the present appellant had approached the First Appellate Court. Though, vide the impugned judgment and order dated 20.07.2018, the findings were partly reversed by holding that it was not necessary to serve notice upon the Tezpur Municipal Board,

before institution of the suit. Accordingly, the learned First Appellate Court, Tezpur had directed allotment of room No. 154(A) in favour of the defendant No. 4. Aggrieved thereby, the present appeal has been preferred.

5. The appeal was admitted on the following substantial questions of law:

(i). Whether the Defendant No.4 having been failed to file any counter claim as provided by the C.P.C Challenging the Order passed by the Defendant No. 3 on 13.10.2006 Learned Court below were justified in deciding in the issue no. 3 and 4 in favour of the defendants?

(ii). Whether Learned First Appellate Court is justified in holding the view that plaintiff has right, title and interest only in shop no.154(B) not as whole shop room no. 154?

6. Subsequently during the course of hearing on 28.03.2023 another substantial question of law was formulated which is as follows:

“Whether the decision of the learned appellate court is perverse in declaring the defendant No.4 to be tenant under the defendant No.3 in spite of holding that the order dated 20.10.2016 of the District Magistrate was bad in law thereby reviving the order dated 13.10.2016, by which the tenancy in favour of the defendant No.4 was cancelled by defendant No.3.”

7. The case of the appellant/ plaintiff:-

The plaintiff pleaded the following facts in his plaint:

I. The plaintiff/appellant possessed a room/shop comprising shop No.154 at Chowk Bazar, Tezpur as the tenant of Tezpur Municipal Board/Defendant No.3. The plaintiff was running a partnership business with the defendant No.4 i.e. Murad Ahmed on one portion of the shop No.4 by erecting a partition.

II. It is the case of the plaintiff that in the month of February 2001, the plaintiff asked the defendant No.4 to remove the partition. The plaintiff was informed that the defendant No.4 has illegally entered into a tenancy agreement with the vice chairman of defendant No.3 and got separate tenancy as holding No.154-A thereby dividing the original shop No.154.

III. Being aggrieved, the plaintiff submitted several representations before the Executive Officer, Tezpur Municipal Board and Deputy Commissioner in the year 2001 and 2002 and further representations in the year 2004 and 2006.

IV. It is the further case of the plaintiff that on 25.09.2006, in the General Meeting of Tezpur Municipal Board/Defendant No.3, the vice chairman of the Tezpur Municipal Board/Defendant No.3 was authorized to take appropriate steps against the grievance of the plaintiff by passing a resolution.

V. The Tezpur Municipal Board/Defendant No.3 by its letter dated 13.10.2006 informed the plaintiff about the mutation in the name of the defendant No.4 was cancelled upon verification of facts and hearing. The defendant No.4 submitted an application before the Deputy Commissioner/defendant no.2, challenging the order of the defendant No.3 dated 13.10.2006, which was subsequently interfered by the defendant No.2 by exercising power under section 296 of the Assam Municipal Act under order dated 20.10.2006.

VI. Accordingly the plaintiff preferred a suit praying for decree by declaring right, title and interest over the entire shop No.154 of Chowk Bazar and for further declaration that the order dated 20.10.2006, passed by the defendant No.2/District Magistrate is

illegal, null and void and without jurisdiction.

8. The case of the defendants:

I. The defendant No.3 and the defendant No.4 contested the suit by filing written statement. The defendant No.4 in addition to the maintainability of the suit raised different issues like waiver, acquiescence, estoppels and limitation.

II. The defendant No.4 in his written statement admitted that the plaintiff was the tenant under the defendant No.3 over shop room No.154 but denied the other allegations of the plaintiff. The defendant No.4 also stated that he was a tenant under defendant No.3 for tenancy over shop room No.154(A). Subsequently, in the same manner, the Board independently entered into tenancy with another similarly situated 30 persons including the appellant.

III. It was pleaded by the defendant No.4 that a notice was served upon defendant No.3 by the defendant No.4 on 12.10.2007 under section 326 of the Assam Municipal Act, 1956 claiming damages for the loss caused to the defendant by the illegal acts. The chairperson issued a letter to the defendant dated 19.01.2007 seeking apology for the illegality committed and the loss caused to the defendant and accordingly the defendant filed for dismissal of the suit.

9. The Issues:

The learned trial court framed the following issues:

- I. Whether the suit is maintainable in present form?
- II. Whether there is any cause of action for the suit?
- III. Whether the plaintiff has right, title and interest as tenant of room/shop No.154 of Chowk Bazar, Tezpur under defendant No.3?
- IV. Whether the tenancy of defendant No.4 over room/shop No.154(A) is illegal and the mutation of defendant No.4 in respect of

said room is liable to be set aside?

V. Whether the order dated 20.10.2006 passed by the defendant No.2 is illegal, incompetent, perverse and without jurisdiction?

VI. Whether the plaintiff is entitled to the decree as prayed for?

VII. To what other relief the plaintiff is entitled to?

10. Decision of the learned trial court:

I. The learned Trial court while dealing with the issue No.1 held that since the plaintiff had not served notice to the defendant No.3 under section 326 of the Assam Municipality Act, 1956, the suit is not maintainable.

II. While deciding the issue No.3, the learned trial Court held that the plaintiff had no right, title and interest over the entire room/shop No.154 of Chowk Bazar, Tezpur under defendant No.3. However, the plaintiff was entitled to right, title as tenant over the portion of 154 except 154(A).

III. The learned trial Court in deciding issue No.4 held that since the tenancy agreement of the defendant No.4 with the defendant No.3 is found to be valid, therefore the mutation of defendant No.4 over room/shop No.154(A) was not illegal and hence the mutation of defendant No.4 in respect of the said room was not liable to be set aside. Thus the Issue No.4 was decided against the plaintiff.

IV. With regard to Issue No.5, the learned trial Court held that under section 296 of Assam Municipal Act, the Deputy Commissioner is empowered to make order in writing to suspend the execution of any resolution or order of the Board. The Deputy Commissioner in the present case had passed an order dated 20.10.2006, invoking his power as District Magistrate which is contrary to law. Hence the

order dated 20.10.2006 passed by the defendant No.2 exceeds his jurisdiction. Accordingly, the issue No.5 was decided in positive.

V. With regard to the Issue Nos.6 and 7, the learned trial Court held that since the suit was not maintainable, the plaintiff was not entitled to any decree or entitled to any other relief. Accordingly, the suit was dismissed on contest with cost.

11. Decision of the learned Appellate Court:

The learned Appellate Court in Title Appeal No.12/2006 decided the following issues:

I. The learned Civil Judge, Tezpur, Sonitpur held that notice under section 326 of Assam Municipal Act is essential and mandatory before filing a suit against the Municipal Board or any officers or any person acting under its direction. In the present case, the appellant/plaintiff made defendant No.3 a party not because any act done by it or its officers but because defendant No.2 passed an order against decision of defendant No.3. There was no relief sought from defendant No.3, hence notice under section 326 of Assam Municipal Act was not mandatory. The decision of the learned trial Court in issue No.1 was reversed by the Appellate Court and it was held that the suit was maintainable.

II. The learned Civil Judge held that the tenancy of defendant No.4 with defendant No.3 was valid in the light of the various evidence adduced. Subsequently, the defendant No.4 was targeted and vide misguided and invalid resolution dated 25.09.2006, the valid tenancy of defendant No.4 on Room No.154(A) was cancelled. Thus, the learned Appellate Court concurred with the decision of the Trial Court.

12. Arguments advanced by Mr. I. Hussain, learned counsel for the

appellants/defendants:

Mr. I Hussain, learned counsel for the appellant submits that while deciding the issue No.3 and issue No.4, the learned trial Court as well as the learned Appellate Court erred both in facts as well as in law. The learned trial court had relied upon the evidence of another suit vide Money Suit No.23/07 to suggest that the defendant No.4 was a sub tenant of the appellant/plaintiff and not a business partner running the partnership business. The Money Suit No.23/07 was filed by the defendant No.4 of the instant case to claim an amount of Rs.1,00,000/- which the defendant had purportedly paid to the plaintiff/appellant as advanced tenancy payment. However, the learned trial Court as well as the Appellate Court failed to appreciate the facts and inquired upon the fate of the Money Suit which was ultimately dismissed and order was passed in favour of the plaintiff/appellant. As such, the claim of defendant No.4 of paying an advance amount of Rs.1,00,000/- to the plaintiff is vague.

13. Findings of this Court:

Both the courts below concurrently decided the following facts:

- A. The plaintiff was a tenant under the Tezpur Municipal Board in respect of shop No. 154.
- B. Said shop was rented out by the plaintiff to the defendant No. 4 by partitioning.
- C. The Municipal Authority subsequently created an independent tenancy with defendant No. 4 and the shop was divided into two parts and it was numbered as 154 and 154 A.
- D. The tenancy between the municipal board and the defendant No. 4 was valid and therefore mutation in respect of respondent No. 4 is not liable to be set aside.

E. The learned appellate court also held that by the resolution dated 25.09.2006, the valid tenancy entered with the defendant No. 4 could not have been cancelled and thus affirmed that the Deputy Commissioner exceeded his jurisdiction while passing the order dated 02.10.2006.

14. Though the learned trial court dismissed the suit for want of notice under Section 326 of Assam Municipal Act, the learned appellate court concluded that such notice is required only when suit is filed against municipal board or any officers or any persons acting under its discretion. However, the cause of action of the suit arose for the action of the defendant No. 2, the Deputy Commissioner, who interfered with the action of the Municipal Board.

15. In the aforesaid backdrop of fact though the suit of the appellant plaintiff was dismissed for want of notice under Section 326 of the Assam Municipal Act, however, the appellate court reversed such finding by holding that notice in the given fact of the plaintiff's case was not necessary.

16. The defendant No. 4 proved the tenancy between the plaintiff and him through Ext. C, tenancy agreement. In view of such proof, the learned courts below had rightly not declared the plaintiff to be a tenant of entire room No. 154.

17. It is no more res-integra that defendant respondent can without filing cross-objection, can attack an adverse finding upon which a decree in part has been passed against the respondent for the purpose of sustaining the decree to the extent the lower court has dismissed the suit against the respondent. In the case in hand, though there was no counter claim/ cross objection, however, the defendant No. 4 was able to establish that he is a tenant under the municipal board in respect of room No. 154 A.

18. By the order dated 13.10.2006 by a resolution, the tenancy with the defendant No. 4 was cancelled by the defendant municipal corporation, however, the Ext. M, by which the municipal board entered into the tenancy agreement with the defendant No. 4 remained and such Ext was duly proved by the defendant no. 4. There was no pleading or prayer for cancellation of such exhibit by the plaintiff. The learned courts below also came to a conclusion that though Ext. C was pleaded by the plaintiff to be a forged one, however, the plaintiff has failed to bring on record any iota of evidence in support of such pleading.

19. It is by now well settled that concurrent finding of fact of trial court and first appellate court cannot be interfered with in exercise of power under Section 100 of the Code of Civil Procedure, 1908 until and unless such recording of facts are perverse. It is the considered opinion of this court, as discussed hereinabove, the learned courts below have concurrently held on the basis of evidence on record that the plaintiff entered into tenancy agreement with defendant No. 4 by partitioning his own tenanted premises and thereafter the Municipal Board created separate tenancy with the defendant No. 4 creating room No. 154A out of the tenanted premises being room No. 154 and therefore, both the courts below declined to declare the right of tenancy of the plaintiff over the original tenanted premises i.e. room No. 154, though the courts have declared his right over the part of tenanted premises being shop No. 154, recognizing the right of the defendant No. 4 over room No. 154A. Therefore, in the considered opinion no separate counter claim by the defendant No. 4 was necessary.

20. In view of the aforesaid, this court is of the opinion that no interference with the aforesaid concurrent finding of both the courts below is warranted. Accordingly, it is held that the substantial question Nos. 1 and

2 cannot treated as substantial question of law inasmuch as such questions involves finding of fact and do not have any material bearing on the decision of the case if answered either way, in so far as the rights of plaintiff and defendant are concerned.

21. The decision of the Municipal Board dated 20.10.2006, though was interfered by the District Magistrate by its order dated 13.10.2006, such decision is having no material bearing so far relating to the declaration of plaintiff's right, title and interest over the suit room No. 154 in absence of any challenge to the agreement of tenancy between the Municipal Board and the defendant No. 4 and in view of failure of the plaintiff to dislodge the validity of Ext. C, which was the tenancy agreement between the plaintiff and the defendant No. 4. Accordingly, the substantial question of law to that effect is answered.

22. Accordingly, the present second appeal stands dismissed being devoid of merit. Prepare a decree accordingly. Parties to bear their own cost.

JUDGE

Comparing Assistant