

GAHC010100192023



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

Case No. : CRP/67/2023

SUNIL GOSWAMI AND 3 ORS.
S/O- LATE MADHAB CHANDRA GOSWAMI

2: ANIL GOSWAMI
S/O- LATE MADHAB CHANDRA GOSWAMI

3: PANKAJ GOSWAMI
S/O- NRIPEN GOSWAMI

4: PRASANTA GOSWAMI
S/O- LATE PRABHAT GOSWAMI

ALL ARE R/O- VILLAGE NOWAPARA
KADAMTAL

P.O- CHAIGAON
PIN-781124
KAMRUP
ASSA

VERSUS

SUBRATA GOSWAMI AND 2 ORS.
D/O- LATE GOKUL CHANDRA GOSWAMI

2:AMITA GOSWAMI
D/O- GOKUL CHANDRA GOSWAMI
W/O- AJIT KUMAR SARMA

ALL ARE R/O- CHITRACHAL PATH (NEAR L.P SCHOOL)

P.O- KHARGHULI

P.S- LATASIL

GUWAHATI-04
DIST- KAMRUP METRO
ASSAM

3:RAJBRAT GOSWAMI
S/O- LATE GOKUL CHANDRA GOSWAMI

R/O- CHITRACHAL PATH (NEAR L.P SCHOOL)

P.O- KHARGHULI

P.S- LATASIL

GUWAHATI-04
DIST- KAMRUP METRO
ASSA

Advocate for the Petitioner : MR P SHARMAH

Advocate for the Respondent : MR. P CHOUDHURY (r-1 to 3)

BEFORE
HON'BLE MR. JUSTICE DEVASHIS BARUAH
ORDER

06.05.2024

Heard Mr P Sharmah, learned counsel appearing on behalf of the petitioners and Mr P Choudhury, learned counsel appearing on behalf of all the respondents.

2. This is an application under Article 227 of the Constitution of India, challenging the order dated 08.02.2023, whereby the learned Court of Munsiff, Kamrup, Amingaon, had rejected the application under Order IX Rule 7 of the Code of Civil Procedure, 1908 (for short, 'the Code') and fixed 05.04.2023, for necessary orders on the Petition No. 2780 and 2781, as well as for payment of cost(s).

3. This Court finds it very pertinent to take note of certain facts which led to the filing of the instant proceedings. On a perusal of the materials on record, it reveals that the respondents herein as plaintiffs, have instituted a suit being Title Suit No. 15/2019, seeking a declaration of their right, title, interest, confirmation of possession as well as injunction.

4. The record clearly shows that on 18.06.2022, the petitioners herein, who were the defendants, had submitted their written statement along with costs. It is further seen that on 10.08.2022, the plaintiffs had filed their draft issues and on that day, the issues have been framed and the case was fixed on 01.11.2022 for steps before premtory hearing. On 01.11.2022, the plaintiffs filed two applications, one is an application under Order XVI Rule 6 of the Code (Petition No. 2780) and other is an application under Order XI Rule 14 of the Code (Petition No. 2781). On the said date, the case was fixed on 21.12.2022, for objection, if any. However, on 21.12.2022, none had appeared on behalf of the defendants and the learned trial Court fixed 08.02.2023, for necessary order(s) on Petition Nos. 2780 and 2781, and observed that the suit shall proceed *ex parte* against the defendants.

5. On 08.02.2023, the defendants, i.e., the petitioners herein, filed an application under Order IX Rule 7 of the Code for permitting the petitioners to participate in the said proceedings, assigning the ground that it was on account of the mistake on the part of the counsel in noting down the date, the defendants could not appear on 21.12.2022.

This application was rejected vide an order dated 08.02.2023 and it is under such circumstances that the instant proceedings have been filed.

6. This Court finds it very strange to take note of that the learned trial Court completely failed to consider as to when a suit has to proceed *ex parte* and what is the reason why the suit should proceed *ex parte*. It is well settled principle of law that in judicial proceedings, the proceedings are required to be held *inter parte*. However, if the defendants failed to appear on a date fixed for hearing, the Court has to pass an order to proceed *ex parte*. This order to proceed *ex parte* is more like an administrative order, inasmuch, as for the Court to further proceed to the next stage, the said order is required.

7. An application under Order IX Rule 7 of the Code is required to be filed when the defendant having failed to appear on the earlier date which was fixed for hearing, and explains the reason why the defendant could not participate in the hearing, so that the clock can be brought back to the date on which the suit proceeded *ex parte* against the defendant. It is equally important to note that an application under Order IX Rule 7 of the Code is not required, when the defendant chooses to appear from the stage at which the suit is otherwise fixed.

8. In the backdrop of the above if this Court duly takes note of the facts involved, it would be seen that it was at the stage of steps before premtory hearing when two applications were filed by the plaintiffs. One under Order XVI Rule 6 of the Code and the other Order XI Rule 14 of the Code. The said applications were not fixed for hearing

or even the suit was not fixed for hearing. Under such circumstances, the Court would not have passed the order dated 21.12.2022 of proceeding *ex parte* against the defendants. The learned trial Court upon finding that no objection was filed on the day fixed for filing objection, the Court had liberty to pass order(s) allowing or dismissing or disposing of the said application so filed by the plaintiffs and nothing more. However, in the instant case, the Court rejected the application under Order IX Rule 7 of the Code, thereby forbidding the petitioners, who were the defendants in the suit to participate in the suit, which is absolutely unwarranted and completely foreign to the provisions of the Code. Accordingly, this Court, therefore, sets aside the orders dated 21.12.2022 and 08.02.2023 and thereby directing the learned trial Court to permit the petitioners who are the defendants in the suit to participate in the suit.

9. This Court further takes note of that vide an order dated 16.06.2023, the further proceedings of Title Suit No. 70/2022, pending in the Court of the learned Munsiff, Amingaon was stayed. The said order stands vacated and the parties are directed to appear before the learned trial Court on 03.06.2024. On the said date, the petitioners herein who are the defendants, would be at liberty to file their objection to the petitions so filed being Petition Nos. 2780 and 2781. It is made clear that if the petitioners herein, i.e., the defendants fail to file their objections, the learned trial Court shall be at liberty to pass such order(s), as deemed fit on such petitions. In addition to that, the petitioners herein are also directed to deposit the costs so imposed earlier by the learned trial Court, which Mr P Sharmah, the learned counsel appearing on behalf of the petitioners,

undertakes to do so on the next date so fixed.

10. With the above, the petition stands allowed.

JUDGE

Comparing Assistant