

GAHC010122862012



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

Case No. : SAO/7/2012

RAHIMUDDIN AHMED @ RAHIMUDDIN,
S/O LATE BHABI SHEIKH, VILL. KABIKARA, P.O. JONARAM CHOWKA,
DIST. DARRANG, ASSAM.

VERSUS

1. SMTI. PATESWARI DEKA AND ORS,
W/O LATE CHANDRA KT. DEKA
 - 1.1 KAMAL CHANDRA DEKA
S/O LATE CHANDRA KT. DEKA
 - 1.2 BIBHASH DEKA
S/O LATE CHANDRA KT. DEKA
 - 1.3 BIMAL CHANDRA DEKA
S/O LATE CHANDRA KT. DEKA
ALL OF VILLAGE-RANGAMATI
 - 1.4 BINAPANI DEKA
W/O KHANGESWAR DEKA
PUB SARANIA, GUWAHATI
 - 1.5 SMTI. NALINI BALA SAHARIAH
W/O HARI RAM SAHARIAH
BISHNUPUR, MANGALDOI-1
2. ON THE DEATH OF RESPONDENT NO.2
BHUBAN CHANDRA DEKA, HIS LEGAL HEIRS
 - 2.1 SMTI. NURUPAMA DEKA
W/O LATE BHUBAN CH. DEKA
 - 2.2 RANJIT DEKA
 - 2.3 DEBAJIT DEKA
 - 2.4 PRANJIT DEKA
 - 2.5 CHITRALEKHA DEKA
 - 2.6. ANJANA DEKA
ALL RESIDENTS OF TANGABARI WARD NO.6



MANGALDOI TOWN, MOUZA GHAPAI, P.O. MANGALDOI,
P.S. MANAGLDOI, DIST. DARRANG, ASSAM

3.ON THE DEATH GIRIN KUMAR DEKA, HIS LEGAL HEIRS

3.1 BHARATI DEKA

W/O LATE GIRIN KUMAR DEKA

3.2 BARNALI BARUA

D/O LATE GIRIN KUMAR DEKA

HATIGAR CHARIALI, GUWAHATI

DISTRICT-KAMRUP, PIN-21

4. JIMAT SAHARIA, S/O LATE MUNESHWAR SAHARIA

5. DULAL SAHARIAH

S/O KULIRAM SAHARIAH

VILLAGE- BARATHIABARI

MOUZA-DAHI, P.O. JONARAM CHOWKA

DISTRICT-DARRANG, ASSAM

For the Petitioner(s) : Mrs. T. Goswami, Advocate

For the Respondent(s) : None appears.

Date of Hearing : **02.05.2024**

Date of Judgment : **02.05.2024**

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER (ORAL)

Heard Mrs. T. Goswami, the learned counsel appearing on behalf of the Appellant. None appears on behalf of the Respondents on call.

2. The instant appeal is directed against the order dated 28.09.2007 passed by the Court of the learned Civil Judge, Darrang at Mangaldoi in



Misc. Appeal No.3/2000 whereby the learned First Appellate Court confirmed the order of the learned Munsiff dated 30.05.2000 passed in Misc. (J) Case No.20/99 but remanded the matter back to the learned Trial Court to ascertain the quantum of mesne profit by making enquiry.

3. From the materials on record, it reveals that this Court vide an order dated 20.06.2013 had admitted the instant appeal by formulating a substantial question of law. With due respect to my learned predecessor, the said formulation of substantial question of law does not arise in a proceedings of the present nature taking into account that this appeal has been filed in terms with Order XLIII Rule 1(u) of the Code of Civil Procedure, 1908 (for short "the Code") read with Section 104 of the Code. Formulation of a substantial question of law would only arise in a case which falls within the ambit of Section 100 of the Code which is not the case in the instant proceedings. This Court however taking into account the order dated 20.06.2013 constricts itself only to the admission of the appeal and nothing further. Under such circumstances, let this Court take note of as to whether any interference is required to the impugned order passed by the learned First Appellate Court in the instant proceedings. For the said purpose, this Court finds it relevant to take note of the brief facts leading to the filing of the instant appeal.

4. The Appellant herein as Plaintiff had instituted a suit being Title Suit No.64/1977 before the Court of the learned Munsiff No.1 for declaration that the plaintiff is an adhiar in respect to the land mentioned in the Schedule to the plaint and for permanent injunction restraining the defendants from dispossessing the plaintiff from the suit land and for certain other



consequential reliefs. It is relevant to take note of that the defendants did not file any counter claim in the said proceedings however contested the suit by filing a written statement. The learned Trial Court vide a judgment and decree dated 28.09.1989 decreed the suit in favour of the plaintiff i.e. the Appellant herein. The Respondents herein who were the defendants being aggrieved preferred an appeal against the said judgment and decree dated 28.09.1989. The said appeal was registered and numbered as Title Appeal No.19/89. The learned First Appellate Court reversed the judgment and decree passed by the learned Trial Court dated 28.09.1989 vide a judgment and decree dated 11.07.1995. Against that, the Appellant herein who was the plaintiff preferred an appeal before this Court which was registered and numbered as SA No.172/1995. The said appeal was dismissed vide a judgment and decree dated 25.02.1999 by this Court thereby affirming the judgment and decree passed by the learned First Appellate Court whereby the suit was dismissed.

5. Subsequent to the said judgment and decree passed by this Court, an application was filed by the Respondents herein who were the defendants in the said suit seeking restitution of the suit land under Section 144 of the Code as well as also seeking mesne profit. The said application was registered and numbered as Misc. (J) Case No.20/1999. The said application was duly objected to by the Appellant herein on the ground that as there was no counter claim filed by the defendants in the said suit and there was also no decree for handing over the possession and as such the question of filing an application under Section 144 of the Code for restitution of the possession did not arise. It was also stated in the objection that the only remedy which was available to the defendants who were the applicants in



Misc. (J) Case No.20/1999 was to file a separate suit for recovery of possession. However, the learned Trial Court allowed the said application vide an order dated 30.05.2000 without ascertaining anything as regards what mesne profit which the defendants would be entitled to.

6. Being aggrieved, an appeal was preferred by the appellant herein challenging the order dated 30.05.2000 which was registered and numbered as Misc. Appeal No.3/2000. The said appeal was partly allowed by the learned First Appellate Court i.e. the Court of the Civil Judge, Darrang vide an order dated 13.06.2001 thereby affirming the restitution and on the question of mesne profit, the said aspect was remanded back to the learned Trial Court for making fresh enquiry and passing appropriate orders. Being aggrieved, the appellant herein preferred a revision application under Section 115 of the Code which was registered and numbered as CRP No.325/2001.

7. This Court vide a judgment and order dated 19.01.2005 set aside the order dated 13.06.2001 passed by the learned First Appellate Court and directed the First Appellate Court to re-hear the appeal on the entitlement of the defendants to the restitution/restoration on the basis of the application filed and pass fresh orders in the matter together with such consequential orders on the issue of mesne profit as may be called for. Pursuant thereto, the impugned order was passed on 28.09.2007 whereby the learned First Appellate Court again partly allowed the said appeal against the order dated 30.05.2000 thereby confirming the restitution but remanding the matter back to the learned Trial Court for fresh enquiry in respect to the mesne profit. It is against that, the instant proceedings have been filed.



8. I have heard Mrs. T. Goswami, the learned counsel appearing on behalf of the Appellant. None appears on behalf of the Respondents on call.

9. This Court expresses shock and anguish as to how an appeal at all is maintainable against an order passed in an application under Section 144 of the Code inasmuch as the same by no stretch of imagination can be said to be a decree thereby permitting filing of an appeal in terms with Section 96 of the Code or an order falling within the ambit of Section 104 of the Code read with Order XLIII of the Code. The said order dated 30.05.2000 being an order passed in an application under Section 144 of the Code in the opinion of this Court was not at all appealable. Under such circumstances, the entire proceedings of filing the appeal being Misc. Appeal No.3/2000 and all other consequential orders which have been passed thereupon is nothing but totally misconceived and ought not to have been at all entertained at the first instance. This Court though duly takes note of that the Coordinate Bench of this Court had directed vide the order dated 19.01.2005 in CRP No.325/2001 to re-hear the appeal but the very aspect of the matter as to whether the appeal was at all maintainable against an order passed in an application under Section 144 of the Code was never a question which was raised before this Court. Under such circumstances, this Court is of the opinion that not only the appeal being Misc Appeal No.3/2000 was totally misconceived but the orders passed therein are also wholly without jurisdiction. In addition to that, this Court further observes that the instant appeal was also not permissible under law as an appeal under Order XLIII Rule 1(u) of the Code would have been permissible if Misc. Appeal No.3/2000 was at all maintainable. Accordingly, this Court sets aside the order dated 28.09.2007 passed by the learned First Appellate Court in Misc



Appeal No.3/2000 and the order dated 30.05.2000 passed by the learned Civil Judge (Junior Division) No.1, Mangaldoi in Misc. (J) Case No.20/1999 is restored.

10. Accordingly, the instant proceedings stands dismissed as totally misconceived.

11. Before parting with the records, this Court makes it clear that this Court had interfered with the order dated 28.09.2007 on the ground that the said order was passed wholly without jurisdiction inasmuch as an appeal did not lie against the order dated 30.05.2000 passed in Misc. (J) Case No.20/1999. This Court had not decided on the legality or validity of the order dated 30.05.2000 in Misc (J) Case No.20/1999. Further, the decision herein shall not act as a bar to the Appellant herein to take such other remedies as available under law.

JUDGE

Comparing Assistant