

GAHC010162152008



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

Case No. : RSA/88/2008

SMTI. MAJONI DUTTA
W/O LATE GOBINDA CH. DUTTA, CHANDAN NAGAR, CLUB ROAD,
JORHAT, DIST. JORHAT

VERSUS

SMTI. ARUNA GOSWAMI and 10 ORS.
W/O BIJOY CH. GOSWAMI, CHALADHARA ROAD, JORHAT TOWN, DIST.
JORHAT.

2:STRUCK OFF
STRUCK OFF VIDE HON'BLE COURT ORDER DATED 23/11/2010 PASSED IN
MC NO 2168/2008

3:STRUCK OFF
VIDE HON'BLE COURT ORDER DATED 23/11/2010 PASSED IN MC NO
2168/2008

4:STRUCK OFF
VIDE HON'BLE COURT ORDER DATED 23/11/2010 PASSED IN MC NO
2168/2008

5:STRUCK OFF
VIDE HON'BLE COURT ORDER DATED 23/11/2010 PASSED IN MC NO
2168/2008

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VIDE HON'BLE COURT ORDER DATED 23/11/2010 PASSED IN MC NO
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VIDE HON'BLE COURT ORDER DATED 23/11/2010 PASSED IN MC NO

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VIDE HON'BLE COURT ORDER DATED 23/11/2010 PASSED IN MC NO
2168/2008

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VIDE HON'BLE COURT ORDER DATED 23/11/2010 PASSED IN MC NO
2168/2008

10:STRUCK OFF

VIDE HON'BLE COURT ORDER DATED 23/11/2010 PASSED IN MC NO
2168/2008

11:STRUCK OFF

VIDE HON'BLE COURT ORDER DATED 23/11/2010 PASSED IN MC NO
2168/200

Advocate for the Appellant : Mrs. A. Bhattacharyya, Advocate

Advocate for the Respondents : None appears

BEFORE

HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 28.03.2024

Date of Judgment : 28.03.2024

JUDGMENT AND ORDER (ORAL)

The instant appeal has been filed challenging the judgment and order dated 03.05.2008 passed by the learned First Appellate Court, i.e. the Court of the Civil Judge, Jorhat in Title Appeal No.19/2007 whereby the learned First Appellate Court remanded the suit back to the Trial Court for fresh decision after disposing of the objection filed by appellant in the Trial Court.

2. In the opinion of this Court as the said impugned judgment is

actually an order passed under Order XLI Rule 23A of the Code of Civil Procedure, 1908 (for short, 'the Code'), therefore, an appeal lies under Section 104 read with Order XLIII Rule 1 (u) of the Code.

3. Be that as it may, this Court converts the instant Appeal so filed under Section 100 of the Code to an appeal under Section 104 read with Order XLIII Rule 1 (u) of the Code, for the ends of justice.

4. In view of the above as the instant Appeal stands converted to an Appeal under Section 104 read with Order XLIII Rule 1 (r) of the Code, this Court is required to only adjudicate in the instant Appeal as to whether the learned First Appellate Court ought to have remanded the suit back to the Trial Court or should have decided the said Appeal on merits.

5. This Court had duly perused the impugned judgment dated 03.05.2008 passed by the learned First Appellate Court in Title Appeal No.19/2007. From a bare perusal of the said judgment, it reveals that on the ground that the objections to the report of the Survey Commissioner were not heard by the learned Trial Court, the said Appeal was disposed of by remanding the suit back to the learned Trial Court for deciding the suit afresh after deciding the objections so raised.

6. The question therefore arises as to whether the learned First Appellate Court was justified in doing so. This Court finds it very relevant to take note of certain important orders passed by the learned Trial Court prior to passing the order on 29.06.2007 in the suit being Title Suit No.10/1996. The record reveals that the suit was pending for the report of the Survey Commissioner from 09.08.2004 in as much as on the said date the Circle Officer, East Jorhat was appointed as the Survey Commissioner

to conduct the survey and ascertain the actual spot of the suit land and submit a report. After 2 years, the report was submitted on 01.11.2006 before the learned Trial Court by the Survey Commissioner. On that day, the learned Trial Court fixed the suit on 28.11.2006 for filing objection by the parties. However, on 28.11.2006, none of the parties submitted any objection and the learned Trial Court vide the order dated 28.11.2006 accepted the Commissioner Report as part of the record. In view of the said order dated 28.11.2006, the said report of the Commissioner was duly accepted by the learned Trial Court. The learned First Appellate Court in the impugned order did not take into consideration the said aspect. It is also apposite to take note of that otherwise also by virtue of the provisions of Order XXVI Rule 10, the said report becomes a part of the record.

7. The record of the suit proceedings further reveal that the suit proceeded and the arguments were duly heard on 27.02.2007 and 06.03.2007. The learned Trial Court thereupon fixed on 20.03.2007 for judgment. However, on 20.03.2007, the learned Trial Court was of the opinion that further clarification was required on law points for which the suit was fixed on 03.04.2007 for arguments on law points. Thereupon, on 03.04.2007; 17.04.2007 and 04.05.2007, the hearing was not completed. However, on 17.05.2007, the counsel for the plaintiffs had submitted a petition bearing No.745/2007 for rejecting the Survey Commissioner's Report and for reissue of a Survey Commission to fulfill the directions of the Appellate Court. The learned Trial Court on such application being filed fixed 21.06.2007 for filing objection if any by the defendants. On 21.06.2007, the defendants had duly submitted their objections. However,

on 29.06.2007, the application so filed by the plaintiff being petition No.745/2007 was not pressed by the learned counsel for the plaintiffs for which the learned Trial Court carried out further hearing in the suit and reserved the said suit for judgment. Thereupon, on 12.07.2007, the judgment was delivered and the decree was prepared against which an Appeal was preferred before the learned First Appellate Court which was registered and numbered as Title Appeal No.19/2007.

8. From the above, it categorically reveals that the Survey Commissioner's Report was duly accepted by the learned Trial Court and there was no objection so filed on the date which was fixed by the learned Trial Court, i.e. on 28.11.2006.

9. This Court further finds it relevant to take note of the provision of Order XXVI Rule 10 (2) of the Code wherein it is stipulated that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form a part of the record. Under such circumstances, in view of the statutory mandate itself, the report of the Commissioner which was submitted on 01.11.2006 had become a part of the record. This Court has also duly taken note of that the learned Trial Court had granted opportunity to both the plaintiffs and the defendants to file their objections thereby fixing 28.11.2006. However, neither the plaintiffs nor the defendants filed any objection or even sought time to file objections for which the suit was fixed for argument. It was only at the stage when the learned Trial Court had fixed for certain clarification on certain law points as could be seen from the order dated 20.03.2007 and that too after three dates thereafter on 17.05.2007, an objection was filed being petition No.745/2007. This objection so filed in the form of a petition was

subsequently withdrawn by the counsel appearing on behalf of the plaintiffs. Under such circumstances, the learned Trial Court did not commit any error in not deciding the petition No.745/2007. Consequently, the order passed by the learned First Appellate Court for remanding the suit on the ground that the learned Trial Court did not decide the petition No.745/2007 is the ex-facie erroneous and requires interference.

10. Consequently, this Court therefore sets aside the judgment dated 03.05.2008 passed by the learned Court of the Civil Judge, Jorhat in Title Appeal No.19/2007 and further directs the said Appellate Court, i.e. the Court of the Civil Judge, Jorhat to decide the Title Appeal No.19/2007 on merits.

11. The records which have been called for by the Registry of this Court be transmitted forthwith to the learned Court of the Civil Judge, Jorhat so that the said Appeal being Title Appeal No.19/2007 could be decided at the earliest.

12. This Court has also taken note of the fact that the suit was filed in the year 1996 and almost 28 years have elapsed till date and as such, this Court requests the learned First Appellate Court, i.e. the Court of the Civil Judge, Jorhat to decide the Title Appeal No.19/2007 by giving due urgency to the said proceedings after serving summons to the Appellants therein; in as much as the Appellants therein are not represented before this Court today when the instant Appeal is taken for hearing.

13. The defendant who is the appellant herein shall appear before the First Appellate Court, i.e. the Civil Judge, on 02.05.2024 and produce a certified copy of the instant order.

14. The Registry, as directed herein above, shall transmit the records to the Court of the Civil Judge, Jorhat on an urgent basis if necessary through a Special Messenger so that the said Court is in a position to take up the matter on 02.05.2024.

JUDGE

Comparing Assistant