

GAHC010199502010



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

Case No. : RSA/196/2010

SMTI. ADARBHAN BIBI
W/O SAMSUL ALOM, R/O VILL. RUPSHI, PT-1, P.S. GOLAKGANJ, DIST.
DHUBRI, ASSAM.

VERSUS

KACHUA SK.
S/O LATE SAFARUDDIN, R/O VILL. RUPSHI PT-1, P.O. GOLAKGANJ, DIST.
DHUBRI, ASSAM.

Advocate for the Petitioner : MS.J PURKAYASTHA

Advocate for the Respondent : MR. A ROSHID

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date : 12-03-2024

JUDGMENT & ORDER

The instant appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, the Code) is directed against the judgment and decree dated

09.12.2009 passed in Title Appeal No.32/2008 whereby the learned 1st appellate court i.e. the Court of the learned Civil Judge, Dhubri had upheld the judgment and decree dated 27.06.2008 passed by the learned Munsiff No.1 Dhubri.

2. This Court vide order dated 20.09.2010 had admitted the instant appeal by formulating a substantial question of law which reads as under:

Whether the learned 1st appellate court was justified in rejecting the application filed under Order XLI Rule 27 of the Code for adducing the additional evidence, so as to prove the original sale deed, the certified copy of which was marked as Exhibit-1.

3. This Court has duly taken note of the records of the learned 1st Appellate proceedings, wherein it is seen that the application under Order XLI Rule 27 of the Code was filed by the Appellant and upon being objected, the said application was rejected vide order dated 05.06.2009, thereupon, the appeal was taken up for hearing and vide the impugned judgment and decree dated 09.12.2009, the said Title Appeal No.32/2008 was dismissed.

4. The rejection of the application under Order XLI Rule 27 CPC prior to taking up the appeal for hearing is in direct conflict with the judgment of the learned Supreme Court in the case of *Union of India v. Ibrahim Uddin*, reported in (2012) 8 SCC 148. Paragraph 49 to 52 of the said judgment being relevant is reproduced hereunder:

49. *An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The*

admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the court. (Vide Arjan Singh v. Kartar Singh [1951 SCC 178 : AIR 1951 SC 193] and Natha Singh v. Financial Commr., Taxation [(1976) 3 SCC 28 : AIR 1976 SC 1053] .)

50. *In Parsotim Thakur v. Lal Mohar Thakur [(1931) 34 LW 76 : AIR 1931 PC 143] it was held : (LW pp. 86-87)*

“... The provisions of Section 107, Civil Procedure Code, as elucidated by Order 41 Rule 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak parts of his case and fill up omissions in the court of appeal.

... Under Rule 27, clause (1)(b), it is only where the appellate court ‘requires’ it (i.e. finds it needful).... The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but ‘when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent’.

... It may well be that the defect may be pointed out by a party, or that a party may move the court to supply the defect, but the requirement must be the requirement of the court upon its appreciation of evidence as it stands. Wherever the court adopts this procedure it is bound by Rule 27(2) to record its reasons for so doing and under Rule 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. ... the power so conferred upon the court by the Code ought to be very sparingly exercised, and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a main issue in the case.”

(emphasis added)

(See also Indrajit Pratap Sahi v. Amar Singh [(1922-23) 50 IA 183 : AIR 1923 PC 128] .)

51. *In Arjan Singh v. Kartar Singh [1951 SCC 178 : AIR 1951 SC 193] this Court held : (AIR pp. 195-96, paras 7-8)*

“7. ... If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent. ...

8. ... The order allowing the appellant to call the additional evidence is dated 17-8-1942. The appeal was heard on 24-4-1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the court required to be filled up for pronouncing its judgment.”

52. *Thus, from the above, it is crystal clear that an application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of the final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored.*

5. Taking into account the above principles of law as held by the learned Supreme Court, this Court is of the opinion that the learned 1st appellate court completely erred in law in dismissing the application under Order 41 Rule 27 of the Code vide the order dated 05.06.2009.

6. In addition to that, this Court also finds it relevant to observe that the said suit had proceeded ex-parte. The document which the plaintiff adduced as Ext-1 is a certified copy of the Registered Deed of Sale dated 27.09.1956 bearing deed No.3311. The learned trial court as well as the 1st appellate court did not also take into consideration the provisions of Section 90 of the Indian Evidence Act, 1872, wherein a presumption can be drawn in respect of such document.

7. In addition to above this Court also finds it relevant to take note of the judgment of the Supreme Court in the case of *Ramesh Chand Ardawatiya v. Anil Panjwani*, reported in (2003) 7 SCC 350, wherein the Supreme Court at paragraph 33 had observed as to how a suit has to be decided wherein there is no written statement. The Supreme Court had observed in the said judgment that in the absence of denial of plaintiff averments the burden of proof on the plaintiff is not very heavy. A *prima facie* proof of the relevant facts constituting the cause of action would suffice and the Court would grant the plaintiff such

relief as to which he may in law be found entitled. It was however also observed that the trial court, however, should scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the "points for determination" and proceed to construct the ex parte judgment dealing with the points at issue one by one. Merely because the defendant is absent, the court shall not admit evidence, the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence. The said paragraph 33 being relevant is reproduced hereunder:

33. So far as the plea of bar as to maintainability of suit for failure to seek further relief is concerned, we cannot find fault with the plaint as framed. The defendant was alleged to be a rank trespasser who was in the process of committing a trespass and was allegedly raising unauthorized construction over the property neither owned nor legally possessed by him. The relief of specific performance is not a further relief to which the plaintiff is entitled or which he could have sought for against this defendant. Thus, from the point of view of the present defendant, we cannot find any such defect or infirmity in the relief sought for by the plaintiff as would render the suit not maintainable and liable to be thrown out at the threshold. But there is substance in the other limb of this submission made by the learned Senior Counsel for the defendant-appellant. Even if the suit proceeds ex parte and in the absence of a written statement, unless the applicability of Order 8 Rule 10 CPC is attracted and the court acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the court cannot be dispensed with. In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex parte the court is not bound to frame issues under Order 14 and deliver the judgment on every issue as required by Order 20 Rule 5. Yet the trial court should scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the "points for determination" and proceed to construct the ex parte judgment dealing

with the points at issue one by one. Merely because the defendant is absent the court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence.

8. A perusal of the judgments passed by the learned Trial Court as well as the First Appellate Court do not show that both the Court had taken into consideration the above principles of law as set out by the Supreme Court as well as the provisions of Section 90 of the Indian Evidence Act, 1872.

9. Taking into account the above, this Court is of the opinion that the substantial question of law which has been formulated is duly involved in the instant appeal and consequently this Court, therefore, sets aside the impugned judgment and decree dated 09.12.2009 passed in Title Appeal No.32/2008 for the reasons abovementioned and remands the matter back to the learned 1st appellate court i.e. the Court of the learned Civil Judge Dhubri to decide afresh the said appeal by taking into account the above observations.

10. The Registry shall forthwith return the LCR so that the matter can be taken up by the learned 1st appellate court at the earliest taking into account that this is a very long pending dispute.

11. This Court, however, takes note of the fact that both the parties are duly represented, as such this Court fixes the matter on 22.04.2024 for appearance of both the parties before the learned 1st appellate court.

12. With the above directions and observations, this appeal stands allowed. No costs.

JUDGE

Comparing Assistant