

GAHC010222482010



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

Case No. : RSA/15/2010

GAURIPUR CONSUMERS CO-OPERATIVE STORES,
REPRESENTED BY ITS SECY. , P.O. /P.S. GARURIPUR, DIST. DHUBRI,
ASSAM.

VERSUS

ON THE DEATH OF GAJANAND PROSAD KANU HIS LEGAL HEIRS SMTI
BINDU KANU and ORS
SMTI NILIMA RAJLAXMI KANU SRI AMITAV RANJAN KANU SRI
SUPRAKASH KANU

1.1:SMTI. BINDU KANU (WIFE)
R/O- WARD NO. 3
GAURIPUR TOWN
P.O. AND P.S.- GAURIPUR
DIST.- DHUBRI
ASSAM

1.2:SMTI. NILIMA RAJLAXMI KANU (D)
R/O- WARD NO. 3
GAURIPUR TOWN
P.O. AND P.S.- GAURIPUR
DIST.- DHUBRI
ASSAM

1.3:SRI AMITABH RANJAN KANU (S)
R/O- WARD NO. 3
GAURIPUR TOWN
P.O. AND P.S.- GAURIPUR
DIST.- DHUBRI
ASSAM

1.4:SRI SUPRAKASH KANU (S)
R/O- WARD NO. 3
GAURIPUR TOWN
P.O. AND P.S.- GAURIPUR
DIST.- DHUBRI
ASSAM

2:THE STATE OF ASSAM
REPRESENTED BY SECY. TO THE GOVT. OF ASSAM
REVENUE DEPTT.
DISPUR
GUWAHATI-6

3:THE DEPUTY COMMISSIONER CUM COLLECTOR
DHUBRI.

4:THE SELECTION OFFICER
DHUBRI

Advocate for the Petitioner : MR.S K GHOSH

Advocate for the Respondent : MR.H K HAZARIKA

BEFORE

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

For the Appellant : Shri SK Ghosh, Advocate.

For the Respondents : Shri A Mobaraque, Advocate.

Date of Hearing : 13.06.2024.

Date of Judgment : 13.06.2024.

JUDGMENT & ORDER

The instant appeal has been preferred under Section 100 of the Code of Civil Procedure against the judgment and decree dated 23.06.2009 passed by the learned Civil Judge, Dhubri in Title Appeal No. 14/2007 dismissing the said appeal and upholding the judgment and decree dated 22.01.2007 passed by the

learned Munsiff No. 3, Dhubri in Title Suit No.446/2002.

2. The present appellant was the defendant no. 5 in the suit. The suit was filed with the following prayers:

“(a) The suit be decreed declaring that the plaintiff obtained decree in T.S. 15/99 /T.A. 93/79 for the suit land and has acquired right, title and interest over the same.

(b) The suit be decreed declaring that the defendants are legally bound to abide by the decision of the decree in T.S. 15/79 and T.A. 33/79 and correct the records of rights accordingly.

(c) A permanent injunction shall be granted restraining the defendants No. 1 to 4 from evicting the plaintiff from suit land and give possession to the defendant no. 5 for the same.

(d) Cost etc. and any other reliefs the plaintiff is entitled to get in law and equity.”

3. It is projected in the suit that in respect of the suit land, the plaintiff had instituted Title Suit No. 15/1979 which was, however, dismissed on 01.09.1979. Being aggrieved, Title Appeal No. 93/1979 was preferred before the learned ADJ which was also dismissed. The plaintiff had accordingly preferred SA/176/1987 and 186/1987 before this Court. This Court had, however, remanded the matter for fresh adjudication by the 1st Appellate Court. On such remand, the 1st

Appellate Court had decreed the suit by interfering with the judgment and order of the learned Trial Court dated 01.09.1979. The present defendant no. 5 was, however, not party in the said suit.

4. The present suit from which this appeal has arisen was subsequently filed in the year 2002 with the prayers which have already been mentioned above. The learned Trial Court had decreed the suit which has also been affirmed by the 1st Appellate Court by the impugned judgment and order 23.06.2009 and accordingly, the present second appeal has been preferred.

5. This Court vide order dated 07.12.2016 had framed the following substantial question of law:

“Whether on the face of the prayer made by the plaintiff/respondent the judgment and decree passed by the Court below are maintainable?”

6. I have heard Shri SK Ghosh, learned counsel for the appellant. I have also heard Shri A Mobaraque, learned counsel for the respondent nos. 1 (a), 1 (b), 1 (c) and 1 (d). Shri KK Bhattacharjee, learned State Counsel, Assam is present for rest of the respondents.

7. It may be mentioned that during the pendency of the appeal, the respondent no. 1 had passed away and the aforesaid respondents are his legal heirs.

8. Shri Ghosh, learned counsel for the appellant has submitted that the original respondent no. 1 in this appeal had the option of filing execution proceeding in respect of decree passed earlier which was admittedly not done. He submits that only to overcome the lacuna, the instant suit was instituted. The learned counsel questions the very maintainability of such suit when remedies in law were available to the party which was not taken recourse to. By referring to Section 34 of the Specific Relief Act, the learned counsel for the appellant has submitted that under the proviso thereto, there is a bar and this aspect has been overlooked by both the courts below.

9. Shri Ghosh, learned counsel for the appellant has submitted that the plot of land in the possession of the defendant no. 5 which is a Cooperative Society was duly allotted by the Assistant Settlement Officer, Dhubri in the year 1993. He has also pointed out that such allotment was never challenged in any forum of law. He further submits that since a bar is there in the Assam Land and Revenue Regulation, in the present suit, there was no specific challenge to the said order of allotment. The learned counsel has clarified that the land in question has already been demarcated with boundary walls and in fact, the apprehension of the respondents-plaintiffs is based on assumption.

10. Shri Mobaraque, learned counsel for the respondents has, however, defended the impugned judgment and decree of the 1st Appellate Court by which the judgment and decree of the learned Trial Court has been upheld. He submits that there is no bar in institution of the suit and the proviso to Section 34 of the Specific Relief Act, 1993 sought to be relied upon by the appellant would not come into operation in the facts and circumstances of the case.

11. The learned counsel for the respondents has also submitted that the total area in question consists of 1 bigha 1 katha 14 lechas and while only 1 katha of land was allotted to the appellant, it is in possession of 3 kathas of land and therefore, the apprehension of the dispossession of the respondents were based on materials on record.

12. The rival submissions have been duly considered.

13. The decree which was passed in Title Appeal No. 93/1979 on 11.03.1991 is exactly on the same subject matter of the present suit. There is nothing on record to show as to why the said decree was not put to execution within the time prescribed by law. The fault on the part of the present respondents in initiating an execution proceeding cannot be rectified by filing another suit that too, for the prayers which have already been mentioned.

14. This Court is also of the opinion that apart from indulging in multiplicity of proceedings, an issue which was already adjudicated cannot be reopened for a fresh adjudication. Though the strict application of the doctrine of *res judicata* may not be applicable as the present appellant was not a party in the earlier suit, this Court is of the opinion that filing of a fresh suit could not have been done only to overcome the aspect of not initiating an execution proceeding *qua* the judgment and decree dated 11.03.1991 passed in Title Appeal No. 93/1979.

15. This Court has also taken note of the submission of Shri Ghosh, learned

counsel for the appellant that the demarcation has already been done and the appellant is in possession of the area allotted to them and the contesting respondents are also in possession of the land which was the subject matter of the suit.

16. In view of the above, this Court is of the opinion that the appellant has made out a case for interference. Accordingly, the judgment and decree dated 23.06.2009 passed by the learned Civil Judge, Dhubri in Title Appeal No. 14/2007 upholding the judgment and decree dated 22.01.2007 passed by the learned Munsiff No. 3, Dhubri in Title Suit No.446/2002 is set aside. The substantial question of law as quoted above is accordingly answered in favour of the appellant and against the respondents.

17. The instant appeal is allowed in the above terms.

18. Send back the records.

JUDGE

Comparing Assistant