

GAHC010260392022



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

Case No. : CRP(IO)/34/2023

MADHU PAUL AND 8 ORS.

S/O- LATE MONORANJAN PAUL, R/O- JANIGANJ BAZAR, SILCHAR,
CACHAR, ASSAM, PARTNER JVL GROUP, ELLORA HOTEL COMPLEX, PARK
ROAD, SILCHAR

2: BIJIT RANJAN ACHARJEE

S/O- LATE BIJAY RANJAN ACHARJEE
R/O- LUCHAN BOIRAGI ROAD
BILPAR
SILCHAR TOWN
P.S- SILCHAR
CACHAR
ASSAM

3: BIKASH RANJAN ACHARJEE

S/O- LATE BIJAY RANJAN ACHARJEE
R/O- LUCHAN BOIRAGI ROAD
BILPAR
SILCHAR TOWN
P.S- SILCHAR
CACHAR
ASSAM

4: BISWAJIT ACHARJEE

S/O- LATE BIJAY RANJAN ACHARJEE
R/O- LUCHAN BOIRAGI ROAD
BILPAR
SILCHAR TOWN
P.S- SILCHAR
CACHAR
ASSAM

5: BISWARAJ ACHARJEE

S/O- LATE BIJAY RANJAN ACHARJEE

R/O- LUCHAN BOIRAGI ROAD
BILPAR
SILCHAR TOWN
P.S- SILCHAR
CACCHAR
ASSAM

6: BIDYUT RANJAN ACHARJEE
S/O- LATE BIJAY RANJAN ACHARJEE
R/O- LUCHAN BOIRAGI ROAD
BILPAR
SILCHAR TOWN
P.S- SILCHAR
CACCHAR
ASSAM

7: BISWADEEP ACHARJEE
S/O- LATE BIJAY RANJAN ACHARJEE
R/O- LUCHAN BOIRAGI ROAD
BILPAR
SILCHAR TOWN
P.S- SILCHAR
CACCHAR
ASSAM

8: APARNA BHATTACHARJEE (ACHARJEE)
W/O- SRI SAJAL KANTI BHATTACHARJEE
R/O-LINK ROAD
BYE LANE NO. 07
SILCHAR
P.S- SILCHAR
CACCHAR
ASSAM

9: MOMOTA BHATTACHARJEE (ACHARJEE)
W/O- SRI SANDEEP KUMAR BHATTACHARJEE
R/O- R R SHOME ROAD
SILCHAR TOWN
P.S- SILCHAR
CACCHAR
ASSA

VERSUS

MALLIKA DEB AND ANR
W/O- SRI MOLIN DEB, R/O- KANAKPUR, SILCHAR, P.O AND P.S- SILCHAR,
DIST- CACCHAR, ASSAM

2:PIJUSH KANTI PAUL
S/O- LATE PRABHAT CH PAUL
R/O- RADHA MADHAV ROAD
SILCHAR
P.O AND P.S- SILCHAR
DIST- CACHAR
ASSA

Advocate for the Petitioner : MR. D MOZUMDER, S NATH,MR D MAZUMDER,MS. D
DEVI,MR. S BISWAS

Advocate for the Respondent : MR H R A CHOUDHURY (r-1,2), MR F U BARBHUIYA (r-1,2),MS
S DAS

BEFORE

HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

12.08.2024

- 1.** Heard Mr. S. Biswas, learned counsel for the petitioners. Also heard Mr. F.U. Barbhuiya, learned counsel for the respondent Nos. 1 and 2.
- 2.** This Civil Revision Petition (I/O) has been registered on filing of an application under Article 227 of the Constitution of India, by the petitioners, praying for setting aside of order dated 12.09.2022 passed by the Court of learned Munsiff No. 5, Cachar, Silchar in Misc.(J) Case No. 119/2022, in connection with the Title Suit No. 427/2021, whereby, the Trial Court vacated its earlier order dated 05.04.2022 and allowed the plaintiffs to adduce evidence, subject to payment of cost of Rs. 2000/- to the defendants.
- 3.** The facts relevant for consideration of the instant Civil Revision Petition (IO), in brief, are as follows: -
 - a) That the respondents herein have filed a Title Suit praying for a decree of declaration of right, title and interest and

recovery of possession of the suit land. The said Title Suit was registered as Title Suit No. 135/2017 and later on, it was re-numbered as Title Suit No. 427/2021. The present petitioners, who are the defendants in the said suit contested the suit by filing their written statement.

b) Upon pleadings of the parties, the Trial Court framed issues and fixed the case for adducing of plaintiff's evidence.

c) On 05.04.2022, the above-mentioned suit was fixed for adducing of the plaintiff's evidence. However, on that day, the counsel for the present respondents/plaintiffs filed an application under Section 30 read with Section 151 of the Code of Civil Procedure, 1908 praying for calling of a sale deed from the office of Sub Registrar, Cachar, Silchar.

d) After consideration of the submissions of both the sides, the Trial Court rejected the said prayer, by order dated 05.04.2022.

e) It is also mentioned in the aforesaid order that on earlier occasions also, i.e. on 28.02.2022, the Trial Court granted time to the plaintiffs for adducing evidence. On that day, i.e., on 28.02.2022, the Trial Court granted time as last opportunity to the plaintiffs' side, subject to payment of cost, for adducing evidence on their behalf.

f) Ultimately, the application filed by the respondents/plaintiffs' on 05.04.2022 was dismissed by the Trial Court and it also observed that since the plaintiffs have failed to adduce their evidence even after granting them last

opportunity, no further chance would be given. The plaintiffs' evidence was closed and it was ordered that the case shall proceed as per the provisions of the Code of Civil Procedure and the next date was fixed, on 02.05.2022, for evidence of defendants' side.

g) It was also observed in the impugned order that since the suit was posted for evidence of plaintiffs' side, since 26.03.2019, several opportunities were granted to the plaintiffs side for adducing their evidence, the plaintiffs evidence was closed.

h) Thereafter, on 02.05.2022, the respondents/plaintiffs filed an application under Order IX Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 for granting an opportunity to adduce the plaintiffs' evidence by setting aside the order dated 05.04.2022, by which the plaintiffs' evidence was closed.

i) The said petition was opposed by the petitioner/defendants. However, by order dated 12.09.2022, the Trial Court had vacated the order dated 05.04.2022, subject to payment of cost of Rs. 2,000/-.

j) It is pertinent to mention herein that the order dated 12.09.2022, was passed not in the Title Suit but in a Misc.(J) Case which was registered as Misc.(J) Case No. 119/2022 on the basis of the petition No. 169/2022 filed by the respondents/plaintiffs under Order IX Rule 9.

4. Mr. S. Biswas, learned counsel for the petitioners has submitted that the Trial Court has acted beyond jurisdiction by allowing the petition filed by the

respondents/plaintiffs under Order IX Rule 9 of the Code of Civil Procedure, 1908 as under the circumstances of the present case, an application under Order IX Rule 9 is not maintainable.

5. The learned counsel for the petitioners has also submitted that by order dated 05.04.2022, the suit of the petitioner was not dismissed for default of the plaintiffs and the only order which was passed was the closure of the plaintiffs' evidence and the next date was fixed for evidence of DW's. Hence, under such circumstances, no application under Order IX Rule 9 could have been maintainable.

6. The learned counsel for the petitioners has also submitted that under the facts and circumstances of this case, the Trial Court, on 04.05.2022, ought to have proceeded under the provisions of Order 17 Rule 3 of the Code of Civil Procedure, 1908. He has also submitted that On failure of the respondents/plaintiffs to adduce evidence on the said date, when the case was fixed for plaintiffs' evidence, the Court ought to have proceeded to decide the suit as per the provisions of Order 17 Rule 3(a) of the Code of Civil Procedure, 1908, instead of fixing the case for evidence of DW's on the next date.

7. The learned counsel for the petitioners has submitted that by invoking the powers under Order IX Rule 9 of the Code of Civil Procedure, 1908, which was not vested in the Trial Court under the circumstances of this case, the Trial Court has exercised powers beyond jurisdiction, therefore, the impugned order is liable to be set aside.

8. In support of his submissions, the learned counsel for the petitioners has cited following rulings: -

a) "***Durgeswar Bordoloi Vs. Trishna Gaon Khowa and Anr.***" reported in **(2013) 2 GLR 712;**

b) "**Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal**" reported in **1961 SCC OnLine SC 17**;

9. On the other hand, the learned counsel for the respondents/plaintiffs has submitted that the petition filed by the respondents on 02.05.2022 was also under Section 151 of the Code of Civil Procedure, 1908. He has also submitted that under the circumstances of the case when the respondents/plaintiffs' was denied the chance to adduce evidence and his evidence was closed by order dated 04.05.2022, an application under Order IX Rule 9 of the Code of Civil Procedure, 1908 is maintainable.

10. He has also cited the case of "**Durgeswar Bordoloi Vs. Trishna Gaon Khowa and Anr.**" (supra) which has also been relied upon by the counsel for the petitioners side and submits that in that case, the Court ultimately held that an application under Order IX Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 was maintainable and the case was remanded back to the Trial Court for fresh consideration of the said application on merit.

11. Replying to the contention raised by the learned counsel for the respondents/plaintiffs', the counsel for the petitioners has submitted that in the case cited by him, by the order which was impugned before the Court in that case, the suit was dismissed and therefore it was held that an application under Order IX Rule 9 is maintainable, whereas, in the instant case, the suit of the plaintiffs was not dismissed and only the plaintiffs' evidence was closed and hence he again submitted that the Trial Court has acted beyond jurisdiction in vacating its earlier order whereby, it has closed the evidence of the plaintiffs side.

12. The learned counsel for the petitioner has also submitted that quoting a

wrong provision of the Code would not make an order illegal, if otherwise, the authority which passed the order was well within its competence to pass such an order. Such an order cannot fail merely because it purports to be made under a wrong provision, if it can be shown that it was within its power under any existing provisions.

13. In support of his submissions, the learned counsel for the respondents/plaintiffs has cited a ruling of this Court in the case of "**Bankim Behari Das Vs. Md. Hasen Ali & Ors.**" reported in "**(2010) 6 GLR 668.**"

14. I have considered the submissions made by the learned counsel for both the parties and have carefully perused the materials available on record.

15. It appears from record that on 05.04.2022, the Trial Court had rejected an application filed by the present respondents/plaintiffs under Section 30 read with Section 151 of the Code of Civil Procedure, 1908 for calling of a sale deed from the office of Sub-Registrar Cachar, Silchar. It also appears that apart from rejecting the aforesaid application filed by the plaintiffs, the Trial Court also closed the plaintiffs' evidence and fixed the case for evidence of DWs.

16. Thus, it is apparent from the aforesaid order dated 05.04.2022 that on that day, by the said order, the Trial Court did not dismiss the suit of the plaintiffs but, only closed the plaintiffs' evidence and the said order cannot be treated as an order passed under Order IX Rule 8 of the Code of Civil Procedure. Therefore, apparently, an application under Order IX Rule 9 of the code would not lie under the aforesaid circumstances and an order may not be passed under the said provisions for restoration of the suit. The question of restoration of suit would arise if and only, when the suit is dismissed and before such dismissal question of restoration of suit under Order IX Rule 9 of the code does not arise.

17. Though, it is also apparent that on that day, i.e. on 05.04.2022, the Title Suit was fixed for evidence of plaintiffs' witnesses, and on failure to produce the evidence the Trial Court could have proceeded as per Order 17 Rule 3(a) of the Code of Civil Procedure. However, in the instant case, the Trial Court proceeded to fix the case for evidence of defence witness on 02.05.2022, instead of deciding the suit forthwith.

18. A plain reading of the provision contained in the Order 17 Rule 3 of the Code of Civil Procedure, 1908 would show that by using the word "may", the legislature intended that the procedure prescribed in the said provision may be treated as directory and not mandatory and the Court may take any other course also, which has not been specifically provided under Order 17 Rule 3(a) of the Code of Civil Procedure. In the instant case, the Trial Court by closing the evidence of the plaintiffs' side, and by fixing the case for defence witnesses, did not commit any wrong or irregularity, as in normal course during the proceeding of a civil suit after closure of the evidence of plaintiff side, the suit is normally fixed for evidence of defendant's side. Moreover, though the impugned order dated 12.09.2022 was passed by the Trial Court on an application filed by the respondents/plaintiffs under Order IX Rule 9 read with Section 151 of the Code of Civil Procedure. However, there is no reflection in the impugned order that the said order has also been passed under Order IX Rule 9 of the Code of Civil Procedure.

19. The Trial court while vacating its earlier order dated 05.04.2022 has given valid reasons for doing so and in the considered opinion of this Court though the respondents/plaintiffs quoted apparently wrong provision, i.e., under Order IX Rule 9 of the Code of Civil Procedure in their application, however, this is not a case where the Trial Court could not have vacated its earlier order as it

has only allowed the respondents/plaintiffs to adduce evidence, subject to payment of cost for reasons mentioned in the said order. Though the respondents/plaintiffs have filed the application under Order IX Rule 9 of the Code of Civil Procedure, however, it is apparent on perusal of the impugned order that the Court did not pass the impugned order under said provision as it did not restore the suit, but only allowed the respondents/plaintiffs to adduce evidence, subject to payment of cost and in the considered opinion of this Court the Trial Court does have the powers to pass such order, though it would have been proper for the Trial Court to specifically mention in the impugned order as to whether it was exercising its review jurisdiction or it is passing the impugned order under Section 151 of the Code of Civil Procedure 1908.

20. However, by not mentioning the same, the order does not become illegal as the Trial Court does have powers to pass such order under the circumstances of the said case. This is not a case where the Trial Court did not have the jurisdiction to pass the impugned order. It could have only clarified that the said order is not under Order IX Rule 9 of the Code of Civil Procedure, 1908. Quoting wrong provisions by the respondents/plaintiffs in the application filed by them would not debar the court from exercising the powers which it otherwise have under other provision of the Code.

21. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation unless compelled by express and specific language of the statute, the provisions of the Code of Civil Procedure, 1908 or any other procedure. The procedural enactment ought not to be construed in a manner which would leave the Court helpless to meet extraordinary situations in the ends of justice. The Apex Court of India in the case of "**Kailash v. Nanhku**" reported in "**(2005) 4 SCC 480**"

has observed as follows:-

"28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in Sushil Kumar Sen v. State of Bihar [(1975) 1 SCC 774] are pertinent: (SCC p. 777, paras 5-6)

"The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. ... Justice is the goal of jurisprudence — processual, as much as substantive."

22. The instant case we have discussed herein above, that the petitioners/defendants is mainly harping on the ground that the respondents/plaintiffs filed the application under Order IX Rule 9 of the Code of Civil Procedure, 1908, and the Court under circumstances of the instant case could not have passed any order under the said provision as the instant case, suit was not dismissed under Order IX Rule 8 of the Code of Civil Procedure, 1908.

23. However, for the reasons stated above, this Court does not find that the impugned order is perverse or would result in manifest injustice and under the facts and circumstances of the case, the Trial Court passed the impugned order citing reasons for the same and for ends of justice that too by imposing cost on the respondents/plaintiffs. Hence, this Court does not find any ground to interfere with the impugned order, this Revision Petition is accordingly dismissed.

24. No order as to cost.

25. As both the parties are represented before this Court, the parties hereto are directed to appear before the Trial Court on 9th September, 2024 and participate in the trial. On that day, the respondents/plaintiffs shall deposit all the outstanding cost due from them to be paid to the petitioners/defendants. It is hereby made clear that in the event of failure to deposit the cost the Trial Court may proceed with the trial in its due course.

26. With the above observations, this Revision Petition is hereby disposed of.

JUDGE

Comparing Assistant