

GAHC030000122017



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

Case No. : RFA/19/2017

Lalmawii
D/o Chalchhunga
R/o KhatlaVeng, Aizawl
VERSUS

Vanneihpuii
D/o Kapbuanga (L)
R/o DawrpuiVeng, Aizawl

Advocates for the Appellant : Mr. Robin Ratnakar David
Mr. JC Lalnunsanga

Advocate for the Respondent : Mr.C. Lalramzuava, Sr. Advocate
Mr C. Tlanthianghlina

::B E F O R E::

HON'BLE MR. JUSTICE NELSON SAILO

Date of hearing : 10.04.2024

Date of Judgment : 25.04.2024

J U D G M E N T & O R D E R

Heard Mr. Robin Ratnakar David, learned counsel for the appellant and Mr. C. Lalramzauva, learned Senior Advocate assisted by Mr. C. Tlanthianghlina, learned

counsel for the sole respondent.

[2.] This is an appeal filed by the appellant against the Judgment dated 16.10.2017 passed by the Court of Senior Civil Judge-III, Aizawl in Civil Suit No. 9/2015 by which the Suit filed by the plaintiff was decreed in her favor. The instant appellant and respondent were the defendant and plaintiff respectively in the Civil Suit.

[3.] The Civil Suit was filed by the Plaintiff for a declaration of right, title and interest in her favor in respect of the land and building covered by LSC No. Azl-445 of 1980 located at Khatla Veng, Aizawl. The plaintiff also sought for a direction to the defendant for vacating the suit land and for handing over peaceful vacant possession of the land and building covered by LSC No. Azl-445 of 1980 along with other consequential reliefs.

[4.] The case of the plaintiff is that the defendant was in need of money and had approached the plaintiff for a loan of Rs. 30 lakhs for a period of three (3) months and for that she was willing to mortgage her land and building covered by LSC No. Azl-445 of 1980 as security for the loan. The plaintiff agreed to give the loan and on 06.03.2008, the defendant executed an undertaking '*Intiamkamna*' on her own free will, agreeing to pay the loan within a period of three (3) months i.e., 06.06.2008 with interest @ 10% per month. The defendant further agreed that if she fails to repay the loan amount with interest by 06.06.2008, the mortgaged property would belong to the plaintiff. The defendant failed to pay the loan amount with interest to the plaintiff

within the stipulated time and therefore, the plaintiff approached the defendant to sell her land and building which was mortgaged. The defendant being unable to repay the loan agreed to sell her land and building and accordingly, they executed a Sale Deed on 07.08.2008. As per the Sale Deed, the defendant sold her land and building to the plaintiff for a sum of Rs. 65 lakhs. The amount was received by the defendant on 07.08.2008 itself and the defendant executed a receipt to this effect in the presence of three (3) witnesses.

[5.] Thereafter, the plaintiff registered the Sale Deed with the District Registrar, Aizawl District, Aizawl under the Indian Registration Act, 1908 vide Document No. D-214(M) on 08.08.2008 and subsequently, the Revenue Authorities transferred and mutated the LSC in favor of the plaintiff after complying with all necessary formalities.

[6.] However, after about ten (10) months from the said transaction, the defendant filed Civil Suit No. 31/2009 against the plaintiff and others praying for a decree declaring the Undertaking (*Intiamkamna*) dated 06.03.2008, the Sale Deed dated 07.08.2008 and the Receipt dated 07.08.2008 to be null and void and unenforceable. However, the Civil Suit No. 31/2009 on contest was dismissed by the Court vide the Judgment & Order dated 21.09.2012. Following the dismissal, the defendant in Civil Suit No. 31/2009 has filed the Civil Suit No. 9/2015 praying for a direction to the respondent/defendant No. 1 to handover vacant possession of the suit land and also for payment of rent for occupying the suit land without the permission and consent of the defendant as she had already purchased the suit land through the

Sale Deed.

[7.] The defendant against the Civil Suit did not file her written statement despite receipt of notice and issuance of several summons. Therefore, ex-parte proceeding was drawn against the defendant on 17.08.2015. The defendant thereafter submitted an application for setting aside of the ex-parte order and for condonation of 120 days of delay for admitting the said application. However, the delay was not condoned and therefore the application for setting aside the ex-parte order was not allowed. The plaintiff examined herself as the sole plaintiff witness and the defendant was given an opportunity to cross-examine the plaintiff. Thereafter, vide the impugned judgment, the learned Trial Court decreed the suit in favor of the plaintiff in the manner as already stated herein above.

[8.] Mr. Robin Ratnakar David, learned counsel for the appellant submits that the procedure to be adopted by the learned Trial Court in view of the absence of the defendant is as per the provision of Order IX Rule 6 CPC. He submits that as per Order IX Rule 6(1)(a), in the event only the plaintiff appears and the defendant does not appear despite service of summon, the court may make an order that the suit be heard ex-parte. He submits that as per Order IX Rule 7 where the court has adjourned the hearing of the suit ex-parte and the defendant before hearing of the suit appears and assigns good cause for his previous non-appearance, he may upon terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day, fixed for his appearance.

[9.] The learned counsel refers to the case of *Tarlochan Singh & Ors. -Vs- Union Bank of India & Ors. 2009 SCC OnLine Del 2408* wherein, the Delhi High Court relied upon the previous judgment of the same Court in *Finolex Cables Ltd. -Vs- Finolux Auto Private Ltd. (2007) 35 PTC 680 (DEL) (DB)* with regard to the legal position in respect of Order IX rule 6 CPC that when the defendant joins and participates in the proceedings at a stage when the plaintiff is yet to examine his witnesses, the defendant shall have right to cross examine the plaintiff's witnesses, provided such cross examination has not already been foreclosed. In that event, the court has also the power to permit the defendant to adduce evidence on his side. It really depends as to at what stage the defendant was set ex parte under [Order IX Rule 6 CPC](#) and at what stage he has chosen to seek permission to participate in the proceedings. In the present case, since the defendant appeared before the court in the subsequent dates, the learned Trial Court ought to have given her all the opportunities to oppose the plaintiff and also lead her evidence. The learned counsel submits that it is therefore the duty of the court to give the defendant opportunity of leading his/her evidence which otherwise was not afforded to the defendant in the instant case.

[10.] The learned counsel submits that Order IX Rule 13 will have no application to the instant case since the said provision is for setting aside ex-parte decree. As no decree had been drawn ex-parte or even otherwise, the said provision will have no application. In support of his submission, the learned counsel relies upon the decision of a coordinate Bench of this Court in *Assam Gramin Vikash Bank -Vs- Prakash Borah*

& *Anr. 2022 (4) GLT 916* wherein, it was held that there is no period of limitation prescribed for setting aside an ex-parte order under Order IX Rule 7.

[11.] The learned counsel further submits that the normal course followed in a Civil Suit proceeding is that issues are framed before evidence are led by the parties. However, in the instant case, the learned Trial Court framed issues after the evidence of the plaintiff was closed on 28.11.2016.

[12.] The learned counsel further submits that as per Section 32A of the Registration Act, 1908, the parties presenting the document for registration are to be present before the Registrar and that finger prints and photograph are to be taken. However, the Sale Deed in the present case does not fulfill the said requirement and for this reason, the Sale Deed could not have been acted upon for any purpose. In this connection, the learned counsel relies upon the decision of a coordinate Bench of this Court in *Abdur Rahman, -Vs- Tahira Alom & Ors. 2022 SCC OnLine Gau 2318* wherein, the Court disagreed with the Judgment of the Madras High Court in the case of *G. Arjunan -Vs- P. Dhanam* in *Second Appeal No. 957/2019* vide Order dated 04.02.2022. The Court by taking into consideration the provisions of Section 32, 32A and 52 of the Registration Act, 1908 held that the provision of Section 32A of the Act is mandatory and imposes an obligation on both the persons presenting the documents in terms of Section 32 of the Act.

[13.] Mr. C. Lalramzauva, learned Senior Counsel on the other hand submits that the respondent plaintiff having not signed the Undertaking (*Intiamkamna*) dated

06.03.2008, the Sale Deed dated 07.08.2008 without her free will, she filed Civil Suit No. 31/2009 for their cancellation. The suit was considered and disposed of on contest by the parties vide Judgment & Order dated 21.09.2012. He submits that the learned Court framed three (3) issues in the Suit and the validity or otherwise of the Undertaking, Sale Deed and Receipt were considered under Issue No. 2. Upon due consideration and contest by the parties, the learned Court did not find any reason to interfere with the Undertaking, the Sale Deed and the Receipt and as such, dismissed the Suit. The learned Senior Counsel submits that the Judgment & Order dated 21.09.2012 has attained a finality since no appeal was preferred. Therefore, the validity of the Sale Deed amongst others is not open for re-examination as there is a bar under Section 11 of the CPC. He submits that as per Section 11 CPC, matters which are directly and substantially in issue cannot be re-opened. The learned Senior Counsel submits that Issue No. 1 framed by the learned Trial Court in Civil Suit No. 09/2015 having already been decided in Civil Suit No. 31/2009, the same was not open for re-examination without following due process of law.

[14.] In support of his above submission, the learned Senior Counsel relies upon the following authorities:-

(1) Sri Gangai Vinayagar Temple & Anr. -Vs- Meenakshi Ammal & Ors. (2015) 3 SCC 624 and

(2) M. Nagabhushana -Vs- State of Karnataka & Ors. (2011) 3 SCC 408.

[15.] Referring to the case of *Sri Gangai Vinayagar Temple & Anr.* (supra), the

learned Senior Counsel submits that in the given facts of that case, multiple Suits were disposed of by one (1) common Judgment but separate decrees were passed. He submits that the questions directly and substantially raised in all the Suits were one and the same but appeal was preferred against the decree passed in one (1) Suit only. He submits that the Apex Court held that the Suit in respect of which decree was passed but no appeal filed against the decree assumes the character of former Suit and therefore, the findings in such decree having attained finality will operate as res-judicata. The learned Senior Counsel by further referring to the case of *M. Nagabhushana* (supra) submits that according to the Apex Court, the principles of res-judicata are of universal application as they are based on two (2) aged old principles that it is in the interest of the State that there should be an end to litigation and the other principle is that no one should be vexed twice in a litigation. Under the circumstance, the learned Senior Counsel submits that the appeal should be dismissed.

[16.] In reply to the submissions made by the learned Senior Counsel, Mr. Robin Ratnakar David, learned counsel for the appellant submits that the instant appeal is filed under Order XLI CPC and the appellant has only raised the issue that was dealt by the learned Trial Court. He submits that the second Civil Suit i.e., Civil Suit No. 9/2015 was filed by the respondent plaintiff herself and therefore, she is not in a position to raise the plea of res-judicata.

[17.] I have heard the submissions made by the learned counsels for the rival

parties and I have perused the materials available on record. Civil Suit No. 31/2009 was filed by the instant appellant/defendant seeking the declaration of the Undertaking (*Intiamkamna*) dated 07.08.2008 and the Receipt dated 07.08.2008 as null and void. From a perusal of the Judgment & Order dated 21.09.2012 passed in Civil Suit No. 31/2009, which is a part of the paperbook and exhibited as Exhibit-P6 in Civil Suit No. 9/2015, it can be seen that the learned Trial Court declined to adjudicate the issues in favor of the plaintiff therein i.e., the present respondent/defendant. The case of the plaintiff (in Civil Suit No. 31/2009) was that the Undertaking, the Sale Deed and the Receipt were not signed voluntarily by her and therefore, she prayed for revoking the same through the said Civil Suit. The Suit was not filed for challenging the validity of the said documents but for cancellation of the same as it was alleged that it was not made or signed by her voluntarily. The learned counsel for the appellant is correct in saying that the respondent cannot raise the plea of res-judicata because it was she who had filed Civil Suit No.9/2015 herself and not the appellant/defendant. Civil Suit No. 9/2015 was filed by the respondent/plaintiff for declaration of right, title and interest in her favor in respect of land and building covered by LSC No. Azl-445 of 1980. Accordingly, the Suit was considered and adjudicated upon by the learned Trial Court in terms of the relief that was sought for. The principles of res judicata in the considered view of this Court is not attracted and therefore, the authorities relied upon in this regard is not being referred to.

[18.] One important aspect of the matter which may be noticed is that on

17.08.2015, ex-parte proceeding was drawn against the defendant for having failed to appear despite issuance of several summons. The ex-parte order sought to be recalled was not allowed by the Trial Court on account of delay. Despite the same, the learned Trial Court allowed the defendant to participate and cross-examine the lone plaintiff witness. However, apart from allowing the defendant to cross-examine the plaintiff witness, the learned Trial Court did not give any opportunity or call upon the defendant to adduce her evidence.

[19.] From a perusal of the order sheet in the LCR, it is seen that the parties were present through their respective counsels on 28.11.2016 and the plaintiff was examined on oath by the counsel for the defendant and that re-examination was also done by the counsel for the plaintiff. The case was then fixed again on 20.01.2017 for plaintiff's evidence. However, on 20.01.2017, the trial Judge being on leave, the matter was adjourned to 15.02.2017. On 15.02.2017, the parties were present through their respective counsels and the plaintiff closed her evidence. The learned Trial Court then fixed on 17.03.2017 for argument/final hearing. However, on 17.03.2017, as issues had not been framed, the counsel for the plaintiff prayed for framing issues and the learned Trial Court accordingly framed two issues namely; (i) Whether the defendant had executed the Sale Deed dated 07.08.2008, selling her land covered by LSC No. Azl 445/1980 to the plaintiff for Rs. 65,50,000/-. (ii) Whether the plaintiff is entitled to the relief claimed? If so, to what extent. After framing these two issues, the learned Trial Court fixed 12.04.2017 for written argument. Thereafter,

written arguments were submitted by the parties and the learned Trial Court consequently passed the impugned Judgment & Order on 16.10.2017.

[20] From a perusal of the LCR as reflected herein above, the procedure which has been adopted by the learned Trial Court is rather unusual and a practice unknown in adjudicating civil disputes. The learned counsel for the appellant has rightly submitted that after the filing of a written statement, the normal course followed by a Civil Court is to formulate and frame issues to be decided in the given facts and circumstances of the case. In order to establish their respective cause as per the issues framed, the rival parties are required to lead their evidence. It is only thereafter that the final argument takes place and the parties may or may not file their written argument. Whereas in the instant case, after the examination, cross-examination and re-examination of the lone plaintiff witness, the learned Trial Court straight away fixed the matter for argument/final hearing.

[21] The Apex Court in *Sangram Singh -Vs- Election Tribunal, Kotah AIR 1955 SC 425* which was also referred in the Delhi High Court judgment in *Finolex Cables Ltd.* (supra) held that when the defendant joins and participate in the proceeding at a stage when the plaintiff is yet to examine his witness, the defendant shall have the right to cross-examine the plaintiff witness provided the same has not been foreclosed. Further, the Court has the power to permit the defense to adduce evidence on his part. In the present case, the appellant who was the defendant in the Civil Suit although permitted to cross-examine the lone plaintiff witness admittedly was not

given the opportunity to produce or lead her evidence. Such being the case, this Court finds it a fit case for remanding the matter back to the learned Trial Court for consideration of the case afresh from the stage of defence evidence. The learned Trial Court in view of the peculiar facts and circumstances of the case, shall allow the defendant to produce and lead defense evidence and it also goes without saying that the plaintiff shall be permitted to cross examine the defence witness/witnesses produced by the defendant. It may appear to be slightly late in the day for remand but having regard to the stakes involved and denial of the appellant to lead evidence in her defense, remand of the case is found to be appropriate.

[22.] In view of the above finding, the issue regarding the validity or otherwise of the Sale Deed is not gone into. The appellant will be at liberty to raise this issue before the learned Trial Court.

[23.] In the result, the impugned Judgment dated 16.10.2017 is set aside and the parties are directed to appear before the learned Trial Court on 09.05.2024 whereafter, the learned Trial Court shall proceed with the matter afresh from the stage of evidence to be led by the defense. It is also made clear that any observation that may have been made in this judgment should not influence the Trial Court in any manner in coming to its own independent finding and conclusion on merit.

[24.] The Civil Suit being of the year of 2015, the learned Trial Court shall make an endeavor to dispose of the case as early as possible, preferably within a period of four (4) months from the date of appearance of the parties.

[25.] With the above observations and directions, the appeal stands disposed of. Registry is directed to send back the Lower Court Records (LCR) immediately.

JUDGE

Comparing Assistant