

**THE HIGH COURT OF TRIPURA
AGARTALA**

RSA NO. 74 OF 2011

APPELLANTS :

1. Sri Biman Behari De,
2. Sri Kshirod De,
3. Sri Monoranjan De,
 - All sons of late Kshitish Mohan De,
4. Smti. Bibha Rani De,
Wife of late Kshitish Mohan De,
 - All residents of village-South Hurua,
P.S. Dharmanagar, PIN 799253,
District North Tripura.
5. Smti. Joya Rani Ghosh
@ Chhaya Rani Ghosh,
wife of late Nani Gopal Ghosh,
resident of village-Rajnagar,
Fatikroy, P.S. Kumarghat,
North Tripura, PIN 799264.
6. Smti. Rubi De,
Daughter of late Monmohan De,
resident of village South Hurua,
P.S. & P.O. Dharmanagar,
PIN 799250, District-North Tripura.

BY ADVOCATES :

Mr. K. N. Bhattacharjee,
Mr. A.K.Das,
Mr.Kohinoor N. Bhattacharjee,

- *Vs* -

RESPONDENTS :

Sri Partha Sarathi Sen,
Son of late Ranjit Kumar Sen,
Resident of Rajbari(BOC para),
P.O. & P.S. Dharmanagar,
PIN-799250, District-North Tripura.

BY ADVOCATES :

Mr. A. Das Gupta,
Ms. K. Roy,
Ms. S. Biswas,
Ms. S. Deb,

RSA NO. 90 OF 2011

APPELLANT :

Sri Partha Sarathi Sen,
Son of late Ranjit Kumar Sen,
Resident of Rajbari,
P.O. & P.S. Dharmanagar,
District-North Tripura.

BY ADVOCATES :

Mr. A. Das Gupta,
Ms. K. Roy,
Ms. S. Biswas,
Ms. S. Deb,

- Vs -

PRINCIPAL RESPONDENTS :

1. Sri Biman Behari De,
2. Sri Kshirode Ranjan De,
3. Sri Monoranjan De,
4. Srimati Bibha Rani De,
Wife of late Kshitish Mohan De,
 - All are sons and wife of Late Kshitish Mohan De,
 - All are residents of village-South Hurua,
P.O. Hurua, District North Tripura.
5. Shrimati. Jaya Rani Ghosh
wife of late Nani Gopal Ghosh,
Daughter of Late Kshitish Mohan De,
village-Rajnagar, P.O. Fatikroy,
P.S. Kumarghat, District-North Tripura,
6. Shrimati Rubi De,
Daughter of late Monmohan De,
resident of village-South Hurua,
P.O. Hurua, District North Tripura.

PROFORMA RESPONDENTS :

7. The Secretary,
Tripura Motor Sramik Union,
Dharmanagar Branch, Rajbari,
P.O. & P.S. Dharmanagar, North Tripura,

8. The Secretary, C.I.T.U.,
Dharmanagar Branch,
P.O. & P.S. Dharmanagar,
District- North Tripura,

BY ADVOCATES :

Mr. K. N. Bhattacharjee,
Mr. A.K.Das,
Mr.Kohinoor N. Bhattacharjee,

**BEFORE
THE HON'BLE MR. JUSTICE S.C. DAS**

Date of hearing : 19.11.2015.

Date of delivery
of Judgment & order : **26.11.2015.**

Whether Fit for Reporting :

Yes	No
	√

JUDGMENT & ORDER.

Both the appeals were heard analogously and this common judgment is passed which shall govern both the appeals.

2. Heard learned senior counsel, Mr. K. N. Bhattacharjee for the appellants in RSA 74 of 2011 and learned counsel, Mr. A. Dasgupta for the respondent.

In RSA 90 of 2011 heard learned counsel, Mr. A. Dasgupta for the appellant and learned senior counsel, Mr. K. N. Bhattacharjee for the respondents.

3. After hearing learned counsel in RSA 74 of 2011, the following substantial question of law was formulated for hearing of the appeal:-

"Whether the judgment and decree passed by the Courts below suffer from perversity for non-consideration of the pleadings and evidence on records regarding counter claim made by the appellants."

4. In RSA 90 of 2011 the following substantial question of law was formulated for hearing of the appeal:-

"Whether the judgment and decree passed by the Courts below suffer from perversity for non-consideration of the pleadings and evidence on record on the issue that the appellant was not a party in T.S. No.01 of 1998 and T.S. No. 09 of 2004."

5. Brief fact is that Sri Partha Sarathi Sen, the appellant of RSA 90 of 2011 as plaintiff (hereinafter mentioned as 'plaintiff') instituted Title Suit 06 of 2010 against Sri Biman Behari Dey and seven others as defendants (hereinafter mentioned as 'defendants') seeking declaration and perpetual injunction *inter alia* contending that the suit land described in Schedule 'A' and 'B' of the plaint was a Government land belonged to Public Works Department and he entered into possession on 01.08.1984. On 20.01.2010 the defendant No.1, Sri Biman Behari Dey, came to the suit land and asked him to vacate the suit land and otherwise he will face serious

consequence. He denied to vacate the suit land and at that time it was disclosed by the defendant that the defendants got decree of T.S. 09 of 2004 in their favour and that on the strength of the decree he will be ousted from the suit land. The plaintiff thereafter on query found that the defendants earlier instituted T.S. 01 of 1988 and T.S. 09 of 2004 and got decree in their favour wherein he was never impleaded as a party. The defendants falsely claimed title over the suit land in those T.S. 01 of 1988 and T.S. 09 of 2004 and obtained decree exercising fraud on the Court and since in both the suits the plaintiff was not a party the decree passed in those suits were not binding on him. The plaintiff, therefore, prayed for the following decree:-

"(a) decree for declaration that judgment and decree dated 29-04-1989 passed by the Ld. Munseff (now designated Civil Judge Jr. Division) Dharmanagar, North Tripura in c/w T.S 01 of 1988 is obtained fraudulently and suppressing material facts without impleading the plaintiff as a party and as such it is null and void and it is not binding upon the plaintiff.

(b) a decree for declaration that the judgment dated 13-07-2007 decree dated 26-07-2007 passed by Ld. Civil Judge (Jr. Division) Dharmanagar in c/w T.S. 09 of 2007 is obtained fraudulently and suppressing material facts and without impleading the plaintiff as a party and such it is null and void and it is not binding upon the plaintiff.

(c) a decree for perpetual injunction restraining the principal defendant, their men, agents and any person claiming through them from interfering with the peaceful possession of the plaintiff over suit premises as described in the schedule 'B' given here in below.

(d) a decree for perpetual injunction restraining the principal defendants, their men, agents and any other person claiming through them from selling or transferring of the decreetal land of T.S. 01 of 1988 and T.S. 09 of 2004 as described in the schedule 'A' till disposal of the suit."

6. The defendants contested the suit by filing written statement contending that the plaintiff was a tenant of the defendants and the plaintiff first entered as a monthly tenant on 05.07.1989 and the tenancy expired on 04.07.1990. Thereafter again the plaintiff entered into the suit premises as a monthly tenant w.e.f. 05.07.1990. He paid rent up to 2004 and thereafter he stopped payment of the rent for which the defendants issued notice, but the plaintiff did not vacate the suit land and did not pay the rent.

7. The defendants set up a counter claim seeking recovery of possession of the suit land and the counter claim has been registered as T.S. 12(CC) of 2010. In the counter claim the defendants prayed for the following decree:-

"a) ejectment/eviction of defendant/tenant Partha Sen from the suit premise/room by removing all obstructions and sign of possession of defendant;

b) for recovery of Rs.47020/- (Rupees Forty seven thousand twenty only) and future compensation of Rs.50/- (fifty) per day from 1st May 2010 to till recovery of possession of suit premise by the counter claimants/plaintiff/landlord;

c) for cost of suit

d) for any other relief/reliefs as the counter claimant/plaintiff may be found entitled as per law."

8. The plaintiff submitted written statement in the counter claim and had taken the same stand.

9. The trial Court considering the pleadings of the parties in T.S. 06 of 2010 framed following issues:-

"i) Whether the suit is maintainable in its present form?

ii) Whether the plaintiffs have cause of action for filing the suit?

iii) Whether the suit is barred by the law of limitation?

iv) Whether the judgment and decree passed by Ld. Civil Judge(Junior Division in TS 01 of 1988 and the judgment and decree passed by Ld. Civil Judge(Junior Division) in TS 09 of 2004 are liable to be set aside?

v) Whether the plaintiff is entitled to the decree as prayed for?"

10. Further considering the pleadings of the parties in T.S. 12(CC) of 2010 the trial Court framed the following issues :-

"i) Whether the suit maintainable in its present form?

ii) Whether the counter claimants have cause of action for filing the suit?

iii) Whether the suit is barred by the law of limitation?

iv) Whether the opposite party is the tenant of the counter claimant?

v) Whether the counter claimant is entitled to the decree as prayed for?"

11. Both the suits were tried together and a single set of evidence was recorded. The plaintiff examined himself as PW1 and also examined another witness, a neighbour of the plaintiff, namely, PW2, Sri Pabitra Sankar Kar. In support of his claim the plaintiff proved the following documents:-

"Exhibit-1 – Certified copy of plaint of T.S. 01 of 1988.

Exhibit-2 – Certified copy of order dated 29.04.1989 passed in T.S. 01 of 1988 by which the suit was decreed exparte.

Exhibit-3 – The decree passed in T.S. 01 of 1988.

Exhibit-4 – The series of orders passed in T.S. 01 of 1988.

Exhibit-5 – Trace map of Dharmanagar mouja No.9 Sheet No.8(part).

Exhibit-6 – Certified copy of Khatian No.2812 of Dharmanagar town mouja.

Exhibit-7(series) – Judgement dated 13.07.2007 passed in T.S. 09 of 2004 by Ld. Civil Judge (Junior Division), Dharmanagar and the decree passed in the suit.”

12. The defendant No.1, Biman Behari Dey examined himself as DW1 and also examined another witness, namely, Sri Goutam Dey, son of defendant No.1 as DW2. In support of their case the defendants proved the following documents:-

“Exhibit-A(series) – Rent receipts containing the signature of the plaintiff.

Exhibit-B – Acknowledgement of the receipt of notice served u/s.106 T.P.Act.

Exhibit-C – Certified copy of registered power of attorney.

Exhibit-D – Power of attorney executed by Smt. Rubi Dey.

Exhibit-E – Revenue receipt No.482591 of revenue deposited to Govt.

Exhibit-F – Certified copy of judgment dated 11.01.2010 passed in T.S. 04 of 2008 and decree.

Exhibit-G – Certified copy of Khatian No.3195.

Exhibit-H(series) – 54 numbers of rent receipts.”

13. The trial Court dismissed both the suit and the counter claim by the impugned common judgment dated 11.02.2010. Aggrieved, the plaintiff, Sri Partha Sarathi Sen, preferred T.A. 07 of 2011 in the Court of learned Additional District Judge, Dharmanagar and the defendant, Sri Biman Behari Dey and five others, i.e., counter claimants, preferred T.A. 06 of 2011 in the Court of learned Additional District Judge, Dharmanagar challenging the common judgment dated 11.02.2010.

14. Learned Additional District Judge heard both the appeals together and by common judgment dated 02.09.2011 dismissed both the appeals and hence, the present second appeals have been filed.

15. The plaintiff in his pleadings clearly and specifically pleaded that he was not made a party in T.S. 01 of 1988 and T.S. 09 of 2004 instituted by the defendants earlier and so, those judgments were not binding on him. In the written statement filed by the defendant Nos.1 to 6 in T.S. 06 of 2010 nothing stated that the plaintiff was made a party in those suits. The copy of the judgment of T.S. 01 of 1988 has been proved as Exbt.-2 and the copy of the judgment of T.S. 09 of 2004 has been proved as Exbt.7 series. A copy of the plaint of T.S. 01 of 1988 has also been exhibited by the plaintiff. Those documents clearly show that the plaintiff was not made a party in those previously instated suits.

16. I am quite surprised and astonished to see that the trial Court as well as the appellate Court while deciding Issue No.4 of T.S. 06 of 2010 has arrived at a conclusion that the plaintiff did not challenge those judgments and decree in T.S. 01 of 1988 and T.S. 09 of 2004 and on that ground decided Issue No.4 against the plaintiff. The finding of the trial Court in respect of Issue No.4 of T.S. 06 of 2010 is in para 11 of the judgment of the trial Court, reads as follows :-

"11. Question raised in this issue is whether the judgment and decree passed by Ld. Civil Judge(Jr. Divn). Dharmanagar in T.S. 01 of 1988 and the

judgment and decree passed by Ld. Civil Judge(Jr. Divn), Dharmanagar in T.S. 09 of 2004 are void and inoperative and liable to be set aside. Obviously the plaintiff has taken the judgment and decree aforesaid into evidence on his side by producing certified copies thereof. In so far as the judgment and decree passed in T.S. 01 of 1988 is concerned, the plaintiff neither challenged the decree in the appellate forum nor approached the trial court for setting aside the exparte decree passed in T.S. 01 of 1988. It is argued by Ld. Counsel of the plaintiff that since the decree was passed exparte the plaintiff had no opportunity to either assail it in appeal or approach the trial court for setting aside the decree. The argument is not tenable because it appears from the evidence adduced by the defendants that the plaintiff was served with summons in T.S. 01 of 1988 before the exparte decree was passed and since the plaintiff who was defendant in that suit did not turn up during the hearing of the suit, the suit was heard exparte and the decree was passed. There is therefore no reason for me to hold that the decree passed in T.S. 01 of 1988 can be termed as a fraudulent decree on any score. Similarly the issue relating to legality of the decree passed in TS 09 of 2007 has already been examined and decided in T.S. 04 of 2008 by this court and it is argued by Ld. Counsel of the defendants that the decree passed by this court in T.S. 04 of 2008 has been upheld in appeal and become final and binding on the parties. In my view it will not be legally permissible to reopen the issue in this suit.

In view of what is discussed above, neither the judgment and decree passed in T.S. 01 of 1988 nor the judgment and decree passed in T.S. 09 of 2004 can be declared null and void. The issue is therefore decided in the negative and against the plaintiff."

- 17.** The finding of the appellate Court in respect of that issue has been made in para 10 of the judgment, which reads as follows:-

"10. In so far as the judgment and decree passed in TS 01 of 1988 is concerned, the plaintiff neither challenged the decree in the appellate forum nor approached the trial court for setting aside the ex-parte decree passed in TS 01 of 1988. It is argued by Ld. Counsel of the plaintiff that since the decree was passed ex-parte the plaintiff had no opportunity to either assail it in appeal or approach the trial court for setting aside the decree. The argument is not tenable because it appears from the evidence adduced by the defendants that the plaintiff was served with summons in TS 01 of 1988 before the exparte decree was passed and since the plaintiff who was defendant in that suit did not turn up during the hearing of the suit, the suit was heard ex-parte and the decree was passed. There is therefore no reason to

hold that the decree passed in TS 01 of 1988 can be termed as a fraudulent decree on any score. Similarly the issue relating to legality of the decree passed in TS 09 of 2004 has already been examined and decided in TS 04 of 2008 by this court and it is argued by Ld. Counsel of the defendants that the decree passed by this court in TS 04 of 2008 has been upheld in appeal and became final and binding on the parties. Hence I find that the Ld. Trial Court has rightly held that it would not be legally permissible to reopen the issue in the suit.

In view of what is discussed above, neither the judgment and decree passed in TS 01 of 1988 nor the judgment and decree passed in TS 09 of 2004 can be declared null and void. The issue is therefore found to be correctly decided by the Ld. Trial Court in the negative and against the plaintiff."

18. Wherefrom the trial Court as well as the appellate Court arrived at a conclusion that the plaintiff did not prefer any appeal against those judgments is not understood. There is no mention on the basis of which pleadings or evidence those findings were recorded. The decision of the trial Court as well as the appellate Court on Issue No.4 of T.S. 06 of 2010 is, therefore, found to be a perverse finding.

19. The plaintiff specifically pleaded that those judgments were not binding on him since he was not made a party in those suits. The trial Court would frame a specific issue in T.S. 06 of 2010 as to whether those previous judgments were binding on the plaintiff or not?

20. The defendants in their counter claim contended that the plaintiff was a tenant and notice was issued to vacate the suit land. In that counter claim also no specific issue was framed as to whether the plaintiff is liable to be evicted from the suit land. The

trial Court decided Issue No.4 of T.S. 12(CC) of 2010 against the counter claimants observing finding in para 12 of the judgment and held that remedy of the counter claimants lies in execution of the decree passed in T.S. 09 of 2007. There is nothing in the record that there was any suit numbering T.S. 09 of 2007. Perhaps the trial Court intended to say T.S. 09 of 2004. But while it is clear from the record that in T.S. 09 of 2004 the plaintiff was not a party, how that decree can be executed against the plaintiff. The finding of the trial Court in respect of Issue No.4 in T.S. 12(CC) of 2010, which is upheld by the appellate Court also appears to be perverse finding and not based on the pleadings and evidence on record.

21. It is apparent that the learned Judge of the trial Court and learned Judge of the appellate Court utterly failed to apply their mind in respect of evidence and pleadings on record. Therefore, both the judgments passed by the trial Court as well as the appellate Court are liable to be set aside. The suit is liable to be remanded back to the trial Court for deciding the following material issues:-

1. In T.S. 06 of 2010 the trial Court shall frame and decide the issue "Whether the judgment and decree passed in T.S. 01 of 1988 and T.S. 09 of 2004 were binding on the plaintiff or not?

2. In T.S. 12(CC) of 2010 the trial Court shall frame and decide the issue "whether the plaintiff of T.S. 06 of 2010 was liable to be evicted from the suit land?

The evidence already recorded shall remain in force and parties may be allowed to adduce fresh evidence on the issues directed above and the suit shall be decided by the trial Court within six months from the date of receipt of the lower Court records.

22. Both the appeals are accordingly allowed. The judgment and decree dated 11.02.2010 passed by the learned Civil Judge(senior Division), Dharmanagar in T.S. 06 of 2010 and T.S. 12(CC) of 2010 and the judgment and decree passed by the learned Additional District Judge, Dharmanagar in T.A. 06 of 2011 and T.A. 07 of 2011 dated 02.09.2011 are set aside. The suit is remanded back to the trial Court to decide afresh the issues indicated above after giving an opportunity of adducing evidence to both side and the suit should be decided within six months from the date of receipt of the lower Court records without fail.

23. Both the second appeals are accordingly disposed of. No order as to costs.

24. Send back the lower court records along with a copy of this judgment.

JUDGE