GAHC010271252017

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

Case No. : CRP(I/O)/370/2017

KANCHAN PODDAR
W/O. SRI AJAY PODDAR, R/O. FOREST GATE, NARENGI PADDAR COMPLEX, P.S. NOONMATI, GUWAHATI-781026, KAMRUP M, ASSAM.

VERSUS

THE GOVERNING BODY and 5 ORS.
NARENGI HIGH SCHOOL, GUWAHATI-26.

2:THE PRESIDENT
GOVERNING BODY

NARENGI HIGH SCHOOL
GUWAHATI-26.

3:THE SECRETARY
GOVERNING BODY

NARENGI HIGH SCHOOL
GUWAHATI-26.

4:THE HEADMASTER
GOVERNING BODY

NARENGI HIGH SCHOOL
GUWAHATI-26.

5:THE CIRCLE OFFICER
DISPUR REVENUE CIRCLE

GUWAHATI-6.

6:THE LAT MANDAL
1NO. MATHGHORIA REVENUE VILLAGE

UNDER DISPUR REVENUE CIRCLE
DISPUR
GUWAHATI-6

Advocate for the Petitioner : MRA K RAI

Advocate for the Respondent : MR. P K GARODIA,MR S TALUKDAR,MR. U BHATTACHARYA,MR D SARMA,MR A DEKA (R 1-4), G.A. ASSAM

BEFORE
HONOURABLE MR. JUSTICE PRASANTA KUMAR DEKA

ORDER

Date : 04-12-2020

Heard Mr. S. P.Roy, learned counsel for the petitioner . Also heard Mr. CKS Barua, learned Govt. Counsel representing respondent Nos. 5 and 6. However none entered appearance on behalf of respondent Nos. 1 to 4 when the matter was taken up for admission hearing though the names of the counsel are shown in the cause list. In fact on 19.11.2020 when the matter was taken up for hearing and the learned counsel Mr. Roy was ready for argument before this court but due to absence of learned counsel for respondent Nos. 1 to 4 the matter was adjourned on that day. Today the learned counsel for respondent Nos. 1 to 4 are absent but I am constrained to take up this revision petition for admission hearing and for final disposal.

The order dated 25.8.2017 passed in Title Suit No. 291/2015 by the learned court of Munsiff No. I, Kamrup(M) at Guwahati is put under challenge by the petitioner in this revision petition. The petitioner as the plaintiff filed Title Suit No. 291/2015 in the court of learned Munsiff No. 1, Kamrup(M) , Guwahati against the present respondents including the State respondent Nos. 5 and 6 i.e the Circle Officer, Dispur Revenue Circle and the Lat Mandal respectively seeking for declaration of right to use the existing pathway by the plaintiff petitioner and for further declaration that the 16 ft wide pathway as her path for ingress and egress from her residential plot of land. Prior to the filing of the suit the plaintiff

petitioner served a notice u/s 80 CPC on the respondent No.5 i.e. the Circle Officer of Dispur Revenue Circle. As there was no reply finally the plaintiff petitioner filed the suit.

It is the pleadings of the plaintiff petitioner that while purchasing her residential plot of land, the same was abutted by a path situated in the eastern direction of the Narengi High School. As the respondent Nos. 1 to 4 representing the Narengi High School Governing Body blocked the said passage, the plaintiff petitioner entered into an agreement with the Governing Body on 7.4.2010 and as per said terms of the agreement the respondent Nos. 1 to 4 representing the Narengi High School demarcated the existing 16 ft width path for her use on the eastern side of the Narengi High School. The defendant respondent Nos. 1,2,3 and 4 blocked the said passage. In order to verify the claim of the plaintiff as to the existence of the said path, she obtained the trace map from the office of the Circle Officer, Dispur Revenue Circle, respondent No.5 which indicates the existence of the pathway way as claimed by her.

Upon such obstruction of the passage, the plaintiff petitioner after issuance of notice u/s 80 CPC to the defendant respondent No.5 instituted the suit wherein the defendant respondent No.5 contested the suit. Subsequently the plaintiff petitioner changed her conducting counsel and the new set of counsel on perusal of the plaint discovered some formal defects in the suit and accordingly filed an application under Order 23 Rule 1(3) CPC for withdrawal of the suit with a leave from the court below to file it afresh after removal of the formal defects. The defendants respondents did not file any written objection against such prayer for withdrawal with leave but the court below disallowed the said application under Order 23 Rule 1(3) CPC fixing 23.10.2017 for framing of issues .

Mr. Roy assailing the impugned order submits that as the passage is covered by Govt land under such circumstances the State of Assam represented by its Secretary is a necessary party to the suit alongwith the Deputy Commissioner of the concerned District but they were not impleaded. He further submits that the nature of the defects being formal one, the application for withdrawal of the suit alongwith the leave to file it afresh was submitted which the learned court below on wrong application of its jurisdiction disallowed the same. In support of his contention Mr. Roy relied *Baniram and Ors –vs- Gaind and ors* reported in *AIR 1982 SC 789* and submitted that non pleading of a point may prove a technical impediment which may result in dismissal of the appeal/suit and though it is pointed out belatedly the Apex Court considered it proper in the interest of justice to withdraw the suit with leave to file afresh on the same cause of action. Relying the said ratio Mr. Roy submits that if the suit is allowed to proceed without impleading the Deputy Commissioner and the State of Assam in the long run, the suit is bound to fail. The plaintiff petitioner pointed out before the court below about the shortcomings in the suit and a duty was cast upon it to accede to the prayer made by the plaintiff petitioner. Having not done so Mr. Roy sought for interference by this Court the impugned order. Mr. Roy further submits that non joinder of necessary party is fatal in a suit and as such further duty is cast upon the court below to look into and if the necessary parties are not impleaded in the suit, the court must allow the same otherwise the whole exercise of continuing a proceeding would be a futile exercise.

Mr. Borua on the other hand submits that in a suit against the State normally the Secretary is the one representing it and in the present case in hand as the land in question is a Government land, the State of Assam is necessary party alongwith the concerned jurisdictional Deputy Commissioner and Circle Officer.

I have given due consideration to the submissions made by the learned counsel. I have perused the plaint, the written statement and the impugned order. Mr. Roy argued that the issue of non joinder of a necessary party is a fatal one and the court below has a duty cast on it to look into such issue raised before the court. The learned court below held that non joinder of necessary party is not a formal defect and only for that reason the plaintiff is not entitled for withdrawal of the suit. This finding of the learned court below, in my considered opinion is a proper finding requiring no interference. Necessary parties if not impleaded in the suit can very well be impleaded under the provision of Order 1 Rule 10 CPC and the court in such a case is bound to pass an appropriate order. The petition for withdrawal of the suit was filed mainly on the ground that the process of impleading the State of Assam through the Secretary and the Deputy Commissioner of concerned district after observing the procedural rules much time would be consumed if 80 CPC notices are issued to the said officials. As such apprehending the delay the petitioner plaintiff sought for granting of the leave to file the suit afresh after the withdrawal of the same.

In my considered opinion if the apprehension and the grounds of the plaintiff petitioner are taken into consideration, the court has ample power to direct the plaintiff petitioner to issue fresh notice under Section 80 CPC to the concerned officials including the Secretary representing State of Assam and once the mandatory period of two months is over under Section 80 CPC , the plaintiff petitioner may be directed to implead the concerned officials in the suit. In the present case in hand the plaintiff petitioner without resorting to such exercise under Order 1 Rule 10 CPC filed the application for withdrawal of the suit with leave to file it afresh that too only on ground of non impleadment of the necessary parties in the suit. But the learned court below disallowed the said petition for withdrawal with leave to file the suit

afresh holding that non impleadment of a necessary party in a suit cannot be held to fall within the scope of the term "formal defects". I do not find any wrong exercise of jurisdiction by the court below requiring interference of impugned order dated 25.8.2017. However keeping in view the apprehension of the plaintiff petitioner as gathered from the petition under Order 23 Rule 1(3) CPC, it is hereby granted the leave to the plaintiff petitioner to file an application under Order 1 Rule 10 CPC bringing to the notice of the court below the date of issuance of notice under Section 80 CPC to the officials sought to be impleaded . The learned court below shall thereafter fix a date after the expiry of the two months notice period under Section 80 CPC. The petition for impleadment shall thereafter be decided by the learned court below as per the law holding the field. Accordingly this revision petition is disposed of with the following observation and direction.

No costs. Interim order if any stands vacated.

JUDGE

Comparing Assistant