CRP 318/2011
BEFORE
HON'BLE MR. JUSTICE N. CHAUDHURY
JUDGMENT & ORDER (Oral)

1. The concurrent findings of the learned two Courts below holding the present petitioner a defaulter in a proceeding under Section 5 of the Assam Urban Areas Rent Control Act, 1972 (hereinafter referred to as 'the Act') has been called in question in the present revision petition. The learned Munsiff No.1, Cachar at Silchar decreed Title Suit No.65/2008 of his Court ex parte against the sole defendant refusing to consider the written statement belatedly filed and an appeal preferred there-against being Title Appeal No.23/2010 in the Court of learned Civil Judge No.1, Cacahr at Silchar stood also dismissed by the judgment and decree dated 23.05.2011. Aggrieved, the tenant has approached this Court challenging both the judgments and decrees passed by the learned Courts below.

2. To understand the respective cases of both sides it is necessary to narrate the brief facts at the beginning. Opposite party herein as plaintiff instituted Title Suit No.65/2008 in the Court of learned Munsiff No.1, Cachar at Silchar stating that the petitioner herein, the defendant in that suit, was a tenant under him with respect to the suit premises described in Schedule-2 to the plaint at a monthly rental of Rs.400/- payable within 10th day of the next month as per English calendar. The tenant continued paying rent till November, 2005 and thereafter defaulted. The schedule-2 suit premises which is a two storied Assam Type house standing on schedule-1 land became old and dilapidated requiring reconstruction. The son of the plaintiff had also become adult in the meantime and he was in need of being accommodated. With these twin reasons the plaintiff claimed that there was bona fide requirement for demolition and reconstruction of the suit premises. The suit was accordingly instituted praying for a decree of eviction of the sole defendant along with realization of Rs.11,200/- being arrear rent. In the body of the plaint it was the basic case of the plaintiff that the suit land described in schedule-1 to the plaint originally belonged to one Rafique Udin Mazumdar of Madhurbond, Silchar who sold the same to the plaintiff on realization of due consideration by executing a registered deed on 01.07.1988. The plaintiff thereafter developed the land and made construction and ultimately put the defendant in possession of one room at the ground floor and one room at the first floor at the aforesaid monthly rental of Rs.400/-.

3. On being summoned the defendant appeared and by filing written statement denied the entire story pleaded in the plaint. According to the defendant, the original owner, namely, father of Rafique Uddin Mazumdar took settlement of the suit land along with Ruplal Goala, the father of the plaintiff and the defendant. Ruplal Goala, the father of the plaintiff as well as the defendant, thereafter developed the land and made construction of the suit premises and thus both the plaintiff and the defendant were enjoying the suit property. After the death of Ruplal Goala both the plaintiff and the defendant acquired right, title and interest over the suit land. The defendant denied the relationship of landlord and tenant between him and the plaintiff and repudiated the claim of default and bona fide requirement made by the plaintiff. Ultimately, the defendant prayed that the suit of the plaintiff for realization of arrear rent as well as for eviction should be dismissed. It is necessary to mention here that this written statement submitted by the defendant was beyond the statutory period of 90 days. The notice was served on the defendant on 21.04.2008 and so he was entitled to file written statement on or before 21.07.2008 although the suit was fixed for necessary order on 15.09.2008. On 15.09.2008 having noticed that the written statement was filed only on 30.08.2008, the matter was fixed for filing objection and objection hearing. In the meantime, the defendant filed an application under Section 5 of the Limitation Act praying for condonation of delay in filing the written statement. By order dated 16.03.2009 the learned trial court rejected the application filed under Section 5 of the Limitation Act holding that the Limitation Act

was not applicable and so application under Section 5 thereof was also not main tainable. Consequently, the written statement filed by the defendant on 30.08.20 08 remained out of record and the defendant did not file any revision petition c hallenging the order dated 16.03.2009. The suit thereafter proceeded ex parte.

4. The plaintiff examined himself and one witness as PW 2. As the matter pr oceeded ex parte against the defendant he was given liberty to cross-examine the se two witnesses. The defendant cross-examined the PW 1 but cross-examination of PW 2 was not allowed by order dated 03.02.2010 as allegedly the learned counsel for the defendant did not turn up in spite of call before 2.00 P.M. The learne d trial Court thereafter on the basis of the depositions of the two PWs passed h is judgment and decree dated 23.03.2010 holding the defendant a defaulter and al so holding that the plaintiff required the house bona fide.

5. The decree of eviction passed along with realization of arrear rent vide aforesaid judgment dated 23.03.2010 was called in question by the defendant in Title Appeal No.23/2010 in the Court of learned Civil Judge No.1, Cachar at Silc har. The learned First Appellate Court dismissed the appeal by his judgment and decree dated 23.05.2011.

6. In the memorandum of appeal of Title Appeal No.23/2010 the defendant/app ellant had taken a ground that the written statement filed by him was not taken on record without there being any cogent reason and so prejudice has been caused to him. But while deciding the first appeal the learned appellate court did not consider this aspect of the matter although the entitlement of the appellant to challenge any of the orders of the learned trial court under Section 104 of the Code of Civil Procedure was not disputed by the learned First Appellate Court. This ground taken up in the memorandum of appeal appeared to have escaped the no tice of the learned First Appellate Court. The learned First Appellate Court als o failed to act in accordance with the provision of Order XLI Rule 31 CPC by not framing any point for determination in the present case. He simply affirmed the findings of the learned trial Court without discussing the evidence available o n record. He has not applied his independent mind as required in terms of the gu idelines laid down by the Hon’ble Supreme Court in the case of Santosh Hazari vs . Purushottam Tiwari (daeceased) by LRS., reported in (2001) 3 SCC 179. The firs t appellate judgement, therefore, appears to be deficient to the above extent.

7. Mr. S. Dutta, learned senior counsel assisted by Mr. C. Sharma, learned counsel for the petitioner, would argue that the learned trial Court committed e rror of jurisdiction in refusing to accept the written statement filed merely af ter a delay of 39 days explanation for which was duly given by filing an applica tion under Section 5 of the Limitation Act. By that time law had crystalised tha t court is not devoid of any power to accept a written statement beyond the peri od of 90 days provided extraordinary circumstances are made out by the defendant . Here, in the present case, the defendant by filing an application explained th e reasons under which the written statement could not be filed within the statut ory period of 90 days. The learned trial Court did not enter into the merit of t he case but merely holding that the application under Section 5 was not applicab le refused to go into the reasons cited for filing the written statement belated ly and such action on the part of the learned trial Court amounts to error of ju risdiction. The defendant, therefore, took such failure on the part of the trial Court vide order dated 16.03.2009 as a ground vide ground No.(e) in the memoran dum of first appeal while challenging the final judgment and decree but the lear ned First Appellate Court also committed jurisdictional error in not considering the ground at all and in overlooking the matter. Thus, both the Courts below ha ve committed jurisdictional error warranting exercise of jurisdiction of this Co urt under Article 227 of the Constitution of India.

8. Per contra, Mr. N. Dhar, learned counsel for the opposite party, argues that even if the written statement is taken into consideration, the defendant wa

s duty bound to establish either by leading evidence or by cross-examining the w itnesses of the plaintiffs to show that the suit property was really the ancestr al property of the plaintiff and the defendant and so both of them have equal ri ght, title and interest. The defendant miserably failed to duly cross-examine th e PWs to find out the case sought to be set up by him by filing the written stat ement and so allowing the defendant at this stage to lead evidence and/or allowi ng the written statement to be taken on record at this stage would only cause ha rassment and prejudice to the plaintiff, Mr. Dhar argued.

9. Having heard the learned counsel for the parties and having perused the order-sheet of the Title Suit as well as the Title Appeal this Court finds that the plaintiff and the defendant are brothers. The plaintiff claimed that he purc hased the land and then he made construction of the suit premises described in s chedule-2 to the plaint and much thereafter the defendant was inducted therein a s a tenant at a monthly rental of Rs.400/- payable within the 10th day of the ne xt month as per English calendar. The defendant, on the other hand, comes forwar d and says that the property was actually taken in settlement by the father of t he plaintiff and the defendant and it is he who developed the land and construct ed the suit premises described in Schedule-2 and so the plaintiff cannot claim t o be the sole owner even if the sale deed was executed by the original owner. T he written statement was filed after a delay of 39 days. The defendant furnished explanation by filing an application under Section 5 of the Limitation Act. Und er such circumstances the learned trial Court was duty bound to find as to wheth er it was an appropriate case for accepting written statement beyond the expiry of statutory period. Although by an amendment of Order VIII Rule 1 of the Code o f Civil Procedure a timeframe has been fixed for filing of the written statement but in view of the preponderant judicial pronouncements holding the field by no w it is established that proviso to Order VIII Rule 1 is directory in nature and not mandatory. Power of court to accept written statement filed beyond 90 days has not in any way been taken away by the amendment made in 2002 in Order VIII R ule 1 of the CPC. This provision is a procedural one and like any other procedur al law it is also handmaid of justice. In the case of Shaikh Salim Haji Abdul Kh ayumsab vs. Kumar and others, reported in (2006) 1 SCC 46, the Hon'ble Supreme C ourt held that even at the stage of argument a trial can be said to have commenc ed and so there is no bar in accepting written statement at that stage. In the c ase of Salem Advocate Bar Association, T.N. vs. Union of India, reported in (200 5) 6 SCC 344 and in the case of Kailash vs. Nanhku and others, reported in (200 5) 4 SCC 480, the Hon'ble Supreme Court held the view that court has the power a nd jurisdiction to accept written statement beyond the period of 90 days in appr opriate cases. So, it is clear from above that even on 16.03.2009 when the learn ed trial court had refused to accept the written statement filed by the defendan t on record, the law had already been crystalised that Court has the power and j urisdiction to entertain written statement even after expiry of 90 days provided sufficient cause is made out. In an appropriate case Court can entertain writte n statement since the provision of Order VIII Rule 1 CPC is merely a procedural one. The substantive law being that in an adversarial litigation it is the duty of the Court to see the respective case of both sides and thereupon to find out the truth underlying the dispute on the basis of evidence led by the parties an d even in an extreme case by taking recourse to the provision of Section 30 of t he CPC by suo motu directing the parties or any other person to produce evidence or to produce such document, as the case may be. In the case in hand the learne d trial Court not only failed to entertain the written statement but even refuse d to consider the grounds set out to explain the delay in filing the written sta tement. What is worse is that even after giving liberty to cross-examine the wit nesses of the plaintiff, by an order passed on 23.02.2010, evidently after 2.00 P.M., the learned trial Court refused to allow cross-examination of PW 2 by the learned counsel for the defendant observing that in spite of repeated call the l earned counsel did not turn up and so the cross-examination of PW 2 is dispensed with under the provision of Order XVII Rule 2(e) of the CPC. Thus, the defendan t virtually remained out of the Court throughout the whole proceeding. He had a

case to plead and establish by filing written statement and by leading evidence and merely because his counsel did not act in the expected promptitude, as he was required to do, the defendant had to bear the brunt. The learned trial Court passed the decree of eviction under such circumstances. The plaintiff must have led evidence to show the quantum of monthly rent, the due date and the mode of payment but the trial Court judgment is not that elaborate to contain the necessary findings as to the due date and mode of payment as is required under Section 5 of the Limitation Act in view of law laid down in the case of Tushar Kanti Dey vs. Sulata Choudhury, reported in 2002 (1) GLT 51. The learned First Appellate Court being the last court of fact and law was duty bound to look into this aspect of the matter and see as to whether the jurisdictional facts as to default and bona fide requirement recorded by the learned trial Court was established or not. The learned First Appellate Court not only failed to examine this aspect of the matter, rather no point for determination as required under Order XLI Rule 31 of the CPC was framed. The learned First Appellate Court is duty bound to appreciate the evidence and to see as to whether the findings of the learned trial Court are correct and such satisfaction of the learned First Appellate Court must get manifestation in the first appellate judgment. In the case in hand the learned First Appellate Court dismissed the appeal merely holding that the learned trial Court had considered the whole aspect of the matter and arrived at the findings on the basis of the material available on record. The learned First Appellate Court did not consider ground (e) set out in the memorandum of appeal wherein the defendant had agitated his grievance against the order dated 16.03.2009 passed by the learned trial Court under Section 104 of the CPC. In an order passed by the court which is not appellable and is not challenged by way of revision or otherwise a party can challenge the same while preferring an appeal against the final judgment and decree and this is what was done by the appellant in the present case. This being the position, the learned First Appellate Court was duty bound to consider and decide as to whether order dated 16.03.2009 was correct and within jurisdiction under the facts and circumstances of the case in hand. The learned First Appellate Court did not do so and thus the impugned first appellate judgment and decree does not satisfy the test of the law laid down in Santosh Hazari (supra).

10. In view of what has been stated above, the first appellate judgment is hereby set aside and quashed and the matter is remanded back to the learned First Appellate Court to redecide the same taking into consideration the observations made herein above. The parties shall appear before the learned First Appellate Court on 18.07.2016. Registry shall transmit the records on the meantime so that appropriate order can be passed by the learned First Appellate Court on that day upon appearance of the parties.

The revision petition stands allowed. No order as to cost.