

GAHC010084182019



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

Case No. : CRP 56/2019

1:SUMAN DEVI SURANA
W/O. SRI JOHARIMAL SURANA, R/O. LOAN OFFICE LANE, DHUBRI, P.O.
DHUBRI, P.S.- DHUBRI, DIST.- DHUBRI, ASSAM.

VERSUS

1:VINOD KUMAR BHARUKA AND 2 ORS.
S/O LT. BANSHIDHAR BHARUKA, R/O. BHAGANBANI LANE, WARD NO. 12,
DHUBRI TOWN, P.O. DHUBRI, P.S.- DHUBRI, DIST.- DHUBRI, ASSAM.

2:MANOJ KUMAR BHARUKA
S/O LT. BANSHIDHAR BHARUKA
R/O. BHAGANBANI LANE
WARD NO. 12
DHUBRI TOWN
P.O. DHUBRI
P.S.- DHUBRI
DIST.- DHUBRI
ASSAM.

3:SUSHIL KUMAR BHARUKA
S/O LT. BANSHIDHAR BHARUKA
R/O. BHAGANBANI LANE
WARD NO. 12
DHUBRI TOWN
P.O. DHUBRI
P.S.- DHUBRI
DIST.- DHUBRI
ASSAM

Advocate for the Petitioner : MR G N SAHEWALLA

Advocate for the Respondent : MR S S SHARMA

BEFORE
THE HON'BLE MR JUSTICE PRASANTA KUMAR DEKA
ORDER

31.10.2019

Heard Mr. G. N. Sahewalla, learned senior counsel assisted by Ms. S. Todi, learned counsel for the petitioner. Also heard Mr. S. S. Sharma, learned senior counsel assisted by Ms. L. Sarma, learned counsel for the respondents.

1. Judgment and decree dated 01.02.2019 passed in Title Appeal No. 41/2017 by the learned court of Civil Judge, Dhubri is under challenge in this revision petition. The plaintiff/petitioner filed Title Suit No. 361/2011 in the court of learned Munsiff No. 1, Dhubri against the present respondents as the defendants. The plaintiff/petitioner is the owner of the Schedule A land and the standing structures thereon. The said land along with standing structures were purchased from one Bhubaneswar Prasad Ram vide Sale Deed No. 342 of 1985. The deceased Banshidhar Bharuka, being proprietor of M/S Mahabir Stores was the tenant of the Schedule B premises under the said Bhubaneswar Prasad Ram. Schedule B forms a part of Schedule A land. The plaintiff/petitioner informed about the said sale transaction and the subsequent change in ownership of the said land and the standing structures to the said Banshidhar Bharuka and thereafter, the said tenant attorned the plaintiff/petitioner and used to pay the monthly rent to the staff of the plaintiff/petitioner. The monthly rent was fixed at Rs. 325/- and the rent was payable on or within first week of every month. The present defendants/respondents are the legal heirs of Banshidhar Bharuka and on his death they inherited the business in the tenanted premises. Since June, 2006, the defendants/respondents failed to make payment of the rent to the plaintiff/petitioner and they are defaulters. In addition to that the plaintiff/petitioner also claimed the tenanted premises on the bonafide requirement exclusively for the use of the family.

2. On earlier occasion, the plaintiff/petitioner filed Title Suit No. 68/2007 against the

defendants/respondents for eviction and khas possession in the court of learned Munsiff No. 1, Dhubri. In the said suit, the defendants/respondents entered appearance, contested the claim by filing written statement taking the plea that there was no landlord tenant relationship between the parties to the suit. The said fact as pleaded in the plaint in the present suit was not correct inasmuch as written notice was sent to the deceased Banshidhar Bharuka informing about the sale transaction and subsequent change of ownership of the tenanted premises. Necessary notice was sent by the advocate informing default in payment of rent from June 2006 to December 2006 and the bonafide requirement etc. But due to the default on the part of the conducting counsel, Title Suit No. 68/2007 was dismissed on 26.11.2008. Thereafter, an appeal was preferred before the court of learned Civil Judge, Dhubri and the same was also dismissed on 19.08.2010. Accordingly, in the plaint of the present suit, i.e. Title Suit No. 361/2011, the plaintiff/petitioner specifically pleaded that she had abandoned the earlier claim of rent upto August, 2010. The plaintiff/petitioner through her husband contacted the defendants/respondents to clear up the rent of September, 2010 which they defaulted to comply. The defendants/respondents are defaulter since September, 2010 till the date of filing the suit and as such sought for decree of ejectment and for arrear rent @ Rs. 325/- per month from September, 2010 to July, 2011.

3. The defendants/respondents filed their written statement denying landlord tenant relationship with the plaintiff/petitioner. It is the defence that they were unaware in respect of the sale transaction and the subsequent change of the ownership of the tenanted premises. Taking the plea that since 1985, the predecessor of the defendants/respondents was occupying the Schedule B premises independently till his death and thereafter the defendants/respondents have been possessing the suit premises by right of inheritance from their predecessor Banshidhar Bharuka. There is specific denial in respect of intimation regarding the sale transaction. Further it is pleaded that the question of failing to pay rent does not arise as no tenancy existed between the plaintiff/petitioner and the predecessor of the defendants/respondents. Admitting the fact of filing earlier Title Suit No. 68/2007, it is the defence by the defendants/respondents terming the suit as fraudulent one and liable to be dismissed in respect of the claim of bonafide requirement of the tenanted premises. They took the plea that the husband of the plaintiff/petitioner was possessing his own chamber

with his son at Ward No. 6, H. N. Das Road and as such question of requirement of the premises is absolutely false. Denying the accrual of cause of action on 06.10.2010, the defendants/respondents sought for dismissal of the suit.

4. On the basis of the said pleadings, learned trial court framed the following issues:-

- “1. Whether this suit is maintainable?*
- 2. Whether the suit is barred by the principle of Res-Judicata?*
- 3. Whether there is cause of action.*
- 4. Whether the plaintiff had purchased the suit land vide sale deed no. 6342 of 1985?*
- 5. Whether the defendants are the tenants of the plaintiff?*
- 6. Whether the defendant defaulted in making payment of rent?*
- 7. Whether the plaintiff has any bonafide requirement for the suit premise?*
- 8. Whether the plaintiff is entitled to relief as claimed?*
- 9. To what other relief/reliefs the plaintiff is entitled to?”*

5. The plaintiff/petitioner adduced her evidence and exhibited some documents. On the other hand, the defendants/respondents did not adduce any evidence. After hearing the parties, the learned trial court decreed the suit.

6. The learned trial court held the suit as maintainable by holding though the plea that the suit is not maintainable under Order VIII Rule 2 of the CPC was taken by the defendant/respondents but the same could not be substantiated. While deciding the issue No. 2, learned trial court considered the stage of dismissal of the suit which was admittedly due to failure on the part of the plaintiff/petitioner to adduce evidence. Finally holding that as the order of dismissal of the suit was under order XVII Rule 3 of the CPC is not a decree as defined under Section 2(2) of CPC as there was no conclusive determination in respect of the right of the parties involved in Title Suit No. 68/2007, as such the said order is not res-judicata in the subsequent suit. The learned trial court while deciding issue No. 4 in favour of the plaintiff/petitioner took note of the registered sale deed i.e. Exhibit 1. Observing that the defendants/respondents did not cross-examine the plaintiff/petitioner and challenged the said act of purchase the learned trial court considering the oral evidence as well as the documentary evidence held that land measuring 01 Katha 06 Lechas along with standing

structures were purchased and the plaintiff/petitioner acquired title over the said land and the property. The learned trial court in issue No. 4 considered pleading of the plaintiff/petitioner and the deposition of PW-1 (plaintiff/petitioner) wherein she deposed that the defendants/respondents were possessing the Schedule property prior to her purchase, that she informed in respect of the purchase of the tenanted premises and further denied the fact that no notice was sent to Banshidhar Bharuka, predecessor in interest of the defendants/respondents. The learned trial court also considered the Exhibit 2 i.e. notice dated 29.11.1985 addressing M/S Mahabir Stores including other tenants informing that the plaintiff/petitioner purchased the schedule property from Bhubneswar Prasad Ram. Though an objection was raised that the said notice was not issued in the name of predecessor in interest of the defendants/respondents but the learned trial court took note of the Exhibit 1 i.e. sale deed wherein M/S Mahabir Stores was shown as the tenant. Considering the said piece of evidence the learned trial court came to the conclusion that the Exhibit 2 was rightly addressed which was served on the addressee in respect of the tenancy. The learned trial court considered the stand taken in the written statement and the nature of cross-examination and came to the finding that the defendants/respondents had taken dual stand inasmuch as in the cross-examination of the PW-1, there was suggestion by the defendants/respondents that they were paying rent to the plaintiff/petitioner and in the written statement it was the defence that there was no landlord tenant relationship. The learned trial court also considered Exhibit 5(6), income tax return of the predecessor of the defendants/respondents wherein it was shown rent @ Rs. 325/- per month was paid to the plaintiff/petitioner. The said Exhibit 5(6) was proved by the income tax officials and as such the court below considered the same as the relevant piece of evidence. Upon such discussion, the learned trial court came to the finding about the existence of landlord tenant relationship between the plaintiff/petitioner and the defendants/respondents.

7. The learned trial court while deciding the Issue No. 6 took note of the evidence of the plaintiff side supporting the pleadings that the defendants/respondents did not pay the monthly rent of the suit house since September 2010. It also took note of the fact that in the written statement it was admitted that the defendants/respondents did not pay the rent to the plaintiff/petitioner. But rejecting the plea that the defendants/respondents were unaware

of purchase made by the plaintiff and the fact that as such they did not tender the rent to the plaintiff/petitioner, the learned trial court held the defendants/respondents as defaulters. It is pertinent to note here that there was no evidence that the defendants/respondents made any effort in order to pay monthly rent of the suit house to the plaintiff/petitioner even during the pendency of the suit. Finally, holding that the plaintiff/petitioner had the bonafide requirement of the tenanted premises decreed the suit.

8. The defendants/respondents being aggrieved by the said judgment and decree of the learned trial court preferred Title Appeal No. 41/2017 which was allowed by the court of learned Civil Judge, Dhubri.

9. Mr. Sahewalla, learned senior counsel for the petitioner submits that the learned court below on the basis of the grounds raised before the learned appellate court framed three number of point for determination as: (1) Res-judicate, (2) Maintainability of fresh suit and (3) Non-establishment of tenant-landlord relation. The point Nos. 1 and 3 were decided in favour of the plaintiff/petitioner. The point No. 2 was decided against the plaintiff/petitioner holding that the subsequent suit after dismissal of the earlier suit, is not maintainable which Mr. Sahewalla terms as perverse. Referring to the finding therein, Mr. Sahewalla submits that in a suit under Rent Control Act every defaulted month in paying rent by the tenant gives rise to fresh cause of action to the plaintiff landlord and as such the finding of the First Appellate Court that the suit is hit under order IX Rule 8 of the CPC is absolutely perverse. In support of his contention Mr. Sahewalla relies the case laws ***K.S.Sundararaju Chettiar Vs. M. R. Ramchandra Naidu*** reported in ***(1994) 5 SCC 14*** and ***N.R.Narayan Swamy Vs. B. Francis Jagan*** reported in ***(2001) 6 SCC 473***. Accordingly, he sought for interference of the findings given by the learned First Appellate Court.

10. Mr. Sarma, learned senior counsel for the respondents on the other hand submits that the learned First Appellate Court while passing the judgement failed to conform to the provision of Order XLI Rule 31 of the CPC inasmuch as on perusal of the judgement passed nowhere, it is found that it considered the evidence on record. The First Appellate Court being the final court of facts a duty is cast upon it to look into the facts pleaded and examine

every issue framed by the learned trial court and examine the correctness of the findings given by the trial court. Having not done so, this is a fit case for remand for deciding the appeal afresh.

11. I have given due consideration to the submissions of the learned counsel. The appeal was preferred by the defendants/respondents and as required under Order XLI Rule 1 Sub-Rule 2 CPC, the appellant in the memorandum should set forth, concisely and under distinct heads, the grounds of objection to the decree appealed without any argument or narrative. The learned First Appellate Court recorded the said grounds in the judgement and thereafter, recorded the points for determination. In my considered opinion recording of points for determination is the process to record the distinct point of disagreement by the appellant against the findings of the trial court. In the present case, the learned court below framed the following points for determination:-

“1. Res-judicata.

2. Maintainability of fresh suit by the plaintiff/respondent after dismissal of the earlier suit TS No. 68/07 and

3. Non-establishment of tenant-landlord relation between the appellants/defendants and respondent/plaintiff.”

12. If we compare the said points for determination with the issues framed by the learned trial court the same covers all the issues required for determination of the real dispute between the parties. The learned court below while deciding point No. 3 considered the evidence on record of the three witnesses of the plaintiff side. It also took into consideration the exhibits produced and proved by the plaintiff/petitioner. It is also observed that the defendants/respondents did not adduce any evidence. Further it took note of the defence taken by the defendants/respondents in the written statement. Considering the said evidence, the First Appellate Court came to the finding that as the plaintiff petitioner purchased the suit land and the defendants/respondents were original tenant under the vendor (of the plaintiff/petitioner) so the plaintiff/petitioner had no tenancy agreement with the defendants/respondents or late Banshidhar Bharuka. As the Sale Deed exhibited as Exhibit 1 was proved and found that the plaintiff/petitioner purchased the suit land from Bhubaneswar

Prasad Ram along with standing structures the tenancy was also proved. In my considered opinion the said finding is proper. If we look to the provision under Section 109 of the Transfer of Property Act, 1882, though the defendants/respondents was not the tenant under Bhubaneswar Prasad Ram being the legal heirs of late Banshidhar Bharuka but the sale transaction was proper and valid, accordingly, the defendants/respondents being the legal heirs of the original tenant under Bhubaneswar Prasad Ram so they are bound by the tenancy agreement which their predecessor in interest had with the vendor of the plaintiff/petitioner.

13. Keeping in view the said finding of the learned First Appellate Court in point No. 3, I am of the view that the learned First Appellate Court complied the provision under Order XLI Rule 31 of the CPC inasmuch as while deciding the said point for determination, the learned court below took note of the facts pleaded in the plaint and considered the evidence on record and arrived at its own findings. The defendants/respondents did not adduce evidence and as such the defence raised in the written statement cannot be considered as evidence nor the defence can be used as evidence.

14. Coming back to the findings given in point No. 2, the learned First Appellate Court held that the suit was hit under provision of Order IX Rule 9 of the CPC. It would be apt to take into consideration of the ratio of the Hon'ble Apex Court in the case law of ***K S Sundaraju Chettiar Vs. M R Ramachandra Naidu*** reported in ***(1994) 5 SCC 14(supra)*** wherein it was held that the cause for eviction of a tenant by the landlord is a recurring one. If the landlord did not raise the bonafide requirement in an earlier suit, the landlord can raise it in a subsequent suit and sought for an eviction decree. In the case law of ***N.R.Narayan Swamy Vs. B. Francis Jagan*** reported in ***(2001) 6 SCC 473*** it was held that in eviction proceedings under the Rent Act the ground of bona fide requirement or non-payment of rent is a recurring cause and, therefore, the landlord is not precluded from instituting fresh proceeding.

15. The learned First Appellate Court came to the finding that the dismissal of the earlier Title Suit No. 68/2007 was under Order IX Rule 8 of the CPC, the plaintiff/petitioner ought to

have filed an application under Order IX Rule 9 of the CPC to restore the suit but as no application was preferred, the subsequent suit is a bar. In my considered opinion, this finding is wrong inasmuch as it is stipulated under Order IX Rule 9 of the CPC where a suit is wholly or partly dismissed under Order IX Rule 8 of the CPC, the plaintiff/petitioner shall be precluded from instituting a fresh suit in respect of the same **cause of action**. Admittedly, Title Suit No. 68/2007 was for eviction of the defendants/respondent on the ground of defaulter and bonafide requirement. There is a specific statement made in the plaint by the plaintiff/petitioner in the subsequent suit that she had abandoned the claim made earlier. The subsequent suit is filed as the defendants/respondents defaulted in paying the monthly rent from September, 2010 onwards on the basis of accrual of fresh **cause of action**. This is because of the reason that a monthly tenant is bound to deposit the rent at the end of the month. Any default in tendering or depositing the same within the time stipulated, that itself is a breach of the terms of the tenancy agreement giving rise to fresh **cause of action** to the landlord. For the said reason, in my considered opinion, the Hon'ble Apex Court as referred hereinabove held that in eviction proceedings under the Rent Act the ground of bona fide requirement or non-payment of rent is a recurring cause and, therefore, the landlord is not precluded from instituting fresh proceeding. Order IX Rule 9 CPC bars a subsequent suit only in respect of the same **cause of action** on the basis of which the earlier suit was filed and dismissed. But here is a case wherein the plaintiff/petitioner after abandoning the earlier claim filed the subsequent suit claiming the relief for eviction on the ground of default in payment of rent from the month of September 2010 till the date of filing the suit in the year 2011. The earlier suit was for default due to non payment of rent from June, 2006 but the subsequent one is for non payment of rent from the month of September, 2010. From the aforesaid discussion, the finding in point no. 2 by the learned First Appellate Court is liable to be set aside which I accordingly do, and the plaintiff/petitioner is entitled to the decree as passed by the learned trial court. Accordingly, this revision petition succeeds. No costs.

16. Admittedly, the defendants/respondents are carrying out their business from the tenanted premises and on a specific query to Mr. Sahewalla for allowing the defendants/respondents some time to vacate the tenanted premises, he agrees for allowing 3(three) months time. I am unable to accept the said submission of Mr. Sahewalla on the

ground that admittedly, the defendants/petitioners are running the business from the suit premises and in order to facilitate their accommodation in some other premises, in my considered view, the said three months period is not sufficient and accordingly six months time from today is granted to the defendants/ respondents to vacate the tenanted premises. However on failure on the part of the defendants/respondents to vacate the tenanted premises on expiry of the stipulated period of six months, the plaintiff/petitioner shall be at liberty to go for execution of the decree for ejectment of the defendants/ respondents by due process of law through the executing court. It is further directed that during the occupation of suit premises, the defendants/respondents shall pay the rent duly to the plaintiff/petitioner and in addition to that the defendants/respondents shall give an undertaking before the trial court that they would vacate the tenant premises on expiry of the 6(six) months period from today. The said undertaking will be given by the defendants/respondent within a period of one month from today. Accordingly, this revision petition succeeds.

17. Interim order stands vacated. No cost.

JUDGE

Comparing Assistant