

GAHC010092332009



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

Case No. : RSA/168/2009

MD. MINHAZ MANDAL and ANR

2: ABUL KALAM MONDAL

BOTH S/O LATE RAHAM MONDAL OF VILL. KATHALDHI P.O. and P.S.
BILASIPARA
DIST. DHUBRI
ASSAM

VERSUS

HAMED ALI TARAFDAR and 20 ORS
ON THE DEATH OF LATE KASAM TARAFDAR HIS LEGAL HEIRS

2:JALALUDDIN ALI TARAFDAR

3:BADSHA TARAFDAR

4:MOTIUR RAHMAN TARAFDAR

5:KHURSHED ALI TARAFDAR

6:NURUDDIN TARAFDAR

7:AMIRUDDIN TARAFDAR

8:ABDUL MONNAF TARAFDAR

9:HASEN ALI TARAFDAR

ALL SONS OF LATE KASEM TARAFDAR OF VILL. KATHALDI
P.O. and P.S. BILASIPARA
DIST. DHUBRI
ASSAM.

10:ON THE DEATH OF RAHIMUDDIN HIS LEGAL HEIRS
AHURBALA BEWA BABDUL LATIF TARAFDAR CABDUL BAREK
TARAFDAR DZAHANARA BEGUM EBASER ALI FABU KALAM
GRASHANARA BEGUM.

11:RUSTAM SK.
S/O LATE SARU SK
VILL. KATHALDI
P.O. and P.S. BILASIPARA
DIST. DHUBRI
ASSAM.

12:KACHAR ALI SK.
FATHER'S NAME NOT KNOWN TO THE APPELLANT PLAINTIFF
VILL. GOYELARCHAR 1
2
3 P.O. BILASIPARA
DIST. DHUBRI
ASSAM.

13:SETTLEMENT OFFICER

DHUBRI.

14:ASSTT. SETTLEMENT OFFICER

BILASIPARA.

15:STATE OF ASSAM REPRESENTED BY COLLECTOR

DHUBRI

For the Petitioner(s) : Mr. R. K. Jain, Sr. Advocate
For the Respondent(s) : Mr. B. Sinha, Advocate

Date of Hearing : **02.04.2024**
Date of Judgment : **02.04.2024**

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

1. This is an appeal under Section 100 challenging the judgment and decree passed by the learned First Appellate Court dated 13.04.2009 passed in Title Appeal No.79/2006 by the Civil Judge, Dhubri (for short "the First Appellate Court") whereby the appeal was allowed thereby setting aside the judgment and decree dated 30.10.2006 passed in Title Suit No.183/96 by the Court of the learned Munsiff No.2 Dhubri.

2. This Court vide an order dated 27.11.2009 had admitted the instant appeal by formulating a substantial question of law however when the instant appeal was heard, the said substantial question of law so formulated did not arise and as such this Court after hearing the parties framed an additional substantial question of law on 19.03.2024 i.e. "Whether the judgment of the learned First Appellate Court suffers from perversity for not taking into account Exhibit-6?"

3. For deciding as to whether the said additional substantial question of law is involved in the instant appeal, this Court in brief would like to take

note of the relevant facts which led to the filing of the instant appeal. One Mr. Aijuddin Poddar (since deceased) was the owner of a plot of land measuring 14 Bighas 1 Kathas 13 Lechas covered by Dag Nos. 224, 225 and 226 included in Patta No.98/17 of village Kajaikota Part-3 within Revenue Circle, Bilasipara in the District of Dhubri. The said land was most specifically described in Schedule-A to the plaint of Title Suit No.183/96.

4. During the lifetime of Late Aijuddin Poddar sold 4 Bighas of land to one Mr. Rahimuddin who is the Proforma Defendant No.1. The said land has been most specifically described in Schedule-B. After the death of Late Aijuddin Poddar, his 4 (four) sons namely Jabbar Poddar, Mazit Poddar, Abdul Haki Poddar and Mokaddas Poddar executed a registered deed of sale bearing Deed No.1776/83 dated 27.01.1983 thereby transferring 10 Bighas 1 Kathas 13 Lechas of the land in favour of the plaintiffs. The said land has been most specifically described in Schedule-C to the plaint. The plaintiffs thereupon claimed in the plaint that 4 Bighas of land out of the Schedule-C land was transferred to the Proforma Defendant Nos. 2 and 3 and possession was duly delivered. The said land has been specifically described in Schedule-D to the plaint. Therefore, on the basis of the said, the land which remained with the plaintiffs was 6 Bighas 1 Kathas 13 Lechas which the plaintiffs claimed that the plaintiffs were in possession thereof. This land measuring 6 Bighas 1 Kathas 13 Lechas was specifically described with definite boundaries in Schedule-E to the plaint. It is the case of the plaintiffs that the defendant in the last part of 1994, trespassed into the said Schedule-E land and dispossessed the plaintiffs. Under such circumstances, the suit was filed seeking declaration of right, title and interest as regards the Schedule-E land; for recovery of khas possession of the Schedule-E land;

for permanent injunction restraining the defendant from alienating, transferring the Schedule-E land to anybody or get correction of the record of rights for the Schedule-E land; a declaration that the plaintiffs are entitled to get mutation of their names in the Schedule-E land etc.

5. The suit was registered and numbered as Title Suit No.183/1996 and filed before the Court of the Munsiff at Dhubri.

6. The principal defendant contested the suit proceedings by filing written statement. Various preliminary objections were taken as regards the maintainability of the suit. It was duly admitted that Aijuddin Poddar (since deceased) was the owner of the land measuring 14 Bighas 1 Kathas 13 Lechas in Dag Nos. 224, 225 and 226, Khatian No.98 in village Kajaikata Part-3 Touji No.5 of Chaparand Koch estate and that the records were entered, entering the name of Kashem Ali showing possessor of the land measuring 4 Bighas 2 Kathas 8 Lechas in Dag No.225 and the land measuring 1 Bighas 3 Kathas 19 Lechas in Dag No.226 totalling to 6 Bighas 1 Kathas 7 Lechas out of 14 Bighas 1 Kathas 13 Lechas. It was further mentioned in the written statement that Late Aijuddin Poddar at the time of his death left behind 8 Bighas 0 Kathas 6 Lechas and out of the said land, the Proforma Defendant No.1 was possessing 4 Bighas. However, fraudulently, the sons of Late Aijuddin Poddar transferred 10 Bighas 1 Kathas 13 Lechas of land in favour of the plaintiffs although they had the right only as regards 4 Bighas 0 Kathas 6 Lechas. It was also mentioned that the name of the Defendant was recorded as tenant for 4 Bighas 2 Kathas 8 Lechas in Dag No.225 and 1 Bigha 3 Kathas 19 Lechas in Dag No.226 which was prepared in the year 1967 during the lifetime of Aijuddin Poddar. In paragraph No.16, it was

specifically mentioned that the transfer of the Schedule-C land in favour of the plaintiffs was a fraudulent Sale Deed inasmuch as the seller had no right, title or interest. The Defendant further stated that the plaintiffs acquired no right, title or interest inasmuch as the defendant had acquired right, title and interest over the land in his possession by his own right against all openly and adversely. It was also mentioned that the question of dispossession of the plaintiffs on 1994 did not arise inasmuch as the plaintiffs were never in possession of the suit land.

7. On the basis of the pleadings, as many as 6 issues were framed which included Issue No.4 as to whether the plaintiffs had any right, title and interest over the Schedule-E land and the Issue No.5 was as to whether the plaintiffs were entitled to a decree as prayed for.

8. From the records, it reveals that on behalf of the plaintiffs, 4 witnesses were examined and 6 documents were exhibited. On behalf of the principal contesting Defendant, 6 witnesses were examined and various documents from Exhibit-Ka(1) to Exhibit-Ka(5) were exhibited. The learned Trial Court vide a judgment and decree, decreed the suit in favour of the plaintiffs. In doing so, the learned Trial Court decided the Issue Nos. 4, 5 and 6 together and came to an opinion that the plaintiffs had right, title and interest over the suit land more particularly the Schedule-E land on the basis of Deed of Sale bearing Sale Deed No.1776/83 i.e. Exhibit-1. The learned Trial Court further observed that in view of Exhibit-6 which is the order of the Settlement Officer dated 04.07.1994, the Defendant's name was duly struck off from the record of rights and there was no appeal filed thereagainst. The learned Trial Court further observed that the Deed of Sale in favour of the

plaintiffs i.e. Exhibit-1 was never challenged by the defendant. In addition to that, the learned Trial Court also came to an opinion that the exhibited documents more particularly Exhibit No.11 on the basis of which the defendant claimed to be in possession was pursuant to filing of the suit. On the basis of that, the learned Trial Court decreed the suit in favour of the plaintiffs declaring that the plaintiffs have right, title and interest over the Schedule-E land; that the plaintiffs are entitled for a decree of khas possession by evicting the defendant from the Schedule-E land as well as a decree for permanent injunction restraining the defendant from alienating the Schedule-E land. The other reliefs which were claimed for were not granted vide the judgment and decree dated 30.10.2006.

9. Being aggrieved, the Defendant No.1 preferred an appeal before the learned Court of the Civil Judge, Dhubri which was registered and numbered as Title Appeal No.79/2006. The learned First Appellate Court vide a judgment and decree dated 13.04.2009 allowed the Appeal and dismissed the suit. The reasons so given by the learned First Appellate Court was solely on the basis of Exhibit-1(1) of the defendant however without taking into account that vide Exhibit-6, the Settlement Officer vide order dated 04.07.1994 had struck off the name of the defendant.

10. Being aggrieved, the instant appeal has been filed which was admitted by framing a substantial question of law on 27.11.2009. This Court vide an order dated 19.03.2024 had framed an additional substantial question of law as noted above and thereby fixing today for hearing on the said additional substantial question of law.

11. Today, when the matter was taken up, both the counsels representing

the Appellants and the Respondents duly addressed on the additional substantial question of law so framed by this Court on 19.03.2024 and the same had been given due consideration.

12. Before deciding the said additional substantial question of law so formulated, this Court finds it very pertinent to take note of the judgment of the Supreme Court in the case of ***Santosh Hazari Vs. Purushottam Tiwari*** reported in **(2001) 3 SCC 179**. A perusal of the said judgment would show that the Supreme Court had not only delineated what constitutes a substantial question of law but also opined the contours of the powers of the learned First Appellate Court and how the same were to be exercised. It was observed that a first Appeal is a valuable right of the parties and unless restricted by law, the whole appeal is open for re-hearing both on questions of fact and law. Paragraph No.15 of the said judgment being relevant is quoted hereinbelow.

“15. A perusal of the judgment of the trial court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious

application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi v. Bijendra Narain Choudhary). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See Madhusudan Das v. Narayanibai) The rule is — and it is nothing more than a rule of practice — that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh) Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned

by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one."

13. From the above quoted judgment, it would be seen that there is no quarrel with the proposition that the learned First Appellate Court would be within its powers to set aside and/or reverse the judgment and decree passed by the Trial Court. However, in doing so, the learned First Appellate Court must come into close quarters with the reasoning assigned by the learned Trial Court and then assign its own reasons for arriving at a different finding. The judgment of the learned Trial Court must therefore reflect its conscious application of mind and records finding supported by reasons.

14. In the backdrop of the above, let this Court decide as to whether the additional substantial question of law so formulated is involved in the instant appeal. A perusal of the judgment of the learned Trial Court would categorically show that the learned Trial Court based its decision on Issue Nos. 4, 5 and 6 primarily on the Deed of Sale bearing Deed No.1766/83. The learned Trial Court had duly taken note of in its judgment that the defendant

after his name was struck out from the records of right vide Exhibit-6 did not challenged the same in any other proceedings. The learned Trial Court further came to a finding that although the defendant had alleged that the sale deed i.e. Exhibit-1 was fraudulent document but there was no challenge to the said deed of sale. However, if this Court takes note of the judgment of the First Appellate Court, it would be seen that the learned First Appellate Court did not address to the reasons which were assigned by the learned Trial Court and based its decision on Exhibit-1(1) of the defendant which no longer existed in view of Exhibit-6. There was no reason assigned why Exhibit-6 was not considered. Therefore the above aspect categorically shows that the learned First Appellate Court did not take into account a vital piece of evidence which would otherwise have changed the course of the proceedings and this very aspect is a facet of perversity which is writ large in the judgment passed by the learned First Appellate Court. Accordingly, in the opinion of this Court, the substantial question of law so formulated is duly involved in the instant appeal for which the judgment of decree passed by the learned First Appellate Court dated 13.04.2009 in Title Appeal No.79/2009 is set aside and quashed and the judgment and decree dated 30.10.2006 passed in Title Suit No.183/1996 by the Court of the learned Munsiff No.2, Dhubri is restored.

15. This Court further quantifies the cost in the instant proceedings at Rs.11,000/-. In addition to that, the Plaintiffs/Appellants herein would be entitled to costs throughout the proceedings.

16. With above observations and directions, the instant Second Appeal stands disposed of.

17. The Registry is directed to forthwith return the LCR to the Court below.

JUDGE

Comparing Assistant