



THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)
PRINCIPAL SEAT AT GUWAHATI

RSA No. 219/2015

1. Mrs. Rosline Anthony @ Reshim Antony,
W/o Late Deshmond Anthony.
2. Mr. Deschamps Anthony @ Deshchamps R. Antony,
S/o Late Deshmond Anthony.
3. Miss Devon @ Desh Chast Antony,
D/o Late Deshmond Anthony.
4. Miss Descant Anthony @ David Antony (Minor),
D/o Late Deshmond Anthony.

Sl. No.4 will be represented by her mother Sl.No.1.

All are residents of village-Digirpar (Mission Road),
PO & PS-Badarpur, Dist.-Karimganj, Assam.

.....Appellants.

-Versus-

- 1.(a) Mustt. Sureha Begum,
W/o Late Abdul Hadee (Choudhury).
- 1.(b) Hashik Akram Chowdhury,
S/o Late Abdul Hadee (Choudhury).
- 1.(c) Jesmin Aktar Chowdhury,
D/o Late Abdul Hadee (Choudhury).
- 1.(d) Nurin Aktar Chowdhury,
D/o Late Abdul Hadee (Choudhury).
- 1.(e) Ahmed Akram Chowdhury,
S/o Late Abdul Hadee (Choudhury).

Sl.No.1(d) and 1(e) being minors, they are represented by their mother at
Sl.No.1(a) Sureha Begum.

2. Abdul Hussain Sodial,
S/o Abdul Musabbir Sadial.

3. Azim Uddin Sodial,
S/o Rois Uddin Sodial.

All are residents of Village-Deorail,
PO & PS-Badarpur, Dist.-Karimganj.

.....Respondents.

**BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN**

For the Appellants : Ms. R. Choudhury. Advocate.

For the Respondents : Mr. D. Mozumder, Sr. Adv.,
Mr. R. Sarma. Advocates.

Date of Hearing : 12.09.2024.

Date of Judgment : **9th December, 2024.**

JUDGMENT AND ORDER (CAV)

Heard Ms. R. Choudhury, learned counsel for the appellants and also heard Mr. D. Mozumder, learned Senior counsel assisted by Mr. R. Sarma, learned counsel for the respondents.

2. This appeal under Section 100 of the Code of Civil Procedure, 1908, is directed against the judgment and decree dated 05.08.2015 passed by the learned Civil Judge, Karimganj, in Title Appeal No.9/2015. It is to be noted here that vide impugned judgment and decree dated 05.08.2015, the learned First Appellate Court had set aside the judgment and decree

dated 02.01.2015, passed by the learned Munsiff No.1, Karimganj, in Title Suit No.143/2006, whereby the suit of the plaintiffs was dismissed.

3. The back ground facts leading to filing of the present appeal is briefly stated as under:-

"The appellants herein are the legal heirs of Deshmond Anthony and the respondents are the legal heirs of Abdul Hadee. Deshmond Anthony, the predecessor-in-interest of the appellants as defendant had entered into an agreement with Abdul Hadee, predecessor-in-interest of the respondents herein as plaintiff to sell the suit land to the plaintiff on consideration of a sum of Rs.1,50,000/- and he received an amount of Rs.1,40,000/- and executed a bainanama undertaking on 01.02.1995 to execute and register a sale deed within 31.01.1996 after obtaining permission from the concerned authority and after receiving the rest of the sale consideration. But, later on, failed to execute the sale deed and also failed to receive the amount of Rs.10,000/-, in favour of the plaintiff and thereafter, tried to alienate the suit land to other persons. The plaintiff thereafter, filed the suit for specific performance of the contract along with other reliefs.

The suit was decreed ex-parte on 28.06.1996, but later on, the ex-parte decree was set aside and the defendant was allowed to contest the suit by filing written statement. Accordingly, he had filed written statement and his projected case is that he was in good relation with the plaintiff No.1 and on his request, he arranged a job to the plaintiff and subsequently, he came to know that plaintiff No.1 left the said job. Thereafter, as per mutual arrangement, the plaintiff No.1 stood as guarantor while the defendant had purchased a truck on private finance and as per the

said arrangement, the management of the truck was with the plaintiff No.1. Later on, he came to know that plaintiff No.1 neither paid any bank installment nor able to generate profit and thereafter, the defendant entrusted the management of the said truck to his younger brother and he never executed any bainanama on 01.02.1995 and the plaintiff No.1 in collusion with the plaintiff Nos.2 and 3 for illegal gain created the said bainanama and as such, prayed to dismiss the suit with cost.

Upon the said pleadings of the parties, the learned Munsiff No.1, Karimganj, framed following issues:-

1. Is there any cause of action for the suit?
2. Whether the suit is maintainable in its present form?
3. Whether the suit is barred by limitation?
4. Whether the suit is barred by law of contract?
5. Whether the plaintiff is entitled to get a decree as prayed for?
6. To what relief/reliefs the plaintiffs are entitled.

Thereafter, hearing both the parties, the learned Munsiff No.1, Karimganj, vide judgment and decree dated 02.01.2015, decided the Issue No.1 in negative against the plaintiffs, Issue Nos.2, 3 and 4 in affirmative in favour of the defendants and negative in favour of the plaintiffs and Issue Nos.5 and 6 in negative against the plaintiffs. Thereafter, dismissed the suit.

Being aggrieved, the plaintiffs preferred an appeal, being Title Appeal No.9/2015 before the learned Civil Judge, Karimganj and thereafter, hearing both the parties, the learned Civil Judge,

Karimganj, has allowed the appeal by setting aside the impugned judgment and decree so passed by the learned Trial Court and decreed the suit.”

4. Being highly aggrieved, the appellants preferred the present appeal under Section 100 of CPC against the impugned judgment and decree dated 05.08.2015 and the same was admitted on the following substantial question of law:-

(i) Whether the learned Court below failed to appreciate the true purport of Section 101, read with Section 102 of the Evidence Act while deciding the Issue No.5 in favour of the plaintiff by decreeing the suit?

5. Ms. Choudhury, learned counsel for the appellants submits that the plaintiff had not taken step to send the Exhibit-1, the bainanama to the expert as the earlier signatures were not legible. Secondly, Ms. Choudhury submits that while the judgment and decree was challenged in the First Appellate Court, the learned First Appellate Court has set aside the ex-parte decree and remanded the matter to the learned Trial Court with a direction to send the additional material to the handwriting expert, but the plaintiff had not taken any step for sending the Exhibit-1, bainanama, for the second time. Thirdly, Ms. Choudhury submits that the bainanama, Exhibit-1 is an unilateral ex-parte agreement without the signature of the purchaser and the same is a forged document and as such, no reliance can be placed upon the same. Fourthly, Ms. Choudhury submits that the plaintiff has conducted the suit before the Trial Court poorly and the plaintiff has failed to prove his case and that the burden to prove his case is upon the plaintiff and he has failed to discharge the same and as such, the impugned judgment and decree so passed by the

learned First Appellate Court is liable to be set aside. Ms. Choudhury in support of her submission, has referred the following case laws:-

- (i) **Jagdish Prasad Patel (Dead) Through Legal Representatives & Anr. v. Shivnath & Ors.**, reported in (2019) 6 SCC 82;
- (ii) **Debajit Barthakur & Ors. v. Sarnalata Devi & Ors.**, reported in 2015 (2) GLT 604;
- (iii) **Ajit Savant Majagvai v. State of Karnataka**, reported in (1997) 7 SCC 110; and
- (iv) **O. Bharathan v. K. Sudhakaran & Anr.**, reported in (1996) 2 SCC 704.

6. On the other hand, Mr. Mozumder, learned Senior counsel for the respondents submits that though the appellants herein as defendants contested the suit by filing written statement, yet, he had not entered into witness box and as such, the statements and averments made in the written statement remained unsubstantiated and unless he entered appearance and proved the statements made in the written statement, the same cannot be taken into account in view of Order 14 Rule 1 sub-rule (2) and (3) of the CPC. Secondly, Mr. Mozumder submits that the First Appellate Court has taken recourse to Section 47 of the Evidence Act, as the defendant had failed to give his admitted signature or his contemporary signature to the plaintiff so as to send the same to the handwriting expert for opinion and as such, the plaintiff could not take any step for which the learned First Appellate Court has undertaken the recourse of Section 47 of the Evidence Act and on the basis of materials/evidence on the record, arrived at the finding that the plaintiff has succeeded in proving Exhibit-1, the bainanama. Thirdly, Mr.

Mozumder submits that the plaintiff has discharged his burden by examining himself and by examining the deed writer, who has also proved the signature of attesting witnesses and the evidence of PW-2 could not be rebutted in cross-examination and even no suggestion was put to him that he did not write the Exhibit-1. And thus, the plaintiff has discharged his burden and because of the doctrine of non-traverse, the statement and averment made in the written statement could not be taken into account and as such, the learned First Appellate Court had not committed any illegality or infirmity in decreeing the suit in favour of the respondents/plaintiffs and therefore, Mr. Mozumder submits that no substantial question of law is involved herein and therefore, it is contended to dismiss the appeal. In support of his submission, Mr. Mozumder has referred following decisions:-

- (i) **Kaushik Premkumar Mishra & Anr. v. Kanji Ravaria @ Kanji & Anr.**, reported in (2024) 0 INSC 540; and
- (ii) **Phool Rani Trivedi v. Shri Vikas Chandra**, reported in 2004 0 Supreme(Del) 325.

7. Having heard the submission of learned Advocates of both the parties, I have carefully gone through the memo of appeal and the grounds mentioned therein and also the impugned judgment and decree passed by the learned First Appellate Court and also by the learned Trial Court.

8. It appears that the learned Trial Court had held that there is no cause of action and that the case of the plaintiff was a false case and the defendant No.2 did not execute any such agreement. It also appears that the learned Trial Court while dealing with the Issue Nos.2, 3 and 4, had held that the cause of action of the instant suit has arisen on 15.09.2002, the date on which the defendant refused to attend the village Shalisha

and some other dates and the suit was filed on 11.10.2002 and that the suit is not barred by the law of limitation and thereafter, decided the Issue No.3 in affirmative in favour of the plaintiff. But, it had held that it cannot decide the suit is maintainable unless the other issues are decided in affirmative. However, no opinion in respect of Issue No.4 is rendered in the said judgment and decree and while dealing with the Issue Nos.5 and 6, the learned Trial Court has held that the plaintiff, in spite of getting sufficient opportunity had failed to send the signature of the defendant for opinion of the handwriting expert and thereafter, based upon the oral evidence and the documents submitted, the learned Trial Court arrived at the finding that the case of the plaintiff is false and he is not entitled to any relief and therefore, dismissed the suit.

9. But, it appears from the impugned judgment and decree passed by the learned First Appellate Court that the learned First Appellate Court has undertook to examine the issue on the basis of evidence on the record as per Section 47 of the Evidence Act. The learned First Appellate Court had held that since the defendant had denied execution of the Exhibit-1, the bairanama on 01.02.1995 and receipt of any part of consideration amount, it is incumbent upon the plaintiff to prove that the defendant had executed the bairanama and the signature of executant appearing in the bairanama belongs to the defendant.

10. Thereafter, the learned First Appellate Court, considering the evidence of the plaintiff as PW-1 and also considering the evidence of PW-2, arrived at a finding that execution of Exhibit – 1 stands proved. The learned First Appellate Court also found that P.W.2 is the deed writer, who proved the Exhibit-1 and also the signatures of attesting witnesses as Exhibit-1(3) and Exhibit-1(4). The learned First Appellate court has also found from the evidence of P.W.2 that the sale

consideration for the plot of land measuring 1 kedar 3 jasti was settled between the plaintiff and the defendant, fixing the sale consideration at Rs.1,50,000/- and out of the said consideration, a sum of Rs.1,40,000/- was paid to the defendant by the plaintiff in his presence and the defendant put his signature on Exhibit-1 as an executant and one Isak Ali and Ala Uddin Laskar were present and they also put their signatures and P.W.2 had exhibited the same as Exhibit-1(3) and Exhibit-1(4) and in view of the evidence of PW-1 being supported by PW-2, the execution of Exhibit-1 stands proved and it has also found that the evidence of PWs-1 and 2 are cogent, clear, consistent and corroborative and the defendant has failed to rebut the evidence of PW-2 and thereafter, arrived at a finding that Exhibit-1 is a document proved by plaintiff so as to make the contents of the documents admissible in evidence.

11. The learned First Appellate Court also held that though the Exhibit-1 did not contain the signature of the plaintiff, yet, in view of the decision of Hon'ble Supreme Court in **Aloka Bose v. Parmatma Devi & Ors.**, reported in (2009) 2 SCC 582, the contract agreement for sale can be enforced, wherein it has been held that "*a contract for sale of land signed by the vendor but not by the purchaser can be enforced*". Further, the learned First Appellate Court has found that the defendant had admitted his signature over Exhibit-1 and accordingly, the learned First Appellate Court has decreed the suit by setting aside the judgment and decree passed by the learned Trial Court. The finding so recorded by the learned First Appellate Court appears to be justified and based upon materials available on the record.

12. I have considered the submission of Ms. Choudhury, learned counsel for the appellants in the light of the facts and circumstances on the record and I find no substance in the same. It appears that the

defendant had failed to give his admitted signature so as to send the same to the handwriting expert for opinion for which, the admitted signature of the defendant could not be sent to the FSL for examination and as such, the learned First Appellate Court on the basis of the evidence on the record undertook the exercise under Section 47 of the Evidence Act and arrived at a just finding supported by sound reason. It also appears that though the defendant has denied execution of the Exhibit-1, yet, he had failed to enter into the witness box and to assert the statement and averment made in the written statement and as such, the statement and averment made in the written statement remained unsubstantiated and that being so, the case of the defendant/appellant cannot be accepted and Mr. Mozumder, learned Senior counsel for the respondents has rightly pointed it out during argument.

13. Thus, it appears that the plaintiff had discharged its burden that Exhibit-1 is executed by the defendant. Though it is contended that Exhibit-1 is a false and forged document, yet, the burden of establishing the same is always rest upon the party who substantially assert the affirmative issue and not upon the party who denies the same. Sections 101 & 102 of the Indian Evidence Act, 1872, Clearly state the same. Reference in this context can also be made to the illustration (b) of Section 102, which is read as under:

“(b) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.”

14. While dealing with burden of proof, Hon’ble Supreme Court, in the case of **Anil Rishi v. Gurbaksh Singh**, reported in (2005) 5 SCC

558 and in *Gian Chand & Brothers & Anr. v. Rattan Lal @ Rattan Singh*, reported in (2013) 2 SCC 606, has held that the burden of proving a fact rest upon the party who substantially assert the affirmative issued and not upon the party who denied the same.

15. Here in this case, the defendant has contended that the Exhibit-1 is a false and forged document and as such, the burden lies upon him to establish the same. But the defendant failed to discharge the said burden. Though he had filed written statement and taken a stand that Exhibit-1 is a forged document, yet, he had failed to enter into the witness box and state his own case.

16. It is to be noted here that in the case of *Vidhyadhar vs. Manikrao and Anr.*, reported in (1999) 3 SCC 573, Hon'ble Supreme Court has held that:

“17. Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in *Sardar Gurbakhsh Singh v. Gurdial Singh* [AIR 1927 PC 230: 32 CWN 119] . This was followed by the Lahore High Court in *Kirpa Singh v. Ajaipal Singh* [AIR 1930 Lah 1 : ILR 11 Lah 142] and the Bombay High Court in *Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh* [AIR 1931 Bom 97 : 32 Bom LR 924]. The Madhya Pradesh High Court in *Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat* [AIR 1970 MP 225 : 1970 MPLJ 586] also followed the Privy Council decision in *Sardar Gurbakhsh Singh case* [AIR 1927 PC 230 : 32 CWN 119]. The Allahabad High Court in *Arjun Singh v. Virendra Nath* [AIR 1971 All 29] held that if a party abstains from entering the witness-box, it would give rise to an adverse inference against him.

Similarly, a Division Bench of the Punjab and Haryana High Court in *Bhagwan Dass v. Bhishan Chand* [AIR 1974 P&H 7] drew a presumption under Section 114 of the Evidence Act, 1872 against a party who did not enter the witness-box.”

17. Same Principle is reiterated by Hon’ble Supreme Court in the case *Kaushik Prem Kumar (Supra)* and in the case of *Phool Rani Trivedi (Supra)*.

18. That being so, the argument so advanced by Ms. Choudhury cannot be accepted. I have gone through the decisions so, relied upon by Ms. Choudhury in the cases- (i) *Jagdish Prasad Patel (Supra)*, (ii) *Debajit Barthakur (Supra)*, (iii) *Ajit Savant Majagvai (Supra)* and (iv) *O. Bharathan (Supra)*. There is no quarrel at the bar about the proposition of law laid down therein. But, the case in hand is factually distinguishable from the cases referred by her. Therefore, the ratio laid down in these cases would not advance her argument. On the other hand, I find sufficient merit in the submission of Mr. Mozumder, learned Senior counsel for the respondents/defendants and the authorities relied upon by him also substantiated his claim.

19. In the result, I find that no substantial question of law is involved herein and even if involved, the same stands answered in negative. Accordingly, the appeal stands dismissed.

20. Send down the record of the learned courts below with a copy of this judgment and order.

21. The parties have to bear their own cost.

Sd/- Robin Phukan
JUDGE

Comparing Assistant