

GAHC010130022023



2024:GAU-AS:11708

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

CRP (I/O) No. 176/2023

Md. Shamsul Hoque,
S/o-Late Rustom Ali,
Village- Deokura, Mouza-Rupasi,
District-Barpeta, Assam.

.....Petitioner

-Versus-

1. The State of Assam
Rep. By the Deputy Collector, Barpeta,
District-Barpeta, Assam.
2. The Secretary,
To the Govt. of Assam, Health and Family
Welfare, Dispur, Assam.
3. The Deputy Collector, Barpeta,
District-Barpeta, Assam.
4. Md. Nurul Islam,
S/o-Late Sabed Ali,
Village-Deokura, P.O. Kalgachia,
District-Barpeta, Assam-781319.

.....Respondents

For Petitioner : Ms. R. Choudhury, Advocate

For Respondent(s) 1. Mr. A.R. Sikdar, Advocate, (R-4)
2. Mr. K.K. Bhattacharjee, Advocate, (R-1 to 3)

Date of judgment : 27.11.2024

**BEFORE
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA**

JUDGMENT & ORDER (CAV)

1. Heard Ms. R. Choudhury, learned counsel for the petitioner. Also heard Mr. A.R. Sikdar, learned counsel for respondent No. 4 as well as Mr. K.K. Bhattacharjee, learned Government Advocate, Assam for the remaining respondents.

2. This application under Article 227 of the Constitution of India has been filed by the petitioner, Md. Shamsul Hoque, impugning the order dated 29.04.2023, passed by learned Civil Judge, Barpeta, in the T.A. No. 02/2022, whereby the prayer of the present petitioner for examination of thumb impression of respondent No. 4 on the sale deed (Exhibit-4) by forensic experts was rejected.

3. The facts relevant for consideration of the instant revision petition, in brief, are as follows: -

- i. The petitioner, as plaintiff, had filed the Title Suit No. 31/2014 before the Court of learned Munsiff No. 1, Barpeta against Md. Nurul Islam and others praying for declaration of right, title and interest of the petitioner over schedule B land of the plaint as well as for confirmation of possession of the petitioner over the said land. The petitioner had also prayed for a permanent injunction against the defendants from entering into the suit land. The respondent Md. Nurul Islam had contested the suit by filing a written statement as well as a counter-claim, wherein, he had prayed for declaration of his right, title and interest over schedule Z-2 land which is a part of schedule Z land of the counter-claim as well as for a declaration that the registered sale deed No. 823/1985 dated 25.04.1985 is fraudulent and liable to be cancelled as well as for permanent injunction. After considering the evidence adduced by both the parties during trial the suit of the present petitioner was dismissed and the counter-claim of the respondent No. 4 was decreed. It was declared that the registered sale deed No. 823/1985 is a forged sale deed.

- ii. The petitioner had preferred an appeal against the judgment and decree passed in T.S. No. 31/2014 which has been registered as T.A. No. 02/2019 before the Court of learned Civil Judge, Barpeta.

4. After completion of the hearing in the aforesaid Title Appeal the said appeal was fixed for delivery of judgment. However, by order dated 21.12.2020, the learned Civil Judge, Barpeta passed an order that while preparing the judgment in the T.A. No. 02/2019, it was felt necessary that the signatures of the defendant No. 4 appearing in Exhibit-4 (registered sale deed No. 823/1985) are required to be sent for forensic examination for obtaining expert opinion regarding the said signatures.

5. Accordingly, specimen signatures of the respondent No. 4 were obtained and along with Exhibit-4 were sent to Forensic Laboratory, Kahilipara for expert opinion as to whether the specimen signatures and the signatures marked in Exhibit-4 are of the same person or not.

6. Later on, the expert opinion on the said signatures was received from the Forensic Laboratory, Kahilipara bearing memo No. DFS/1208/2022/254 dated 13.09.2022. It was stated in the report of the Forensic Laboratory that as the questioned signatures on the Exhibit-4 were of the year 1985, whereas, the specimen signatures

were of the year 2022, it was not possible to conduct fruitful comparison between two sets of signatures as same were not contemporaneous and therefore, no definite opinion could be formed regarding authorship of the questioned signatures.

7. The First Appellate Court thereafter observed that the appeal shall be considered on the basis of the evidence on record as per settled principles of law and fixed the appeal for further hearing on 04.03.2023.

8. Thereafter, the present petitioner filed an application under Order XXVI Rule 10A and Order XLI Rule 27 1(b) and Section 151 of the Code of Civil Procedure, 1908 for allowing the petitioner to examine forensic expert, who submitted the report dated 13.09.2022 regarding forensic examination of the signatures appearing in Exhibit-4. The petitioner also prayed for a direction to send the thumb impression appearing on Exhibit-4 and to compare the same with the thumb impression of the respondent No. 4. However, by the order dated 29.04.2023, which has been impugned in this revision petition, the First Appellate Court allowed the examination of the expert on his report dated 13.09.2022 bearing memo No. DFS/1208/2022/254 dated 13.09.2022. However, it rejected the prayer for examination of thumb impression appearing on Exhibit-4 as prayed for by the petitioner.

9. The learned counsel for the petitioner has submitted that the First Appellate Court had erred in rejecting the prayer for examination of thumb impression appearing on Exhibit-4 as it would have revealed the true facts as to whether the Exhibit-4 is a genuine one or forged one.

10. The learned counsel for the petitioner has also submitted that the order dated 21.12.2020, itself indicate that the next date of the appeal was fixed for taking thumb impression of respondent No. 4 and hence, by not allowing the petitioner's prayer for examination of thumb impression of respondent No. 4 would amount to denial of justice to him.

11. The learned counsel for the petitioner has also submitted that the Appellate Court also failed to take into consideration that under the provisions of Order XXVI Rule 10(3) of the Code of Civil Procedure, 1908, the Court is empowered to direct further enquiry if it is not satisfied with the report of the commissioner.

12. The learned counsel for the petitioner has also submitted that the purpose of every trial is the discovery of truth involved in the matter and in order to bring on record the relevant facts or material which may help the Court to find out the truth, the Courts have to take active role instead of remaining as a mere umpire between the contesting parties.

13. In support of her submission, the learned counsel for the petitioner has cited a ruling of a co-ordinate bench of this Court in the case of *Imran Hussain Vs. Monnaf Ali and Others* reported in *(2022) 1 Gau LR 71*, wherein the Court refused to interfere with the impugned order of the First Appellate Court, whereby, the Appellate Court had allowed the examination of thumb impression of the original defendant in the sale deed which was under challenge in the said case.

14. On the other hand, Mr. A.R. Sikdar, learned counsel for the respondent No. 4 has submitted that the First Appellate Court has rightly rejected the prayer for examination of thumb impression appearing on the Exhibit-4 as the prayer for examination of thumb impression appearing on Exhibit-4 was never made by the petitioner during the trial or before the First Appellate Court *suo moto* passed the order dated 21.12.2020, at the time of preparing the judgment in the T.A. No. 02/2019, for examination of the signatures of the defendant No. 4 appearing in the Exhibit-4.

15. The learned counsel for the respondent No. 4 has also submitted that the thumb impressions, the prayer for whose examination has been made by the respondent in his petition, was never exhibited by the plaintiff.

16. I have considered the submissions made by learned counsel for both the sides and have perused the materials available on record.

17. On perusal of the impugned order, it appears that the petitioner, by filing the Petition No. 309/2023, under Order XXVI Rule 10 A and under Order XLI Rule 27(1)(b) of the Code of Civil Procedure, 1908, made prayer for examination of the expert of the Forensic Laboratory, who submitted the report dated 13.09.2022, regarding the signatures appearing on the Exhibit-4. The petitioner also sought for a direction to send the thumb impressions of the respondent No.4 to Forensic Laboratory for comparison with the thumb impressions appearing on the Exhibit-4. By the impugned order dated 29.04.2023, though, the learned Civil Judge, Barpeta allowed the prayer for examination of the expert on the report regarding examination of the signatures appearing on Exhibit-4. However, the learned Civil Judge rejected the prayer for forensic examination of the thumb impression appearing on the Exhibit-4 on the ground that the said thumb impressions were never exhibited during the trial nor its authenticity or genuineness was specifically challenged during the trial.

18. Order 41 Rule 27 of the Code of Civil Procedure, 1908 provides as follows-

"27. Production of additional evidence in Appellate Court. -

(1)The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a)the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

¹(aa)[the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b)the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

19. Thus, it appears that under the provision of the Code of Civil Procedure, 1908 only under three contingencies an Appellate Court may allow production of additional evidence at the appellate stage. Those three contingencies are enumerated in (a), (aa), (b) of Clause (1) of Order 41 Rule 27 of the Code of Civil Procedure, 1908.

20. In the instant case, it is not the case of the petitioner that any prayer for forensic examination and thumb impression was made before the Trial Court and that it had refused to admit the evidence which ought to have been admitted. Hence, the case does not fall within clause (a) of Order 41 Rule 27 (1) of the Code of Civil Procedure, 1908. Similarly, the petitioner has not put up a case that that the additional evidence which is sought to be adduced was not within his knowledge or that in spite of exercising due diligence it could not be produced during the trial stage, hence his case does not fall within clause (aa) of the aforesaid provision.

21. In the instant case, it is the First Appellate Court which exercised its *suo moto* powers under Order 41 Rule 27 (1) (b) of the Code of Civil Procedure, 1908, for examination of signatures appearing on the Exhibit-4, which it felt necessary while preparing the judgment. Accordingly, said examination was also done. The Appellate Court has also allowed the examination of expert who has submitted the forensic report to the Court, on the prayer of the petitioner himself.

22. Under Order 41 Rule 27 (1) (b) of the Code of Civil Procedure, 1908 there are two exigencies under which an appellate court may allow production of additional evidence, namely, (a) the appellate court requires production of such additional evidence to enable it to pronounce judgement or (b) for any other substantial cause.

23. The “requirement”, under Order 41 Rule 27 (1) (b) of the Code of Civil Procedure, 1908, must be of the court and not of the parties. It is for the court to come to the conclusion that unless additional evidence is adduced, it may not pronounce the judgement. However, in the instant case, by the order dated 09/01/2023 passed in T.A. No. 02/2019, the court of learned Civil Judge, Barpeta as observed that appeal shall be considered on the basis of evidence available on record as per settled principles of law. Thus, it appears that the first appellate court does not require forensic examination of the thumb impressions appearing in the Exhibit-4 to enable it to pronounce the judgement.

24. The second contingency under Order 41 Rule 27 (1) (b) of the Code of Civil Procedure, 1908, under which an appellate court may allow production of additional evidence is for “any other substantial cause”. In the instant case, no such “any other substantial cause” could be shown by the petitioner except for pleading that the petitioner also made oral prayer before the appellate court, at the time of sending the specimen signatures to the Forensic Laboratory, to also send thumb impression of the defendant No. 4 for forensic examination. Another reason shown in the petitioner in his application praying for sending the thumb impression for forensic examination was that the respondent No. 4 may deliberately alter his specimen signatures. The cause shown by the petitioner for

praying for forensic examination of the thumb impression appearing in Exhibit-4 appears to be speculative and same cannot be regarded as substantial cause justifying production of additional evidence at the appellate stage.

25. Though the quest for truth is ultimate goal of every trial, however, the materials which may reveal the truth in a civil proceeding have to be brought on record within the bounds of statutorily defined procedural law. In a civil proceeding, which is basically adversarial in nature, a litigant is expected to be diligent in pursuing his cause as per laid down procedures. The production of additional evidence at the appellate stage is allowed only under exceptional circumstances, that too only within the parameters of the provisions of Rule 27 of Order 41 of the Code of Civil Procedure, 1908.

26. The facts in the case of *Imran Hussain Vs. Monnaf Ali and Others* (supra), cited by learned counsel for the petitioner in support of her submission, are distinguishable from the facts of the instant case. In the said case, there was a statement made by the petitioner that their earlier engaged counsel did not take steps for making a prayer before the Trial Court to send the thumb impression for examination in spite of specific request made by him to do so. However, in the instant case, that is not the case. Here the petitioner has relied on the fact that in order dated 21.12.2020,

the learned Civil Judge, Barpeta had fixed next date of the case for specimen thumb impression. If we peruse the order dated 21.12.2020, passed in T.A. No. 02/2019, it appears that in the said order, the Court of learned Civil Judge, Barpeta has categorically stated that for arriving into a just decision and for removing all ambiguities, additional evidence in form of expert opinion in respect of the signature of defendant No. 4, Nurul Islam, appearing in Exhibit-4, after comparing the same with his specimen signature is felt necessary and therefore, in exercise of powers under Order 41 Rule 27 of the Code of Civil Procedure, 1908, an order was made for examination of signatures of Nurul Islam in Exhibit-4. Nowhere in the said order, there is any mention regarding examination of thumb impression appearing in Exhibit-4, though in the last line of the said order, it is mentioned that the next date is fixed for specimen thumb impression on 21.01.2021. The mention about thumb impression, in the order dated 21.12.2020 appears to be an inadvertent typographical error in the said order. This Court is of opinion that without allowing any examination of thumb impression by the Appellate Court in the order dated 21.12.2020 and only mere mentioning that the next date is for specimen thumb impression would not mean that the Appellate Court had felt the requirement of the examination of the thumb impression to enable it to pronounce judgment. No other substantial cause has been shown by the

petitioner in his petition No. 309/23 filed before the first appellate court.

27. The power of superintendence under Article 227 of the Constitution of India is to be exercised most sparingly and only in appropriate cases, to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. The instant case does not appear to be a case where there is unjustifiable refusal to exercise jurisdiction vested in the First Appellate Court. More so, when there is a categorical observation made by the appellate court, in order dated 09/01/23, that the appeal shall be decided on the basis of the evidence on record as per the settled principles of law.

28. For the reasons discussed in the foregoing paragraphs, this court is of considered opinion that this is not a fit case for interfering with the impugned order by invoking the supervisory jurisdiction of this court under article 227 of the Constitution of India.

29. This revision petition is accordingly dismissed.

30. The interim stay on further proceeding of the Title Appeal No. 02 /2019, granted earlier by this court, is hereby vacated. Both the parties shall appear before the court of learned Civil Judge, Barpeta on a date to be notified by it.

31. Parties shall bear their own cost.

32. Registry is directed to send a copy of this order to the Court of learned Civil Judge, Barpeta.

JUDGE

Comparing Assistant