

GAHC010152002006



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

Case No. : RSA/151/2006

ON THE DEATH OF KAMALESWAR DEB HIS LEGAL HEIRS AND ORS
NAMELY-

S/O LATE KAMLESWAR DEB. DEB, VILL - NALUA, PO-JALALNAGAR, PS
and DIST - KARIMGANJ, PRESENTLY RESIDING AT SETTLEMENT ROAD,
KARIMGANJ TOWN, WARD NO.1, PO-SETTLEMENT ROAD, PS, DIST -
KARIMGANJ.

2: 2. SMT. PUSHPA DEVI

W/O LATE KALIPRASANNA DEB.

3: 3. SMT. PINAKI DEB

D/O LATE KALIPRASANNA DEB.

4: 4. SMT. PAMPI DEB

D/O LATE KALIPRASANNA DEB.

5: 5. RINKU DEB

S/O LATE KALIPRASANNA DEB. SERIAL NO.2 TO 5 ARE RESIDENTS OF
VILL-NALUA
PO-JALALNAGAR
PS and DIST-KARIMGANJ
PRESENTLY RRESIDING AT VILL-NIVIA BAZAR
PO-NIVIA BAZAR
PS-RATABARI
DIST - KARIMGANJ

VERSUS

ON THE DEATH OF KALYANBRATA DEB HIS LEGAL HEIRS AND ORS
NAMESLY-

1.1:SRI KANAI LAL DEB
S/O LATE KALYANBRATA DEBDEB
VILL - NALUA KAMALPUR
PO-JALALNAGAR T.E.
and DIST- KARIMGANJ
ASSAM PIN 788712

1.2:SRI KORNOLAL DEB
S/O LATE KALYANBRATA DEBDEB
VILL - NALUA KAMALPUR
PO-JALALNAGAR T.E.
and DIST- KARIMGANJ
ASSAM PIN 788712

1.3:SRI KRIPAMAY DEB
S/O LATE KALYANBRATA DEBDEB
VILL - NALUA KAMALPUR
PO-JALALNAGAR T.E.
and DIST- KARIMGANJ
ASSAM PIN 788712

1.4:SRI KOSHOR DEB
S/O LATE KALYANBRATA DEBDEB
VILL - NALUA KAMALPUR
PO-JALALNAGAR T.E.
and DIST- KARIMGANJ
ASSAM PIN 788712

1.5:SMTI KANCHAN DEB
D/O LATE KALYANBRATA DEBDEB
VILL - NALUA KAMALPUR
PO-JALALNAGAR T.E.
and DIST- KARIMGANJ
ASSAM PIN 788712

1.6:SMTI KAJOL DEB
D/O LATE KALYANBRATA DEBDEB
VILL - NALUA KAMALPUR
PO-JALALNAGAR T.E.
and DIST- KARIMGANJ
ASSAM PIN 788712

2:ON THE DEATH OF KETAKI DEB

HIS LEGAL HEIRS -
S/O LATE KULENDRA CH. DEB
VILL - NALUA
PO-JALALNAGAR
PS and DIST - KARIMGANJ.

2.1:SMTI. SABITA RANI DEB
VILL - NALUA
PO-JALALNAGAR
PS and DIST - KARIMGANJ.

2.2:KINKAR DEB
VILL - NALUA
PO-JALALNAGAR
PS and DIST - KARIMGANJ.

2.3:KRISHNA DEB
VILL - NALUA
PO-JALALNAGAR
PS and DIST - KARIMGANJ.

2.4:KAPIL DEB
VILL - NALUA
PO-JALALNAGAR
PS and DIST - KARIMGANJ.

2.5:SMTI. SAMPA RANI DEB
VILL - NALUA
PO-JALALNAGAR
PS and DIST - KARIMGANJ.

3:ON THE DEATH OF LAXMI RANI DHAR HER LEGAL HEIRS
NAMELY-

3.1:SMTI SHYAMALI DHAR
D/O. LATE LAXMI RANI DHAR
W/O. BIJOY DHAR
R/O. KALINAGAR
P.O. KALINAGAR PART (II)
DIST. HAILAKANDI
ASSAM
PIN- 788801

3.2:SMTI AMITA DHAR
D/O. LATE LAXMI RANI DHAR
W/O. BIDYUT DHAR
R/O. KALINAGAR
P.O. KALINAGAR PART (II)

DIST. HAILAKANDI
ASSAM
PIN- 788801

3.3:SRI ANJAN DHAR
S/O. LATE LAXMI RANI DHAR AND LATE AKHIL CHANDR DHAR
R/O. P.O. MALUA
DIST. KARIMGANJ
PIN- 788806

3.4:SRI ANUP DHAR
S/O. LATE LAXMI RANI DHAR AND LATE AKHIL CHANDR DHAR
R/O. P.O. MALUA
DIST. KARIMGANJ
PIN- 788806

3.5:AMIYO DHAR
S/O. LATE LAXMI RANI DHAR AND LATE AKHIL CHANDR DHAR
R/O. P.O. MALUA
DIST. KARIMGANJ
PIN- 788806

4:ONE THE DEATH OF RADHA RANI DEY
HER LEGAL HEIRS
NAMELY

4.1:SRI SUNIL CHANDRA DEY
S/O RADHA RANI DEY

RO VILLAGE NALUA KAMALPUR
PO JALALNAGAR T.E.
DISTRICT KARIMGANJ
ASSAM
PIN 788712

4.2:SRI SITUL CHANDRA DEY
S/O RADHA RANI DEY

RO VILLAGE NALUA KAMALPUR
PO JALALNAGAR T.E.
DISTRICT KARIMGANJ
ASSAM
PIN 788712

4.3:SRI ATUL CHANDRA DEY
S/O RADHA RANI DEY

RO VILLAGE NALUA KAMALPUR

PO JALALNAGAR T.E.
DISTRICT KARIMGANJ
ASSAM
PIN 788712

4.4:SMTI SUMA RANI DEY
D/O RADHA RANI DEY

RO VILLAGE NALUA KAMALPUR
PO JALALNAGAR T.E.
DISTRICT KARIMGANJ
ASSAM
PIN 788712

4.5:SMTI RABOTI RANI DHAR
W/O KARUNA SINDHU DHAR

R/O KALINAGAR
PO KALINAGAR (KATAKHAL)
DIST HAILAKANDI
PIN 788801

5:5. STATE OF ASSAM

NOTICE TO BE SERVED ON DEPUTY COMMISSIONER
KARIMGANJ AS COLLECTOR OF THE DISTRICT
PO and PS-KARIMGANJ
DIST - KARIMGANJ

For the Petitioner(s) : Mr. A. C. Sharma, Sr.Advocate
: Mr. G. Bharadwaj, Advocate

For the Respondent(s) : Mr. B. Chakraborty, Advocate
: Mr. S. K. Medhi, Advocate
: Mr. K. Bhattacharjee, Advocate

Date of Hearing : 14.03.2024

Date of Judgment : 14.03.2024

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORAL)

1. This Court vide an order dated 22.09.2006 had admitted the instant second appeal by formulating the three substantial question of law which are reproduced hereinunder:

“(1) Whether the learned Lower Appellate Court was justified in holding that the plaintiff No.1 had no possession just because the plaintiff No.1 acquired a separate property of his own at Karimganj Town when the plaintiffs/appellants were being Co-owners in respect of their ancestral properties, the suit land?

(2) Whether the finding of the learned Lower Appellate Court that the plaintiffs/appellants were not in possession was contrary to the law when the plaintiffs/appellants and defendants being brothers and the law being that all co-owners are presumed to be in possession even though some may be elsewhere?

(3) Whether the learned Lower Appellate Court was legally justified in holding that the self acquired property having not been included in the suit property for partition, the suit itself was not maintainable?”

2. For deciding as to whether the said substantial questions of law arises in the instant appeal, this Court finds it relevant to take note of the facts of the instant case infra.

3. The predecessor-in-interest of the appellants [1(a), 1(b) and 1(c)] along with the Appellant Nos. 2, 3, 4 and 5 had filed a suit being Title Suit No.223/2000 seeking declaration of 1/6th of the scheduled property and for perpetual injunction. It appears from a perusal of the plaint that one Kulendra Chandra Deb (since deceased) was the predecessor-in-interest of the plaintiffs, the principal defendant No.1 and the proforma defendant Nos. 2 to 4. During his lifetime, he purchased the scheduled property as described in the plaint. The

plaintiff No.1 on the basis of the above, claimed $1/6^{\text{th}}$ right of the said property to the similar extent the plaintiff Nos. 2 to 5 who are the successor-in-interest of another son of Late Kulendra Chandra Deb have sought for declaration of their right and partition to the extent of $1/6^{\text{th}}$ share of the scheduled property.

4. Pursuant to the filing of the suit, the defendant No.1 filed a written statement wherein various preliminary objections were taken. In the said written statement, it was duly admitted that the plaintiff No.1, the defendants as well as the predecessor-in-interest of the plaintiff Nos. 2 to 5 are the Class-I heirs of Late Kulendra Chandra Deb. It was the specific stand taken that during the life time of Late Kulendra Chandra Deb, there was an oral partition and the plaintiff No.1 was duly given his share. It was the specific case of the defendant No.1 that the plaintiffs had no right over the schedule property described in the plaint as they had already pursuant to the oral partition have received their due share.

5. On the basis of the above pleadings, 5 (five) issues were framed which included the issues as to whether the plaintiffs have right, title and interest and possession over the suit land and whether the suit property is an ejmali property of the plaintiffs and the defendants. The learned Trial Court vide judgment and decree dated 10.10.2002 while deciding the Issue Nos. 3 and 5 came to an opinion that the suit property was an ejmali property between the parties and they have right, title and interest and possession over the same. On the basis of the above, it was decreed that the Plaintiff No.1 was entitled to $1/6^{\text{th}}$ share of the property; the Plaintiff Nos. 2 to 5 are jointly entitled to $1/6^{\text{th}}$ share of the suit property; the Defendant No.1 and the Proforma Defendant No.2 are entitled to $1/6^{\text{th}}$ share of each over the suit property. The preliminary decree was

directed to be prepared. Being aggrieved, the Defendant No.1 preferred an appeal before the Court of the District Judge, Karimganj which was registered as Title Appeal No.5/2005. The said appeal was allowed by setting aside the judgment and decree dated 10.10.2002 passed in Title Suit No.223/2000.

6. Being aggrieved by the said judgment and decree passed by the First Appellate Court, the instant appeal has been filed under Section 100 of the Code which have been duly admitted by formulating the substantial questions of law which have already been quoted hereinabove.

7. I have heard Mr. A. C. Sharma, the learned Senior counsel assisted by Mr. G. Bharadwaj, the learned counsel appearing on behalf of the Appellants and Mr. B. Chakraborty, the learned counsel appearing on behalf of the Respondent No.1, Mr. S. K. Medhi, the learned counsel appearing on behalf of the other Private Respondents. I have also heard Mr. K. Bhattacharjee, the learned Government Advocate appearing on behalf of the Respondent No.5.

8. The Supreme Court in the case of ***Santosh Hazari Vs. Purushottam Tiwari*** reported in ***(2001) 3 SCC 179*** categorically observed the role of the First Appellate Court while deciding an appeal against a judgment and decree passed by the learned Trial Court. In paragraph No.15 of the said judgment, it was observed that the Appellate Court has jurisdiction to reverse or affirm the findings of the Trial court. The first appeal being a valuable right of the parties and unless restricted by law, the whole case is therefore open for rehearing both on question 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. It was categorically observed that 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. It was also observed that the said did not mean that when an appeal lies on facts, the Appellate Court is not competent to reverse a finding of facts 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. Secondly, it was also observed that 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. Paragraph No.15 of the said judgment being relevant is reproduced hereinunder:

“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 Choudhary⁸). 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."

9. In the backdrop of the above law, let this Court take into account the judgment passed by the First Appellate Court. The facts already narrated hereinabove would show that the Plaintiff No.1, the predecessor-in-interest of the Plaintiff Nos.2 to 5, the Defendant No.1 and the predecessor-in-interest of the Defendant Nos. 2 to 4 were Class-I heirs of Late Kulendra Chandra Deb. The suit property herein admittedly belonged to Late Kulendra Chandra Deb. On the basis thereof, the Plaintiffs sought for partition to the extent of their share. It is seen that only the Defendant No.1 filed the written statement who alleged that during the lifetime of Late Kulendra Chandra Deb, there was an amicable oral partition and the suit property fell into the share of the said defendant No.1. On the basis of the evidence adduced, while deciding Issue Nos. 3 and 5, the learned Trial Court came to a categorical finding that there was no partition and the plaintiffs as well as the Defendant Nos.1 to 4 had right, title and interest and possession over the same. In this regard, this Court finds it relevant to take note of the impugned judgment of the learned First Appellate Court which was passed contrary to the above law and further it shows that it was passed ignoring the mandate of Order XLI Rule 31 of the Code.

10. Be that as it may, a perusal of the judgment impugned herein would show that there is not a single whisper in the said judgment of the learned First

Appellate Court that there was an oral partition during the lifetime of Late Kulendra Chandra Deb. Now let this Court further take note of another very vital aspect of the matter which touches on the substantial questions of law which were formulated. The three substantial questions of law are interlinked. It is well settled principle of law that the possession by a co-owner of a property is always deemed to be the possession of all the owners unless the co-owners specifically pleads and proves adverse possession. There is nothing on record to show that the Defendant No.1's possession of the suit property was adverse to his co-owners. Under such circumstances, the question whether the plaintiffs were in possession or not had no relevance. However, the said aspect was made the basis by the learned First Appellate Court for setting aside the judgment and decree passed by the learned Trial court.

11. In that view of the matter, this Court is of the opinion that the substantial questions of law so framed by this Court are duly involved in the instant appeal for which the appeal stands allowed by setting aside and quashing the impugned judgment and decree dated 15.07.2006 passed by the learned District Judge Karimganj in Title Appeal No.05/2005. This Court further restores the judgment and decree dated 10.10.2002 passed by the learned Civil Judge, (Junior Division) No.3, Karimganj in Title suit No.223/2000.

12. With above observations and directions, the instant appeal stands disposed of.

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

JUDGE

Comparing Assistant