

GAHC010224982014



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

Linked Case : **RSA/114/2013**

ILLA BARTHAKUR CHOUDHURY and 5 ORS.
W/O LT. FANINDRA NATH CHOUDHURY

2: SHRABANA CHOUDHURY
S/O LT. FANINDRA NATH CHOUDHURY

3: PRANAMI CHOUDHURY
S/O LT. FANINDRA NATH CHOUDHURY

4: HARISHIKESH CHOUDHURY

S/O LT. FANINDRA NATH CHOUDHURY
ALL ARE RESIDENT OF NALBARI TOWN
WARD NO. 11
MOUZA KHATA
P.S. and DIST. NALBARI
ASSAM.

5: JNANENDRA NATH CHOUDHURY
S/O LT. NAGENDRA NATH CHOUDHURY

6: NARENDRA NATH CHOUDHURY
S/O LATE NAGENDRA NATH CHOUDHURY
BOTH ARE RESIDENT OF NALBARI TOWN
WARD NO. 11
MOUZA KHATA
P.S. and DIST. NALBARI
ASSAM.

VERSUS

SOROJINI BHATTACHARJYA and 7 ORS.
W/O LATE GIRIJA NANDA BHATTACHARYA

2:PARAMANANDA BHATTACHARJYA

S/O LATE GIRIJA NANDA BHATTACHARYA

3:BIBHABA NANDA BHATTACHARJYA

S/O LATE GIRIJA NANDA BHATTACHARYA

4:BIBEKA NANDA BHATTACHARJYA

S/O LATE GIRIJA NANDA BHATTACHARYA

5:BIBEKA NANDA BHATTACHARJYA

S/O LATE GIRIJA NANDA BHATTACHARJYA

6:NIGAMA NANDA BHATTACHARJYA

S/O LATE GIRIJA NANDA BHATTACHARJYA

ALL ARE RESIDENT OF VILL. JOYMANGALA AZARA

DIST. NALBARI

ASSAM

PIN

7:SARADA CHOUDHURY

W/O LT. NRIPENDRA NATH CHOUDHURY

8:DIPANKI CHOUDHURY

S/O LT. NRIPENDRA NATH CHOUDHURY

9:SMT. BANASHRI CHOUDHURY

S/O LT. NRIPENDRA NATH CHOUDHURY

NO. 6/7 ARE MINOR THEREFORE THEY ARE IN CUSTODY AND CARE OF
MOTHER SRI SARADA CHOUDHURY

ALL ARE RESIDENT OF MALIKUCHI

MOUZA KHATA

P.S. and DIST. NALBARI

ASSAM.

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the appellants : Shri B. C. Das, Senior Advocate.
Shri B. Kaushik, Advocate.

Advocates for the respondents : Shri G. Sahewalla, Senior Advocate.
Ms. K. Bhattacharyya, Advocate.

Date of hearing : **25.06.2024**

Date of Judgment : **25.06.2024**

JUDGMENT & ORDER

The instant appeal has been preferred under Section 100 of the Code of Civil Procedure challenging a judgment and decree dated 26.02.2013 passed by the learned District Judge, Nalbari in TS No. 08/2005. The First Appellate Court, vide the impugned judgment has affirmed the judgment and decree dated 30.03.2007 passed by the learned Civil Judge, Nalbari. The appellants were the defendants in the suit which was instituted for declaration of right, title, interest and recovery of possession.

2. This Court vide order dated 02.08.2013 had framed the following substantial questions of law:-

“(1) Whether the learned courts below erred in law in decreeing the suit of the plaintiffs although the defendants have antecedent title over the suit land by way inheritance?”

“(2) Whether the learned courts below erred in law in declaring right, title and interest of the plaintiff and for eviction of the defendants as trespasser without specifying the share of all the legal heirs of Ramananda Bhattacharjya?”

3. I have heard Shri B. C. Das, learned Senior Counsel assisted by Shri B. Kaushik, learned counsel for the appellants. I have also heard Shri G. N. Sahewalla, learned Senior Counsel assisted by Ms. K. Bhattacharyya, learned counsel for the respondents.

4. Shri Das, the learned Senior Counsel has submitted that the impugned judgment of the First Appellate Court which has affirmed the judgment of the Trial Court has not taken into consideration the materials which were discernible from the pleadings. It is submitted that the suit property was a plot of land

measuring 1 Bigha out of which 2 Katha was purchased by the predecessor-in-interest of the plaintiffs namely, Girijananda and 3 katha was purchased by one Ramananda, who was the father of Girijananda. It is submitted that the defendants are also the legal heirs of Ramananda and therefore both the Trial Court and the First Appellate Court had erred in decreeing the entire suit land in favour of the plaintiffs without going into the aspect of the share of the defendants at least on the portion of 3 katha which was purchased by Ramananda. The learned Senior Counsel has drawn the attention of this Court to the pleadings made in paragraph 7 of the plaint to contend that the aforesaid aspect was admitted by the plaintiffs that Ramananda had owned 3 kathas of land which is a part of the suit land. It is also submitted that though the learned Trial Court as well as the First Appellate Court had decreed the suit, this aspect has been overlooked. It is submitted that when a clear case is made out by the pleadings, it was incumbent upon the learned Courts to formulate an issue and decide the same. He submits that by the said inaction, the appellants cannot be precluded from raising this point which would clearly form one of the issues between the parties. It is submitted that when admittedly there is a dispute on a certain factual position, an issue is required to be framed and in the interest of justice, this Court being an Appellate Court can go into that aspect. The learned Senior Counsel for the appellants has submitted that even otherwise, the issue being apparently discernible from the reading of the pleadings, the matter can be remanded back to the First Appellate Court to decide the same on the aspect as to whether the decree could have been passed in view of the fact that the defendants were the legal heirs of Ramananda.

5. The learned Senior Counsel for the appellants has relied upon the following case laws:-

- i. (1972) 4 SCC 165 [**The State of Rajasthan Vs Rao Raja Kalyan Singh**]
- ii. (2001) 3 SCC 179 [**Santosh Hazari Vs Purushottam Tiwari**]
- iii. (2014) 2 SCC 269 [**Union of India & Ors. Vs Vasavi Co-op. Housing Society Ltd. Ors.**]
- iv. 1979 0 AIR (Gau) 10 [**Commissioner of Taxes Vs Golak Nath Kakati & Anr.**]

6. The case of **Rao Raja** (supra) has been cited in support of the contention that even if an issue is not specific but covers a plea, the same may be taken into consideration. Reliance upon the case of **Santosh Hajari** (supra) is on the aspect of framing the substantial question of law by striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity. The case of **Vasavi Co-op** (supra) is on the aspect that the plaintiff is required to stand on his own footing and not of the weakness of the defendant and further that the records of right do not confer any title over a plot of land. In the case of **Golak Nath Kakati** (supra) this High Court had relied upon the case of **Rao Raja** (supra).

7. *Per contra*, Shri Sahewalla, the learned Senior Counsel for the respondents has submitted that issues are formulated based on the pleadings of the respective parties. By drawing the attention of the Court to the written statement of the defendants in the suit, more specifically the pleadings made in paragraph 16 thereof, the learned Senior Counsel has submitted that the plea of defence of the defendants was of adverse possession. It is submitted that the specific pleading was that the plaintiffs have not disclosed dispossession or

discontinuation of possession or any break of possession by the defendants and they have perfected their title through adverse possession. It is submitted that the plea of defence of adverse possession was taken into account and accordingly issue nos. 7 & 8 were formulated and answered in favour of the plaintiffs and against the defendants.

8. The learned Senior Counsel for the respondents has submitted that though it is correct that in the plaint, more particularly in paragraph 7 thereof there is an admission of the relationship, that admission has nothing to do with the claim of the plaintiffs *vis-à-vis* the defence taken by the defendants in the written statement.

9. The learned Senior Counsel for the respondents has submitted that a second Appellate Court cannot go into the aspect of a new case altogether and there cannot be any re-appreciation of evidence. It is also submitted that this Court in exercise of jurisdiction under Section 100 of the Code of Civil Procedure cannot go beyond the pleaded case of the parties. He further submits that, in fact no substantial question of law is involved in this appeal which ought to be dismissed.

10. In support of his submission, the learned Senior Counsel for the respondents has relied upon the following decisions:-

(i) AIR 1961 SC 1097 [Raruha Singh Vs Achal Singh]

(ii) (2008) 17 SCC 491 [Bachhaj Nahar Vs Nilima Mandal & Anr.]

11. In the case of ***Raruha Singh*** (supra) the Hon'ble Supreme Court has laid down that the Appellate Court should not make out a new case which was not pleaded by the parties and a High Court in a second appeal should not attempt

to re-appreciate the evidence. In the case of **Bachhaj Nahar** (supra) the Hon'ble Supreme Court while discussing the powers under Section 100 of the CPC has laid down as follows:

“10. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensues by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are:

(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.

(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.

11. The Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfilment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation should not be a ground to flout the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions.”

12. In his rejoinder, Shri Das, the learned Senior Counsel for the appellants has submitted that if the facts and circumstances require, in the interest of justice a new question of law can be raised and adjudicated even at a second appellate stage. In support, he has cited the decision of the Hon'ble Supreme Court reported in **(2010) 2 SCC 407** in the case of **Mohammad Laiquiddin**

& Anr. Vs Kamala Devi Misra (Dead) By LRS & Ors.

13. The rival submissions have been duly considered and the materials placed before this Court, including the LCRs have been carefully perused.

14. The learned Trial Court had formulated 10 numbers of issues and those relevant for the purpose of adjudication of this appeal are Issue Nos. 7 & 8 which are extracted herein below:-

”7. Whether the plaintiffs have right, title and interest over the land and house described in Schedule 'Ka' of the plaint?

8. Whether the plaintiffs are entitled to recover 'khas' possession of the land and house described in Schedule 'Kha' of the plaint?”

15. The primary contention advanced on behalf of the appellants is that so far as a portion of the suit land is concerned namely, 3 katha, they also claimed to be the legal heirs of Ramananda and therefore entitled to a part thereof. The appellants have also sought the support of the pleadings made in paragraph 7 of the plaint wherein the relationship has been admitted. The claim made in this appeal is that the aforesaid aspect was not even gone into by both the Courts and therefore, it is a fit case wherein remand may be made in the interest of justice. The pleadings which are relied upon by the appellants, namely, those made in paragraph 7 of the plaint discloses that the plaintiffs had indeed admitted that the defendants are the relatives and legal heirs of Ramananda. However, it is to be seen whether such statement would amount to an admission *vis-a-vis* the point involved in the *lis*. The suit was instituted for declaration of right, title and interest and recovery of possession. It is specifically pleaded that while 2 katha of the suit land was purchased by the father Girijananda which the plaintiffs have inherited, the rest 3 katha though

purchased by Ramananda has devolved on his son Girijananda and thereafter upon the plaintiffs. It is submitted that nowhere in the written statement any plea was taken by the defendants that they are entitled to a share of the suit land on the basis of being relatives of Ramananda. Rather, as noted above in paragraph 16 of the written statement, there is a definite and clear assertion that the defendants had taken the plea of adverse possession.

16. The learned Courts below had answered the aforesaid point through Issue Nos. 7 & 8 and had come to a finding that the defence projected by the defendants of adverse possession could not be proved and therefore the suit was decreed in favour of the plaintiffs.

17. This Court, in exercise of the powers conferred under Section 100 of the CPC would not make a roving enquiry into the aspect of re-appreciation of evidence and it is only on availability of any substantial questions of law which would be answered. The Hon'ble Supreme Court in the case of **Panchugopal Barua v. Umesh Chandra Goswami** reported in **(1997) 4 SCC 713** has been held as follows:

“7. A bare look at Section 100 CPC shows that the jurisdiction of the High Court to entertain a second appeal after the 1976 amendment is confined only to such appeals as involve a substantial question of law, specifically set out in the memorandum of appeal and formulated by the High Court. Of course, the proviso to the section shows that nothing shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if the court is satisfied that the case involves such a question. The proviso presupposes that the court shall indicate in its order the substantial question of law which it proposes to decide even if such substantial question of law was not earlier

formulated by it. The existence of a "substantial question of law" is thus, the sine qua non for the exercise of the jurisdiction under the amended provisions of Section 100 CPC."

18. Keeping in view the aforesaid settled principle on exercise of powers under Section 100 of CPC, the application of the case laws presented by the parties may be examined. The case of **Rao Raja** (supra) itself states that the question which was raised was purely on a legal point of maintainability. It further appears from paragraph 3 of the judgment that the High Court was the First Appellate Court. In the case of **Golak Nath Kakati** (supra), the point was similarly on the aspect of maintainability and that plea was allowed to be taken.

19. The case of **Vasavi Co-op.** (supra) is on the aspect that the plaintiff is required to prove his own case and not depend on the weakness of the defendants and further that a jamabandi or any records of right would not confer any title over the land. There is absolutely no dispute with the aforesaid proposition. However, in the instant case, it is seen that it is not on the weakness of the defendants that the suit was projected or argued but the pleaded case of the defendants was a defence of adverse possession. The issue of jamabandi was only to demonstrate the aspect of possession and the title had devolved upon the plaintiffs by inheritance. In the case of **Mohammad Laiquiddin** (supra) on the aspect of a new question of law that may be raised in a second appeal, in paragraph 18 thereof it has been clarified that the issue involved has to be one which is a pure question of law. In the instant case, the issues framed and answered are based on the rival pleadings and the decision arrived at appears to be on the basis of the materials before the Courts including the evidence.

20. In the considered opinion of this Court, the present is not a fit case for exercising jurisdiction under Section 100 of the CPC.

21. Appeal is accordingly dismissed. The substantial questions of law accordingly stand answered in favour of the respondents and against the appellants.

22. Send back the records.

JUDGE

Comparing Assistant