



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

RSA No. 185/2013

On the death of Hemendra Das, his legal heirs-

- 1(a). Smt. Cinu Das,
W/o Late Hemendra Das.
- 1(b). Shri Padum Das,
S/o Late Hemendra Das.
- 1(c). Shri Swapan Das,
S/o Late Hemendra Das.
- 1(d). Shri Utpal Das,
S/o Late Hemendra Das.
- 1(e). Shri Jitumoni Das,
S/o Late Hemendra Das.
2. Shri Raj Kumar Das,
S/o Late Raj Kanta Das.
3. Smt. Deva Mani Das,
W/o Late Naren Das.

All are residents of Dakhin Haiborgaon,
Mouza-Town, PS-Sadar (Nagaon),
Dist.-Nagaon.

.....Appellants.

-Versus-

1. Smt. Niramai Das @ Miramai Das,
D/o Late Dhaneswar Das.
2. Smt. Minu Das @ Monu Das,
D/o Late Dhaneswar Das.
3. Smt. Rebati Das,

D/o Late Dhaneswar Das.

All are residents of Dakhin Haiborgaon, Lakhinath Bezbaruah Path,
Mouza-Town, PS-Sadar (Nagaon),
Dist.-Nagaon, Assam.

.....Respondents.

4. Shri Dinesh Das,
S/o Late Naren Das.

5. Smt. Parvati Das,
D/o Late Naren Das.

6. Smt. Maramree Das,
D/o Late Naren Das.

Sl. Nos.4 to 6 are residents of Dakhin Haiborgaon,
Mouza-Town, PS-Sadar (Nagaon),
Dist.-Nagaon, Assam.

.....Proforma Respondents.

BEFORE

HON'BLE MR. JUSTICE ROBIN PHUKAN

For the Appellants : Mr. S.R. Gogoi,
Mr. C. Sarma. Advocates.

For the Respondents : Mr. S.P. Choudhury. Advocate.

Date of Hearing : 10.09.2024

Date of Judgment : **22.11.2024**

JUDGMENT AND ORDER

Heard Mr. S.R. Gogoi, learned counsel for the appellants and also heard Mr. S.P. Choudhury, learned counsel for the respondents.

2. In this appeal, under Section 100 of the Code of Civil Procedure, 1908, the appellants have challenged the correctness or otherwise of the impugned judgment and decree dated 03.04.2013 passed by the learned Civil Judge, Nagaon, hereinafter the First Appellate Court, in Title Appeal No.29/2011. It is to be noted here that vide impugned judgment and decree dated 03.04.2013, the learned First Appellate Court had upheld and affirmed the judgment and decree dated 25.07.2011, passed by the learned Munsiff No.1, Nagaon, in Title Suit No.106/2006.

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

“The respondents as plaintiffs have instituted a civil suit, being Title Suit No.106/2006 for declaration of right, title, interest and recovery of khas possession of the suit land, measuring 2 katha 12 lecha, out of 1/3rd portion of the total land measuring 1 bigha 2 katha 16 lecha covered by Dag No.874 and Periodic Patta No.394 of Nagaon Town. It is alleged that while the plaintiffs were at Kaki, in connection with some agricultural purposes, the defendants taking the advantage of their absence, had encroached upon the suit land on 01.03.1979, and constructed one house. Being aware of the same, the plaintiffs filed a suit against the defendants, which was decreed ex-parte in favour of the plaintiffs and the possession of the suit land delivered to the plaintiffs in execution of the decree in Title Execution Case No.5/1981, and since then the plaintiffs

were in possession of the suit land. On 04.10.1996, the defendants again encroached the land of the plaintiffs and when they raised objection, the defendants assured them to deliver vacant possession of the suit land, but they failed to do the same. Then on 10.08.2003, the defendants denied right, title of the plaintiffs. Hence, the plaintiffs instituted the suit with the prayers, mentioned hereinabove.

On receipt of summons, the defendant Nos.1, 3 and 5 appeared before the Trial Court and submitted their written statement stating that the suit is not maintainable, no cause of action arose and the suit is barred by limitation and adverse possession and bad for non-joinder of necessary parties. Their case was that the predecessor-in-interest of the plaintiffs, in need of money, sold 2 katha of land out of the suit land in favour of the predecessor-in-interest of the main defendant Nos.1 and 3, namely, Phuleswari Kaibartani on 02.03.1954, at consideration of Rs.200/-, by a registered sale deed and delivered possession and since then she is in possession of the suit land and after her death, the suit land devolved on the present main defendant Nos.1, 2 and 3 and the plaintiffs were never in possession of the suit land. It is also stated that the main defendant No.2 had sold 13 lechas of land from the 2 katha of land in favour of the main defendant No.5 and in rest 1 katha 7 lecha of land, the defendant Nos.1, 2 and 3 have their possession and the plaintiffs have no right, title and interest over the same. Another stand they have taken in their written statement is that against the order of ex-parte passed in Title Suit No.75/1979, they have preferred an appeal, wherein ex-parte decree was set aside and the suit was remanded back to the

Trial Court for a fresh trial and during trial the plaintiffs remained absent and the suit was dismissed for default and therefore, no suit has been filed by the plaintiffs and therefore, no decree in the name of the plaintiffs stands in the instant suit. The said material fact was suppressed by the plaintiffs and therefore, it is contended to dismiss the same.

Upon the aforesaid pleadings, the learned Trial Court had framed following issues:-

1. Whether there is any cause of action for the suit?
2. Whether the suit is maintainable in the present form?
3. Whether the plaintiff has right, title and interest over the suit land?
4. Whether Smt. Phuleswari, the predecessor-in-interest of the defendants, had purchased the suit land from Dharmeswar Das, the predecessor-in-interest of the plaintiffs, as alleged by the defendants?
5. Whether the plaintiff is entitled to a decree as prayed for?
6. To what relief/reliefs the parties are entitled to?

Thereafter, considering the evidence and the documents, so exhibited during trial, the learned Trial Court had decreed the suit in favour of the plaintiffs.

Being aggrieved, the defendants had preferred by the First Appeal, being Title Appeal No.29/2011 and thereafter, hearing both the parties, the learned First Appellate Court vide impugned judgment and decree dated 03.04.2013, had affirmed the

judgment and decree dated 25.07.2011, passed by the learned Munsiff No.1, Nagaon, in Title Suit No.106/2006."

4. Being aggrieved, the appellants approached this Court by filing the present appeal, which was admitted on the following substantial question of law:-

(i) Whether the Title Suit No.106/2006 is maintainable, in view of the provisions contained in Order 9 Rule 9 of the CPC, as the earlier suit, being Title Suit No.75/1979 was dismissed for default, in other words, whether for the same cause of action a fresh suit is maintainable when the earlier suit was dismissed for default?

5. Mr. Gogoi, learned counsel for the appellants submits that before the learned Trial Court, the respondents herein as defendants, had not exhibited any document to substantiate their right, title and interest. Mr. Gogoi, further submits that the Title Suit No.106/2006 is not maintainable in view of the provisions contained in Order 9 Rule 9 of the CPC as the earlier suit, being Title Suit No.75/1979, was dismissed for default. Mr. Gogoi, submits that the ex-parte decree passed in Title Suit No.75/1979 was set aside in Title Appeal No.28/1981 by the learned Assistant District Judge No.2, Nowgong, and remanded the matter to the Court of learned Munsiff, Nowgong, for trial and during pendency of the said title suit, before the Court of learned Munsiff, the plaintiffs remained absent and the suit was dismissed under Order 9 Rule 8 of the CPC and after a gap of many years and suppressing the aforementioned facts, the plaintiffs filed the Title Suit No.106/2006 against the principal defendant Nos.1, 2, 3, 4 and 5.

5.1 Mr. Gogoi, also submits that the plaintiffs have not executed any title document of the suit land in their evidence, though they have exhibited one jamabandi in the year 1957-58, the name of Phuleswari Kaibarta, predecessor-in-interest of the defendant Nos.1, 2 and 3 is there as pattadar of the suit, at Sl.No.5 and that the plaintiffs had failed to exhibit any sale deed, which is a title document to prove their title of the suit land and in absence of any document of title being exhibited, the finding, so recorded by the courts below are perverse. In support of his submission, Mr. Gogoi has referred to a decision of Hon'ble Supreme Court in the case of **Suraj Bhan & Ors. v. Financial Commissioner & Ors.**, reported in (2007) 6 SCC 186.

5.2 Mr. Gogoi, also submits that Exhibit-6 is a draft jamabandi for the year 1957-58, of the land covering the Periodic Patta No.255(new)/362(old) and in Sl.No.6, the name of the predecessor-in-interest of the defendants/appellants i.e. Phuleswari Kaibarta is written as pattadar and in the Periodic Patta No.394(new) in Sl.No.3, the predecessor-in-interest of the defendants/appellants i.e. Phuleswari Kaibarta is written as pattadar. Again in Exhibit-9 (jamabandi) also, the name of Phuleswari Kaibarta is written as pattadar at Sl.No.9 and that when the plaintiffs come for a declaration of their title and it is their burden to establish the title in affirmative and they cannot take advantage of the weakness of the case of the defendants. In support of his submission, Mr. Gogoi has referred to a decision of this Court in **R.K. Madhuryyajit & Anr. v. Takhellambam Abung Singh & Anr.**, reported in MANU/GH/0298/2001.

5.3 Mr. Gogoi, further submits that the evidence of PW-4, the Junior Assistant Record Keeper of the office of the District Magistrate also indicates that the name of Phuleswari Kaibarta was written as pattadar in

the suit land. Further, Mr. Gogoi has pointed out that the plaintiffs have prayed for declaration of right, title and interest over a plot of land measuring 2 katha 12 lecha, but the learned Trial Court had decreed the suit for 2 katha 16 lecha and that the finding so recorded by the learned Courts below are perverse as it was not supported by any evidence on record and therefore, Mr. Gogoi has contended to allow the appeal by setting aside the impugned judgment and decree.

6. Per contra, Mr. Choudhury, learned counsel for the respondents submits that there is concurrent finding of fact by both the learned courts below and in second appeal the said facts cannot be re-appreciated again. Mr. Choudhury, further submits that no substantial question of law is involved here in this appeal and that the cause of action in the subsequent suit i.e. Title Suit No.106/2006 is different from the cause of action of the Title Suit No.75/1979 and as such, the bar of Order 9 Rule 9 of the CPC cannot come into play and therefore, Mr. Choudhury has contended to dismiss the appeal. In support of his submission, Mr. Choudhury has referred two decisions of Hon'ble Supreme Court, one in **Amiya Bala Dutta & Ors. v. Mukud Adhikari & Ors.**, reported in **(2011) 11 SCC 628** and in **Nazir Mohamed v. J. Kamala & Ors.**, reported in **(2020) 19 SCC 57**.

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 perused the impugned judgment and decree passed by the learned First Appellate Court and also by the learned Munsiff No.1, i.e. the Trial Court and also gone through the decisions referred by learned Advocates of both the parties.

8. Before directing a discussion to the substantial question of law involved herein, this Court deem it appropriate to peruse the Order 9 Rule 9 CPC. Order 9 Rule 9 bars a fresh suit, which read as under:-

Decree against plaintiff by default bars fresh suit.-

(1) Where a suit is wholly or partly dis-missed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

9. Again, Order 9 Rule 8 CPC provides that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

10. In the case in hand, admittedly, before institution of the Title Suit No.106/2006, the plaintiff has instituted another suit, being Title Suit No.75/1979, wherein an ex-parte decree was passed. Thereafter, in Title Appeal No.28/1981, the learned Assistant District Judge has set aside the ex-parte decree and remanded the original Title Suit No.75/1979 to the

Court of learned Munsiff for trial. And during trial of Title Suit No.75/1979, on one day, the plaintiff remained absent and the defendant was present and the suit was dismissed under Order 9 Rule 8 of the CPC. However, on an application filed by the plaintiffs, the suit was restored and continued. Then again on a subsequent date, the plaintiff remained absent and the defendant was present and the suit was again dismissed under Order 9 Rule 8 of the CPC and since then, he did not file any suit against the defendant, but after a gap of many years by suppressing the abovementioned facts, the plaintiff filed the Title Suit No.106/2006 against the principal defendant Nos.1—5.

11. These facts are not disputed by the respondents' side. But, Mr. Choudhury, learned counsel for the respondents has pointed out that in Title Suit No.106/2006, the cause of action is different and as such, the bar of Order 9 Rule 9 CPC will not come to play here in this case.

12. In order to appreciate the submission of Mr. Choudhury, learned counsel for the respondents, I have gone through the plaint of both the cases i.e. Title Suit No.75/1979 and Title Suit No.106/2006 and also the judgment and decrees passed in Title Suit No.75/1979 and Title Suit No.106/2006.

13. It appears that in Title Suit No. 106/2006, the cause of action arose on 10.08.2003, on which the defendants had denied to vacate possession of the suit land comprising of 1/3 portion of total land, measuring 01 bigha, 02 katha 16 lessa, covered by periodic patta No. 394 and Dag No. 874., which the defendants had encroached on 04.10.1996.

14. And in the Title Suit No. 75/1979, the cause of action arose on 01.03.1973, wherein ex-parte judgment and decree was passed on 25.02.1981, and thereafter, in Title Execution Case No. 05/1981, the suit

land was handed over to plaintiff on 10.09.1981. And this fact is apparent from the receipt Exhibit-1, in Title Suit No. 106/2006. Though subsequently, the decree was set aside in Title Appeal No.28/1981, vide judgment, dated 11.01.1983, the land in question was in possession of the plaintiff, as the same was handed over to the plaintiffs in Title Execution Case No. 05/1981, on 10.09.1981 and since then it was in their possession.

15. Though in the written statement the defendants had taken a stand that while the ex-parte judgment and decree dated 25.02.1981, was put to execution, in Title Execution Case No. 05/1981, the same was partially executed, yet, the defendants had never entered in the witness box to establish the same and on such count the stand remains unsubstantiated. It is well settled in catena of decisions of Hon'ble Supreme Court that 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. Reference in this context can be made to a decision in **Vidhyadhar v. Manikrao**, reported in (1999) 3 SCC 573.

16. Thus, I find substance in the submission of Mr. Choudhury, learned counsel for the respondents. It appears that the cause of action in both the suits are different and as such, to the considered opinion of this Court, the bar of Order 9 Rule 9 of the CPC does not come into play here in this case and as such, no substantial question of law is involved herein.

17. Mr. Gogoi, learned counsel for the appellants has raised some other points also at the time of argument such as the judgments and decrees so passed by the learned Trial Court as well as First Appellate Court suffers from perversity, yet no substantial question of law was framed on such count. Besides, having gone through the record, I find

that such point involves discussion of facts and there is a concurrent finding of facts by both the learned courts below. And as there is concurrent finding of facts by both the learned courts below, this Court is not entitled to re-appreciate the same again, in view of the bar of Section 100 CPC and the concurrent finding of facts are binding upon this Court in view of the decision of Hon'ble Supreme Court in the case of **Commissioner, Hindu Religious & Charitable Endowments v. P. Shanmugama**, reported in (2005) 9 SCC 232, wherein Hon'ble Supreme Court has held that the High Court has no jurisdiction in second appeal to interfere with the finding of facts.

18. Again, the Hon'ble Supreme Court in the case of **State of Kerala v. Mohd. Kunhi**, reported in (2005) 10 SCC 139, has reiterated the same principle that the High Court is not justified in interfering with the concurrent findings of fact. This Court observed that, in doing so, the High Court has gone beyond the scope of Section 100 of the Code of Civil Procedure.

19. Thereafter, in the case of **Harjeet Singh v. Amrik Singh**, reported in (2005) 12 SCC 270, Hon'ble Supreme Court with anguish has mentioned that the High Court has no jurisdiction to interfere with the findings of fact arrived at by the first appellate court. In this case, the findings of the trial court and the lower appellate court regarding readiness and willingness to perform their part of contract was set aside by the High Court in its jurisdiction under Section 100 C.P.C. This Court, while setting aside the judgment of the High Court, observed that the High Court was not justified in interfering with the concurrent findings of fact arrived at by the courts below.

20. And also in the case of **Narayanan Rajendran & Anr. vs. Lekshmy Sarojini & Ors.**, reported in (2009) 5 SCC 264, referring to the observation made by the Judicial Committee of the Privy Council in

1890, it is stated that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be and they added a note of warning that no Court in India has power to add to, or enlarge, the grounds specified in Section 100 of the Code of Civil Procedure. Thereafter, referring to various decisions of Privy Council and also of Hon'ble Supreme Court, it has been observed at paragraph No.63 of the said decision that the analysis of cases decided by the Privy Council and this Court prior to 1976 clearly indicates the scope of interference under Section 100 CPC by this Court. Even prior to amendment, the consistent position has been that the Courts should not interfere with the concurrent findings of facts.

21. Thereafter, again in paragraph No.65 of *Narayanan Rajendran (supra)*, it has been observed as under:-

“65. The fact that, in a series of cases, this court was compelled to interfere was because the true legislative intent and scope of Section 100 C.P.C. have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly misappreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross misappreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be administered in accordance with law.”

22. I have considered the submission of Mr. Gogoi had also gone through the decisions referred by Mr. Gogoi, the learned counsel for the appellants and I find that the ratio laid down in those cases are not

applicable in all force to the facts herein this case. To dispose of the present appeal, reference to all those decisions is found to be not necessary.

23. In the result, I find no merit in this appeal and accordingly, the same stands dismissed. Send down the record of the courts below with a copy of this judgment and order. The parties have to bear their own cost.

J U D G E

Comparing Assistant