

GAHC010210882015



2024:GAU-AS:11841

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

Case No. : RSA/71/2015

ON THE DEATH OF JHARNA DAS @ JHUNU DAS HER LEGAL HEIR BAPPI
RANJAN DAS (SON)
S/O BALARUM DAS, R/O VILL. BILASIPARA, ANANDHANAGAR, KRISHNA
NAGAR, WARD NO. 14, BILASIPARA TOWN, P.O. BILASIPARA, DIST.
DHUBRI, ASSAM.

VERSUS

SANJIB BARMAN and ANR
S/O JUGEN BARMAN

2:RANJIT BARMAN

S/O JUGEN BARMAN
BOTH ARE R/O ANANDHANAGAR
KRISHNA NAGAR WARD NO. 14
BILASIPARA TOWN
P.O. BILASIPARA
DIST. DHUBRI
ASSAM

Advocate for the appellant	: Mr. J. Ahmed.
Advocate for the respondents	: Mr. A.C. Sharma, Senior Advocate, Mr. G. Bharadwaj.

Date of hearing	: 08.11.2024
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Date of judgment	: 27.11.2024
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**BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN**

JUDGMENT & ORDER (CAV)

Heard Mr. J. Ahmed, learned counsel for the appellant and Mr. A.C. Sharma, learned Senior counsel, assisted by Mr. G. Bharadwaj, learned counsel for the respondents.

2. This second appeal, under Section 100 of the CPC, is directed against the judgment dated 29.01.2015 and decree dated 13.02.2015, passed by the learned Civil Judge, Dhubri, in Title Appeal No. 33/2007.

3. It is to be noted here that vide impugned judgment dated 29.01.2015 and decree dated 13.02.2015, the learned Civil Judge, Dhubri had upheld the judgment and decree dated 23.05.2007, passed by the learned Munsiff No. 1, Dhubri, in Title Suit No. 313/2001.

4. The background facts, leading to filing of the present appeal, are briefly stated as under:

“That the respondents herein as plaintiffs instituted a title suit, being Title Suit No. 313/2001, against the appellant/ defendants, stating that they had purchased a plot of land measuring 5 bighas 2 kathas 11 lechas, covered by Dag No. 592/594 of Khatian No. 157, and the same had been described in Schedule-A of the plaint and thereafter, they had been possessing the same. The appellant/defendants entered into possession of a plot of land measuring 1 katha 5 lechas out of the aforesaid Schedule-A land and the said land is described in Schedule - B of the plaint. Thereafter, the respondents had requested the appellant/defendants to vacate the suit land, but the said request failed to yield any result. Being

left with no other option, the respondents/plaintiffs instituted the aforementioned title suit for declaration of right, title and interest over the suit land and for eviction of the appellant/defendants. The appellant/defendants contested the suit by filing written statement and the stand that they had taken is that they purchased the suit land in the year 1981, vide registered sale deed No. 3908, dated 16.11.1981. Their further contention was that the plaintiffs purchased the adjacent land sometime in the year 1990 and according to the appellant/defendants, the land purchased by the respondents/plaintiffs is not included in the land purchased and possessed by the appellant/defendants and therefore, it was contended to dismiss the suit.

Upon the pleadings of the parties, the learned trial Court had framed the following issues:

- (1) Is this maintainable in its present form and manner?
- (2) Is there any cause of action for this suit?
- (3) Is this suit barred by limitation?
- (4) Is this suit barred by res-judicata?
- (5) Is this suit under-valued?
- (6) Whether the plaintiffs have right, title, interest and possession over A schedule land?
- (7) Whether the plaintiffs were dispossessed from the B schedule land on 20/4/1994 by the defendants?
- (8) Whether the plaintiffs are entitled to khas possession over B schedule land by evicting the defendants therefrom and by demolishing structures?
- (9) To what relief, if any, the plaintiffs are entitled?

Thereafter, hearing both the parties, and also considering the evidence of the concerned parties, the learned trial Court, vide judgment and

decree dated 23.05.2007, decreed the suit.

Being aggrieved, the appellant/defendants preferred an appeal, being Title Appeal No. 33/2007, before the Court of learned Civil Judge, Dhubri. Thereafter, the learned Civil Judge, Dhubri had framed the following four points for determination:

- (i) Whether the learned trial Court had rightly decided the issue No. 1 wherein the learned trial Court held that the suit is maintainable?
- (ii) Whether the learned trial Court had rightly decided the issue No. 2 wherein the learned trial Court held that the plaintiff had the cause of action for the suit?
- (iii) Whether the learned trial Court had rightly decided the issue Nos. 6, 7 and 8, wherein the learned trial Court held that the plaintiffs have the right, title and interest over the suit land and that the defendants had dispossessed the plaintiffs from the suit land and are liable to be evicted from the suit land?
- (iv) Whether the learned trial Court had rightly decided the issue No. 3 wherein it is held that the suit is not barred by limitation?

Thereafter, the learned first appellate Court had decided all the points No. (i), (ii), (iii), (iv) in affirmative and thereafter, upheld the judgment and decree so passed by the learned trial Court."

5. Being highly aggrieved and dissatisfied with the impugned judgment and decree so passed by the learned first appellate Court, the appellant has preferred this appeal challenging the correctness or otherwise of the impugned judgment and decree, whereby the learned first appellate Court had affirmed the judgment and decree so passed by the learned Munsiff No. 1, Dhubri, in Title Suit No. 313/2001.

6. Thereafter, this Court was pleased to admit this appeal on the following substantial questions of law:

- 1.** Having regard to the pleaded stand of the defendants claiming title and possession over the 'B' schedule land, whether the judgment and decision of the Courts below declaring title of the plaintiffs over the suit land is vitiated by perversity and complete non application of mind?
- 2.** Whether the Courts below were justified in law in discarding the report of the Amin Commissioner on the grounds cited by the Court below?

7. Mr. Ahmed, learned counsel for the appellant submits that the learned first appellate Court, while deciding the point No. (iii) corresponding to issue Nos. 6, 7 and 8 of the judgment and decree of the learned trial Court, had committed manifest illegality and perversity as the suit land was in exclusive possession of the appellant herein and the said fact had been ignored by the learned first appellate Court as well as by the learned trial Court and while arriving at a decision in the point No. (i), the learned first appellate Court had ignored the law and facts and the learned trial Court also ignored the same and both the judgments are vitiated by perversity and as such, this Court has power to re-appreciate the evidence when appreciation of evidence suffers from material irregularities and when there is perversity in findings which are not based on any material, the court can interfere on question of facts as well. In support of his submission, Mr. Ahmed has referred to the following decisions:

(i) Balasubramanian and Anr. vs. M. Arockiasamy (dead) through legal representatives, reported in (2021) 12 SCC 529.

(ii) Ramathal vs. Maruthathal and Ors., reported in

(2018) 18 SCC 303.

7.1. Under the aforementioned facts and circumstances, Mr. Ahmed had contended to allow the appeal, alternately, Mr. Ahmed has also contended to remand the matter back to the learned first appellate Court to decide the matter afresh.

8. It is to be noted here in the case of **Balasubramanian (supra)**, Hon'ble Supreme Court has held as under:-

“14. In the background of the legal position and on reasserting the position that there is very limited scope for re-appreciating the evidence or interfering with the finding of fact rendered by the trial court and the first appellate court in a second appeal under Section 100 of the Civil Procedure Code, it is necessary for us to take note as to whether in the instant facts the High Court has breached the said settled position.”

9. In the case of **Ramathal (supra)**, Hon'ble Supreme Court has held that:-

“14. A clear reading of Sections 100 and 103 CPC envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the High Court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a second appeal is a substantial question of law involved in the case which has to be adjudicated by the High Court. It is the intention of the legislature to limit the scope of second appeal only when a substantial question of law is involved and the amendment made to Section 100 makes the

legislative intent more clear that it never wanted the High Court to be a fact-finding court. However, it is not an absolute rule that the High Court cannot interfere in a second appeal on a question of fact. Section 103 CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, the court is empowered to interfere on a question of fact as well. Unless and until there is absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact just because two views are possible; in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact.”

10. Per contra, Mr. A.C. Sharma, learned Senior counsel for the respondents has supported the impugned judgment and decree so passed by the learned first appellate Court as well as the learned trial Court. Mr. Sharma, submits that though the appellant/defendants had filed written statement in the Title Suit, yet, they had not entered into witness box and the statements and averments made in the written statement remained unsubstantiated and as such, adverse inference can be drawn against the appellants that their case is based on falsehood. In support of his submission, Mr. Sharma has referred to a decision of Hon’ble Supreme Court in the case of **Vidhyadhar vs. Manikrao and Ors.**, reported in (1999) 3 SCC 573. Mr. Sharma, further submits that there is concurrent finding of facts by both the learned Courts below and this Court while dealing with second appeal, cannot enter into the arena of facts and that only on the law point, this Court has to entertain the second appeal and no question of law is involved herein and that the decree was executed about 9

years back and nothing is left now and there is no question for remanding the matter back to the learned first appellate Court and therefore, it is contended to dismiss the appeal.

11. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the appeal and the grounds mentioned therein and also perused the impugned judgment dated 29.01.2015 and decree dated 13.02.2015, passed by the learned Civil Judge, Dhubri, in Title Appeal No. 33/2007 and the judgment and decree dated 23.05.2007, passed by the learned Munsiff No. 1, Dhubri, in Title Suit No. 313/2001, and also gone through the decisions referred by learned Advocates of both the parties.

12. Coming to the first substantial question of law, I find that the learned trial Court had found the right, title and interest over the Schedule-A land comprising of Dag No. 592/594, Khatian No. 157 and also found that the possession of 1 katha 5 lechas of land, which is described in Schedule-B, is dispossessed by the appellant herein. On arriving at such a finding, the learned trial Court had relied upon the sale deed No. 443, dated 12.04.1990 (Ext.1) and the revenue receipt (Ext.2), which were duly proved during the course of trial and on the basis of the aforesaid sale deed and also the oral evidence adduced by the plaintiffs, the learned trial Court had decided the issue No. 6 concerning right, title, possession and interest of the plaintiffs over the suit land. However, the learned trial Court had arrived at a finding that the plaintiffs were dispossessed from the Schedule-B land i.e. 1 katha 5 lechas. Coming to the issue No. 7, the learned trial Court had held that though the counsel for the appellant herein had suggested the witnesses of the respondents herein that the appellant/defendants have been possessing the suit land since 1980/1981, yet, the said averment though made in the written statement, could not be proved

by adducing any evidence. Notably, they had not filed any counterclaim and also not entered into witness box to prove the averment made in their written statement.

13. In the case of *Vidhyadhar* (supra), 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.”

14. In the case in hand also, though the counsel for the appellant herein, had

put a suggestion to the witnesses of the respondents that since 1980/1981, the appellants herein are in possession of the suit land, yet no such evidence and no documentary proof have been adduced to establish the same and he also did not enter into witness box to state his case. And as such, his contention in his written statement also remained unsubstantiated. Thus, the presumption available under Section 114(g) of the Evidence is also available against the appellant herein. This aspect has elaborately been dealt with in issue No. 8 by the learned trial Court.

15. It also appears from the judgment and decree of the learned first appellate Court that the learned first appellate Court had also endorsed the findings so recorded by the learned trial Court in respect of issue Nos. 6, 7 and 8 and found that the learned trial Court had rightly arrived at the finding, after discussion of the evidence both oral and documentary placed on record. In that view of the matter, the first substantial question of law has to be answered in negative. And accordingly, the same stands answered.

16. Now coming to the second substantial question of law, which relates to discarding of the report of the Amin Commissioner, this Court finds that the learned trial Court in its judgment and decree in issue No. 7, had dealt with the same and held that the Amin Commissioner report reveals that the defendant is possessing adjacent land of Khatian No. 117, Dag No. 782 (new) of 564/592 (old) and he found excess land in possession of the plaintiffs, but the report is silent about any encroaching by the defendant and the Amin Commissioner did not survey the land comprising Dag No. 592/594 of Khatian No. 157, instead he surveyed the land comprising Dag No. 564/592 (old) of Khatian No. 117 and since the suit land involves Dag No. 592/594 of Khatian No. 157, and from the report it cannot be ascertained about the relation between Khatian Nos. 117

and 157 and as such, it had arrived at a finding that the Amin Commissioner report cannot be accepted as he did not survey the land of Khatian No. 157.

17. The learned first appellate Court had also arrived at a finding that the learned trial Court had rightly arrived at its finding in respect of issue No. 7. The learned first appellate Court had also not accepted the Amin Commissioner's report and endorsed the finding so recorded by the learned trial Court.

18. Thus, it appears that the learned trial Court as well as the learned first appellate Court had not accepted the Amin Commissioner's report in view of its categorical admission having not surveyed the land comprising Dag No. 592/594 of Khatian No. 157, and that he surveyed the land comprising Dag No. 564/592 (old) of Khatian No. 117. The suit land involves Dag No. 592/594 of Khatian No. 157 and the report is silent about the relation between Khatian Nos. 117 and 157. That being so, the ground for discarding the Amin Commissioner's report appears to be sound and based on materials on record and the learned trial Court had assigned good and sufficient reason for discarding the same.

19. In view of the above, the second substantial question of law also has to be answered in negative and accordingly, the same stands answered.

20. Another aspect of the matter which should not eschewed consideration of this Court is that the decree, being challenged in this appeal, is already put to execution and realised fully about 9 years back, and nothing survived by now. On this count also the appeal becomes infructuous.

21. I have considered the submissions of learned Advocates of both side and in view of the discussion herein above this Court is unable to record concurrence with the submission of Mr. Ahmed, learned counsel for the appellant. It cannot be said, in view of the discussion herein above, that there is perversity in the

impugned judgments and decrees. I have also gone through the decisions referred by Mr. Ahmed.

22. In the result, I find no merit in this second appeal and accordingly, the same stands dismissed.

23. Send down the records of the learned courts below with a copy of this judgment and order.

JUDGE

Comparing Assistant