(2021) 11 GAU CK 0043

In the Gauhati High Court

Case No : Regular Second Appeal No. 224 Of 2018

Md Mobarak Hussain And Anr — APPELLANT

Vs

Md Amir Hussain And 5 Ors — RESPONDENT

Date of Decision : 23-11-2021

Acts Referred:

Constitution Of India, 1950 — Article 133(1)(a)
Code Of Civil Procedure, 1908 — Section 100, 109, 110, Order 41 Rule 11
Transfer Of Property Act, 1882 — Section 54

Citation : (2021) 11 GAU CK 0043

Hon'ble Judges : Devashis Baruah, J

Bench : Single Bench

Advocate : L K Borah, D Choudhury

Final Decision : Dismissed

Judgement

1. Heard Mr. L.K. Borah, counsel appearing on behalf of the Appellants and Mr. S.N. Krishnatraya, counsel appearing on behalf of the respondent No.1.

2. This second appeal under Section 100 of the Code of Civil Procedure, 1908 is directed against the judgment and decree dated 10/07/2019 passed in Title Appeal No. 33/2014 by the First Appellate Court, whereby the judgment and decree dated 19/11/2012 passed by the Trial Court in Title Suit No. 21/2010 was affirmed.

3. Before deciding the contentions raised by the counsels as aforementioned, it would be necessary to look into the jurisdiction of this Court in exercise of the power under Section 100 of the CPC. It is relevant herein to mention that the instant appeal arises out of a concurrent findings of facts. Section 100 of the CPC permits the High Court to exercise the jurisdiction against an appellate decree only when there arises a substantial question of law. The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the

parties. 'Substantial question of law' means not only 'substantial question of law' of general importance, but also a substantial question of law arising in a case as between the parties. In the context of Section 100 of the CPC, any question of law, which affects the final decision in a case is a 'substantial question of law' as between the parties. A question of law which arises incidentally or collaterally having no bearing in the final outcome will not be a substantial question of law. Where there is a clear and settled enunciation of a 'question of law', it cannot be said that the case involves a 'substantial question of law'. It is said that a substantial question of law arises when a question of law, which is not finally settled, arises for consideration in the case but this statement has to be understood in the correct perspective meaning thereby that where there is a clear enunciation of law and the Lower Court has followed or rigidly applied, such clear enunciation of law, obviously the case will not be considered as giving rise to a substantial question of law, even if the question of law may be one of general importance. On the other hand, if there is a clear enunciation of law, but the Lower Court had ignored or misinterpreted or misapplied the same, and correct application of the law as declared or enunciated by the Supreme Court or this Court would have led to a different decision, the appeal would involve a 'substantial question of law' as between the parties. Even where there is an enunciation of law by the Supreme Court or this Court and the same has been followed by the Lower Court and if the appellant is able to persuade this Court i.e. that the enunciated legal position needs reconsideration, alteration, modification or clarification or that there is a need to resolve an apparent conflict between two different viewpoints, it can be said that a substantial question of law arises for consideration. In that view of the matter, there cannot, therefore be a straight jacket definition as to when a substantial question of law arises in a case. It shall depend on the facts of each case along with the decision rendered by the Courts below.

4. The Supreme Court in the case of Santosh Hazari Vs. Purushottam Tiwari (Deceased) by LRs reported in (2001) 3 SCC 179 discussed what would be a substantial question of law in paragraphs 12, 13 & 14, which are quoted herein below :

"12. The phrase substantial question of law, as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying question of law, means - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with - technical, of no substance or consequence, or academic merely. However, it is clear that the Legislature has chosen not to qualify the scope of substantial question of law by suffixing the words of general importance as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta & Anr. Vs. T. Ram Ditta, AIR 1928 Privy Council 172, the phrase substantial question of law as it was employed in the last clause of the then existing Section 110 of the C.P.C. (since omitted by the Amendment Act, 1973) came up for consideration and Their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In Sir Chunilal V. Mehta & Sons Ltd. Vs. The Century Spinning and Manufacuring Co., Ltd., (1962) Supp.3 SCR 549, the Constitution Bench expressed agreement with the following view taken by a Full Bench of Madras High Court in Rimmalapudi Subba Rao Vs. Noony Veeraju, ILR 1952 Madras 264:-

..[W]hen a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative view, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest Court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:-

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

13. In Deputy Commr., Hardoi, in charge Court of Wards, Bharawan Estate Vs. Rama Krishna Narain & Ors., AIR 1953 SC 521, also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to certificate under (the then) Section 110 of the Code.

14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is

a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

5. In the backdrop of the above, taking into consideration that the instant appeal is taken up for hearing at the stage of Order XLI Rule 11 of the CPC, it would be relevant to find out as to whether the substantial question of law as urged by the counsel appearing on behalf of the appellants can at all be formulated as a substantial question of law for the purpose of adjudication of the instant appeal.

6. Mr. L.K. Borah, the counsel appearing on behalf of the appellants submits that the judgments and decrees passed by both the Courts below, though concurrent ,are vitiated in view of the fact that the Courts below did not take into consideration that for a sale to be made in respect of an immovable property as envisaged under Section 54 of the Transfer of Property Act, 1882 delivery of possession is a component which is mandatorily required and in absence of a delivery of possession, there cannot be a valid sale deed.

7. Mr. S.N. Krishnatraya, counsel appearing on behalf of the respondent No.1 submits that the proposition of law as submitted by the counsel appearing for the appellants is not at all tenable on a reading of Section 54 of the said Act of 1882.

8. To answer to the submissions made by the counsel for the parties, Section 54 of the said Act of 1882 is quoted herein below :-

"54. "Sale" defined.- ''Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.-Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for Sale.-A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property."

9. A reading of the above quoted Section would go to show that sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. Hence a sale of an immovable property has to be for a price. The price may be payable in future. It may also be partly paid and the remaining part can be made in future. The said Section further conceives of two types of immovable properties. One is tangible immovable properties and the other is intangible

immovable property. A tangible immovable property is an interest in land in possession whereas an intangible immovable property is right over the land in the possession of another which may be a future right to possession. A further perusal of the said Section would show that transfer in the case of tangible immovable property of the value of Rs.100/- and upwards or in the case of reversion or other intangible things, can only be made by a registered instrument. It means all transfer by way of sale in respect to intangible immovable property, reversion and tangible immovable property of a value of Rs. 100/- or upwards can only be done by way of a registered instrument. The said Section stipulates an exception in so far as tangible immovable property is concerned of a value less than Rs. 100/-either by way of registered instrument or delivery of possession and in that context the said Section further stipulates when a delivery of tangible immovable property takes place.

10. In view of the above, taking into consideration that a patta right is an intangible property and the requirement of a sale would be completed upon the price being paid as promised or partly paid or partly paid and made by a registered instrument. The delivery of possession has no relevance for the purpose of a sale to be completed in respect to an intangible property. Consequently the question of law so urged is not a substantial question of law for which the instant Second Appeal stands dismissed. No costs.