

(2021) 12 GAU CK 0041

In the Gauhati High Court

Case No : Regular Second Appeal No. 302 Of 2018

Md.Safir Ali And 7 Ors

APPELLANT

Vs

Md. Rahim Ali And 5 Ors

RESPONDENT

Date of Decision : 16-12-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Section 100, Order 41 Rule 2

Citation : (2021) 12 GAU CK 0041

Hon'ble Judges : Devashis Baruah, J

Bench : Single Bench

Advocate : A K Choudhury, K Kalita

Final Decision : Dismissed

Judgement

1. Heard Mr. D. Choudhury, learned counsel appearing for the appellants and Mr. I. H. S aikia, learned counsel appearing on behalf of the respondents.

2. This is an appeal under Section 100 of the Code of Civil Procedure challenging the judgment and decree dated 24.06.2014 passed by the learned Civil Judge, Nalbari in Title Appeal No.34/2013 whereby the judgment and decree dated 15.12.2012 passed by the learned Munsiff No.2, Nalbari in Title Suit No.31/2002 was upheld.

3. The learned counsel for the appellants, during the course of argument, has placed on record three substantial questions of law which the counsel urges should be formulated for the purpose of disposal of the instant appeal. Let me take the said formulations and see as to whether the said questions can at all be formulated as substantial questions of law at this stage under Order XLI Rule II of the CPC. The first question of law which was formulated by the learned counsel for the appellants is as to whether the findings of the appellate court in deciding the Issue No.5 is without consideration of the defendants' right over the Schedule-Kha land by virtue of Ext-Kha i.e. the wakf nama and whether the finding as to the plaintiffs right, title and interest over the Schedule-Kha land is

perverse to the evidence on record. For determination of the lis between the parties, it is relevant to take note of as to whether the said question of law can at all be considered to be substantial on the basis of the foundation laid in the suit.

4. The case of the plaintiffs is that vide Exts-2, 3, 4 and 8 the plaintiffs had purchased in total an area of 1 katha 16 lechas of land in Dag No.238 and on the basis thereof taking into consideration the allegation that the defendants had dispossessed the plaintiffs from the Schedule-Kha land, the suit was filed seeking declaration of the plaintiffs' right over the Schedule-Kha land, for recovery of khas possession in respect of the Schedule-Kha land and for permanent injunction. In the plaint it has been specifically mentioned at paragraph 6 that the vendor of the plaintiffs had by their wakf nama transferred 1 katha 10 lechas of land under Dag No.238 and other dags to Madhapur Hatkhala Supar Masjid Committee. The said paragraph has been denied in paragraph 7 of the written statement. Further to that, in paragraph 8, the case of the defendants is that the land under Dag No.238 and Dag No.239 wherein Morowa Bazar is situated was owned by Late Matiur Rahman and Late Matiur Rahman allowed to continue the bazaar over the said land and on the basis thereof the said Morowa Bazar is running. There is no whisper in the written statement as regards the wakf nama.

5. The learned counsel for the appellants had produced before this Court the wakf nama dated 27.09.1973 which was exhibited as Ext-Kha in the Title Suit. I have perused the schedule mentioned in the wakf nama as well as also perused the schedule mentioned in the plaint. From a perusal of the schedule mentioned in the plaint, more particularly the Schedule-Kha it goes to show that the to the north of the said land there is the land of under possession of the Masjid Committee. It is a trite principle of law that while framing the substantial question of law it has to be seen as to whether the said question of law involved in the said case has a foundation laid down in the pleadings and the question should emerge from the substantial question of fact arrived by the Courts of facts. 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. In the instant case, there is no averment in the written statement as regards the wakf nama. In fact, as already stated in paragraph 7 of the written statement, the statements pertaining to the wakf nama has been denied by the defendants. In paragraph 8, as already stated herein above, the defendants have claimed their right on the basis of being allowed to possess by one Late Matiur Raman. Further to that, there is not even a plea to that effect in the written statement that Schedule-Kha land falls within the ambit of Ext-Kha (wakf nama). Under such circumstances, the said question of law so raised to be formulated cannot, in my opinion, be a substantial question for the purpose of the instant proceedings.

6. The next question of law which was urged to be formulated was as to whether the declaration of right, title and interest of the plaintiffs over the suit land without proving the source of the title of the vendors and whether this finding is

based on no evidence and pleading.

7. I have perused the impugned judgment and decree passed by the learned First Appellate Court wherein while discussing Issue No.5 the learned First Appellate Court has duly taken note of Exts-2, 3, 4 and 8 which were the original deeds of sale produced before the trial court which was adduced as evidence by the plaintiffs in support of their claim. In the written statement filed by the defendants they have not denied the deeds of sale on the basis of which the plaintiffs have claimed their right, title and interest over the suit land. Their only statement made in the written statement was that those sale deeds are only paper transactions. I have also perused the impugned judgment and decree of the trial court dated 15.12.2012 wherein also the trial court has duly taken into consideration the relevant principles of law while appreciating the said deeds of sale.

8. At this stage, it is also relevant to take note of as to who are the defendants or the appellants before this Court. A perusal of paragraph 16 of the judgment of the trial court show that the defendants who have adduced evidence as DWs-1 and 2 have admitted that they are tenants of the Masjid Committee and they were allowed to hold the land and possess the same on the basis of the wakf nama. The Masjid Committee is not before the Court or has even challenged the legality and validity of the deeds of sale. Under such circumstances, the said question of law, which has been sought to be formulated, in my opinion, cannot be a substantial question of law for disposal in respect of the instant second appeal.

9. The 3rd question of law which was urged to be formulated as a substantial question of law is as to whether the plaintiffs could prove that the Schedule-Kha is the land which they purchased by dint of Exts-2, 3, 4 and 8. This is a finding of fact which has already been held by both the Courts below holding inter-alia that the Schedule-Kha land is the land of the plaintiffs on the basis of Exts-2, 3, 4 and

8. Further to that, it is also relevant to take note of that there is no pleadings in the written statement that the Schedule-Kha land is not the land falling within the land conveyed vide Exts-2, 3, 4 and 8. Even there is no pleading to that effect that Schedule-Kha land falls in Ext-Kha. Under such circumstances, the said question cannot be said to be a question of law to be framed as a substantial question of law for the purpose of the instant appeal.

10. In view of the above, the instant appeal stands dismissed. No costs.