

(2022) 06 GAU CK 0015

In the Gauhati High Court

Case No : Regular Second Appeal No. 88 Of 2022

Mousomi Dey And 2 Ors

APPELLANT

Vs

Shikha Dey And 27 Ors

RESPONDENT

Date of Decision : 10-06-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Section 100, 100(3), 100(4), 107, 145, 146, Order 42 Rule 1, Order 42 Rule 2, Order 41 Rule 11
Specific Relief Act, 1963 — Section 6

Citation : (2022) 06 GAU CK 0015

Hon'ble Judges : Devashis Baruah, J

Bench : Single Bench

Advocate : R C Das

Final Decision : Dismissed

Judgement

1. Heard Mr. R.C. Das, the learned counsel appearing on behalf of the appellant.
2. This is an appeal filed under Section 100 of the Code of Civil Procedure (for short the "Code") against the judgment and decree dated 11.07.2019 passed in Title Appeal No.10/2017 whereby the First Appellate Court had affirmed the judgment and decree dated 07.01.2016 passed in Title Suit No.125/2008 by the Court of the Munsiff No.2, Kamrup(M) at Guwahati, Assam.
3. The instant appeal has been taken up for consideration at the stage of Order XLI Rule 11 of the Code of Civil Procedure as the whether there arises any substantial question of law for admission of the instant appeal to be formulated. For the purpose of deciding the said aspect to the matter, it would be relevant to take note of the brief facts of the case. For the purpose of convenience, the parties before this Court are referred to in the same status as they were before the Trial Court.
4. The appellants herein as plaintiffs filed a suit seeking declaration of their right, title and interest for their respective shares; for delivery of Khas possession of

the suit land by demolishing and removing any structures constructed by the defendants; for permanent injunction against the defendant, her men, agents, servants and workers as well as restraining defendant from disturbing the peaceful possession of the Plaintiffs over the suit land and also from making any illegal construction over the suit land.

5. The case of the plaintiffs in brief is that one Asgarh Ali Dewan was the absolute owner of a plot of land measuring 1 Bigha covered by Dag No.15 of K.P. Patta No.16 of Village Jyotikuchi, Mouza Beltola, in the District of Kamrup(M), Assam. In course of time, the Patta number i.e. Patta No.16 was changed to Patta No.246, however the Dag No.15 remained the same.

6. In the year 1997, the said Asgarh Ali Dewan offered to sell the said plot of land of 1 Bigha to both the plaintiffs. Initially, the Plaintiff Nos. 1 and 2 purchased 1 Katha 5 Lecha and 1 Katha 10 Lecha respectively out of the said 1 Bigha of land by two separate registered Sale Deeds bearing No. 4759 and 4758 respectively, both dated 09.09.1997 and took over possession of the said land. Subsequent thereto, vide two more Registered Sale Deeds i.e. Sale Deed No. 6150 dated 13.11.1998 and Registered Sale Deed No.6149 dated 13.11.1998 were executed whereby the Plaintiff No.1 purchased 1 Katha and 1 Katha 5 Lecha of land from the said Asgarh Ali Dewan. Therefore, in total the Plaintiff No.1 had purchased 3 Katha 10 Lecha of land and the Plaintiff No.2 purchased 1 Katha 10 Lechas of land. The lands described in Schedule in A, B, C and D are on the basis of the Sale Deeds as would appear from a perusal of the plaint. However, relevant herein to mention cumulatively that the land mentioned in the Schedules to the plaint measures 1 Bigha. It is the further case of the plaintiffs that the plaintiffs after purchase of the land and the possession being handed over erected boundary pucca pillars and constructed the foundation of the plinth of the brickwall on all sides of the suit land and a tinchali was also constructed over the same and were in physical possession of the suit land which comprised of Schedule A, B, C and D lands. It is the case of the plaintiffs that on 12.04.2006, the defendant accompanied and assisted by gang of notorious, desperate persons trespassed into the suit land, demolished the boundary pillars and plinth of the proposed brick walls and engaged labourers and masons to erect boundary walls over the plinth that was constructed by the plaintiffs and the defendant has also erected a tinchali on the suit land. Under such circumstances, as the rights of the plaintiffs were affected by the alleged illegal trespass made by the defendant, the suit was filed seeking the reliefs as aforementioned. The said suit was registered and numbered as Title Suit No.125/2008. It may not out of place to mention that the suit was filed against one principal defendant and 28 proforma defendants.

7. The records shows that the principal defendant had filed a written statement. In the said written statement various preliminary objections were taken. Notably, were the preliminary objections that the suit was barred by limitation and the suit was bad for non-joinder and mis-joinder of necessary parties. On merits, by

denying the case of the plaintiffs, the case projected by the defendant was that one Ratan Ali Dewan (since deceased) was the owner of various plots of land. By a deed of partition, the various lands of Late Ratan Ali Dewan were mutually divided. The said deed of partition is a registered document bearing No. 3189 dated 24.07.1953. On the basis of the said registered deed of partition one Taziman Nessa (since deceased) got land measuring 62 Bighas 4 Kathas 16 Lechas covered by Patta No. 554, 152 and 46 under the then Panbari and Beltola Mouza and thereby she became the absolute owner of those properties by right, title and inheritance and got possession of the land as per the said partition.

8. The said Late Taziman Nessa expired leaving behind 3 (three) sons namely (i) Afajat Ali Choudhury, (ii) Amanat Ali Choudhury and (iii) Liaqat Ali Choudhury, who became the legal heirs, successors and absolute owners of the properties left behind by their mother. The 3 (three) sons by a registered Deed of Sale No. 2415/84 dated 28.02.1984 transferred 2 Bighas of their land to one Mr. Anup Kumar Sanyal, who became the owner of the said lands without any dispute and disturbance from any quarter. Out of the said 2 Bighas of land, Mr. Anup Kumar Sanyal transferred 1 (one) Bigha of land to one Mrs. Rani Prabha Choudhury and delivered possession of the same to her whereby she became the absolute owner of the land and was in occupation without any disturbance from any quarter. Thereafter, by a registered deed bearing Sale Deed No.2414/85 dated 04.03.1985, Mrs. Rani Prabha Choudhury, out of her 1 Bigha of land, sold 4 Kathas of land to Mrs. Shukla Chatterjee and delivered khas possession of the same whereby Mrs. Shukla Chatterjee became the absolute owner with right, title and interest. The said Mrs. Shukla Chatterjee sold 4 Kathas of land to the principal defendant by a registered Deed of Sale bearing No. 643/94 executed on 14.02.1994 and delivered possession to her. The Assistant Settlement Officer, Guwahati, by an order dated 16.06.1995 granted mutation of the land in Mutation Case No.422 in favour of the principal defendant and the revenue records also corrected accordingly in the name of principal defendant who had paid the revenue also to the Government in respect to the land. It is the further case of the principal defendant that she had developed the said plot of land by earth filling and putting boundary pillars on four corners as well as a plinth of the boundary walls alongwith an ek-chali shed constructed thereon which was assessed by the GMC Authority. It was further stated that on 12.04.2008, the plaintiffs with some hired persons tried to trespass into the said plot of land measuring 4 Kathas to dispossess the principal defendant but could not succeed in their bid at the intervention of police and other people. The police submitted a non-FIR case to the ADC (Metro) over the disputed land and the said case on transfer was taken by the learned SDM (Metro), who drew up proceeding under Sections 107/145/146 Cr.P.C. by registering a Case No. 115/2008 and the same as on the date of filing of the written statement was pending. It was further disclosed in the said written statement that Dag No.15 of KP Patta No.46 in Village Jyotikuchi contained an area of 8 Bighas 4 Kathas 4 Lechas and as per the Deed of Mutual Settlement of 1953, all the lands under the said Dag fell in the

share of Late Taziman Nessa and after her death the said land devolved to her 3 (three) sons who transferred the land measuring 2 Bighas to Sri Anup Kumar Sanyal and thereafter, out of the 2 Bighas the said Sri Anup Kumar Sanyal sold 1 Bigha to Mrs. Rani Prabha Choudhury who thereupon sold 4 Kathas of land to Mrs. Shukla Chatterjee and from the said Mrs. Shukla Chatterjee the principal defendant had purchased the land of 4 Kathas.

9. It was also mentioned in the written statement that the vendor of the plaintiffs i.e. Mr. Asgarh Ali Dewan was the son of Late Sabir Ali Dewan, who was one of the parties to the Mutual Partition Deed dated 24.07.1953 alongwith the original owner of the defendant's land i.e. Late Taziman Nessa. In terms with the said registered Partition deed, Late Sabir Ali Dewan did not receive any land in Village Jyotikuchi whereas he received 2 Kathas 18 Lechas in Patta No. 410 of Village Kumarpara, 1 Bigha 3 Kathas 12 Lechas in Patta No. 554 of Village Athgaon, both under the then Panbari Mouza, and also received 5 Bighas of land in Patta No. 115 of Village Ulubari in the said Mouza. Under such circumstances, it was specifically pleaded in the written statement that Asgarh Ali Dewan from whom the plaintiffs derived their title did not have a saleable right to the suit land.

10. On the basis of the said pleadings, as many as 6 issues were framed which were as hereinunder.

(I) Whether the suit is bad for non-joinder of necessary parties?

(ii) Whether the plaintiff have right, title, interest over the schedule properties as prayed for?

(iii) Whether the plaintiff is entitled to get delivery of khass possession as prayed for in the plaint?

(iv) Whether the plaintiff is entitled to get decree of permanent injunction as prayed for in the plaint?

(v) Whether the plaintiff is entitled to get the relief as prayed for in the plaint?

(vi) To what other relief(s) the plaintiff are entitled to?

11. On behalf of the plaintiff as many as 4 witnesses were examined and the plaintiff exhibited 14 documents. The defendant adduced the evidence of 2 witnesses and exhibited Exhibit-A to Exhibit-I. Relevant to mention herein that Exhibits 1, 2, 3 and 4 were the Sale Deed Nos. 4759, 6150, 6149 and 4758 dated 09.09.1997, 13.11.1998, 13.11.1998 and 09.09.1997 respectively. Exhibit-A is the deed of partition of the property between Sabir Ali Dewan and Taziman Nessa being Deed No. 3189 dated 24.07.1953.

12. The Trial Court dismissed the suit vide a judgment and decree dated 7.01.2016. The crucial issue in the said suit was the Issue No.2 as to whether the plaintiffs had right, title and interest over the schedule properties. The Trial Court held that the plaintiffs vendor did not have a saleable interest in respect of the suit land in as much as the land, on the basis of the partition deed dated

24.07.1953 bearing Deed No.3189 vested upon Late Taziman Nessa and thereupon vide the various Deeds of Sale exhibited by the defendant, the plot of land measuring 4 Kathas devolved upon the defendant. It was also held that the plaintiffs failed to prove Exhibit-1 and Exhibit-2 to establish their claim over the suit land and also failed to show their title over the suit land by showing the land records of the suit land. On the basis of the decision in Issue No.2, the other issues being consequential were decided on the basis of decision arrived in Issue No.2.

13. Being aggrieved and dissatisfied, the plaintiffs as appellants preferred an appeal before the Court of Civil Judge (Senior Division) No.3, Kamrup (Metro), Guwahati which was registered and numbered as Title Appeal No.10/2017. Vide the judgment and decree dated 11.07.2019, the said appeal was also dismissed. The First Appellate Court after taking into account the various grounds of objection and the contentions raised by the parties framed a point of determination to the effect as to "Whether the vendor of the plaintiff namely Asgarh Ali Dewan has saleable right in respect of the suit land?" The said point of determination was framed as it incumbent to see as to what was the source of title of the plaintiffs namely as to whether, Asgarh Ali Dewan had a right to execute the Deeds of Sale in favour of the plaintiffs.

14. Taking into account the evidence on record and more particularly Exhibit-A, the First Appellate Court came to a finding that the Asgarh Ali Dewan who was the son of Sabir Ali Dewan, did not have a saleable right to transfer the suit land which comprised of Schedule A, B, C and D lands in favour of the plaintiffs and on the basis thereof had dismissed the said appeal. It appears on record that thereupon the plaintiffs preferred a review application against the judgment and decree dated 11.07.2019 passed in Title Appeal No.10/2017 which was registered and numbered as Misc.(J) Case No.142/2021. By an order dated 24.08.2021, the said review application was dismissed. Feeling dissatisfied and aggrieved, the plaintiffs as appellants are before this Court under Section 100 of the Code of Civil Procedure. The findings arrived at by both the Courts below, are concurrent finding of facts.

15. Before examining the merits of the matter, this Court may briefly refer to the scope of a Second Appeal as also the procedure for entertaining them as laid down under Section 100 of the Code of Civil Procedure. Second Appeal would lie in cases which involves 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 the 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 on the final outcome, will not be a substantial question of law. Where there is a clear and settled enunciation on a 'question of law', by the Supreme Court or even by this Court, 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 by the Supreme Court or by this Court, but the Lower Courts had ignored or misinterpreted or misapplied the same and correct application of the law as declared or enunciated by the Supreme Court or by 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 by this Court and the same has been followed by the Lower Court and if the appellant is able to persuade this Court 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 other words, 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.

16. The Supreme Court in the case of State Bank of India & Ors. Vs. S.N. Goyal reported in (2008) 8 SCC 92 at paragraphs 14 & 15, dealt with the procedural aspect relating to Second Appeal. The said Paragraphs being relevant are quoted herein below :

"Procedure relating to second appeals

14. We may next refer to the procedure relating to second appeals as evident from Section 100 read with Order 42 Rules 1 and 2 of the Code of Civil Procedure:

(a) The appellant should set out in the memorandum of appeal the substantial questions of law involved in the appeal.

(b) The High Court should entertain the second appeal only if it is satisfied that the case involves a substantial question of law.

(c) While admitting or entertaining the second appeal, the High Court should formulate the substantial questions of law involved in the case.

(d) The second appeal shall be heard on the question(s) of law so formulated and the respondent can submit at the hearing that the second appeal does not in fact involve any such questions of law. The appellant cannot urge any other ground

other than the substantial question of law without the leave of the Court.

(e) The High Court is at liberty to reformulate the substantial questions of law or frame other substantial question of law, for reasons to be recorded and hear the parties on such reformulated or additional substantial questions of law.

15. It is a matter of concern that the scope of second appeals and as also the procedural aspects of second appeals are often ignored by the High Courts. Some of the oft-repeated errors are:

(a) Admitting a second appeal when it does not give rise to a substantial question of law.

(b) Admitting second appeals without formulating substantial question of law.

(c) Admitting second appeals by formulating a standard or mechanical question such as "whether on the facts and circumstances the judgment of the first appellate court calls for interference" as the substantial question of law.

(d) Failing to consider and formulate relevant and appropriate substantial question(s) of law involved in the second appeal.

(e) Rejecting second appeals on the ground that the case does not involve any substantial question of law, when the case in fact involves substantial questions of law.

(f) Reformulating the substantial question of law after the conclusion of the hearing, while preparing the judgment, thereby denying an opportunity to the parties to make submissions on the reformulated substantial question of law.

(g) Deciding second appeals by reappreciating evidence and interfering with findings of fact, ignoring the questions of law.

These lapses or technical errors lead to injustice and also give rise to avoidable further appeals to this Court and remands by this Court, thereby prolonging the period of litigation. Care should be taken to ensure that the cases not involving substantial questions of law are not entertained, and at the same time ensure that cases involving substantial questions of law are not rejected as not involving substantial questions of law."

17. It is not longer res integra that concurrent findings of fact is usually binding on this Court while hearing a Second Appeal under Section 100 of the CPC. However, this Rule of law is subject to certain well known exceptions. It is a trite law that in order to record any finding on the facts the Trial Court is required to appreciate the entire evidence (oral and documentary) in the light of the pleadings of the parties. Similarly it is also trite that the First Appellate Court also has the jurisdiction to appreciate the evidence de novo while hearing the First Appeal and either affirm the finding of the Trial Court or reverse it. If the First Appellate Court affirm the findings, it is called "concurrent finding of facts" whereas if the findings are reversed, it is called "reverse findings". These

expressions are well known in legal parlance. However, when any concurrent finding of fact is assailed in the Second Appeal, the Appellant is entitled to point out that it is bad in law because it was recorded dehors the pleadings, or it was based on no evidence, or it was based on misreading of material documentary evidence, or it was recorded against the provisions of law and lastly the decision is one which no Judge acting judicially could reasonably have reached. If any or more grounds as mentioned herein above is made out in an appropriate case, on the basis of the pleadings and evidence, such ground or grounds will constitute substantial question of law within the meaning of Section 100 of the Code.

18. In the backdrop of the above, let this Court first take into consideration as to whether there arises any substantial question of law which can be formulated for the purpose of admission of the instant appeal. A perusal of the Memo of appeal shows that the ground of objection have been stated to be the substantial questions of law that arises before this Court. On a specific query being made by this Court to the learned counsel appearing on behalf of the appellant as to whether the Appellants independently wishes to state the substantial questions of law separately from the grounds, he submits that the grounds stated in the Memo of appeal be taken as compliance to Section 100(3) of the Code.

19. The learned counsel for the appellant submitted that Exhibit-A and Exhibit-B were two false deeds of partition exhibited in the year 1953 which were absolutely in violation to the Muslim law and as both the Courts below have taken into consideration the said two Exhibits, a substantial question of law arises. In the opinion of this Court, the said cannot be a substantial question of law involved in the instant case which could be formulated inasmuch as both Exhibit-A and Exhibit-B are registered documents and there is no challenge to the said two Exhibits. Merely stating that the said Exhibits are false, would not make the same a substantial question of law. Moreover, it is also a well established principle of law that to be a substantial question of law, there has to be foundation in the pleadings.

20. The learned counsel for the appellant further submitted that both the Courts below did not observe Exhibit-12 of the plaintiff which would have shown that the plaintiff was in possession from the date of purchase of the land. He further submitted that Exhibit-8 which was the GMDA NOC permission for sale dated 04.09.1997 was also taken into consideration. The learned counsel for the appellant submitted that both the Courts below did not take into consideration the Exhibits 1, 2, 3, 4, 8 and 12 and as such the concurrent findings of facts were arrived at on misreading of material documentary evidence and as such, the judgment and decree passed by the First Appellate Court suffers from perversity which is a substantial question of law. This Court had perused the judgment and decree passed by both the Trial Court and the First Appellate Court and it is seen that the Exhibits 1, 2, 3 and 4 which were the Sale Deeds executed by one Asgarh Ali Dewan in favour of the plaintiffs were duly taken into consideration. It was on the basis that the plaintiffs failed to prove the title of

Asgarh Ali Dewan in respect to the suit land, the Issue No.2 was decided against the plaintiffs. It is also seen that the principal defendant had proved the Exhibit-A which was the partition deed of 27.04.1953, which categorically showed that the suit land which was the part of 62 Bighas 4 Kathas 16 Lechas of land covered by Patta No. 554, 152 and 46 fell into the share of Late Taziman Nessa and from whom the principal defendant had derived the title pursuant to various deeds of sale being executed by the defendants.

21. Now, coming to the question as regards non-consideration of Exhibit-8 and Exhibit-12, it is relevant to take note that while Exhibit-8 pertained to NOC permission for sale dated 04.09.1997 given in favour of Asgarh Ali to sell the land to the plaintiff and the Exhibit-12 would only show that the plaintiffs were in possession of the suit land, the same does not have any relevance inasmuch as the plaintiffs failed to prove that they or their predecessors in interest had right, title and interest over the suit land. The instant suit is not a suit under Section 6 of the Specific Relief Act but a suit based upon title and as such in order to get the consequential reliefs, the plaintiffs had to prove their right, title and interest over the suit land. It is also not res-integra that when perversity is alleged in respect to a judgment and decree, it is required for the appellant to show that certain vital pieces of evidence have not been taken into consideration which if had been taken into consideration would have changed the course of the result in the litigation. In the opinion of this Court, Exhibit-8 and Exhibit-12 would not have changed the course even if the said documents would not have been taken into consideration as the plaintiffs as well as their predecessors in interest had failed to prove their right, title and interest over the suit land.

22. The learned counsel for the appellant further submitted that Exhibit-E is the Deed of Sale by one Shukla Chatterjee bearing Deed No. 643 dated 14.02.1994 to the principal defendant and the said Deed of Sale would show that the Deed of Sale was executed prior to the purchase of stamp paper. In the opinion of this Court, the said cannot be a substantial question of law. The reasons is that there is no challenge to the Exhibit-E i.e. the Deed of Sale bearing Deed No. 643 dated 14.02.1994.

23. The learned counsel for the appellant further submitted that a substantial questions of law arises in as much as in the suit on account of a mistake on the part of the earlier counsel of the plaintiffs, the suit was filed for recovery of possession instead the suit ought to have been for confirmation of possession. This also in the opinion of this Court cannot be a substantial question as the records would show that the plaintiffs have filed the instant suit for declaration of their right, title and interest as well as for recovery of khas possession and there was no amendment sought for.

24. Consequently, as no substantial question of law can be formulated in terms with Section 100(4) of the Code of Civil Procedure, the instant appeal stands dismissed. Taking in account that the Appeal is dismissed at the stage of Order XLI Rule 11 of the Code, this Court is not inclined to impose costs for the instant

Appeal.