

**(2023) 04 GAU CK 0028**

**In the Gauhati High Court**

**Case No :** Regular Second Appeal No. 233 Of 2018

Uma Sankar Yadav

APPELLANT

Vs

Musstt Lutfur Nessa And 8 Ors

RESPONDENT

**Date of Decision :** 20-04-2023

**Acts Referred:**

Code Of Civil Procedure, 1908 — Order 26 Rule 10A  
Evidence Act, 1872 — Section 45, 67, 73

**Citation :** (2023) 04 GAU CK 0028

**Hon'ble Judges :** Arun Dev Choudhury, J

**Bench :** Single Bench

**Advocate :** G. N. Sahewalla, T. J. Sahewalla, M. Hazarika, M. K. Borah

**Final Decision :** Dismissed

## Judgement

1. Heard Mr. G. N. Sahewalla, learned Senior Counsel assisted by Ms. T. J. Sahewalla, learned counsel for the appellant. Also heard Ms. M. Hazarika, learned Senior Counsel assisted by Mr. M. K. Borah, learned counsel for the respondents.

2. This second appeal has been preferred against the Judgment and decree dated 05.04.2018 passed by the learned Additional District Judge No. 2, Nagaon, Assam in Title Appeal No. 16(N)/2015 whereby the Judgment and decree dated 31.08.2015 passed by the learned Civil Judge, Nagaon in Title Suit No. 19/2007 dismissing the suit of the Appellant, was upheld.

3. This court under its order dated 28.08.2018, admitted the present appeal on the following two substantial question of law:-

1. Whether the Exhibit-Tha sale deed No. 3081/2001 can be accepted to be an invalid one on the basis of the expert opinion vis-à-vis the evidence of the witnesses and the author of the said sale deed?

2. Whether the learned court below was correct in holding that the Exhibit- Tha is invalid on the basis of the opinion of the fingerprint expert and if not, whether

the evidence on record is sufficient to hold that the Exhibit-Tha, sale deed is a valid one?

4. For the purpose of ascertaining, whether the said substantial question of law are involved in the present appeal, it would be relevant to take note of the facts leading the filing of the present second appeal.

5. The respondent/plaintiff preferred the Title Suit No. 19/2007 for cancellation of a sale deed (Schedule-A) and for declaration of right, title and interest of the plaintiff in respect of the Schedule-B land and recovery of possession of Schedule-B land.

6. The case of the plaintiff as projected and pleaded were to the following effect:

I. That the suit land originally belonged to the plaintiff and had acquired such title by virtue of gift and possession from her mother.

II. It is the case of the plaintiff that while the plaintiff was possessing the suit land, the defendant No. 2/ appellant, with some musclemen came to the suit land on 15.09.2006 and forcibly entered into the possession of the suit land and dispossessed the plaintiff. When the plaintiff protested with the help of her well wishers, the defendant No. 2, made it clear that he had purchased the suit land from the defendant No. 1.

III. Being helpless and unable to protest her dispossession from the suit land, she rushed to the Circle Officer at Hojai and obtained certified copy of the Jamabandi from the S.D.O, Civil at Hojai from which she came to know that the land was mutated in the name of defendant No. 2 by right of purchase of the said suit land from defendant No. 1. She also came to the know from the certified copy of the jamabandi that the said suit land was mutated in the name of defendant No. 1 by right of inheritance from one Robindra Nath Saha, the deceased husband of defendant No. 1.

IV. Thereafter, on an enquiry, the plaintiff came to know that somebody in her name executed a registered sale deed in respect of the said suit land. She sought help from the office of the Sub Registrar, Hojai, but she could not find any help. Thereafter, the plaintiff approached before the Deputy Commissioner, Nagaon. Thereafter the Deputy Commissioner, Nagaon immediately directed the Sub-Registrar, Hojai to furnish certified copies of 10 nos. of sale deeds by which it was shown that the plaintiff has sold the aforesaid land to the predecessor-in-interest of defendant No. 1.

V. After obtaining the sale deeds, she could find out that some other sale deeds which were executed by the defendant No. 1 in favour of the defendant No. 2/ appellant.

VI. The plaintiff pleaded that the defendant No. 1 did not have any right, title and interest to execute the sale deed in favour of the defendant No. 2/appellant inasmuch the sale deed through which it was shown that the predecessor-in-

interest of the defendant No. 1 sold the land is fraudulent and the plaintiff has never executed such sale deed. Accordingly, the plaintiff filed the suit.

7. The defendant Nos. 1 and 2 filed their joint written statement and raised usual pleas such as lack of cause of action, suppression of material facts etc. They also took the following specific pleas:

I. The defendants took a specific stand that the plaintiff herself executed the registered sale deed No. 21/09/01, in favour of Robindra Nath Saha, the predecessor-in-interest of defendant No. 1, and subsequently, the defendant No. 1 had sold the said suit land to the defendant No. 2/appellant.

II. The defendants specifically denied that sale deed is fraudulent and it was executed by some other person and not by the plaintiff herself.

III. The defendant Nos. 3, 5, 6 and 8 by filing their written statement had taken a stand that they had no personal gain or interest in transfer of the scheduled land.

8. The learned Court below framed the following issues for determination of the suit:-

1. Whether there is any cause of action for the suit?
2. Whether the suit is bad for waiver, estoppels and acquiescence?
3. Whether the plaintiff has got any right, title and interest in the suit land?
4. Whether the plaintiff has sold the schedule land to Rabindra Nath Saha and Smti. Bina Saha?
5. Whether the plaintiff is entitled to get a decree as prayed for?
6. What relief or reliefs the parties are entitled to in law and equity?
9. The plaintiff examined as many as 4 (four) witnesses including herself as PW-1 and exhibited 13 documents. The defendants examined as many as 4 (four) witnesses and also exhibited 12 documents including the sale deeds.
10. The plaintiff also filed an application under Order 26 Rule 10(A) of the C.P.C. for comparison of signatures and thumb impression put by the plaintiff on the plaint and her thumb impression put on the deposition sheet while taking her evidence on commission.
11. Such application was allowed by the learned Trial Court below and the said signatures and thumb impressions were sent to the expert for examination and no objection was raised by the defendants for such examination.
12. After receipt of report, two Court Witnesses i.e. one finger print expert and other hand writing expert who gave report on such comparison were examined as CW-1 and CW-2. They were cross examined by the appellant/defendants.

13. While dealing with the issue No. 4, the learned Court below came to a conclusion that the plaintiff did not sale the scheduled land to the defendant No. 1. While coming into such decision on issue No. 4, the learned Court below relied on certain evidences and disbelieved certain evidences and came to the following determination:-

I. The hand written expert opined that the signatures in the disputed sale deed under challenge in the suit and the sample signatures of the plaintiff was not of the same person.

II. The thumb impression of the plaintiff sent for the examination before the Director, Finger Print Bureau and the report submitted thereof, reflects that the thumb impression in the sale deed under challenge and the sample thumb impressions are not of the same person.

III. The DW-1, who is the beneficiary of such sale even does not know the dag numbers and patta numbers of the suit land.

IV. The DW-2, who is the witness to the sale deed and neighbor of the plaintiff, though affirmed that he witnessed the execution of the sale deed, however during his cross examination in the year 2015, he stated that the plaintiff died seven months ago, actually but plaintiff died in the year 2010 during the pendency of the suit.

V. DW-3 who is another witness to the sale deed and claims to be the neighbor of the plaintiff in his cross examination stated that the plaintiff is aged about 40-45 years whereas, the age of the plaintiff was 70 years in the year 2007. She stated that her age to be 73 years when her evidence was recorded on 13.02.2010 and due to her serious bedridden condition, she gave thumb impression in her evidences and she expired in the same year. Accordingly, the Court came to a conclusion that the evidence of aforesaid DWs is contradictory.

VI. Therefore, the learned trial Court below relied on the evidence of court witness i.e. finger print expert and the hand writing expert, who deposed that the same were sent to them and the signature and thumb impression in the purported sale deed were not of the same person as compared to the samples. Their evidences remained unshaken.

14. The decision of the learned First Appellate Court:

I. The learned First Appellate Court did not find any infirmity in the aforesaid findings of the learned Trial court and further considered that DW-1 Smti. Bina Saha, who purportedly inherited the property from her husband, has not come to the Court to give her evidence.

II. After considering the witnesses and their testimonies in details, the learned appellate Court came to a conclusion that as the hand writing samples and finger print samples were sent by the learned Court below after obtaining the consent from both the parties, for expert opinion, the contention of the appellants not to

rely on such piece of evidence were liable to be rejected and the learned appellate Court refused to disbelieve the evidence of the expert.

III. The learned Appellate Court agreed with the finding of the Trial Court regarding contradiction in evidences of the purported eye witnesses to the Deeds under Challenge. Accordingly the learned appellate Court dismissed the appeal.

15. Mr. G. N. Sahewalla, learned Senior Counsel for the appellant while assailing the aforesaid two judgments argues:

I. That the both the learned Courts below had decreed the suit of the plaintiff only on the basis of the evidence of CW1 and CW2 who were the expert witnesses, by ignoring the eye witnesses to the execution of the sale deed.

II. Mr. Sahewalla, learned Senior Counsel contends that expert opinion ought not to have been solely relied upon inasmuch as it is well settled that expert opinion must always be received with great caution and it is unsafe to come to such a conclusion only on the basis of the expert opinion.

III. The learned Senior Counsel further contends that the ordinary method of proving a document is by calling as a witness, the person who had executed the document or saw it being executed or signed or is otherwise qualified and competent to express his opinion as to the hand writing. In the present case, the eye witnesses were called and their evidences remain unshaken and both the learned Courts below giving much importance to some inconsistencies, irrelevant to determination of the issue, had solely relied on the expert witnesses and therefore committed perversity. In support of such contention, Mr. Sahewalla, learned Senior Counsel relies on the decision of the Hon'ble Apex Court in the case of Gopal Reddy -Vs- State of A.P. reported in (1996) 4 SCC 596 and in the case of S.P.S. Rathore -Vs- Central Bureau of Investigation and Another reported in (2017) 5 SCC 817.

16. Per contra Ms. M. Hazarika, learned Senior Counsel for the respondent submits:

I. In the present case, the purported vendor of the sale deed / author of the signature has herself disputed her signature. She has reaffirmed such stand during the cross-examination. Therefore, the learned Court was left with no other option but to allow the prayer of the plaintiff to send the signatures for expert opinion and expert has given the opinion which fortifies the contention of the plaintiff. Thus the opinion of the expert was corroborated by the unshaken evidence of the PW-1, the plaintiff.

II. The learned Courts below has not also committed any error of law by relying on the inconsistencies inasmuch as the inconsistencies cannot be said to be minor for the reason that the one of the witnesses who claims to witness the plaintiff putting the signature in the sale deed had stated before the Court that the plaintiff died before 7/8 months, whereas, the plaintiff died in the year 2010 and such deposition was made in the year 2015. The other witness who claims to

be the neighbor of the plaintiff has deposed that the plaintiff is aged about 40 to 45 years whereas, at the time of execution of purported sale deed, she was aged about 70 years. Had he seen the actual person executing the sale deed, he ought not to have said the age of a person 70 years to be age of 45 years and such contradictions are material to the present case for the reason that the dispute is whether the plaintiff has actually put her signature in the sale deed.

III. Further Ms. Hazarika, learned Senior Counsel submits that it is not an absolute rule that without corroboration the opinion of evidence cannot be accepted inasmuch as in the present case, the opinion of the expert was corroborated by the unshaken evidence of plaintiff herself. In support her contention, Ms. Hazarika, learned Senior Counsel relies on the decision of the Hon'ble Apex Court in the case of Alamgir -Vs- State (NCT, Delhi) reported in (2003) 1 SCC 21.

IV. Ms. Hazarika, learned Senior Counsel further contends that the decisions of the Hon'ble Apex Court relied on by Mr. Sahewalla, learned Senior Counsel for the appellant relates to standard of proof in a criminal case, where the proof must be beyond reasonable doubt and in the present case, standard is preponderance of probability and therefore, the cases relied on by Mr. Sahewalla, learned Senior Counsel shall have no relevance to the facts of the present case.

V. Ms. Hazarika, learned Senior Counsel in support of her contention further relies on a judgment of this Court in the case of Debajit Barthakur and Others - Vs- Sarnalata Devi and Others reported in 2015 3 GLR 554.

17. This Court has given anxious considerations to the arguments advanced by the learned counsel for the parties.

18. Both the learned Courts below had concurrently found and treated the evidence of the DWs to be inconsistent and believed the testimonies and evidence of the two expert witnesses.

19. In the case in hand, the plaintiff has specifically denied the execution of the sale deed and to prove such contention sought for comparison of her signature and thumb impression with the alleged signature and thumb impression in the sale deed. The same was allowed without any objection from the side of the defendants. Thus the plaintiff tried to bring additional evidence on record in support of her contention and deposition that she has not put her signature in the sale deed in question.

20. Section 73 of the Indian Evidence Act, 1872 deals with the comparison of signature and handwriting and seal with admitted or proved one. Under such provision, the Courts are empowered to compare a purported signature, writing or seal with one which is admitted or proved to the satisfaction of the Court to be genuine one. It is by now well settled that though Section 73 of the Indian Evidence Act, does not expressly authorized reference to any expert or other person, the same is not prohibited in as much as section 45 of the Evidence Act

empowers courts to have expert opinion.

21. Under the provision of Order 26 Rule 10 A of the CPC, 1908, a Court can also appoint Commissioner for scientific investigation, when a scientific investigation is required in a suit for deciding a dispute between the parties and if the Court is of the opinion that the same cannot be done before the Court, it can very well appoint an expert for its opinion.

22. In the case in hand, the expert opinion was sought for on an application filed by the plaintiffs and such direction has attained finality inasmuch as the defendant duly cross-examined such expert witnesses.

23. Section 45 of the Indian Evidence Act, 1872 deals with opinion of experts and provides that when a Court has to form an opinion regarding identity of handwriting, the opinions of persons especially skilled in this regard are relevant facts. It is well settled that such opinion is not binding upon the Court and it is open to the Court to accept or discard such expert opinion by giving reason.

24. The proof of signature and handwriting of a person alleged to have been signed or written document can be made by taking recourse to Section 67 of the Indian Evidence Act, 1872. Proof of such document can consist of direct evidence of a person who saw the other person putting his signature or thumb impression.

25. In the backdrop of aforesaid settled proposition of law, now let this Court examine whether there is any substantial question of law involved as framed.

26. The dispute was whether the plaintiff affixed her signature in the sale deed in question. The plaintiff has specifically denied her signature in the sale deed and the defendant asserted that it is the plaintiff who executed the sale deed. To prove the case, the plaintiff examined herself as PW-1 and in her deposition specifically denied execution of the sale deed and such evidence remain unshaken during the cross examination. The defendants tried to prove that it is the plaintiff who put her signature through the witnesses to the deed. Their depositions were treated to be not trustworthy by both the learned courts below due to certain contradictions.

27. The Expert witnesses specifically opined that the signatures and the thumb impressions in the sale deed are not similar to that of the sample signature and the thumb impression of the plaintiff. In the aforesaid backdrop of evidence, the onus that sale deed is genuine and had duly been executed by the plaintiff shifted to the defendants. Though the defendants brought the attesting witnesses to prove that it is the plaintiff who put the signature in the sale deed, however, both the learned Courts below had not relied on their evidences on the basis of the inconsistencies as has been discussed hereinabove. No official witnesses from the office of the Registrar were called for regarding proof of execution of the sale deed or the original books of registration were called for. Therefore, in the aforesaid backdrop, seeking expert opinion as to the genuineness of the signature and thumb impression and relying on such

evidence to come to a conclusion by both the learned Courts below cannot be interfered with at a second appellate stage being concurrent finding of fact inasmuch as such determination/finding can't be said to be perverse.

28. There is no quarrel with the argument of Mr. Sahewalla, learned Senior Counsel for the appellant that the expert opinion is a weak type of evidence and it is usually considered to be of light value and is not conclusive. However, in the given factual matrix of the present case as discussed hereinabove, this Court cannot find fault with both the Court's below in relying on the opinion of the expert in arriving at the impugned decisions inasmuch as one party denied the execution and the other asserted such execution and the expert examined were independent expert witnesses and their evidence remained unshaken.

29. The fact also remains that taking the opinion of experts and sending the signature and thumb impression for comparison has not been objected and such expert, who gave the opinions were duly examined and cross-examined. The issue before the learned trial Court was such that the trial Court felt that expert testimony was necessary and no doubt has been raised regarding the expertise of the expert.

30. In view of the forgoing discussions and reasons, this Court finds that no substantial question of law is involved in the present appeal. Accordingly, same is dismissed. LCR be sent back forthwith.

31. Parties to bear their own cost.