



GAHC010101872007

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

Case No. : RSA/123/2007

SIRISH CH. SARMA
R/O,BALI,P.S.TIHU.DIST.NALBARI

2: BIPUL SARMA
BOTH ARE THE SONS OF LT. RAMESH SARMA

3: DHARMA KANTA SARMA

4: GIRINDRA DEB SARMA
3 and 4 ARE THE SONS OF LATE KAMALA SARMA

5: TRAILOKYA SARMA
S/O LT. SANTI RAM SARMA

6: SARAT CH. SARMA
S/O LT. PRABHAT SARMA ALL ARE THE R/O VILL BALI MOUZA
NAMBARBHAG P.S TIHU DIST NALBAR

VERSUS

MADAN CH. SARMA
S/O LT. LAKHIKANTA SARMA VILL BALI MOUZA NAMBARBHAG P.S TIHU
DIST NALBARI

For the Petitioner(s) : Mr. Sheeladitya, Advocate

For the Respondent(s) : Mr. S. Das, Advocate

Date of Hearing : **23.04.2024**

Date of Judgment : **23.04.2024**

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (ORA)

The instant appeal under Section 100 of the Code of Civil Procedure, 1908 (for short "the Code") is directed against the judgment and decree dated 07.05.2007 passed by the Court of the learned Civil Judge, Nalbari in Title Appeal No.08/2006 whereby the judgment and decree dated 16.01.2006 passed by the learned Civil Judge (Junior Division) No.2, Nalbari in Title Suit No.05/1995 was affirmed.

2. This Court vide an order dated 23.11.2007 admitted the instant appeal by formulating the following substantial question of law:

"Whether the sale deeds exhibited by the appellants/defendants as exhibit B, C, D and E after producing those from proper custody as the documents being more than 30 years old, whether further corroboration is necessary to legally prove those documents as per Section 90 of the Evidence Act as has been observed by the courts below?"

3. This Court for the purpose of deciding as to whether the said substantial question of law which has been formulated is involved in the instant appeal, finds it relevant to briefly take note of the facts leading to the filing of the instant appeal.

4. From the materials on record, it reveals that the Respondent herein as plaintiff had instituted a suit seeking declaration of right, title and interest; for confirmation of possession upon partition of the suit land and for other reliefs. The brief facts leading to the filing of the suit was that one Daya

Nath Sarma (since deceased) was the original owner of various plots of land which have been specifically described in Schedule-Ka and Schedule-Kha. It is the case of the plaintiff that Late Daya Nath Sarma had three sons i.e. Late Santiram Sarma, Late Tara Nath Sarma and Late Lakhi Kanta Sarma. The plaintiff's father was Late Lakhi Kanta Sarma.

5. During the lifetime of Late Lakhi Kanta Sarma and his two brothers, there was no dispute as regards the rights and possession of the schedule lands however, pursuant to the death of Late Lakhi Kanta Sarma, the plaintiff remained in possession of the Schedule-Ga land which is a part of the Schedule-Ka land. Accordingly, the plaintiff filed the said suit seeking the declaration of his title in respect of half of Schedule-Kha land i.e. an area measuring 1 Bighas 1 Katha 16½ Lechas out of 2 bighas 3 Kathas 13 Lechas and further 1/3rd share of the land in Schedule-Ka i.e. 14 Bighas 1 Kathas 8 2/3rd Lecha and other reliefs. The said suit was registered and numbered as Title Suit No.5/1995.

6. Although there were various defendants, but the Defendant Nos. 1, 2, 3 and 4 as well as the Defendant Nos.10, 11 and 12 jointly submitted a written statement. In the said written statement it was stated amongst others that a plot of land measuring 4 Bighas 1 Kathas 1 Lechas was sold to Late Tara Nath Sarma and Late Santiram Sarma by the father of the plaintiff Late Lakhi Kanta Sarma by executing various Deeds of Sale. In addition to that, it was also mentioned that the father of the plaintiff as well as the plaintiff had sold other plots of land and as such out of the land which have been claimed by the plaintiff in the suit, 11 Bighas 1 Kathas 18 Lechas of land was sold by the plaintiff as well as his father. The remaining entitlement

of the plaintiff therefore was only 3 Bighas 4 Kathas 19 Lechas which the plaintiff was duly possessing.

7. On the basis of the said pleadings, the learned Trial Court framed as many as 6 issues. Issue No.5 is relevant inasmuch as the said issue relates as to whether the plaintiff had right, title and interest over the suit land.

8. The plaintiff adduced the evidence of two witnesses in support of his claim and exhibited some documentary evidence. The defendant side also examined two witnesses in their favour and exhibited some documents. Amongst the various documents which were exhibited by the DW-4, Exhibit-A pertained to Bighag Nama, Exhibit-B pertained to Sale Deed dated 30.08.1941, Exhibit-C pertained to Sale Deed dated 04.04.1935, Exhibit-D pertained to Sale Deed dated 07.11.1941, Exhibit-E pertained to Sale Deed dated 28 Puha, Bangla Year, 1340 and Exhibit-F pertained to Sale Deed dated 23.06.1944. It is relevant to take note of that these exhibited documents i.e. Exhibit A to F by the DW-4 were 30 years old and the said documents were exhibited without any objection. The learned Trial Court vide a judgment and decree dated 16.01.2006 passed a preliminary decree thereby declaring the right, title and interest in respect to the suit land to the extent of half share in the Schedule-Kha land and 1/3rd share in the Schedule-Ka land and thereupon, sent the said preliminary decree to the Collector, Nalbari for affecting partition in accordance with the Assam Land and Revenue Regulations, 1886.

9. At this stage, it is very pertinent to mention that while decreeing the suit, the learned Trial Court decided Issue No.5 in favour of the plaintiff. It is apposite herein to take note of that the learned Trial Court disregarded the

Exhibits B, C, D, E and F after holding that the said documents were produced from proper custody and the documents were more than 30 years old on the ground that the said documents required corroboration from external circumstances. Being aggrieved, the appellants herein preferred an appeal before the Court of the learned Civil Judge, Nalbari which was registered and numbered as Title Appeal No.08/06. The learned First Appellate Court vide a judgment and order dated 07.05.2007 dismissed the appeal by confirming the judgment and decree passed by the learned Trial Court.

10. At this stage, this Court finds it very pertinent to take note of that the learned First Appellate Court did not even care to frame the points of determination or decide the appeal in accordance with the provisions of Order XLI Rule 31 of the Code. Be that as it may, the instant appeal has been filed which has been admitted by this Court vide the order dated 23.11.2007 by formulating the substantial question of law as quoted hereinabove.

11. In the backdrop of the above, let this Court therefore take note of as to whether the said substantial question of law which has been formulated is duly involved in the instant appeal.

12. For deciding the said substantial question of law, this Court finds it relevant to reproduce the provisions of Section 90 of the Indian Evidence Act, 1872 (for short "Evidence Act") along with Illustration-(a) as herein under:

“90. Presumption as to documents thirty years old. — Where any document, purporting or proved to be thirty years old, is produced from any

custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.— Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

Illustrations

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(b)"

13. Section 90 of the Evidence Act is based on the legal maxim *nemo dat qui non habet* (no one gives what he has not got) and *nemo plus juris tribuit quam ipse habet* (no one can bestow or grant a greater right, or a better title than he himself). Section 90 does away with the strict rules, as regards the requirement of proof which are enforced in the case of private documents by giving rise to presumption of genuineness, in respect of certain documents that has reached certain age. The period is to be reckoned backwards from the date of the offering of the document and not any subsequent date i.e. the date of the decision of the suit or appeal. Thus the Section deals with the admissibility of the ancient documents, dispensing

with the proof as would be required, in the usual course of events in the usual manner.

14. The Supreme Court in the case of **Lakhi Barua and Others Vs. Padma Kanta Kalita and Others** reported in **(1996) 8 SCC 357** observed that Section 90 of the Evidence Act is found on the necessity and convenience because it is extremely difficult and sometimes not possible to lead evidence to prove handwriting, signature or execution of old documents after a lapse of thirty years. In order to obviate such difficulties or improbabilities to prove execution of an old document, Section 90 has been incorporated in the Evidence Act, 1872 which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised if the documents in question are produced from proper custody. It is, however, the discretion of the Court to accept the presumption flowing from Section 90. It was further observed that there is, however, no manner of doubt that judicial discretion under Section 90 should not be exercised arbitrarily and not being informed by reasons. Paragraph Nos. 14 and 15 of the said judgment being relevant are reproduced herein under:

“14. It will be appropriate to refer to Section 90 of the Evidence Act, 1872 which is set out hereunder:

“90. Presumption as to documents thirty years old.— Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person’s handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports

to be executed and attested.”

15. *Section 90 of the Evidence Act, 1872 is founded on necessity and convenience because it is extremely difficult and sometimes not possible to lead evidence to prove handwriting, signature or execution of old documents after lapse of thirty years. In order to obviate such difficulties or improbabilities to prove execution of an old document, Section 90 has been incorporated in the Evidence Act, 1872 which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised if the documents in question is produced from proper custody. It is, however, the discretion of the court to accept the presumption flowing from Section 90. There is, however, no manner of doubt that judicial discretion under Section 90 should not be exercised arbitrarily and not being informed by reasons.”*

15. In the instant case, it would be seen that the DW-4 had exhibited the Exhibit A, B, C, D, E and F. In his evidence on affidavit, the DW-4 had categorically stated that the said documents were in the custody of the heirs of Late Tara Kanta Sarma and Late Santiram Sarma who are the ancestors of the DW-4. This Court has also perused the cross-examination of the DW-4. None of these exhibited documents were put under objection or the admissibility of the same was questioned. In fact the cross-examination of the DW-4 reveals that the plaintiff side did not even cross-examine the DW-4 on the contents of the said documents.

16. In the backdrop of the above, let this Court now take note of as to how the learned Trial Court dealt with the said aspect of the matter inasmuch as the learned First Appellate Court merely confirmed the said findings without expressing any reasons. The learned Trial Court while deciding the Issue No.5 categorically observed that the defendant side though exhibited the sale deeds Exhibit-B, C, D, E and F and have produced from proper custody and the said documents were more than 30 years old

but their value as evidence must be decided upon corroboration derived from external circumstances. It is for that reason, the learned Trial Court rejected the said documents observing that the learned Trial Court was not inclined to draw the statutory presumption. The reason so assigned in the opinion of this Court is totally arbitrary inasmuch as the said exhibits being Exhibit B, C, D, E and F were not only more than 30 years old but also the same were produced from proper custody as would be seen from the evidence of the Defendant No.4 as well as the same would be apparent from a reading of the Explanation to Section 90 of the Evidence Act and Illustration (a) of the said Section as already quoted hereinabove.

17. This Court further finds it relevant that the observations made by the learned Trial Court that the said documents required further corroboration is not at all justified inasmuch as there is nothing pointed out during the cross-examination challenging the contents of the said documents not to speak of raising any objection to the admissibility of the said documents.

18. In the backdrop of the above, if this Court now takes note of the judgment passed by the learned First Appellate Court, it would be seen that the learned First Appellate Court merely confirmed the said findings holding inter alia that the learned Trial Court had discussed the Issue No.5 in an extensive way.

19. Before further proceeding, this Court finds it very relevant to take note of the judgment of the Supreme Court in the case of ***Santosh Hazari Vs. Purushottam Tiwari*** reported in **(2001) 3 SCC 179** wherein the Supreme Court categorically delineated as to how a First Appellate Court should decide a first appeal. It was categorically observed by the Supreme Court that the

first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the First Appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the Appellate Court. In the said judgment, the Supreme Court though observed that Appellate Court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the learned Trial Court and the expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice. However, the Supreme Court categorically observed with a note of caution that expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the Appellate Court for shirking the duty cast on it.

20. In the instant case, this Court having perused the judgment and decree passed by the learned First Appellate Court and finds it relevant to observe that the learned First Appellate Court failed to discharge the duty as mandated under XLI Rule 31 of the Code and shirked its duty which have been cast upon it by law. Under such circumstances, in the opinion of this Court, the impugned judgment and decree passed by the learned First Appellate Court i.e. 07.05.2007 requires to be interfered with and therefore, the same is set aside and quashed.

21. This Court further is of the opinion that as the appreciation of Exhibits B, C, D, E and F was not done property following the mandate of Section 90

of the Evidence Act, the same requires to be again appreciated by the learned First Appellate Court and taking into account the limited scope available with this Court under Section 100 of the Code, this Court finds it a fit case for remand of the entire appeal to the learned First Appellate Court for deciding the said appeal afresh by duly taking note of the Exhibits B, C, D, E and F. Accordingly, this Court exercising the powers under Order XLI Rule 23A of the Code remands the said appeal back to the learned First Appellate Court i.e. the Court of the learned Civil Judge, Nalbari for deciding the said appeal in terms with the observations and directions given hereinabove.

22. This Court has also taken note of that the instant suit was filed in the year 1995 and as such an attempt may be made by the learned First Appellate Court to dispose of the same at the earliest.

23. Taking into account that the parties are duly represented before this Court, they are directed to appear before the learned First Appellate Court on 03.06.2024 so that the said First Appellate Court can proceed with the said appeal in accordance with law.

24. For the sake of clarity, the judgment and decree dated 07.05.2007 is set aside and quashed and the appeal is remanded back to the learned First Appellate Court i.e. the Court of the learned Civil Judge, Nalbari for de novo adjudication of the entire appeal.

25. The Registry shall forthwith return the LCR along with the copy of the instant judgment to the learned First Appellate Court so that the same can be taken up by the learned First Appellate Court on the next date so fixed by



this Court.

26. With above observations and directions, the instant appeal stands disposed of.

JUDGE

Comparing Assistant