GAHC010002392008

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

Case No. : RSA/56/2008

BANWARILAL SHARMA.
S/O DURGA PRASAD SHARMA, R/O ADARSH NAGAR NEAR MAHESWARI BHAWAN, ATHGAON, GHY-8, PS. BHARALUMUKH.

VERSUS

SMT. KAMALA DEVI AJITSARIA..
-
2:RENU SUREKHA AJITSARIA

3:LALITA KESHAN

4:INDIRA AGARWALLA

5:PINKI AGARWALLA
NO.1 IS THE WIFE AND 2
3
4 and 5 ARE THE DAUGHTERS OF LATE RUKMANAND AJITSARIA. ALL ARE RESIDENT OF JAI NARAYAN ROAD
FANCY BAZAR
GHY-1

6:RAJESH AGARWAL

S/O SRILAL AGARWAL
PERMANENT RESIDENT OF SONAPUR SAW MILL
SONAPUR
DIST. KAMRUP AND ALSO R/O JAI NARAYAN ROAD
FANCY BAZAR
GHY-

Advocate for the Petitioner : R P N SINGH

Advocate for the Respondent : G N SAHEWALLA

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER (CAV)

Date : 13-05-2022

Heard Mr. S.P. Roy, the learned counsel appearing for the Appellant and Mr.G.N.Sahewalla, the learned senior counsel assisted by Ms. S. Todi, the learned counsel appearing on behalf of the Respondents.

2. This instant appeal has been filed under Section 100 of the Code of Civil Procedure, 1908 challenging the judgment and decree dated 15/09/2007 passed in Title Appeal No. 109/2006 by the Court of the Additional District Judge(FTC) No. 4, Kamrup (Metro) at Guwahati, whereby the judgment and decree dated 25/9/2006 passed in Title Suit No. 109/2006 by the Court of the Civil Judge (Sr. Division) No. 2, Kamrup (Metro) at Guwahati was affirmed.

3. At this stage, it may be relevant herein to mention that both the Courts below had on the basis of a concurrent findings of fact dismissed the suit of the Appellants and decreed the counter claim of the Respondents.

4. 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, 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.

5. 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 & 14, 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."

6. 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 law that the Appellate Court also has the jurisdiction to appreciate the evidence denovo while hearing the First Appeal and either affirm the finding of the Trial Court or reverse it. If the Appellate Court affirms the finding it is called "concurrent finding of facts" whereas if the finding is reversed, it is called "reverse finding". 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.

7. Coming to the case in hand, it would be seen that vide an order dated 16/3/2009, this Court had admitted the Appeal for hearing on two questions formulated—

> 1. Whether the impugned judgment and decree is perverse, illegal for non-consideration of the evidence and records and the Exhibits and particularly Exts. 14 and 15 ?
>
> 2. Another substantial question of law which may arise during the course of hearing ?

8. At the outset, it is relevant to mention that the second substantial question of law so formulated with due respect, cannot be a substantial question of law. Therefore, this Court confines itself as to whether the substantial question of law as formulated in Sl. No. 1 is a substantial question of law involved in the instant appeal.

9. For the purpose of deciding as to whether the substantial questions of law so formulated at Sl.No. 1 is a substantial question of law involved in the instant Appeal and as to whether the same arises at all, it would be relevant to take note of the relevant facts of the instant case.

10. The Appellant herein as plaintiff had filed a suit which was registered and numbered as Title Suit No. 223/1997. The case of the Plaintiff in brief is that he purchased the plot of land measuring 2 Kathas covered by Dag No. 1107 of K.P. Patta No. 661 of Village Chartribari vide a registered Sale Deed No.7213 dated 30/11/1992 from one Rukmanand Ajitsaria(since deceased), who happened to

be the husband of the Defendant No. 1 and father of the Defendant Nos. 2 to 5. The Plaintiff's further case is that he had taken the possession of the entire suit land measuring 2 Katha 17 Lechas more than 20 years ago and he mutated his name in the revenue records and the structures including Assam Type House and the building standing over the suit land were also duly assessed under the Holding No. 388 of Ward No. XVIII of GMC and the Plaintiff was paying the taxes to the GMC regularly. However, on 25/9/1997, the Plaintiff came to know that without having any right, title and interest and possession over the suit land, the Defendants mutated the names in respect to 17 lechas of land as legal heirs of the original pattadars Rukmanand Ajitsaria. It is the further case of the Plaintiff that apart from the Defendants, one Pawan Kumar Ajitsaria was the adopted son of Lt. Rukmanand Ajitsaria and the said Pawan Kumar Ajitsaria had filed a Title Suit No. 74/1997 which was pending between the said Pawan Kumar Ajitsaria and the Defendants for disposal. The Plaintiff's further case is that on coming to learn about the order of mutation the Plaintiff filed a Revenue Appeal No. 47/1997-98 before the ADC, Kamrup. The Defendants thereupon tried to evict the Plaintiff from the suit land and the premises on 5/12/1997 by threatening the Chowkidar to vacate the suit premises. The Defendants also threatened to demolish the houses standing on the suit land and entered the office of the Plaintiff and ransacked the furniture with an intent to evict the

Plaintiff from the said room. In that regard the Plaintiff also stated that he had filed an FIR at Fatasil Ambari Police Outpost. It has also been alleged that the Defendants again tried to dispossess the Plaintiff from the suit premises on 6/12/1997 but could not do anything due to the protest of the Plaintiff. Though from a perusal of a plaint, it appears on the face of it that the rights of the Plaintiff over the suit land as described in the Schedule to the plaint were put to challenge in as much as the Defendants had obtained the mutation over the land which as per the Plaintiff, he had challenged in an appeal before the ADC, Kamrup, however, the Plaintiff did not seek for a declaration of the right, title and interest and instead the Plaintiff sought for a decree for declaration that the Defendants have no right to evict the Plaintiff from the suit premises as described in the Schedule forcibly and illegally without following the procedure established by law and also have no right to cause any kind of threatening, intimidation, annoyance and to disturb the peaceful possession of the Plaintiff over the suit land in any manner without following the procedure established by law. In terms with the said declaration, a permanent injunction was also sought against the Defendants from disturbing the peaceful possession of the Plaintiff in the suit land and from causing any kind of nuisance, obstruction, intimidation and threatening to the Plaintiff in respect to the suit land as described in the Schedule below without following the procedure established by law. Therefore,

from a perusal of the plaint, it would be clear that the Plaintiff has not sought for declaration of his right, title and interest over the suit land and rather sought only for a declaration and permanent injunction against the Defendant not to disturb the peaceful possession of the Plaintiff over the suit land without following the procedure established by law. It may be relevant herein to mention that a perusal of the plaint also would not show that the Plaintiff had disclosed construction of apartments/flats over the Schedule land.

11. The Defendants had filed a joint written statement-cum-counter claim. In the written statement, it was the categorical stand of the Defendants that the Plaintiff was possessing the aforesaid plot of land as a tenant under the Defendants and had all along been paying rent to the predecessor-in-interest of the Defendants and on his death had attorned the Defendant No.1 as landlady of the premises. However, since the month of February, 1997 the Plaintiff defaulted paying the rent for the said premises for the reasons best known to him. It was the specific stand that the predecessors-in-interest of the Defendants never sold the land to the Plaintiff. By making the counter claim the Defendants had stated that the predecessors- in interest of the Defendant Nos. 1 to 5, Lt. Rukmanand Ajitsaria was the owner of the suit land. During his life time, the said late Rukmanand Ajitsaria possessed the same by constructing boundary wall and houses thereon. The house was let out to the Plaintiff for the

purpose of a go-down at a monthly rent of Rs.4100/- payable within the first week of every succeeding English Calender month. The remaining land of the suit Dag had been given to Rukmanand Ajitsaria Charity Trust. During the life time of Lt. Rukmanand Ajitsaria, the Plaintiff was regularly paying rent and thereafter the Defendants collected the rent from the Plaintiff. It was mentioned that the vacant part of the land was under the possession of Lt. Rumanand Ajitsaria. It was further mentioned that the relationship of the Plaintiff with Lt. Rukmanand Ajitsaria was very cordial and after the death of Lt. Rukmanand Ajitsaria, the Defendant Nos. 1 to 5 as legal heirs inherited all the properties including the suit land and the house left by Lt. Rukmanand Ajitsaria. It was mentioned that since about 10 years prior to the death of Rukmanand Ajitsaria, he became extremely infirm and he was not in a position to sign and execute any documents. After the death of Lt. Rukmanand Ajitsaria, the plaintiff failed to pay the rent for the suit premises. The Defendants/Counter Claimants' further case was that when they instituted the Mutation Case No.420/96-97, they came to know about the mutation of 2 Kathas of land of the suit land in the name of the Plaintiff. The Defendants preferred an appeal against the order of mutation in respect to 2 Kathas of land wherein in the said proceedings, the Plaintiff claimed that he purchased 2 Kathas of land, of the suit patta vide registered Sale Deed No.7213/92. It is the case of the Defendants that the said Sale Deed

is fraudulent, collusive and liable to be cancelled. It was also mentioned in the counter claim that the Plaintiff constructed a C.I. Sheet fencing so that his nefarious activities could not be seen from the public road and that the Plaintiff collected huge quantity of building materials and started construction of a new building in spite of protest raised by the Defendants. It is on the basis thereof, the Defendants sought for dismissal of the suit and for declaration that the Defendants' right, title and interest over the suit property; for declaration that the Sale Deed No. 7213/92 dated 30/11/92 is fraudulent, collusive and void ab initio and the same has not conferred any right, title and interest to the Plaintiff over the suit property or any part thereof and for delivering up and cancelling of the Sale Deed; for ejectment of the Plaintiff from the suit property; for recovery of khas possession of the suit property by evicting and removing the Plaintiff and all his men and materials therefrom; for permanent injunction restraining the Plaintiff and his men, agents, servants etc from entering into the suit property and from interfering with peaceful enjoyment and possession of the Defendants over the suit property; for recovery of Rs. 1 lakh as compensation for the wrong done to the go-down house and the structure over the suit land; for issuance of a precept directing the Sub-Registrar to record cancellation of the Sale Deed No. 7213/92 dated 30/11/1992; to issue a precept to the Revenue and Municipal Authority for correction of the revenue and municipal

records in accordance with the decree etc.

12. At this stage, it may not be out of place to mention that in the written statement –cum- counter claim, it was mentioned at Paragraph 29 (xv) that the Defendants for the first time came to know about the execution and registration of the void and fraudulent Deed of Sale on 28/2/1997, the date on which the rent for the month of Febraury became due. It is relevant herein to mention that the said written statement cum counter claim was filed on 10th of February, 1998.

13. The Plaintiff filed his written statement against the counter claim reiterating the statements made in the plaint. In Paragraph 2 of the said written statement to the counter claim, it was mentioned that the counter claim was time barred. It was mentioned that the counter claim was bad for non-joinder of necessary parties and mis-joinder of necessary parties. It was also mentioned that the Defendants have no locus standi in absence of Pawan Kumar Ajitsaria who is the adopted son of Late Rukmanand Ajitsaria. It was mentioned that Lt. Rukmanand Ajitsaria had executed the Sale Deed No. 7213 dated 30/11/92 voluntarily and willingly in his sound health and mind. It was mentioned that the Defendants had full knowledge and information of the Sale Deed dated 30/11/92.

14. On the basis of the aforementioned pleadings, six issues were framed :-

"1. Whether there is any cause of action in the Plaintiff's suit ?

2. Whether the Plaintiff has got any right, tile and interest over the suit land described in the schedule of the plaint ?

3. Whether the Sale Deed No.7213 dated 30.11.92 is fraudulent, collusive and void ab initio and liable to be cancelled ?

4. Whether the Plaintiff is entitled to a decree as prayed for /

5. Whether the Defendants are entitled to permanent injunction as prayed for ?

6. To what relief/reliefs the parties are entitled ?"

15. At this stage, it may be relevant herein to mention that the written statement cum counter claim was filed on 10/2/1998 and at that point of time, the Code of Civil Procedure (Amendment) Act, 2002 had not come into effect. It is also relevant to take note of that at the time of filing of the written statement cum counter claim, a list of documents was filed by the Defendants. The said list of documents is pertinent for the purpose of adjudication of the instant appeal as the said list of documents was marked as Ext.-14. To the said list of documents, a photocopy of the certified copy of the Deed of Sale bearing Deed no. 7213/92 was enclosed and the said documents was marked as Ext.15. A perusal of the said documents marked as Ext. 15 had two dates mentioned in the last page. Relevant to mention that the dates mentioned were 22/3/1995 and 2/9/1997.

16. The Plaintiff adduced evidence of five witnesses and exhibited various documents which were marked as Ext.1 to Ext. 13, both inclusive. The Defendants adduced the evidence of two witnesses and exhibited various

documents marked as Ext.-A to Ext. G. Ext.5 was the Sale Deed No.7312 dated 30/11/92 which was put to challenge in the counter claim. The records reveals that the Sale Deed was produced before the Trial Court and was proved in original. It is also relevant to take note of Ext.C which is a certified copy of the Deed of Sale bearing Deed No.7312/92. A perusal thereof shows that the said certified copy was issued on 16.6.2000. Ext.D is a Deed of Sale dated 30/6/1947, wherein Lt. Rukmanand Ajitsaria has put his signatures and signatures were exhibited as Ext. D1 and Ext. D-2. Ext.E is a registered General Power of Attorney, wherein Late Rukmanand Ajitsaria had appointed one Kanailal Sarma as his Attorney. The signatures of Rukmanand Ajitsaria were exhibited Ext.E (1), Ext. E(2), Ext.E (3) and Ext. E(4). Ext-F is the challan wherein Late Rukmanand Ajitsaria had put his signature and his signature was exhibited as Ext. F(1). Pertinent herein to mention the evidence on affidavit of the DW-2, who was one Mr. Ram Narayan Sarma. In his evidence-in-chief, he stated that Lt. Rukmanand Ajitsaria had vide a Deed of Sale bearing Deed No. 5840 dated 7/11/1991 sold a plot of land measuring more or less 1Katha 6 Lechas covered by Dag No. 2317 of K.P. Patta No. 1262 of Saher Sarania Part-II under Mouza Ulubari to the said DW-2. The Deed of Sale was exhibited as Ext.-G and the thumb impression of Late Rukmanand Ajitsaria was put Ext. G(1), G(2), G(3), G(4), G(5), G(6) and G(7). In the said evidence in chief it was

mentioned that Lt. Rukmanand Ajitsaria due to shivering of his hand, he could not write at all, for which he had to put his thumb impression at the time of execution of the Sale Deed. During cross-examination of the DW-2 , he categorically stated that before 1991 Lt. Rukmanand Ajitsaria used to sign documents and after the execution of Ext.G, Lt. Rukmanand Ajitsaria was not in a position to put his signature in any other documents till his death.

17. The Trial Court vide the judgment and decree dated 25/09/2006 dismissed the suit and decreed the counter claim in favour of the Defendants. The Trial Court took up issue No.2 and 3 and after perusing the evidence on record came to a finding that Lt. Rukmanand Ajitsaria never executed Ext.5 in favour of the Plaintiff. The learned Trial Court further exercising the jurisdiction under Section 73 of the Indian Evidence Act, 1872 compared the signatures appearing in Ext. 5 with Exts. D, E and F and came to a finding that on a comparison of the signatures appearing in Ext. 5(1) to 5(10) with Ext. D(1), E(1), E(2), E (3) and Ext. F(1) the person who signed Exts-D, E and F is not the person who signed Ext.-5. In coming to the said conclusion that Lt. Rukmanand Ajitsaria did not execute the Ext.5, the learned Trial Court had also taken into consideration the evidence of DW-2 who during his cross-examination also confirmed that due to trembling of the hands of Rukmanand, he could not sign Ext.G and as such put his thumb impression. In deciding the Issue Nos. 4, 5 and 6 and taking into

consideration the submission made by the learned counsel appearing on behalf of the plaintiff that the Plaintiff had constructed apartments/flats on the suit land and sold the said flat to 20 flat owners, the Trial Court held that at the time when the suit and the counter claim were filed, the building was not in existence, and as such the same would not affect the rights of the Trial Court to pass a decree as prayed for in the counter claim. Accordingly, the Trial Court dismissed the suit and decreed the counter claim with cost declaring the right, title and interest of the Defendant Nos. 1 to 5 over the suit land and cancellation of the Sale Deed No. 7312/92 dated 30/11/1992 as fraudulent. It was further decreed that the Defendant Nos. 1 to 5 are also entitled to get possession of the suit land by evicting the Plaintiff and his men under him and/or steps into his shoes by removing the building constructed by the Plaintiff over the suit land during the pendency of the suit and after recovery of possession the Defendants shall be entitled to permanent injunction to restrain the Plaintiff and his men under him from entering into the decreetal property.

18. Being aggrieved and dissatisfied with the judgment and decree dated 25/9/2006, the Appellants herein preferred an appeal before the Court of the District Judge, Kamrup(M) at Guwahati. The said appeal was registered and numbered as Title Appeal No. 109/2006. The First Appellate Court vide a judgment and decree dated 15/9/2007 dismissed the appeal thereby affirming

the findings and conclusions arrived at by the Trial Court. A perusal of the impugned judgment and decree dated 15/9/2007 would show that the First Appellate Court had taken into consideration the contentions put forth pressed by the parties and had given reasons for the decision. It is against the said judgment and decree passed by the First Appellate Court dated 15/9/2007 that the Appellants are before this court under Section 100 of the Code of Civil Procedure.

19. In the backdrop of the above, this Court would like to take up the questions of law so formulated by this Court vide the order dated 16/3/2009. The said question of law as quoted above relates to perversity in the findings of the First Appellate Court for non-consideration of the evidence on record and the Exhibits, more particularly Exts. 14 and 15. As already noted herein above, Ext-14 is a list of documents filed on 10/2/1998 and Ext. 15 is a photocopy of the certified copy of the Sale Deed bearing No. 7213/92.

20. Mr. S.P. Roy, the learned counsel for the Appellant on the basis of Exts. 14 and 15 submits that the perversity in the judgments of both the Trial Court as well as the First Appellate Court in not considering the Extx. 14 and 15 in as much as if the said Exhibits would have been considered the counter claim would be barred by limitation. As noted herein above, in the counter claim at paragraph 29 (xv), it has been specifically mentioned that the Defendants first

came to know about the execution and registration of the Sale Deed 7213/92 dated 30/11/92 on 28/2/1997. The counter claim was filed on 10th of February, 1998.

21. It appears from a perusal of the said document marked as Exhibit 15 that there are two dates at the last page; one 22/3/1995 and the other is 2/9/1997. Being so, the said Exts. -15 does not show in any manner that the counter claim was barred by limitation. The learned counsel for the Appellant also further could not substantiate as to whether Exts. 14 and 15 shall impact the concurrent finding of fact.

22. In the question of law so framed, it also takes into consideration perversity for non consideration of the evidence on record. The learned counsel for the Appellant have failed to show on the basis of what evidence and records, it can be said that the concurrent finding of fact suffers from any perversity. Under such circumstances, this Court is therefore of the opinion that the said substantial question of law so framed is not involved in the instant Second Appeal.

23. The learned counsel for the Appellant further submits that the Appellant was permitted to raise any other substantial question of law during the course of hearing vide the order dated 15/3/2009, and as such, he submits that not sending the Ext. 5 to a handwriting expert and the Court exercising the power

under Section 73 of the Indian Evidence Act, 1872 by itself is a substantial question of law which is involved in the instant appeal. He refers to two judgments of the Supreme Court rendered in the case of **Thiruvengdam Pillai Vs. Navaneethammal And Another** reported in (**2008**) **4 SCC 530** and **Ajay Kumar Parmar Vs. State of Rajasthan** reported in (**2012**) **12 SCC 406**.

24. I have perused both the judgments. In the case of Thiruvengdam Pillai(supra) the Supreme Court at paragraph 16 and 17 observed that there is no doubt that the Court can compare disputed handwriting/signature/finger impression with the admitted handwriting/signature /finger impression, but such comparison by court without the assistance of any expert has always been hazardous and risky. It was also mentioned that when the Court finds that the disputed finger impression and admitted thumb impression are clear and the Court is in a position to identify the characteristics of fingerprints, the court may record a finding on comparison, even in the absence of an expert's opinion. But where the disputed thumb impression is smudgy, vague or very light, the court should not hazard a guess by a casual perusal. It was observed that even in cases where the court is constrained to take up such comparison, it

should make a thorough study, if necessary with the assistance of counsel, to ascertain the characteristics, similarities and dissimilarities. Necessarily, the judgment should contain the reasons for any conclusion based on comparison of the thumb impression, if it chooses to record a finding thereon. It was observed that the Court should avoid reaching conclusions based on a mere casual or routine glance or perusal. Paragraphs 16 and 17 of the said judgment being relevant are quoted herein below:-

> *"**16.** While there is no doubt that court can compare the disputed handwriting/signature/finger impression with the admitted handwriting/signature/finger impression, such comparison by court without the assistance of any expert, has always been considered to be hazardous and risky. When it is said that there is no bar to a court to compare the disputed finger impression with the admitted finger impression, it goes without saying that it can record an opinion or finding on such comparison, only after an analysis of the characteristics of the admitted finger impression and after verifying whether the same characteristics are found in the disputed f inger impression. The comparison of the two thumb impressions cannot be casual or by a mere glance. Further, a finding in the judgment that there appeared to be no marked differences between the admitted thumb impression and disputed thumb impression, without anything more, cannot be accepted as a valid finding that the disputed signature is of the person who has put the admitted thumb impression. Where the court finds that the disputed f inger impression and admitted thumb impression are clear and where the court is in a position to identify the characteristics of fingerprints, the court may record a finding on comparison, even in the absence of an expert's opinion. But where the disputed thumb impression is smudgy, vague or very light, the court should not hazard a guess by a casual perusal.*
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> ***17.** The decision in Murari Lal and Lalit Popli should not be construed as laying a proposition that the court is bound to compare the disputed and admitted finger impressions and record a finding thereon, irrespective of the condition of the disputed finger impression. When there is a positive denial by the person who is said to have affixed his finger impression and where the finger impression in the disputed document is vague or smudgy or not clear, making it difficult for comparison, the court should hesitate to venture a decision based on its own comparison of the disputed and admitted finger impressions. Further, even in cases where the court is constrained to take up such comparison, it should make a thorough study, if necessary with the assistance of counsel, to ascertain the characteristics, similarities and dissimilarities. Necessarily, the judgment should contain the reasons for any conclusion based on comparison of the thumb impression, if it chooses to record a finding thereon. The court should avoid reaching conclusions based on a mere casual or routine glance or perusal."*

25. It may, however, be relevant to mention herein that the case of Thiruvengdam Pillai(supra) was a judgment in respect to thumb impression. The next case to which the learned counsel for the Appellant had referred is a judgment in the case of Ajay Kumar Parmar(supra). The Supreme Court in Paragraph Nos. 25 to 28 dealt with the issue as regards the comparison of the signatures or handwriting by the Court. The said paragraphs Nos. 25 to 28 of the said judgment being relevant are quoted herein below :-

> "**25.** In *Murari Lal* v. *State of M.P.* this Court, while dealing with *the said issue, held that, in case there is no expert opinion to assist the court in respect of handwriting available, the court should seek guidance from some authoritative textbook and the court's own experience and knowledge, however even in the absence of the same, it should discharge its duty with or without expert, with or without any other evidence.*
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> ***26.*** *In A. Neelalohithadasan Nadar v. George Mascrene, this Court considered a case involving an election dispute regarding whether certain voters had voted more than once. The comparison of their signatures on the counterfoil of the electoral rolls with their admitted signatures was in issue. This Court held that in election matters when there is a need of expeditious disposal of the case, the court takes upon itself the task of comparing the signatures, and thus it may not be necessary to send the said signatures for comparison to a handwriting expert. While taking such a decision, reliance was placed by the Court, on its earlier judgments in State (Delhi Admn.) v. Pali Ram and Ram Pyaralal Shrivastava v. State of Bihar.*
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> ***27.*** *In O. Bharathan v. K. Sudhakaran, this Court considered a similar issue and held that the facts of a case will be relevant to decide where the court will exercise its power for comparing the signatures and where it will refer the matter to an expert. The observations of the Court are as follows: (SCC p. 713, para 18)*
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> > "*18. The learned Judge in our view was not right … taking upon himself the hazardous task of adjudicating upon the genuineness and authenticity of the signatures in question even without the assistance of a skilled and trained person whose services could have been easily availed of. Annulling the verdict of popular will is as much a serious matter of grave concern to the society as enforcement of laws pertaining to criminal offences, if not more. Though it is the province of the expert to act as Judge or jury after a scientific comparison of the disputed signatures with admitted signatures, the caution administered by this Court is to the course to be adopted in such situations could not have been ignored unmindful of the serious repercussions arising out of the decision to be ultimately rendered.*"
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> ***28.*** *The opinion of a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the court from*

comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the court may also not be conclusive. Therefore, when the court takes such a task upon itself, and findings are recorded solely on the basis of comparison of signatures or handwritings, the court must keep in mind the risk involved, as the opinion formed by the court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an opinion whether of an expert, or of any witness, the court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision."

26. From a perusal of the said judgment the Supreme Court had categorically observed that when the Court takes up task upon itself and the findings are recorded **solely** on the basis of comparison of the signatures or handwriting, the Court must keep in mind the risk involved and the opinion formed by the Court may not be conclusive and is susceptible to error especially when the exercise is conducted by one do not conversant with the subject. It was observed that the Court, therefore, as a matter of prudence and caution hesitate to base its finding **solely** upon a comparison made by the Court.

27. The above judgment would clearly shows that the court is not denuded with the power to compare the signature in terms with Section 73 of the Indians Evidence Act., 1872. However, the Court has to be slow to base its finding solely made upon the comparison made by it.

28. In the backdrop of the above, let this Court take into consideration as to

how and on what basis did the Courts below made comparison of the signatures as appearing in Ext.5 with the Exts, D, E, F and G and did the Courts base their findings solely on the comparison . Paragraph No. 26 to Paragraph 29 of the Trial Court Judgment being relevant is quoted herein below :--

"26. *Ext. –D is a Sake Deed executed by Rukmanand Ajitsaria on 30/6/47, Ext.-E is a power of Attorney executed by Rukmanand Ajitsaria on 23/12/52 and Ext.F is a Treasury Challan signed by Rukmanand Ajitsaria on 23/7/53.*

The Defendant through PW-2 proved the signatures of Rukmanand Ajitsaria in Ext-D, E and F. DW1 Amit. Indira Agarwal is the daughter of Rukmanand Ajitsaria. she also proved the signatures of Rukmanand Ajitsaria in Ext-D, E and F.

27. Under section 73 of the Evidence Act, a court is also competent to compare the admitted or proved handwriting with the disputed writing. The las is well settled that although there is not legal bar to the Judge using his own eyes to compare the dispute writing with admitted or proved writing, he should, as a matter of prudence and caution, hesitate to base his finding solely on comparison made by himself.

Here in the instant case, one can compare the alleged signatures of Rukmanand Ajitsaria appeared in Ext-5 and Ext-D to F without the old of microscopic enlargement of expert evidence.

A bare eye comparison of the signatures Ext.-D (1), Ext-E (1), (2) (3) and Ext-F (1) appear in Ext-D, Ext-E and Ext-F shows that the said signature are same and similar. But without taking any help from the hand-writing expert one can draw opinion by comparison of the signatures Ext-5(1) to 5(10) with the signatures Ext.-D(1), Ext-E(1), (2), (3) and Ext-F91) that the person who signed the Ext-D, E and F is not the person who signed the Ext.-5.

28) Further, besides oral evidence of DW 1, the defendants in support of their case that Rukmanand Ajitsaria since about 10 years prior to his death was not in a position to sign any paper due to illness proved Sale Deed Ext.-'G' executed on 7/11/91. Ext. –'G' was allegedly executed by Raumanand Ajitsaria in favour of one Shri Ram Narayan Sarman by putting thumb impression.

The defendants examined aforesaid Shri Ram Narayan Sarman as DW2. DW 2 in his evidence on affidavit stated that he was a tenant under Rukmanand Ajitsaria. As such, he knew that due to shivering of his hand due to illness he was not in a position to write for about ten years prior to his death. DW 2 was vigorously cross-examined by the plaintiff. DW 2 in cross-examination also confirmed that due to trembling on his hand Rukmanand Ajitsaria could not sign. But before 1991 he used to sign document. DW 2 proved the LTI of Rukmanand Ajitsaria put in Ext.'G'.

The learned counsel for the plaintiff vehemently contended that the defendants without obtaining any leave from the Court have produced the Ext.'G', therefore, Ext-'G' is not admissible in evidence. A careful scrutiny of record supports the contention raised by the learned counsel. However, if the Ext-'G' is not accepted as evidence the entire evidence of DW 2 cannot be discarded. i found no reason to discard his evidence-in-chief and cross examination, reproduced above. The above evidence of DW 1 that prior to his death Rukmanand Ajitsaria was not in a position to write or sign for several years.

29. In view of the reasons discussed hereinbefore, coupled with the fact of non-examination of

the identifier of seller Rukmanand of Ext.-5, I am constrained to hold that Rukmanand Ajitsaria never executed Ext-5 in favour of the plaintiff. As such, the plaintiff has acquired no right, title and interest over the suit land."

29. The findings so arrived at by the Trial Court, as it would be seen from a perusal of Paragraphs 26 to 29 quoted herein above would show that the Trial Court did no solely base its findings upon a comparison made by it. The Trial Court had taken into consideration the evidence of DW 2as well as the Ext.G.

30. The First Appellate Court had also considered the said aspect of the matter in Paragraph No. 18 of the impugned judgment and decree and the same for the sake of convenience is quoted herein below :-

18. The appellant has taken another ground that the learned trialm court has not sent signature of Rukmanand Ajitsaria allegedly put in Ext-5 along with his admitted signatures to the F.S.L. for comparison i.e. the learned trial court has not sent the signature of Ext-D, Ext.-E and Ext.-F, that is,Ext.D (1), E (1), E(2), E(3) and Ext.-F (1) to compare with the signatures of Ext-5, that is Ext.5(1) to Ext-5(10) to F.S.L. without examining those signatures by any expert by bare eye it cannot be ascertained whether the signatures of Ext-D. E & F are the same and similar with the signatures of Ext.-5. The learned trial court has committed wrong by comparing those signatures by herself. But under Section 73 of the Evidence Act a court is also competent to compare the admitting of proved hand writing with a disputed writing. There is no legal bar to a Judge in using his own eyes to compare the writing. But is is a matter of prudence and caution. In this instant case anyone can compare the signature of Rukmanand Ajitsaria appeared in Ext-5 with the signatures of Ext-D, Ext.-E and Ext.-F without the said of any expert evidence. By comparing the signatures of Rukmanand Ajitsaria, the learned trial court has not committed any wrong. As the signatures of Ext.-5 is not the signature of the same person who put the signature in Ext-D, Ext.-E and Ext.-F and as the signatures of Ext-D, Ext.-E and Ext.-F is admittedly the signatures of Rukmanand Ajitsaria, it can be safely held that Rukmanand Ajitsaria, has not put the signatures in Ext.-5."

31. The exercise of jurisdiction by the Trial Court as well as by the Appellate

Court under Section 73 of the Indian Evidence Act, 1872 in the opinion of this Court does not suffer from any illegality committed by the Trial Court or by the First Appellate Court as would be apparent from a perusal of the above quoted portion of the judgments of the Trial Court as well as the Appellate Court. Under such circumstances, the question of law so suggested by the learned counsel for the Appellant during the course of hearing cannot also be considered to be a question of law involved in the instant appeal.

32. The learned counsel for the Appellant further urged that the question of limitation was not taken into consideration in the proper perspective as the Deed of Sale bearing No. 7312/92 was executed on 30/11/1992 and counter claim was filed on 10/2/1998 and the period of limitation for cancellation of the said document had already expired and the said substantial question of law as is involved in the instant appeal. In the opinion of this Court, a perusal of the counter claim shows that it was categorically mentioned therein at Paragraph 29(xv) that the Defendants have asserted that they first came to know about the execution and registration of the Sale Deed on 28/2/1997. There is no material which would suggest that the Defendants had knowledge of the said Deed of Sale bearing No. 7213/92 dated 30/11/92 prior to the said date. Ext.-15 is a photocopy of the certified copy of the Deed of Sale bearing Deed No. 7213/92 dated 30/11/92. It shows the last of such date as 2/9/1997 and as

such on the basis of Ext.15, it cannot be said that the Defendants had knowledge about the execution of the Deed of Sale/bearing No. 7213/92 prior to 28/2/1997.

33. The learned counsel for the Appellant further submitted Courts below had passed the decree in absence of one Pawam Kr. Ajitsaria, who was the adopted son of Late Rukmanand Ajitsaria and as such a substantial question of law is involved as to whether the counter claim was maintainable in absence of Sri Pawan Kumar Ajitsaria. There is no document on record which would show that Sri Pawan Kumar Ajitssaria is the adopted son of Lt. Rukmanand Ajitsaria. The learned First Appellate Court had also taken into consideration the said aspect of the matter and in Paragraph 19 of the impugned judgment and decree observed that all cases filed by Pawan Kr. Ajitsaria claiming himself to be the adopted son of Rukmanand Ajitsaria were dismissed. Consequently, this Court is also of the opinion that the question of law so suggested is not a substantial question of law involved in the instant appeal.

34. Lastly, the learned counsel for the Appellant submits that in the meantime, during the pendency of the instant suit, a multi storey building was constructed whereby various flats have been sold to individual owners and in absence of the said owners being brought on record, the Trial Court as well as

the First Appellate Court could not have passed the decree. The said submission on the face of it is misconceived in a proceedings under Section 100 of the Code of Civil Procedure, in as much as this Court's power under Section 100 of the CPC can be exercised only on a substantial question of law and it is no longer res integra that such substantial question of law so sought to be raised has to have a foundation in the pleadings. A perusal of the plaint would clearly show that there is no foundation laid as regards the existence of multi storey building wherein flats have been sold to various persons. The record on the other hand, shows that the construction of building was carried out during the pendency of the litigation and as such any change brought to the status of the property shall is always subject to the result of the litigation. Consequently, the same cannot also be a substantial question of law involved in the instant proceedings.

35. In view of the above, as in the instant appeal there arises no substantial question of law, the instant appeal stands dismissed. The Defendants/the Respondents herein shall be entitled to all costs throughout the proceedings.

36. Registry is directed to return the LCR to the learned Court below forthwith.

JUDGE

Comparing Assistant