



GAHC010106312010

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

Case No. : RSA/90/2010

ARABINDA MITRA
S/O LATE RABINDRA MITRA, R/O MORANHAT, DIST. DIBRUGARH, ASSAM.

VERSUS

SOMNATH MITRA
SOMNATH MITRA, S/O LATE RABINDRA MITRA, R/O MORANHAT, DIST.
DIBRUGARH, ASSAM.

Advocate for the Petitioner : MS.B CHOUDHURY

Advocate for the Respondent : MR.M NATH

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant : Ms. B Choudhury, Advocate
Mr. S Sahu, Advocate

For the Respondent : Mr.S Dutta, Sr. Advocate
Mr. K Upamanyu, Advocate

Date of Hearing : 30.03.2023

Date of Judgement : 21.04.2023

JUDGEMENT & ORDER (CAV)

1. Heard Ms. B Choudhury, learned counsel assisted by Mr. S Sahu, learned counsel for the appellant. Also heard Mr. S Dutta, learned Senior counsel assisted by Mr. K Upamanyu, learned counsel for the respondent.
2. The present second appeal is directed against the judgment and decree dated 23.10.2009 passed by the learned Civil Judge, Dibrugarh in TA 01/2009 upholding the judgment and decree dated 27.11.2008 passed by the learned Civil Judge Junior No. 1, Dibrugarh in TS 35/2002 whereby the suit of the plaintiff was decreed.
3. During the course of hearing the following substantial question of law is framed:

“Whether the learned Court below is justified in decreeing the suit of the plaintiff/respondent for recovery of khas possession in respect of Schedule-B land without recording any finding that the Schedule-B land is part of Schedule-A land”

4. To examine whether the aforesaid substantial question of law is involved in the present case, let this court first record in a nutshell, the facts leading to filing of the present second appeal.

5. The case of the plaintiff:

- I. The plaintiff instituted a suit before the learned Civil Judge Junior No. 1, Dibrugarh, which was registered as TS No.

35/2002 with a prayer for declaration of right, title and interest of the plaintiff over the scheduled B land and recovery of the scheduled B land. According to the plaintiff, the said land has been encroached by the defendant.

- II. The pleaded case of the plaintiff is that the plaintiff and defendant are own brothers. Plaintiff had purchased the schedule A land through a registered sale deed executed on 07.05.1988 from the defendant.
- III. The said suit land consists of 7.4 Lechas. It was also pleaded that the said suit land is part and parcel of 1/7 of the total land measuring 2 Kathas 12 Lechas, which belongs to the defendant.
- IV. It is the case of the plaintiff that the defendant has sold 1/7 of the total land of 2 Kathas and 12 Lechas belonging to the defendant.
- V. The plaintiff pleaded that on 30.04.2002, suddenly, the defendant collected RCC construction materials and stacked the same over the scheduled B land in spite of strong protest from the plaintiff and thereafter on 05.05.2002 engaged some labourers to excavate the land for laying foundation of RCC building. Finally, the defendant started construction work without demarcation of the suit land and without obtaining permission for construction thereon only with a view to grab the schedule B land.
- VI. It was also pleaded that defendant is having no right, title and

interest over the scheduled B land.

6. The case of the defendant:

- I. The defendant appeared in the suit and contested the same by filing written statement. The sale deed by which the plaintiff purchased the land from the defendant was not disputed and also the pleading that the said land was part of 2 Kathas 12 Lechas of land belonging to the defendant.
- II. However, the allegation of collecting building material and encroachment was denied by the defendant.
- III. It was also a stand of the defendant that as the scheduled B land has not been specifically mentioned, it may so happened that building materials were collected over the scheduled B land, however, it was specific stand taken that over the portion of land where building materials were stacked belongs to the defendant and the defendant has been in possession of the suit land having a Gumti like shop thereon and running a pan Gumti shop and has been managing through another brother Pabitra Mitra.
- IV. It was also pleaded that there is no vacant land nor it has been under the occupation of the plaintiff at all.
- V. A further stand was taken to the effect that the for clarification and for proper understanding the dispute, a settlement was arrived on 16.11.1989 in presence of one Kanak Chetia i.e. DW3, one Nakul Phukan, Lotmandal of the area and one Sri Shymal Dey.

VI. After consideration of document and area, the dispute was settled and an agreement was entered into between them, which was written by one Bidhan Ch. Dev (DW2).

7. The Issues:

The learned trial court framed the following issues:

1. Whether the suit is maintainable in law and in fact?
2. Whether the plaintiff has right to sue?
3. Whether there is any cause of action?
4. Whether the defendant has any right, title or interest over the suit land?
5. Whether the plaintiff is entitled to decree as claimed?
6. To what relief are the parties entitled?
7. Whether the plaintiff has right, title and interest over the suit land?
8. Whether the defendant encroached the land of the plaintiff?

8. The evidence:

- I. The plaintiff examined himself as PW1 and the defendant examined four witnesses including the defendant himself as DW1. DW2 is the petition writer, who wrote the compromise settlement and DW3 is one of the person, who according to the defendant was present during the amicable settlement and DW4 is the next door neighbor of the plaintiff and defendant
- II. During the pendency of the suit, the defendant also had filed

an application dated 18.07.2005 for appointment of Commission by its petition under Order 26 Rule 9 of the CPC, 1908 and though the plaintiff objected to such petition, the learned trial court below allowed such prayer and appointed the Circle Officer, Moran Revenue Circle as Commissioner.

- III. Thereafter, the learned Commissioner visited the site and did his job in presence of the plaintiff, defendant and their respective counsels on 02.02.2008 and submitted his report on the same date i.e. on 02.02.2008, which shall be dealt with in details at the later part of this judgment as extensive argument has been advanced on the said report by both the parties..

9. The findings of the Trial Court:

Thereafter, the learned trial court decreed the suit and declared that the plaintiff is having right, title and interest and possession over the suit land A and B and the defendant is declared liable to deliver peaceful and vacant possession of the suit land B to the plaintiff within a period of 15 days from the passing of the decree. The learned trial Court also granted permanent injunction restraining defendant and all persons under him from any sort of interference in respect of the schedule A and B land.

10. The findings of the Appellate Court:

- I. Being aggrieved, the defendant preferred First Appeal before the Appellate Court i.e. learned Civil Judge, Dibrugarh, which

was registered as TA No. 1/2009.

- II. The learned Appellate Court concurred with the decision of the learned trial court and accordingly, dismissed the suit.
 - III. The learned Appellate court further came to a conclusion that the defendant had encroached a plot of land measuring 1 Lecha owned and possessed by the plaintiff. Being aggrieved, the present appeal is preferred.
11. Argument advanced by the learned counsel for the appellant are as under:
- I. Both the learned courts below heavily relied on the report of the learned Commissioner in passing the decree and holding that the defendant had encroached 1 Lecha of land i.e. schedule B land. However, even after written objection from the defendant as to the validity of the finding of the Commissioner's report dated 02.02.2008, the learned trial court has not given any chance to examine the Commissioner and thus relied on evidence, which is not evidence in the eye of law in view of objection of the defendant to such finding.
 - II. The plaintiff has miserably failed to bring on record through his evidence to establish that the defendant has encroached the schedule B land inasmuch as during his cross-examination, the plaintiff as PW1 has admitted that the construction materials were stacked beyond the disputed land. Therefore, in view of such evidence, finding that the plaintiff has encroached the scheduled B land is perverse.



- III. Even if the Commissioner's report is accepted, the finding of the Commissioner's report will show that after measurement, the Commissioner came to a conclusion that the plaintiff was in possession of 5.5 Lechas of land and there is no finding regarding possession by the defendant and therefore, such finding cannot lead to a conclusion that the defendant had encroached some land. Therefore, the impugned decisions are perverse.
- IV. The direction to the Commissioner was issued to measure the entire plot of land, however, the Commissioner has measured only the land under possession of the plaintiff and came to a conclusion that the plaintiff was under possession of 5.5 Lechas of land. There are no findings in the Commissioner's report that the defendant had encroached the remaining part of the land. Therefore, even if it is assumed that the Commissioner's report is correct, the learned court below could not have come to a conclusion that defendant/appellant had encroached the same. Therefore, such finding is a perverse finding and this court should interfere with both the judgments.
- V. The defendant has established through evidence that the scheduled B land is being possessed since long by the defendant by constructing a Gumti, which was specifically admitted by the defendant in the written statement.
- VI. The DW4, who is a neighbor of both the plaintiff and the defendant and an independent person has also ascertained

such fact and proved the pleading independently. However, such evidence and material on record has not at all been discussed by both the learned courts below. Therefore, the finding is perverse.

- VII. Without examination of the Commissioner, the report of the Commissioner cannot be treated as evidence. In support of such contention, the learned counsel for the appellant relies on the judgment of this court in **Radhe Shyam Bhaumik Vs Lal Mohan Nath** reported in **1992 1 GLJ 364** and the case of **Smt. Vadda Rajeswaramma vs V.L. Narasimha Charyulu** reported in **AIR 1998 Andhra Pradesh 202**.

12. The Argument advanced by Mr. S. Dutta, learned Senior Counsel on behalf of the plaintiff/respondent:

- I. Both the courts below after appreciation of evidence concurrently found that the defendant has encroached an area of 1 Lecha of land and such finding of fact do not suffer from any error and not to say the same being perverse. Therefore, this court in exercise of its power under Section 100 of the CPC, 1908 may not like to reverse the concurrent judgments and decrees of the court below.
- II. Through the evidence of PW 1, the plaintiff has established his right over the schedule-A land and that Schedule-B is a part of schedule-A land. The commissioner's report also corroborates such evidence of the PW 1. At the same time, the defendant has also not disputed regarding ownership of the plaintiff over

schedule A land. Therefore, such evidences should not be brushed aside lightly inasmuch as sufficiency of evidence is not the concern of a Court dealing with the second appeal.

- III. The decision of both the courts below and the finding that the defendant is an encroacher is based on evidence. It is cannot be said that such finding is without any evidence inasmuch as sufficiency of evidence cannot be a subject matter of second appeal. Therefore this court may not like to interfere with the concurrent finding of both the court below arrived at on the basis of evidences through the PW 1, the admission of DW 1 and report of the Commissioner.
- IV. In support of the aforesaid contention, Mr. Dutta relies on the decision of the Hon'ble Apex Court in the case of **Azrith Bivi vs Chinnathambi** reported in **(2013) 14 SCC 608** and Judgment of this court in the case of **Ranjit Kakati vs Krishna Prasad Kakati** reported in **2014 (5) GLT 248**.
- V. The purported deed of settlement cannot be relied upon and the same has rightly been not relied upon by both the courts below inasmuch as the said deed was a unregistered deed and such un registered deed is not admissible in evidence inasmuch as it is cannot be said that said unregistered deed was brought as evidence for any other collateral purposes. The same was brought on record to establish the case of the defendant that the matter was amicably settled. Therefore, such unregistered documents cannot be relied on as a piece of evidence.

- VI. In support of such submission, Mr.Dutta relies on the decision of the Hon'ble Apex Court in the case of ***Gurdev Kaur & Ors vs Kaki & Ors.*** reported in ***AIR 2006 SC 1975*** (in respect of Substantial questions of law).
- VII. Every report of the Commissioner appointed and collected in terms of the Order XXVI Rule 9 is a part of the record of the suit by virtue of mandate of Rule 10. Reading of the Order XXVI and Rule 9 and 10 will show that there is no provision for filing an objection to such report made by local Commissioner. When an Inspection by local Commissioner is made in presence of party, the said report is to be ordinarily accepted by the court appointing the local Commissioner unless any inherent defect could be pointed out therein. In the case in hand, except submitting that the report is not complete and not as per the order of this court, the defendant could not raise any fundamental flaw or inherent flaw to reject such report. Therefore such acceptance of the report by the both the courts below itself became a finding of facts and therefore in a second appeal this court may not like to test the veracity of such finding of fact by the Commissioner affirmed by both the learned trial courts below.
- VIII. It is also contended that even when defects are inherent, the court shall have further power to go for further enquiry. In the present case the courts below had not found any inherent flaw with the report and therefore, had accepted such report. In support of such contention, Mr Dutta relies on the decision

of Punjab and Haryana High Court in the case of **Balbir Dewan vs. Neveen Chander** reported in **AIR 1989 Punjab and Haryana 257** and in the case of **Vemuseti Appayamma vs Lakshman Sahu** reported in **AIR 1973 Andhra Pradesh 168**.

- IX. Only filing of an objection shall not suffice the objection for the reason that Commissioner's report is admissible in evidence. When the defendants raises any objection to the report of the Commissioner, the defendant should have applied for examining the Commissioner in person before the court, which has not been done in the present case and therefore at this belated stage, in a second appeal, the appellants are debarred from objecting such settled question of fact inasmuch as the report itself discloses that both the plaintiff and defendant and the respective counsels were present on the date of examination and survey Commissioner has not reported any thing to suggest that there was any objection regarding conduct of the survey by the Commissioner. In support of such contention, Mr. Dutta relies on the Judgment of this court in the case of **Sayarani Das Vs. Bireswar Rudrapal** reported in **1999 (2) GLT 600**.
- X. It is clear that both the courts below after perusal of Ext.1 and Ext. 2 came to a specific finding of fact that the plaintiff purchased 7.4 lechas from the defendant and the land was mutated in the name of the plaintiff and that the evidence of the PW 1 remains unrebutted inasmuch as the defendant had

failed to rebut the evidence of PW 1 in respect of delivery of possession of 7.4 lechas of land to the PW 1.

13. **Determination made by this Court:**

- I. It is admitted by the parties and also conclusively determined by both the learned Courts below that Schedule-A land was purchased by the plaintiff from the defendant by a registered sale deed executed on 07.05.1988 which consists of 7.4 Lechas. The defendant/vendor is a owner of 2 Katha 12 Lechas and the Sale Deed discloses that the land under sale is 1/7th of the total land measuring 2 Kathas 12 Lechas of the vendor/defendant.
- II. For the purpose of determination of the alleged encroachment, a Survey Commissioner was appointed on the application of the plaintiff. The defendant was present during the survey along with his lawyer however subsequently an objection was filed. Therefore, this Court has perused the copy of the Survey Commissioner's report which was exhibited. The Survey Commissioner reported that he surveyed the land under Dag No. 160 and Periodic Patta No. 164 on 02.02.2008. Due to the shape of dag No. 160 which is not fully rectangular or triangular or square rather a polygonic type, it is quite difficult to conduct the survey as laid down in Survey Rules and to ascertain the possession of the plaintiff, a tentative and rough demarcation was carried out and result of the survey report was that survey mark was put up to the boundary of Periodic

Patta No. 164 of Dag No. 160 and ascertained the boundary possession of the Somnath Mitra (defendant). From such boundary, measurement of area possessed by Somnath Mitra was done as per sale deed. It was found that Somnath Mitra was possessing land measuring 5.5 Lechas approximately under Dag No. 160.

- III. Thus, what is discernible from the Survey report is that the plaintiff was possessing an area of 5.5 lechas. The land which was possessed by the defendant was not at all measured. The order of the learned trial court dated 08.08.2005 by which survey commissioner was directed reflects that the Circle Officer of Moran Circle was appointed to measure the land and to submit the report before the Court. The land shall in the context of the suit meant the suit land/Schedule A and B land. According to the Schedule of the plaint, Schedule –B land which has been allegedly encroached consists of approximately 1 Lecha out of total land of 7.4 Lechas. Thus, according to the pleading of the plaintiff, encroached land is 1 Lecha out of 7.4 Lechas i.e. the plaintiff was in possession of 6.4 Lechas. However, the Survey Commissioner found the possession of the plaintiff to be 5.5 Lechas and on the basis of such evidence, both the learned Courts below came to a finding that the defendant has encroached 2 Lechas of land.
- IV. It is well settled that power of High Court to interfere in second appeal under Section 100 is very limited and the Court is to decide only substantial question of law, if at all arises. Finding

of facts reached by the learned Courts below cannot be interfered or reversed in a second appeal without coming to a conclusion that the said finding of fact is either perverse or not based on materials on record. In this regard, this Court can gainfully rely on the judgment of the Hon'ble Apex Court in the case of ***Karnataka Board of Wakf vs- Anjuman-E Islamia*** reported in ***1999 6 SCC 343***. It is equally well settled that even when from the evidence two inferences are possible, then the one drawn by the Courts below should be opted. Such finding of facts and decisions can only be interfered in a second appeal when such decision is based on inadmissible evidence or arrived at without evidence or recorded based on misreading of material on records and documents.

- V. As the perversity of the decision regarding encroachment is a substantial question of law framed therefore, this Court has perused the survey commissioner report as well as evidence of the witnesses who were brought to prove the dispossession and encroachment.
- VI. The Word "Perverse" in the legal parlance is defined to mean "against the weight of evidence".
- VII. In the case in hand, the PW-1 in his cross examination admitted that the construction materials were stacked beyond the disputed land against the pleaded case of the plaintiff that the encroachment started with stacking of constructed materials. The DW-4 who is a neighbor of both the parties

deposed that Schedule B land is under possession of the defendant since long and there was a gumti inasmuch as the defendant also pleaded that there was a gumti in the Schedule B land. Therefore, the vital piece of evidence was the Commissioner's report. What is discernible from the commissioner report was that the plaintiff was under possession of 5.4 leaches of land. The land of defendant was not measured and it was not ascertained what area of land is under possession of the defendant. It was also not a finding in the Commissioner's report that the defendant has encroached the land of the plaintiff inasmuch as such opinion cannot also be given, when land under possession of the defendant was not measured. This Court is also of the view that on the basis of a report that plaintiff is possessing 2 lechas less land than his actual claim shall not automatically lead to a conclusion that the it is the defendant who has encroached these 2 lechas of land, more particularly in the background fact that survey commissioner was not examined as a witness by the learned trial Court below. Therefore, this Court is of the considered opinion that the findings recorded by the learned Court below that the defendant has encroached 2 lechas of land is not supported by any evidence on record and the same is not based on the evidence adduced by the parties. Therefore, in the considered opinion of this Court, no reasonable person could have come to such a conclusion on the basis of the evidence as discussed hereinabove. Thus, it is held that the

findings of both the learned Courts below in this regard are perverse and contrary to the materials on record while concluding that the defendant has encroached 2 lechas of land.

- VIII. In the given facts of the case where it is an admitted position that the plaintiff is owner of the Schedule-A land and that the defendant purchased his portion of land from the plaintiff and it is alleged that Schedule-B land is encroached by the defendant, this Court is of the opinion that the matter should be remanded back to the learned Appellate Court below to take fresh determination on the issue whether the schedule B land is part of the A land and whether the defendant has encroached the Schedule-B land. For determination of such issue the appellate court may direct/ appoint survey Commission to measure the entire land under possession of the plaintiff and defendant.
- IX. Accordingly, upholding the title of the plaintiff over the Schedule –A suit land, the suit is remanded back to the learned Appellate Court below in the aforesaid term.
- X. The learned Appellate Court for the determination of the said issue shall be at liberty to appoint a Survey Commissioner as discussed hereinabove and the parties may also lead their evidences in support of the aforesaid issue.
- XI. The parties shall appear before the learned trial Court below on 16.09.2023.

- XII. The judgments relied on by Mr. Dutta, learned counsel basically relates to the principle and extent of power of second appellate Court in interfering with findings of concurrent fact. The aforesaid judgments nowhere lays a proposition that even in a situation where the concurrent findings of fact are perverse or such finding of facts are based on misreading of evidence available, then also second appellate court is powerless to reverse such findings of fact. Therefore, in given facts of the present case, such decisions are not applicable.
- XIII. Accordingly, the substantial question of law framed on 09.02.2011 is answered in favour of the defendant and the matter is remanded back to the learned Appellate Court in the aforesaid term. As the matter pertains to the year 2010, this court requests the learned Appellate Court to decide the matter as expeditiously as possible within a period of six months.

JUDGE

Comparing Assistant