GAHC010161662011

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

Case No. : RSA/185/2011

GAUTAM SAHA
S/O LATE BINOD BEHARI SAHA, ALL ARE RESIDENTS OF NEW COLONY,
P.O. and DIST. TINSUKIA, ASSAM.

VERSUS

ON THE DEATH OF SUKHDEB SAHA HIS LEGAL HEIRS AND ORS
Represented By-

1.1:GITA SAHA
W/O LATE SUKHDEB SAHA
R/O DHANIRAM PATHAR
HOJAI
PIN 782435.

1.2:MONOJ SAHA
S/O LATE SUKHDEB SAHA
R/OGOBINDAPALLY
HOJAI
PIN 782435.

1.3:RINKI SAHA
D/O LATE SUKHDEB SAHA
R/O DHANIRAM PATHAR
HOJAI
PIN 782435.

1.4:PINKI SAHA
D/O LATE SUKHDEB SAHA
R/O DHANIRAM PATHAR
HOJAI
PIN 782435

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Advocate for the Petitioners : Mr. S. P.Choudhury, Advocate

Advocate for the Respondents : Mr. J. C. Gaur, Advocate

BEFORE

HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 21.03.2024

Date of Judgment : 21.03.2024

JUDGMENT AND ORDER (ORAL)

Heard Mr. S. P. Choudhury, the learned counsel for the appellant and Mr. J. C. Gaur, the learned counsel appearing on behalf of the respondents.

2. The instant appeal arises out of the judgment and decree passed by the learned First Appellate Court dated 29.06.2011 passed in Title Appeal No.01/2008 whereby the Appeal was allowed thereby setting aside the judgment and decree passed by the learned Trial Court dated 26.02.2008 passed in Title Suit No.22/1996.

3. This Court vide an order dated 18.11.2011 admitted the instant appeal and formulated the following two substantial questions of law:-

(i) Whether the Appellate Court can pass an order on presumption of power exercising under Order VII Rule 7 of the CPC ignoring the statutory provisions of Section 34 of the Specific Relief Act, 1963?

(ii) Whether the findings of the Appellant Court affirming the observation of the Trial Court relating to Exbt.7 are perverse?

4. For the purpose of deciding the two substantial questions of law that are involved in the instant appeal, this Court would like to take the facts leading to the filing of the instant appeal infra.

5. The plaintiff and the defendant No.1 are brothers and they claim to be the joint owners and in occupation of a suit property described in Schedule-A to the plaint. Prior thereto, the mother of the plaintiff and defendant No. 1 was the absolute owner of a plot of land measuring 2 kathas 5 lessas covered by Dag No. 1983 (in part) of P.P. No. 429, of

Tinsukia Mouza, Tinsukia on which residential houses were constructed both by the plaintiff and the defendant No.1. During the lifetime of the mother, she gifted the said land to the plaintiff and defendant No. 1 by a registered Gift Deed bearing No.2005/1970 dated 18.09.1970 and delivered the vacant and khas possession of the said plot of land to both the plaintiff and the defendant No.1. Subsequently, on 22.03.1996, the plaintiff came to know that the defendant No.1 got the name of the plaintiff deleted and cancelled from the Records of Rights in respect of the property on the basis of the order dated 29.10.1995 passed by the Circle Officer, Tinsukia in Mutation Case No.510 of 1994-95 by showing a purported Gift Deed being Gift Deed No.556 of 1995. In terms with the said Gift Deed, it was shown that the plaintiff had executed the said Gift Deed in favour of the defendant No.1 wherein as per the plaintiff, the plaintiff had never executed any such Gift Deed. The said Gift Deed was challenged in Title Suit No.13/1996 and along with the same suit, an injunction application was filed which was registered and numbered as Misc. (J) Case No. 10/1996. But during the pendency of the suit, the defendant No.1 handed over the possession of the portion of the suit land which was fully described in Schedule-B to the defendant No.2 to defeat the cause of the suit. Under such circumstances, the plaintiff withdrew the said suit and filed the present suit seeking declaration that the Gift Deed No.556 of 1995 is void, inoperative and bad in law; declaring that the order dated 29.10.1995 passed by the Circle Officer, Tinsukia was bad, inoperative and void and a precept be issued to both the Sub-Registrar as well as the Circle Officer for rectifying the records. Further to that, the plaintiff also prayed for permanent injunction and also a declaration that

the defendant No.1 has no right to transfer, hand over the possession of the suit property described in Schedule-B to the defendant No.2 and for demolition of the house so constructed by the defendant No.2. The said suit was registered and numbered as Title Suit No.22/1996.

6. Thereupon, the defendant No.1 filed a written statement denying the contents of the plaint and also supporting the Gift Deed bearing Deed No.556 of 1995 executed by the plaintiff in favour of defendant No.1.

7. On the basis thereof, the learned Trial Court framed as many as 7 Issues. Amongst them, Issue No.3 relates to whether the plaintiff is the joint owner in equal share of the suit property described in Schedule-A to the plaint along with the defendant No.1. Issue No.4 was whether the Gift Deed No.556 of 1995 in respect to the Schedule-B land is a forged and fabricated document and liable to be cancelled. The Issue No.5 relates to as whether the plaintiff and the defendant No.1 jointly constructed the house over the Schedule-A land.

8. The plaintiff and the defendant No.1 adduced oral as well as documentary evidence as are apparent from the records.

9. The learned Trial Court took up the Issue Nos.3 & 4 together and came to a finding that the plaintiff is the joint owner in equal share of the suit property described in the Schedule-A to the plaint and the Gift Deed No.556 of 1995 in respect of the suit land is forged and fabricated document. In respect to the Issue No.5, it was held against the plaintiff holding inter-alia that the plaintiff failed to prove that both the plaintiff and the defendant No.1 jointly constructed the house. The learned Trial Court however dismissed the suit by the judgment and decree dated

26.02.2008 on the basis of Issue No.1 holding inter-alia that the suit was not maintainable as the plaintiff did not seek the relief of the recovery of possession.

10. Being aggrieved by the said judgment and decree, the plaintiff preferred an Appeal before the Court of the District Judge, Tinsukia which was endorsed to the Court of the Additional District & Sessions Judge (FTC) No.1 for disposal. The said Appeal was registered and numbered as Title Appeal No.1/08.

11. It is relevant to take note of that the defendant who is the appellant herein did not file cross-objection challenging the findings as regards the Issue Nos.3 & 4. The learned First Appellate Court vide the judgment and decree decided the Appeal in favour of the appellant thereby interfering with the decision made in respect of Issue No.1 and Issue No.5, and accordingly, passed the decree in favour of the plaintiff. Being aggrieved, the instant Appeal has been filed and this Court vide the order dated 18.11.2011 formulated two substantial questions of law as already quoted herein above.

12. In the backdrop of the above, this Court has heard the learned counsels appearing on behalf both the appellant as well as the respondent and duly taken note of their submissions.

13. The first substantial question of law so formulated by this Court is as to whether the Appellate Court can pass an order on presumption of power exercising under Order VII Rule 7 of the CPC ignoring the statutory provisions of Section 34 of the Specific Relief Act, 1963. This Court in the foregoing paragraphs of the instant judgment has duly taken note of that

the plaintiff and the defendant No.1 are both brothers. The said land and properties which have been described in Schedule-A to the plaint belonged to both the plaintiff and the defendant No.1. There is no challenge pursuant to the decision passed by the learned Trial Court as regards the Issue Nos.3 & 4 wherein it has been held that the plaintiff and the defendant No.1 are both joint owners of the Schedule-A property and also to the effect that the Gift Deed bearing No.556 of 1995 is a forged and fabricated document. It is also seen from the Issue No.5, it has also been decided in favour of the plaintiff holding that the properties which have been erected over the land have been jointly constructed by both the plaintiff and the defendant No.1. Under such circumstances, both the plaintiff and the defendant No.1 being co-owners, the possession of the defendant No.1 over the land would be deemed to be also the possession of the plaintiff. Under such circumstances, in the opinion of this Court, the learned First Appellate Court did not comment any illegality in passing the decree in favour of the plaintiffs.

14. This Court further finds it also relevant to take note of the judgment of the Supreme Court in the case of *Mst. Rukhmabai vs Lala Laxminarayan & Others*, reported in *AIR 1961 SC 335* wherein the Supreme Court at paragraph No.30 of the said judgment while dealing with the proviso to Section 42 of the Specific Relief Act, 1877 which is pari-materia to the proviso to Section 34 of the Specific Relief Act, 1963 observed that it is a well settled rule of practice not to dismiss suit automatically but to allow the plaintiff to make necessary amendment if he seeks to do so. It was observed that in the said case, the appellant did not take the plea in the written statement nor was there any issue in respect thereof. Under such

circumstances, the plea pertaining to proviso to Section 42 of the Specific Relief Act, 1877 could not have been applied.

15. This Court also finds it relevant to take note of another judgment of the Calcutta High Court in the case of *Jai Narayan Sen vs. Shrikantha Roy,* reported in *XXVI Calcutta Weekly Notes 206* wherein the issue arose as to whether it was obligatory on the part of the plaintiff to ask for partition in every case, particularly when the plaintiff claims that he is in the joint possession of the immovable property along with the defendants. In the said proceedings, the question which was involved as to whether the plaintiff ought to have asked for partition which was the further relief in terms with the proviso to Section 42 of the Specific Relief Act, 1877. It was observed by the Calcutta High Court that when the plaintiff is in joint possession of an immovable property whether such possession be actual possession of his share of the whole or actual possession of the part coupled with constructive possession of the reminder is entitled to maintain a suit for declaratory relief with a view to remove a cloud on his title created by the act of the defendant disputing his share. It was observed that in a suit so framed in such circumstances, declaration of title is all that the plaintiff needs and he is consequently not called upon to ask for consequential relief by way of partition. The said judgment is binding on this Court.

16. It is also well settled that the proviso to Section 34 of the Specific Relief Act, 1963 though forbids a suit for pure declaration without further relief; but it does not compel the plaintiff to seek all reliefs, which he could possibly be granted, or debar him from obtaining a relief, which he wants unless, at the same time, he ask for a relief, which he does not want.

17. In addition to the above, this Court is of the opinion that the reliefs which were sought for by the plaintiff seeking declaration, issuance of precept and permanent injunction were in compliance with the proviso to Section 34 of the Specific Relief Act, 1963 keeping in mind that the plaintiff is only required to seek further relief and not other relief(s).

18. Taking into account the above proposition of law, this Court is of the opinion that the first substantial question of law so formulated by this Court is not involved in the instant appeal.

19. The second substantial question of law is as to whether the findings of the Appellant Court affirming the observation of the Trial Court relating to Exbt.7 are perverse. The said substantial question of law so formulated in the opinion of this Court cannot be taken as a substantial question of law involved sans anything shown how the Appellate Court had committed perversity. It is relevant to observe that perversity would mean that the findings stood vitiated on wrong test and on the basis of assumption and conjectures and resultantly there is an element of perversity. It is also relevant to observe that inadequacy of evidence or a different reading of evidence is not perversity, nor a wrong finding of fact by itself constitute a question of law. It is well settled that in order to constitute a question of law, the wrong finding of fact should stem out of a complete misreading of evidence or it should be based upon conjectures or surmises. No doubt perversity would be a question of law but to show that the said substantial question of law is involved, it has to be shown as to why the judgment suffers from perversity on the basis of the aforesaid exposition. As already stated, the appellant could not show anything in this regard. In that view of the matter, the second substantial question of law formulated does not

arise in the present Appeal.

20. Consequently, this Court finds no substantial question of law involved in the instant appeal for which the appeal stands dismissed with a cost quantified at Rs.10,000/- and the plaintiff/respondents therein shall be entitled to costs throughout.

21. Send back the LCR to the learned Court Below.

22. Interim orders, if any, stands vacated.

JUDGE

Comparing Assistant