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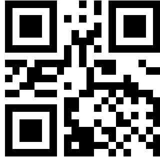


THE GAUHATI HIGH COURT

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

Case No. : RSA/99/2013

ON THE DEATH OF MEDHI THAKURIA HIS LEGAL HEIRS - DIRBEY THAKURIAWIFE RAMEN THAKURIA, UDAY THAKUR
, R/O DANGARDI, MOUZA, PAKOWA, P.S. MUKALMUA, DIST. NALBARI, ASSAM.

2: TARUN THAKURIA

S/O LATE ATMA THAKURIA
R/O VILL. TARMATHA
MOUZA
UPPAR BARBHAG
P.S.NALBARI
DIST. NALBARI
ASSAM.

3: BHABEN THAKURIA

S/O LATE ATMA RAM THAKURIA
VILL. TARMATHA
MOUZA
UPPAR BARBHAG
P.S. NALBARI
DIST. NALBARI
ASSAM.

4: PRADIP THAKURIA
S/O LATE PRASANYA THAKURIA
R/O VILL. DANGARDI
MOUZA
PAKOWA
P.S. MUKALMUA
DIST. NALBARI
ASSAM.

5: GIRISH THAKURIA
S/O PRASANNYA THAKURIA
R/O VILL. DANGARDI
MOUZA
PAKOWA
P.S MUKALMUA
DIST. NALBARI
ASSAM.

6: PHUKAN THAKURIA
S/O PRASANNYA THAKURIA
VILL. SANGARDI
MOUZA
PAKOWA
P.S. MUKALMUA
DIST. NALBARI
ASSAM

VERSUS

MD. MASLIM ALI and ORS.
S/O LATE LALPA ALI, R/O VILL. PUB-KALAKUCHI, MOUZA BAHJANI, P..
MUKALMUA, DIST. NALBARI, ASSAM.

2:MD. TAMIZ ALI
S/O LATE DANDI ALI
R/O VILL. PUB-KALAKUCHI
MOUZA BAHJANI
P.S. MUKALMUA
DIST. NALBARI
ASSAM.

3:MD. AZIZUR RAHMAN
PETITION WRITER BELSOR SUB-REGISTRY OFFICE
BELSOR

4:MD. SAYED ALI
PETITION WRITER
TARANI SANGHA
NALBARI COURT

5:MD. ABDUR RAHMAN
S/O LATE KASIM ALI
VILL. TARMATHA
MOUZA
UPPAR BARBHAG
P.S. NALBARI
DIST. NALBARI

ASSAM.

6:MD. RIAZ ALI
S/O LATE KATHA ALI
VILL. KALAKUCHI
MOUZA
BAHJANI
P.S. MUKALMUA
DIST. NALBARI
ASSAM

Advocate for the Petitioner : MRS.S S BAWARI

Advocate for the Respondent : MR.M CHOUDHURY

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER(ORAL)

Date : 12-06-2023

Heard Mr. G.N. Sahewalla, the learned Senior Counsel assisted by Ms. S. Todi, the learned counsel for the Appellants. Mr. D. Choudhury, the learned counsel appears on behalf of the Respondent Nos. 1 and 2.

2. The instant appeal was admitted by this Court on 9/5/2013 on the following substantial questions of law :-

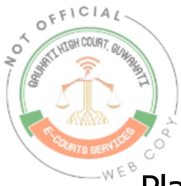
> i) Whether the learned Appellate Court below misplaced the burden of proof of the defendant regarding genuineness of Exhibit "Ka", the sale deed executed in 1993 ?
>
> ii) Whether the consideration of the evidence of the plaintiffs is perverse and thereby vitiated the judgment ?

3. The learned counsel appearing on behalf of the Respondents submits that

the said substantial questions of law so formulated by this Court under Section 100(4) of the Code of Civil Procedure, 1903 (for short 'the Code') do not arise for consideration in the facts involved in the instant case.

4. In that view of the matter, this Court finds it relevant to take note of the brief facts of the instant case.

5. The Appellants herein as Plaintiffs have filed the suit being Title Suit No. 38/2004 against the Respondents herein who were arrayed as Defendants. For the sake of convenience, the parties herein are referred to in the same status as they stood before the Trial Court. The case of the Plaintiffs is that they were the joint owners of a suit land as has been described in Schedule 'Ka' to the plaint. It was mentioned that there was no partition amongst the Plaintiffs and the Plaintiff No. 1 have been managing and possessing the suit land on behalf of the other co-owners. On 25/11/2004, the defendant No. 1 accompanied by other persons tresspassed into a portion of the Schedule "Ka" land which have been most specifically described in Schedule 'Kha'. When the Plaintiff No. 1 raised objection, the Defendant No. 1 disclosed that the Plaintiff No.4 sold the suit land as described in Schedule 'Kha" to the Defendant No.2 and in turn the Defendant No. 2 sold the same to the Defendant No. 1. It was alleged that the Defendant No. 1 forcefully occupied the suit land despite the protest of the



Plaintiffs. The Plaintiff No.1 upon enquiry came to know that the Plaintiff No. 4 never executed any Deed of Sale in favour of the Defendant No. 2 and upon enquiry in the Office of the Sub-Registrar and the Revenue Authority, the Plaintiff No. 1 came to learn that the Defendant Nos. 1 & 2 got mutation over the suit land on the basis of a forged and fraudulent Sale Deed bearing No. 213/1993. It was further alleged that the Defendant No. 2 thereupon vide another Deed of Sale transferred the land to the Defendant No. 1. It was the specific case of the Plaintiffs in the suit that the Plaintiff No. 4 did not sell the suit land to the Defendant No. 2 and the Sale Deed executed by the Defendant No. 2 in favour of the Defendant No. 1 is also forged and collusive. On the basis thereof, the Plaintiffs sought the reliefs inter alia for a declaration of right, title and interest over the land described in Schedule-'Ka'; for declaration of the Sale Deed No.213 and 683 to be illegal which were more specifically described in Schedule 'Ga" to the plaint; for recovery of possession by evicting the Defendants from the Schedule "Kha" land along with permanent injunction and a precept for cancellation of the mutation of the Defendants.

6. It appears from the records that the Defendant No. 1 and the Defendant Nos. 2, 4 and 5 submitted separate written statements. From a perusal of the said written statements, it transpires that various preliminary objections were taken as regards the maintainability of the suit. It was denied that the lands of

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Late Atmaram Thakuria belonged to the Plaintiffs as ejmali lands. It was stated that the Defendant No. 2 purchased the land from the Plaintiff No. 4 and had possessed the land openly as the possession was handed over to the Defendant No. 2 by the Plaintiff No. 4. It was further mentioned that the Defendant No. 2 by upon acquiring the right, title and interest sold away a part of the Schedule "Kha" land to the Defendant No. 1 on 7/7/2004. It was further mentioned that the said lands were also mutated in favour of the Defendants since 1973 and as such the filing of the suit was barred by limitation.

7. On the basis of the various pleadings, as many as nine issues were framed which are as herein under :

"1. Whether there is cause of action for the suit ?

2. Whether the suit is maintainable in its present form ?

3. Whether the suit is barred by limitation ?

4. Whether the plaintiff No. 4 has saleable interest to the extent of the land as shown in sale deed No. 213/93 ?

5.Whether land of schedule "Ka" is joint land of the plaintiffs with right, title, interest possession ?

6. Whether sale deeds mentioned in Schedule 'Ga" are fraudulent ?

7.Whether plaintiffs were dis-possessed from the schedule "Kha" land and deserves khas possession ?

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8.Whether the plaintiffs are entitled to decree as prayed for ?

9.To what other relief(s) parties are entitled ? "

8. It further appears that on the basis of the said issues framed, on 16/12/2005, the suit was fixed for cross-examination of the PWs. On the said date, an application was filed by the Plaintiffs praying for issuance of commission for proving the signatures and fingerprints of the Plaintiff No. 4 and the case was fixed on 10/1/2006 for Objection and Objection Hearing.

9. It further appears that on 1/2/2006 as the Defendants did not Object to the said petition, the Trial court duly taking into account that the Plaintiff No. 4 was bed ridden and not in a position to come to the Court, issued a commission to the learned Advocate Mr. Kader Ali of Nalbari Bar Association whereby he was directed to collect and obtain the thumb impression as well as the signatures of the Plaintiff No. 4 in presence of the learned counsels for both the parties at any date before the next date which would be convenient to the Commissioner and to submit the report. The records further shows that the Commissioner submitted the report on 15/5/2006 and the case was fixed on 8/6/2006 for filing affidavit and objection on the Commissioner's report.

10. It further appears that the Plaintiffs had also filed a petition to direct the Defendant No. 2 to produce the original Deed of Sale No. 213/1993. The said petition however, was withdrawn and there was a direction vide an order dated

15/7/2006 to the Sub-Registrar to produce the Sale Deed No. 213/1993. When the said process was going on, the Plaintiff No. 4 expired and an application was filed on 5/1/2007 to substitute the legal heirs of the Plaintiff No. 4. It further transpires from the record of the Trial Court that on 2/3/2007, the learned Trial Court directed the Sale Deed No. 213/1993 to be sent to an expert along with the original plaint and copy of the Vakalatnama to tally the signature of the Plaintiff No. 4. It further appears that on 2/4/2007, the Defendants sought for review of the said order dated 2/3/2007. However, vide the order dated 13/4/2007 the said application seeking review was rejected. It further reveals that on 23/7/2008 the report of the handwriting expert and fingerprint expert was received by the Trial Court. On 19/8/2008, the Defendants submitted an objection. The Trial Court vide the order dated 19/5/2008 observed that the Defendants' side did not file any objection against the Commissioner's report as reflected in the order dated 15/5/2006 and as such the Trial Court gave the liberty to the Defendants to the effect that if the Defendants' side had any iota of objection in respect to the report of the handwriting and fingerprint expert, they were at liberty to take fresh steps as per the order dated 2/3/2007, to any other reputed expert of their choice and fixed for fresh report. The Trial Court accordingly fixed the matter on 30/8/2008 for steps. It appears on record that the Defendants did not take any steps as required under Order XXVI Rule 10 of

the Code or had submitted any other fresh report though liberty was given vide the order dated 19/8/2008.

11. Be that as it may, the records further reveal that the Plaintiffs adduced the evidence of four witnesses and the Defendants also adduced the evidence of four witnesses and examined various documents. The Trial Court vide the judgment and decree dated 23/12/2008 decreed the suit in favour of the Plaintiffs thereby issuing a precept to the concerned Sub-Registrar to cancel the Sale Deeds described in Schedule 'Ga' to the plaint as they were declared null and void and inoperative in law ; khas possession of Schedule 'Kha" land was to be delivered to the Plaintiffs; mutation in favour of the Defendant Nos. 1 and 2 be cancelled and precept be issued to the concerned authority and permanent injunction was also issued against the Defendants.

12. Before further proceeding, this Court finds it relevant to take note of that the Trial Court while deciding the suit and more particularly the issue No. 3, the Trial Court based its decision on the report of the handwriting and fingerprint expert and held that the Deed of Sale bearing Deed No. 213/1993 was a fraudulent document and accordingly declared the same to be null and void/inoperative in law. In doing so, the learned Trial Court also held therefore that the suit was within the period of limitation.

13. Being dissatisfied and aggrieved, the Defendant Nos. 1 and 2 as Appellants preferred an appeal before the First Appellate Court i.e. the Court of the District Judge, Nalbari. The said appeal was registered and numbered as Title Appeal No. 6/2011. The First Appellate Court reversed the findings of the Trial Court and dismissed the suit on the ground that the Plaintiffs failed to prove their title over the land as well as also failed to prove that the alleged Deed of Sale was forged. The reasons given by the First Appellate Court to arrive at the said findings was primarily on the basis that the opinion of the expert is not a substantive piece of evidence and it cannot be taken as a conclusive proof of the matter. It was observed by the First Appellate Court that an expert opinion is only an opinion evidence, which the Court can act upon as a corroborative evidence. It was further observed that in a civil suit in order to act upon a document, it is to be proved by examining the author inasmuch as acceptability and credit-worthiness of an expert opinion certainly depends upon the probative value of such report. It was further observed that the opinion of an expert cannot be relied upon, unless it is exhibited and the expert is examined in proof of his opinion and the other party is given opportunity to cross-examine the expert. The First Appellate Court held that in the instant case, not to speak of calling the expert to prove and exhibit his reports and to give the other party an opportunity to cross-examine him, even the alleged

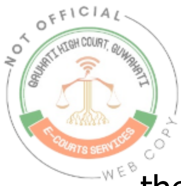
report of the expert have not even been tendered in evidence or marked as exhibit. It was therefore observed by the First Appellate Court that the status of the report of the handwriting expert was nonest and as such the learned Trial Court was not justified to rely upon an expert opinion which was not even duly proved or brought on record. It is under such circumstances that the First Appellate Court vide the impugned judgment and decree dated 14/2/2013 allowed the appeal and dismissed the suit.

14. In the backdrop of the above, the instant appeal has been filed by the Plaintiffs challenging the impugned judgment and decree passed by the First Appellate Court dated 14/2/2013 and this Court as already noted hereinabove had formulated two substantial questions of law as quoted hereinabove.

15. From a perusal of the two substantial questions of law so formulated, it would transpire that both the substantial questions of law are interlinked and can be decided together in view of the fact that the Trial Court decreed the suit in favour of the Plaintiffs on the basis of the report submitted by the handwriting and fingerprint expert and the First Appellate Court disregarded the said report on the basis that the same was not exhibited in the manner required under the law and an opportunity was not given to cross-examine the handwriting expert.

16. Mr. G.N. Sahewalla, the learned Senior Counsel appearing on behalf of the Appellants submits that the report of the handwriting and fingerprint expert was a substantive piece of evidence which could not have been disregarded in view of the provisions of Order XXVI Rule 10 of the Code. The learned Senior Counsel referring to Sections 45 and 47 read with Section 73 of the Indian Evidence Act, 1872 (for short 'the Act of 1872'), submitted that it is not always mandatory that the handwriting expert report has to be relied upon the basis of corroborative evidence. He submits that it would depend upon the Court as to whether the handwriting expert's opinion is to be taken into account or not on the basis of corroborative evidence in the attending facts. In that regard, he relied upon a judgment of the Supreme Court in the case of **Lalit Popli Vs Canara Bank and Ors**. reported in **(2003) 3 SCC 583** and more particularly to paragraph No.13 of the said judgment.

17. On the other hand, Mr. D. Choudhury, the learned counsel appearing on behalf of the Respondent Nos. 1 and 2 submitted that the handwriting expert's opinion is a weak piece of evidence. He submitted from a perusal of evidence of cross-examination of PW-3, it would be seen that he had duly admitted that the Plaintiff No. 4 had executed the Deed of Sale No. 213/1993 in favour of the Defendant No. 2. He further submitted that in the evidence of PW-4 during his cross-examination, he had categorically stated that he had not enquired with



the Plaintiff No. 4, Late Anil Thakuria as to whether he had executed the Deed of Sale bearing Deed No. 213/1993 or not. It is therefore the submission of the learned counsel for the Respondent Nos. 1 and 2 that merely on the basis of the handwriting expert's opinion and that too when the PW-3 and PW-4, who are the Plaintiffs did not give any corroboration to the handwriting expert report, the said report could not have been taken as a sole basis for decreeing the suit and as such the First Appellate Court was right in dismissing the suit of the Plaintiffs. The learned counsel for the Respondents further referred to a judgment of the Privy Council in the case of **A.L.N. Narayanan Chettyar & Anr. Vs. Official Assignee, High Court Rangoon and Anr**. reported in **AIR 1941 PC 1993** and submitted that when there is an allegation of fraud, the said allegation has to be tested on the basis of proof beyond reasonable doubt unlike in a normal civil suit which is decided on the basis of probabilities.

18. I have heard the learned counsels for the parties and perused the materials on record.

19. From a perusal of the substantial questions of law so formulated, it transpires that both the substantial questions of law are interlinked. On the question of the burden of proof in respect to Exhibit –"Ka" i.e. the Sale Deed bearing Deed No.213/1993, the Trial Court vide a judgment and order dated

23/12/2008 while deciding the issue No. 3 had taken into account the report of the handwriting and fingerprint expert, wherein it was observed that the disputed signatures Q1 to Q4 have not been written by the writer of the standard signature A1. In the same opinion, it was also mentioned that the disputed Print D is not identical with the standard print S1 and S2. It was further mentioned in the said report that signatures along with thumb impressions in the Sale Deed No. 213/93 were not of the Plaintiff No. 4. The learned Trial Court on the basis of the said report was of the opinion that the onus shifted upon the Defendants 1 to prove by adducing cogent and convincing evidence that the Sale Deed No. 213/93 was executed by the Plaintiff No. 4 or the Sale Deed bears genuine signatures of the Plaintiff No. 4. The learned Trial Court taking into account that the Defendants failed to do so held that the Sale Deed No. 213/93 was not signed and the thumb impression in the Sale Deed were not the thumb impression of the Plaintiff No. 4 and accordingly declared the Sale Deed No. 213/93 as null and void/inoperative in law.

20. On the other hand, the First Appellate Court rejected the opinion of the handwriting and the fingerprint expert on the ground that it is required to be brought on record like any other document in terms with the provisions of the Indian Evidence Act, 1872. It was further observed by the First Appellate Court that in a civil suit, in order to act upon a document, it has to be proved by

examining the author on the ground that acceptability and credit worthiness of an expert opinion certainly depends upon the probative value of such report. It was further observed that in the instant case, not to speak of calling the expert to prove and exhibit his reports and to give the other party an opportunity to cross-examine him, even the alleged report of the expert was not tendered in evidence or marked as exhibit. It is on the basis thereof that the First Appellate Court therefore totally disregarded the report.

21. In the backdrop of the above, let this Court therefore take into account as to whether the First Appellate Court was justified in not accepting the handwriting and the fingerprint expert's report on the ground as mentioned in paragraph No. 13 of the First Appellate Court's judgment. This aspect of the matter also touches upon the first substantial question of law so formulated, inasmuch as, if the report is accepted, the onus would shift and it would then be upon the Defendants to prove by evidence that the report of the handwriting expert could not be trusted or faulty as well as by giving better evidence to nullify the effect of the handwriting and fingerprint expert's report. For understanding the said aspect of the matter, this Court finds it relevant to take note of Order XXVI Rule 10 as well as Order XXVI Rule 10A of the Code which are quoted herein below :-

"***10 "Procedure of Commissioner"*** *– (1)The Commissioner, after such local*

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inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) ***Report and depositions to be evidence in suit.***-- *The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.*

(3) ***Commissioner may be examined in person*** *--Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."*

10A "Commission for scientific investigations--- *(1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.*

(2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under Rule 9."

22. Order XXVI Rule 10(1) of the Code stipulates the procedure which is to be adopted by the Commissioner. It stipulates that the Commissioner after making such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence together with his report in writing, signed by him to the Court. Sub Rule (2) of Rule 10 of Order XXVI is very pertinent for the purpose of the instant dispute inasmuch as it stipulates that the report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form a part of the record. Therefore, on the basis of Sub Rule (2) of Rule 10 of Order XXVI,

the submission of the report along with the evidence shall on its own without any further act be evidence and form part of the record. There is no requirement therefore that the evidence collected as well as the report have to be again exhibited by the party concerned.

23. Furthermore, from a perusal of Sub Rule (2) of Rule 10 of Order XXVI of the Code, it empowers the Court on its own or at the behest of any of the parties to the suit to examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation. Therefore, the Court could have exercised the jurisdiction or the party aggrieved by the report could have sought the permission of the Court to examine the Commissioner personally in open Court, touching on any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he had made the investigation. However, the records of the Trial Court do not reflect that the Defendants sought the permission or leave of the Trial Court to examine the expert on any of the aspects as mentioned in Rule 10(2) of Order XXVI of the Code. It is further relevant to take note of that the Defendants did submit an objection. The Trial Court on the basis of the said objection permitted the Defendants to submit a fresh report, if they desired vide the order dated 19/8/2008. However, the Defendants neither took any such

steps in that regard nor submitted or submit any report contradicting the report of the handwriting and fingerprint expert.

24. In the backdrop of the above, let this Court therefore take into account the provisions of Sub Rule (3) of Rule 10 of Order XXVI as quoted herein above. A perusal of the said Sub Rule would show that when the Court is for any reason dissatisfied with the proceedings of the Commissioner, the Court may direct such further enquiry to be made as it shall deem fit.

25. Rule 10A of Order XXVI of the Code relates to commission for scientific investigation. The said Rule is pertinent for the purpose of the instant dispute inasmuch as the commission issued to a handwriting and fingerprint expert is done under Rule 10A of Order XXVI and by dint of Sub Rule (2) of Rule 10A, Rule 10 of Order XXVI of the Code is made applicable to commission for scientific investigation.

26. Now let this Court take into account what is the effect of the report so submitted by the Commissioner under Order XXVI Rule 10 of the Code. A Coordinate Bench of this Court in the case of **Silchar Municipal Board, Silchar Vs. Eastern Estates Pvt. Ltd. Nag Naha Road, Silchar Town** reported in **(1993) 2 GLR 445** observed as to what is the effect of the report submitted as well as whether the said report would be treated as evidence even

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without the examination of the Commissioner. The Coordinate Bench of this Court observed that there is no requirement for the Court to pass an order for the report to be a part of the record inasmuch as it becomes a part of the record by virtue of the provisions of Rule 10 of Order XXVI of the Code. Paragraph Nos. 6, 7 & 8 of the said judgment being relevant are quoted herein below :-

> "***6****. The object of the local investigation is not so much to collect evidence which can be taken in court but to obtain evidence which from its very peculiar nature can only be had on the spot. The Court has a discretion to issue Commission for local investigation or not; it is not bound to order it in all cases. It is the duty of the Commissioner to make local inspection after due notice to the parties and observe various matters directed to be reported upon by the court and make a faithful report. The report shall form a part of the record. This only means that it shall form part of the record in the same way as pleadings, affidavits, etc form part of the record. In other words, it is to be treated as evidence even without the examination of the Commissioner though either party or both parties are entitled to examine the Commissioner. Parties are entitled to prefer objections to the report and where such objections are raised the court is bound to hear the objections. If the court is dissatisfied with the proceedings of the Commissioner, further enquiry as thought fit can be ordered. For the purpose of satisfying the court that further enquiry should be ordered parties are entitled to adduce evidence and seek to examine or cross-examine the Commissioner.*
>
> **7**. *More than 50 years ago the Judicial Committee of the Privy Council held in Chandan Mull Indra Kumar & ors. Vs. Chiman Lal Girdhur Das Parekh and Anr. AIR 1940 PC 3 that :*
>
> > "*Interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.*
>
> *This is of course does not mean that the report irrespective of its merits or quality is to be accepted by the Court. In fact, in the reported case the court did not chose to act upon the report. It is for the court in every case to examine*

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the report carefully, the objections preferred by the parties and the evidence on record before coming to a conclusion that the report is of such quality as could be acted upon.

8. *The question which however arises for consideration is whether at the preliminary stage the court has to apply its mind on the acceptance of the report and to pass an order. Commissioner's report of course does not conclude the matter in issue. It is only one piece of evidence which ultimately has to be considered along with other evidence in the case before the Court can come to a conclusion over the disputed issue. It is for the court ultimately to rely or refrain front relying upon Commissioner's report for the purpose of granting a decree to the plaintiff or to dismiss the suit. But the law does not oblige the court to pass a formal order accepting the report at a preliminary or intermediatory stage, as done in the case. Such as order of acceptance passed in the light of failure of the parties to file objections or on consideration of objections filed by the parties is not contemplated in the scheme of Rule 10 Order 26, CPC. It is open to a party to point out defects, irregularities and shortcomings in the work done by the Commissioner, the procedure adopted by the Commissioner, the observations made by him and the inferences, if any, drawn by him and request the court to direct the Commissioner to make a further enquiry. If the mistakes and errors in the report are mistakes or errors so fundamental as to take away the value of the report, if the report is vitiated by bias, it may be open to the parties to request the court to appoint a fresh Commission. In one case the court decides that further enquiry is called for and in the other case the court decides that a fresh Commission is to be appointed, but in no case is the court called upon to pass a formal order "accepting the report" or directing the "report to be part of the record". Every report is part of the record by virtue of the mandate of Rule 10. A report does not become a part of the record by order of the court it becomes part of the record by virtue of the provisions of Rule 10. Even where the court is not satisfied that a farther report is called for or that a fresh Commission should be appointed, it is still open to the court not to rely on the report at the conclusion of the trial having reference to the totality of the evidence adduced before it in the trial. It is wholly inappropriate for the court at the preliminary stage to reject objections as without merit. This is because the court may be persuaded to take a different view after evidence is adduced at the trial of the suit. The court is not precluded from considering the report and the objections in the light of evidence adduced at the trial.*

At the preliminary stage what the court is called upon to consider is whether a fresh enquiry is called for and not to consider whether the objections are to

> *be accepted or rejected or whether report is to be accepted or rejected. Before deciding whether further enquiry is to be ordered, court should give an opportunity to the parties to examine the Commissioner."*

27. The above quoted paragraphs of the said judgment would therefore show that the report along with the evidence so submitted by the handwriting and the fingerprint expert in the instant case would be construed as evidence even without the examination of the Commissioner. A perusal of the records would show that though objection was filed, but the Defendants never exercised their rights to examine the Commissioner. Therefore the question of the Appellants having been not afforded an opportunity to cross-examine the handwriting and fingerprint expert in the opinion of this Court do not effect the findings of the report. There is nothing on records to show that the learned Trial Court was dissatisfied with the report. The order dated 19/8/2008 passed by the Trial Court further reveals that an opportunity was granted to the Defendants to submit a fresh report for the purpose of proving their case or nullifying the report so submitted by the handwriting and the fingerprint expert which admittedly, the Defendants did not do so.

28. The learned First Appellate Court, however disregarded the handwriting and fingerprint expert's report without taking into consideration the provisions of Order XXVI Rule 10 & 10 A of the Code as well as the well settled principles

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of law as laid down in **Silchar Municipal Board, Silchar**(supra).

29. The next question therefore arises in view of the specific submission made by the learned counsel appearing on behalf of the Defendants is whether the handwriting and fingerprint expert's report be taken as the sole document for holding that the Sale Deed bearing Deed No. 213/93 to be a fraudulent document while deciding the said question, this Court finds it relevant to take note of the submission made by the learned counsel appearing on behalf of the Defendants to the effect that when there is an allegation of fraud alleged, the burden of proof even in a civil suit has to be beyond reasonable doubt and not on the basis of preponderance of probability. In that regard, the learned counsel appearing on behalf of the Defendants had relied upon the judgment in the case of **A.L.N. Narayanan Chettyar**(supra) and more particularly to the last paragraph which is quoted herein below :-

> "*There are other difficulties in the plaintiffs' way have been sufficiently considered in the judgments of the High Court. Fraud of this nature, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. The High Court were justified in holding that the trial Judge's finding was largely based on suspicion and conjecture. There were documents unaccounted for which would conclusively prove the issue one way or the other. In their absence the High Court's decision on the merits was right and cannot be disturbed. Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal."*

30. From a perusal of the above paragraph, it would be seen that the Privy

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Council in the said judgment held that fraud of the nature alleged in the said proceeding, like any other charge of a criminal offence whether made in civil or criminal proceeding, must be established beyond reasonable doubt. It was further observed that the High Court was justified in holding that the Trial Judge's findings were largely based on suspicion and conjecture.

31. It is no longer res integra that for establishing 'fraud', there has to be specific pleadings as well as proof. Mere statements and allegations without being substantiated by evidence cannot constitute a fraud.

32. At this stage, this Court further finds it relevant to refer to a judgment of the Supreme Court in the case of **Vishnu Dutt Sharma Vs. Daya Sapra** reported in (**2009**) **13 SCC 729**, wherein the Supreme Court was dealing with the matter pertaining to a proceedings under Order VII Rule 11(d) of the Code filed on the ground that the plaint ought to be rejected as the person concerned was acquitted in a criminal proceeding. The Supreme Court observed in the said judgment that there cannot be any doubt or dispute that a creditor can maintain a civil or criminal proceeding at the same time. Both the proceedings thus, can run parallel. It was further observed that the facts required to be proved for obtaining a decree in the civil suit and a judgment of conviction in the criminal proceeding may be overlapping but the standard of proof in a criminal case vis-

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a-vis a civil suit, undisputedly is different. It was further observed that in a criminal case the prosecution is bound to prove the commission of the offence on the part of the accused beyond any reasonable doubt. However, in a civil suit "preponderance of probability" would serve the purpose for obtaining a decree. It was further observed as regards the effect of a judgment passed in the criminal proceeding in relation to the subject-matter for which a civil proceeding has also been initiated to the effect that in a criminal proceeding, although upon discharge of initial burden by the complainant, the burden of proof may shift on an accused, the Court must apply the principle of " presumption of innocence as a human right". Therefore, in a criminal proceeding the statutory provision containing the doctrine of reverse burden must therefore be construed strictly. However, in a civil proceeding no such restriction can be imposed. Further to that, it was again observed by the Supreme Court in the said judgment that the reverse burden or evidentiary burden on an accused, thus, would require "strict interpretation and application". However, in a civil suit, such strict compliance may not be insisted upon. The Supreme Court went to the extent of observing that if the reverse burden or evidentiary burden on the accused is applied to a civil suit, it may not be correct to contend that a judgment rendered in a criminal proceeding would make continuation of a civil proceeding an abuse of the process of Court.

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33. Therefore, from the above two judgments, one delivered by the Privy Council in the case of **A.L.N. Narayanan Chettyar(supra)** and the other by the Supreme Court in the case of **Bishnu Dutt Sarma(supra)**, it would be clear that for the purpose of proving fraud, mere statements or allegations would not constitute a fraud. It has to be on the basis of specific pleadings and evidence substantiating the said pleadings. For the purpose of civil proceedings, to constitute 'fraud', it has to be looked into in terms of Section 17 of the Indian Contract Act, 1872. On the other hand, to attract the provisions of Sections 463 and 464 of the Indian Penal Code, the requirement thereof cannot be equated with 'fraud' as defined in Section 17 of the Indian Contract Act, 1872. Therefore, the expression used by the Privy Council in the case of **A.L.N. Narayanan Chettyar(supra)** has to be understood in that context, meaning thereby, that in respect to civil proceedings the fraud has to be established on the basis of pleadings as mentioned in Order VI Rule 4 of the Code of the Civil Procedure, 1908 and substantiated by way of evidence.

34. In the backdrop of the above, it would be seen from the evidence-on-affidavit so filed by the Plaintiffs, more particularly, the PW-3, that there is a clear and categorical statement to the effect that the Plaintiff No. 4 did not execute the Deed of Sale. The records of the Trial Court would show that the Plaintiff No. 4 at the time of tendering evidence was in bed ridden condition and

for the said specific reason, Commission had to be issued for taking his signature and his fingerprint. The evidence on the basis of which the Trial Court came to the conclusion was on the basis of the handwriting and fingerprint expert which categorically in clear terms opined that the questioned signatures as well as the fingerprints appearing in the Deed of Sale bearing Deed No. 213/93 were not the signatures as well as the fingerprint of the plaintiff No. 4. In the backdrop of the same, question posed in paragraph 29 hereinabove as to whether the Trial Court was justified in passing the judgment and decree only on the said report, in the opinion of this Court can be seen from the judgment of the Supreme Court in the case of **Lalit Popli (supra)**. Paragraph Nos. 12 and 13 of the said judgment being relevant are quoted herein below :-

> "***12.*** *Sections 45 and 73 of the Indian Evidence Act, 1872 (in short "the Evidence Act") deal with opinion of experts and comparison of signature, writing or seal with others admitted or proved. Section 45 itself provides that the opinions are relevant facts. It is a general rule that the opinion of witnesses possessing peculiar skill is admissible. There was no challenge to the expertise of V.K. Sakhuja. He deposed to have testified in about ten thousand cases relating to disputed documents. Though the employee highlighted certain adverse remarks, it cannot be lost sight of that they were about four decades back. But we need not go into that aspect in detail as no infirmity in the report acted upon by the authority in the present case was noticed or could be pointed out.*
>
> ***13.*** *It is to be noted that under Sections 45 and 47 of the Evidence Act, the court has to take a view on the opinion of others, whereas under Section 73 of the said Act, the court by its own comparison of writings can form its opinion. Evidence of the identity of handwriting is dealt with in three sections of the Evidence Act. They are Sections 45, 47 and 73. Both under Sections 45 and 47 the evidence is an opinion. In the former case it is by a scientific comparison and in the*

latter on the basis of familiarity resulting from frequent observations and experiences. In both the cases, the court is required to satisfy itself by such means as are open to conclude that the opinion may be acted upon. Irrespective of an opinion of the handwriting expert, the court can compare the admitted writing with the disputed writing and come to its own independent conclusion. Such exercise of comparison is permissible under Section 73 of the Evidence Act. Ordinarily, Sections 45 and 73 are complementary to each other. Evidence of the handwriting expert need not be invariably corroborated. It is for the court to decide whether to accept such an uncorroborated evidence or not. It is clear that even when an expert's evidence is not there, the court has power to compare the writings and decide the matter. (See Murari Lal v. State of M.P.)"

35. It appears from the above quoted paragraphs that the evidence of the handwriting expert need not be invariably corroborative. It is for the Court to decide whether to accept such an uncorroborative evidence or not. In the instant case, the Trial Court had decided the suit by taking into account the report which was evidence within the meaning of Order XXVI Rule 10 of the Code as already observed. The Trial Court had also taken into account that the liberty was given to the Defendants to submit a fresh report, which the Defendants failed to do so. It would also be seen from the records that the Defendants did not exercise their liberty to examine the handwriting and the fingerprint expert and therefore there is no challenge by the Defendants to the said report. The First Appellate Court however on a totally erroneous application of law disregarded the report of the handwriting and the fingerprint expert.

36. This Court further finds it relevant to take another aspect of the matter which touches upon the findings of the First Appellate Court whereby it was held that the Plaintiffs failed to prove their case by showing evidence that they were the owners of

the suit land. It surprises this Court to take note of that when the Defendants claimed that the suit land was purchased from the Plaintiff No. 4 and on the basis of which the Defendants claimed their right, it was therefore an admitted fact that the Defendants duly admitted that the Plaintiffs, or for that matter, the Plaintiff No. 4 was the owner of the suit land. This aspect of the matter therefore clearly shows the apparent non-application of mind.

37. Considering the above, this Court finds that the substantial questions of law so formulated by this Court are substantial questions of law arising in the instant appeal. For the reasons stated hereinabove, the First Appellate Court, in the opinion of this Court, committed gross illegality in dismissing the suit and setting aside the judgment and decree passed by the Trial Court. Consequently, this Court therefore sets aside the judgment and decree dated 14/02/2013 passed by the First Appellate Court in T.A. No. 6/2011 and affirms the judgment and decree passed by the Trial Court dated 23/12/2008 in T.S. No.38/2004.

38. The Registry is directed to prepare the decree accordingly.

39. The LCR be returned forthwith.

JUDGE

Comparing Assistant

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