GAHC010034862016

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

Case No. : RSA/62/2021

SRI LECHU BISWAS
S/O LATE RAJANI KANTA BISWAS, RESIDENT OF WARD NO. 3,
BILASIPARA TOWN, P.O. and P.S. BILASIPARA, DIST. DHUBRI, ASSAM, PIN 783348.

VERSUS

SMTI AJABALA DAS and 2 ORS
C/O ARATI NATH,HOUSE NO.8,GIRIJA PATH, DURGA MANDIR,BANGALI BASTI, BASISTHA CHARIALI,GHY-781029.
WIFE OF LATE MANINDRA CHANDRA BISWAS ALIAS MANINDRA DAS, RESIDENT OF BILASIPARA TOWN, WARD NO.3,P.O. BILASIPARA, DIST.DHUBRI, , PIN 783348

2:ON THE DEATH OF DEFENDANT NO. 2 LATE JATRA DAS HIS LEGAL HEIRS
NAMELY
SMTI KAMALA DAS (DAUGHTER)
W/O LT. MADAN BISWAS
RESIDENT OF WARD NO. 3
BILASIPARA
P.O. and P.S. BILASIPARA
DIST. DHUBRI
ASSAM
PIN 783348

3:SMTI KHANJU DAS (DAUGHTER)
W/O LT. BHANU DAS
RESIDENT OF PURANI BAZAR HARIPARA
P.O. and P.S. BILASIPARA
DIST. DHUBRI
ASSAM

PIN 783348

Advocate for the Petitioner : MR G P BHOWMIK

Advocate for the Respondent : MR. A K PURKAYASTHA

Linked Case : RSA/78/2021

SRI LECHU BISWAS
S/O LATE RAJANI KANTA BISWAS
R/O WARD NO. 3
BILASIPARA TOWN
P.O. and P.S. BILASIPARA
DIST. DHUBRI
ASSAM
PIN 783348

VERSUS

SMTI AJABALA DAS and 2 ORS
W/O LATE MANINDRA CHANDRA BISWAS @ MANINDRA DAS
R/O BILASIPARA TOWN
WARD NO. 3
P.O. BILASIPARA
DIST. DHUBRI
PIN 783348 PRESENT ADDRESS- SMTI AJABALA DAS C/O ARATI NATH
HOUSE No. 8
GIRIJA PATH
DURGA MANDIR
BANGALI BASTI
BASISTHA CHARIALI
GUWAHATI - 781029

2:ON THE DEATH OF DEFENDANT NO. 2 LATE JATRA DAS HIS LEGAL HEIRS NAMELY -
SMTI KAMALA DAS (DAUGHTER)
W/O LT. MADAN BISWAS
R/O WARD NO. 3
BILASIPARA
P.O. and P.S. BILASIPARA
DIST. DHUBRI
ASSAM
PIN 783348
3:SMTI KHANJU DAS (DAUGHTER)
W/O LT. BHANU DAS
R/O PURANI BAZAR (HARIPARA) P.O. and P.S. BILASIPARA
DIST. DHUBRI

ASSAM
PIN 783348

Advocate for : MR G P BHOWMIK
Advocate for : appearing for SMTI AJABALA DAS and 2 ORS

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT & ORDER (CAV)

Date : 31-03-2022

Heard Mr. G. P. Bhowmik, the learned Senior Counsel assisted by Mr. M. Hore for the appellant and Mr. A.K. Purkayastha, the learned counsel representing the respondent Nos. 1, 2 & 3.

2. Both these appeals i.e. RSA No. 62/2021 and RSA No. 78/2021 were listed before this Court under the provisions of Order XLI Rule 11 of the Code of Civil Procedure, 1908 (for short "the Code) and are directed against the judgment and decree dated 20/01/2015 passed in Title Appeal No. 54/2013, whereby the judgment and decree dated 29/06/2013 passed by the Munsiff, Bilasipara in Title Suit No. 78/2009 was affirmed. It is relevant to note that the trial court vide the judgment and decree dated 29/6/2013 dismissed the suit and the counter claim filed by the principal defendants/the principal respondents herein was decreed.

3. This Court vide an order dated 17/11/2021 in both the Second Appeals had granted the liberty to the appellant to insert the proposed substantial questions of law as are required under Section 100(3) of the Code and in pursuance thereof, four

substantial questions of law were proposed to be involved in both the appeals which were as herein under :-

> "1. Whether the lower Appellate Court is justified for not holding that location of the suit land mentioned in the Schedule A & B of the plaint of T.S. No. 78/2009 and location of the land mentioned in the Exhibit-A registered sale deed i.e., in Schedule C & D of the counter claim of the defendants/respondents are of different place ?
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> 2. Whether the lower Appellate Court is justified for not taking the learned Trial Court committed illegality for nor framing an issue namely "whether location of the suit land described in Schedule A & B and the land described in Exhibit-A, registered sale dee i.e., the Schedule C & D of counter claim are of different locality ?
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> 3. Whether the lower Appellate Court is justified for not holding that appointment of an Amin Commission under Order XXVI Rule 9 CPC to survey location of the land described in the suit land of Schedule A & B and the land described in Ext. A sale deed i.e. the Schedule C & D of counter claim of defendants/respondents is necessary to resolve the controversy involve in the case ?
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> 4. Whether there is perversity in finding of facts and land involve in the case in deciding the issue No. 12, 13 and 14 on counter claim of the defendants/respondents ?"

4. Before dealing with the said substantial questions of law so proposed, it would be apposite herein to take note of the contours of the jurisdiction under Section 100 of the Code.

5. At this stage, it would be relevant herein to take note of, that both the appeals arise out of the concurrent findings of the courts below. Section 100 of the Code permits the High Court to exercise jurisdiction against an appellate decree only when there arises a 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 question of law of general importance but refers to 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 Code 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 of a 'question of law, it cannot be said that a 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 when 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 but the lower Court had ignored or misinterpreted or misapplied the same and the correct application of law as declared or enunciated by the Supreme Court or 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 this Court and the same has been followed by the lower Court, if the Appellant is able to persuade this Court, i.e., that the enunciated legal position in its reconsideration, alteration, modification or clarification or that there is a need to resolve the apparent conflict between two different viewpoints, it can be said that the

substantial question of law arises for consideration. In that view of the matter, there cannot therefore be a straitjacket definition as to when a substantial question of law arises in a case, it shall depend on the fact of each case along with the decision rendered by the Court below.

6. The Supreme Court in the case of **Santosh Hazari V. Purushottam Tiwari (DECEASED)** by LRS., reported in (**2001) 3SCC 179**, discussed what would be a substantial question of law in paragraph 12, 13 and 14 which is quoted hereinbelow:

> "12. *The phrase "substantial question of law", as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with - technical, of no substance or consequence, or academic merely. However, it is clear that the Legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta & Anr. Vs. T. Ram Ditta, AIR 1928 Privy Council 172, the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 110 of the C.P.C. (since omitted by the Amendment Act, 1973) came up for consideration and Their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In Sir Chunilal V. Mehta & Sons Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd., (1962) Supp.3 SCR 549, the Constitution Bench expressed agreement with the following view taken by a Full Bench of Madras High Court in Rimmalapudi Subba Rao Vs. Noony Veeraju, ILR 1952 Madras 264:-*
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> > '*..when a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative view, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest Court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law.' and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:-*

> "*The proper test for determining whether a question of law" raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."*
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> *13. In Deputy Commr., Hardoi, in charge Court of Wards, Bharawan Estate Vs. Rama Krishna Narain & Ors., AIR 1953 SC 521, also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to certificate under (the then) Section 110 of the Code.*
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> *14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial", a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."*

In the backdrop of the above, let this Court first take into consideration the substantial question of law as has been stated in the Memo of Appeal to be involved in the present appeal in terms with Section 100(3) of The Code and considered as to whether the said substantial question of law as stated can be at all formulated.

7. In the backdrop of the above, it would be relevant to take note of the brief facts of the instant case. For the purpose of convenience, the parties before this Court are referred to in the same status as they stood before the Trial Court.

8. The plaintiff who is the appellant herein claimed that he along with the proforma defendant Nos. 1 to 4 jointly purchased the plot of land measuring 1 Katha 5 lecha covered by Dag No. 102 of Khatian No. 49 situated at village Bilasipara Sadar from one Hiren Bhattacharjee by way of a registered Deed of Sale bearing Deed No. 3780 of 1978. The said plot of land was most specifically described in the plaint as Schedule A. It is the further case of the plaintiff that the said Hiren Bhattacharjee had purchased the aforesaid land from the grandfather of the plaintiff, namely, one Jharu Prodhani in the year 1975, although no details whatsoever have been mentioned as to how the said Hiren Bhattacharjee had purchased the Schedule A land from Jharu Prodhani in the year 1975. It is the further case of the plaintiff that he allowed the defendants Smt. Ajabala Das and Jatra Das (predecessors in interest of the defendants No. 2 (i) and 2 (ii)) to reside over a part of the Schedule A land which was more specifically described in Schedule-B of the plaint sometime during September, 2002 on the ground that the said defendants did not have a place to reside. It is the further case of the plaintiff that the said defendants i.e. Smti. Ajabala Das and Jatra Das got their names mutated in the revenue records and tried to construct house over the Schedule B land for which the plaintiffs instituted a suit which was registered and numbered Title Suit No. 78/2009 claiming inter alia for declaration of the plaintiffs and the Proforma Defendants' right, title and interest over the Schedule B land which is a part of the Schedule A land; for declaration that the inclusion of the names of the Defendant Nos. 1 and 2 in the revenue records covering Khatian No. 49 of Dag No.102

of village Bilasipara Sadar under Bilasipara Revenue Circle was without any basis and liable to be expunged; for recovery of khas possession of the Schedule B land by removing the Defendant Nos. 1 and 2 by demolishing the houses thereon; for cost etc.

9. The Defendants No. 1 and 2 filed their written statement and in the said written statement it was specifically mentioned that Lt. Jharu Prodhani was the final Khatiandar of the land measuring 1 Katha 8 Lechas of Dag No.102 under Final Khatian No. 49 of village Bilasipara Sadar under Revenue Circle Bilasipara, district Dhubri, Assam as per final record of 1961. Late Jharu Prodhani was survived by three sons, namely, Rajani Biswas, Haridas Biswas and Tufanu Biswas. The said Rajani Biswas who happened to be the father of the plaintiff sold land measuring 3 Kathas 19 Dhur(about 19 lechas in present measurement) vide the registered Deed of Sale bearing Deed No. 3522 dated 10/04/1965 in favour of Manindra Biswas and Nani Mohan Biswas(the predecessors in interest of the defendant Nos. 1 and 2). The predecessors-in-interest of the principal defendants were delivered possession of the said land conveyed by the registered Deed of Sale dated 10/04/1965 and they constructed houses thereon and lived there. After the death of Manindra Ch. Biswas and Nani Mohan Biswas, the principal defendants, who were their legal heirs have been residing on the said land with their dwelling houses. It was also stated that after the sale of 19 lechas of land vide registered Deed of Sale bearing No.3522 dated 10/04/1965 only 9 lechas of land was left with the legal heirs of Jharu Prodhani, and as such the alleged sale in the year 1975 in favour of Hiren Bhattacharjee and the subsequent sale in the year 1978

by the said Hiren Bhattacharjee were not valid in the eyes of law. It was also mentioned that in the resettlement operation the area of the Dag was reduced to 1 Katha 2 Lechas and renumbered as Dag No. 102/212 under Patta No. 49/400 of Village Bilasipara Sadar Revenue Circle, Bilasipara, District- Dhubri, Assam. It was also alleged that in the month of November 2019 the plaintiff taking advantage of the poverty stricken condition of the Defendant No. 1 and 2 forcibly occupied 9 lechas of land leaving only 10 lechas of land with the defendant Nos. 1 and 2. The defendants along with one Smti. Patani Das applied for mutation of 19 lechas of the land to the A.S.O., Bilasipara but by an order dated 14.11.2000 in Mutation Case No. 184(B)/1999-2000, the said Authority refused to grant mutation on the plea that there was delay in applying for mutation and that the defendant No. 1 and Smti. Patani Das had only 10 lechas in their possession out of 19 lechas of their purchased land. Being aggrieved the defendant No. 1 and Smti. Patani Das preferred appeal (Mutation Appeal No. 1/2001) before the Settlement Officer, Dhubri. The Settlement Officer, Dhubri holding that the land purchased by the predecessors of the defendants is the same as the land involved in the case set aside the ASO's order and allowed mutation in favour of the defendant No. 1 and 2 and Smit. Patani Das for 10 lechas of the above land by its order dated 27/8/2002. in Mutation Appeal No.1/2001. An appeal was preferred by the plaintiff against the order of the Settlement Officer before the Assam Board of Revenue and the Board of Revenue by the judgment and order dated 27/6/2005 passed in Revenue Appeal No. 4RA (DBR)/2003 dismissed the appeal and

upheld the order of the Settlement Officer, Dhubri. The land measuring 19 lechas which were purchased by the predecessors-in interest of the defendant Nos. 1 and 2 vide the registered deed of sale bearing No..3522 dated 10/04/1965 was described as Schedule C land and 9 lechas of land which is a part of the Schedule C land and alleged to be forcibly occupied by the plaintiff was described as Schedule-D land. Along with the said written statement a counter claim was also filed by the principal defendants seeking declaration of right, title and interest of the counter claimants over the Schedule-C land; a decree of khas possession in favour of the counter claimants over D-Schedule land by evicting the plaintiff thereof by demolishing his houses; for cost of the counter claim etc.

10. To the said counter claim, a written statement was filed by the plaintiff wherein apart from reiterating the stand taken in the plaint, it was mentioned that the land in the Sale Deed No. 3522 dated 10/04/1965 and the land covered by Dag No. 102, Final Khatian No. 49 of village Bilasipara Sadar under Revenue Circle, Bilasipara, District Dhubri, Assam are different and not identical or in other words, the Schedule-A land was different from the land conveyed vide Sale Deed No. 3522 dated 10/04/1965.

11. On the basis of the said pleadings, the learned Trial Court framed as many as 15 issues which for the sake of convenience is quoted herein below :-

(1) Whether the suit is maintainable ?
(2) Whether there is cause of action for the suit ?
(3) Whether the suit is barred by law of limitation ?
(4) Whether the suit is under-valued ?

(5) Whether the suit is bad for non-joinder of necessary parties ?

(6) Whether the plaintiffs have the right, title and interest over the schedule B land ?

(7) Whether the plaintiff is entitled to khas possession of the Schedule B land by evicting the defendants from the said land ?

(8) Whether the plaintiff is entitled to decree as prayed for ?

(9) Whether the counter claim is maintainable ?

(10) Whether the counter claim has any action ?

(11) Whether the counter claim is bad for non-joinder of legal heirs of Lt. Pachu Biswas as necessary parties ?

(12) Whether the counter claimants/defendant no. 1 and 2 have right, title and interest over the Schedule C land ?

(13) Whether the counter claimants/defendant No. 1 and 2 are entitled to get khas possession of Schedule B land by evicting the plaintiff from thereon ?

(14) Whether the counter claimants/defendant No.1 and 2 are entitled to a decree as prayed for ?

(15) *To what reliefs, the parties are entitled to* ?

12. The plaintiff adduced evidence of three witnesses whereas the defendants adduced the evidence of as many as four witnesses. The plaintiff exhibited various documents which have been marked as Exhibits-1 to 5 and the defendants exhibited documents which were marked as Ext. A to Ext.H(1) to H(29).

13. The Trial Court dismissed the suit of the plaintiff vide a judgment and decree dated 29/06/2013. In doing so, issue No. 6 and issue No. 12 were taken up together. While deciding both the issues together, the Trial Court had come to a finding that Exhibit A was executed way back in the year 1965 and during the hearing of the case, it was brought to the attention of the Trial Court the land was described by Tonzi No. and not Patta No. and Dag No. It was also observed that during the hearing of the

case, it was submitted that the land is situated in Bilasipara Non Agricultural Town. The Trial Court also took into consideration that the Plaintiff side during cross examination of the DWs tried to suggest that the land in Exhibit A is situated at Badertal, Puran Bazar, Baniapara but apart from that there is no evidence to prove the fact that the land of Exhibit A is situated at Badertal, Puran Bazar, Baniapara**.** Further to that the Trial Court after taking into consideration the evidence came to a clear finding that the northern and western boundary of the suit land and land in Exhibit A were similar. It was further held that the plaintiff had neither exhibited the Sale Deed executed by the original pattadar Jharu Prodhani in favour of Hiren Bhattacharjee nor exhibited the certified copy of the Jamabandi of the suit land and hence had failed to prove that Hiren Bhattacharjee had any right to sell the suit land and also failed to prove that the names of the plaintiffs were recorded in the revenue records on the basis of the Sale Deed executed by Hiren Bhattacharjee in the year 1978. It was also held that Ext.A (the deed of sale dated 10.04.1965) was executed before Ext. 1 and the plaintiff failed to prove that Ext. A does not relate to the suit land and consequently held that the counter claimants had right, title and interest over the Schedule C land. While deciding the issue No. 13, the Trial Court after taking into account the Exhibits H(1) to H (29) which were the municipal tax receipts for the year 1968, 1972 1976, 1977, 1987 and 1988 and coupled with the mutation done in favour of the counter claimants answered the issue No. 13 in favour of the counter claimants while negatively answering the issue No. 7 against the plaintiff. On the basis of the

same, the Trial Court dismissed the suit of the plaintiff and decreed the counter claim of the principle defendants.

14. Being aggrieved by the said judgment and decree passed by the Trial Court, an appeal was filed before the Court of the Civil Judge, Dhubri which was registered and numbered as Title Appeal No. 54/2013. The First Appellate Court framed two points of determination. They were:-

> **Point for Determination No. 1** : Whether the learned Trial Court had rightly decided the issue Nos. 6 and 12 wherein the learned Trial Court held that the plaintiff had failed to prove his right, title and interest over the Schedule-B land, but the defendants had proved their right, title and interest over the Schedule C land ?
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> **Point for Determination No. 2** : Whether the learned Trial Court had rightly decided the issue No. 7 and 13 wherein the learned Trial Court held that the plaintiff is not entitled to recover the khas possession of Schedule-B land, but the defendants were entitled to recover the khas possession of the Schedule –D land ?

15. In determining the first point of determination the learned First Appellate Court came to a finding that a perusal of the record reveals that the appellant/plaintiff had cross-examined the witnesses at length regarding the exact location of the suit land and the Schedule C land and as such, it cannot be held that the plaintiff/appellant were prejudiced in any manner or that a separate issue was required to be framed in

that regard. The learned First Appellate Court further after perusal of the materials on record had c0me to a finding of fact that the predecessors-in-interest of the defendants had purchased the Schedule C land in the year 1965, which is a part of the suit land, which was prior to the alleged purchase by the plaintiff in the year 1978 and consequently upheld the decision of the Trial Court decided in issue No. 6 and 12 and held that the defendants had right, title and interest over the Schedule C land and the plaintiff did not have any right, title and interest over the Schedule B land. As regards the point of Determination No. 2, the First Appellate Court held that the Trial Court had rightly decided the issue No.7 and 13 and held that the plaintiff was not entitled to recover the possession of the Schedule B land but the defendants were entitled to recover the possession of the Schedule D land by evicting the plaintiff. Consequently the appeal was dismissed thereby confirming to the decree passed in favour of the defendants.

16. It is against the said judgment and decree dated 20/01/2015 that the present two appeals have been preferred under Section 100 of the Code. The substantial question of law so proposed at Sl. No. 1 hereinabove is in relation to a finding of fact already arrived concurrently at by the Courts below wherein it has been held that the land described in Schedule C of the counter claim is a part of the Schedule A land. The said being pure findings of fact and questions involving findings of fact, this Court does not have jurisdiction under Section 100 of the Code to interfere with the same and consequently the substantial question of law so proposed at Sl. No. 1 is not a

substantial question of law involved in the instant appeal.

17. The second substantial question of law relates to non-framing of an issue as to whether the location of the suit land as described in Schedule A land described in Ext.A, i.e. the Schedule A of the plaint and Schedule C of the counter claim are different lands. It is no longer res integra that when the parties understood the nature of the issue in the case, absence of an issue did not lead to mis-trial sufficient to vitiate the decision. In the instant case as it would be seen from a perusal of the written statement filed to the counter claim a specific stand was taken by the plaintiffs which is as herein under :

> "*The land shown in the Sale Deed No. 3522 dated 10/04/ 1965 and the land covered by Dag No. 102 Khatian No. 49 of village – Bilasipara Sadar under Revenue Circle – Bilasipara, district Dhubri, Assam are different and not identical*."

18. A perusal of the judgment of the Trial Court and more particularly in respect to issue No. 6 and 12 would show that the parties have duly addressed the issue as regards as to whether the land included in Ext.A i.e. the Schedule C and D land was a part of the Schedule A land. The First Appellate Court while also determining the point of determination No. 1 had specifically framed the said point of determination on the said aspect of the matter and had also duly taken note of the contentions so raised by the learned counsel for the appellant therein and observed at paragraph No. 14 as herein under :

> "*14. I have perused the impugned judgment and the records of ths casse and it appears that the learned Trial Court had considered all the relevant materials on record while discussing the above issues. The perusal of the impugned judgment reveals that the learned Trial Court had dealt with the argument of the*

plaintiff/appellant that the schedule B land and the land allegedly purchased by the defendants are different and held that both the land are same, the perusal of the record further reveals that the plaintiff/appellant had cross-examined the witnesses at length regarding the exact location of the suit land and the schedule C land; as such it cannot be held that the plaintiff/appellant was prejudiced in any manner or that a separate issue was required to be framed in this regard.

In view of the above, the prayer of the plaintiff/appellant to frame an additional issue as regards the fact whether the schedule A land and the schedule C land are same or different is not required to be framed."

19. It is true that the Trial Court did not frame any specific issue as to whether the land conveyed in Ext.A is a part of the Schedule A land but a bare perusal of the judgment passed by the Trial Court as well as the First Appellate Court would clearly demonstrate that the parties were aware not only aware of the same but also advanced their respective submissions in relation thereto. Moreover, it would be seen that it was the specific case of the plaintiff in their written statement to the counter claim that the land conveyed vide Exhibit-A is not a part of the suit land. Under such circumstances, to contend that the plaintiff/the appellant herein was not aware of the adjudication as to whether the land conveyed vide Exhibit-A is a part of the Schedule A land and as such was prejudiced is totally misconceived, that too when specific submissions were made in that regard and the defendants' witnesses were cross-examination specifically in respect to the said aspect of the matter. Consequently the substantial question of law so proposed in Serial No. 2 cannot be a substantial question of law involved in the instant appeal.

20. The third substantial question of law so proposed is as to whether the First Appellate Court was justified in proceedings with the adjudication without appointing an Amin Commission to resolve the controversy as to whether the Schedule A & B

lands were the same lands as described in Schedule C & D of the counter claim. On a specific query made to the learned counsel as to whether any application under Order XXVI Rule 9 was filed, the said counsel as per the instructions submits that no such application was filed before the Trial Court or even before the Appellate Court. Be that as it may, a perusal of the provisions of Order XXVI Rule 9 of the Code shows that in a suit in which a Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market value of a property or the amount of any mean profits of damages or annual rent, the Court may issue a Commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court. The exercise of jurisdiction under Order XXVI Rule 9 is discretionary jurisdiction of the Court and is dependent upon as to whether the Court deems it requisite or proper for the purpose of elucidating any matter in dispute. On the basis of the evidence so placed, if the Court was of the opinion that there was no necessity for the purpose of elucidating any matter in dispute for issuance of a local investigation and on the basis of the facts available on record the Court could come to an opinion to decide the dispute, it is not required for that Court to issue a Commission in exercise of the powers under Order XXVI Rule 9 of the Code. If the parties thought that it would have been necessary that a local investigation be carried out the appellant could have filed an application before the Trial Court or even before the First Appellate Court. Having not done so, the appellant cannot raise such issue in the form of a substantial question of law to be involved in

the instant appeal. Accordingly, the third substantial question of law so proposed to be involved in the instant appeal is mis-conceived.

21. The fourth substantial question of law is in relation to the perversity in finding of fact in deciding the Issue Nos. 12, 13 and 14 is a vague substantial question of law without any material particulars as to on what basis the appellant claimed that there was perversity in the finding of fact in deciding the issue Nos. 12, 13 and 14.

22. A perusal of the grounds in the Memo of Appeal reveals that it has been mentioned that the DW-1 during her cross-examination had stated that the distance of the suit land and the land under Exhibit-A is about 2 kms i.e. both are different lands but the materials on record on the basis of which the Courts below had come to a finding that the land conveyed vide Exhibit A to the predecessors-in-interest of the principal defendants i.e. Schedule C land is a part of the Schedule A land and the said finding so arrived at being based upon appreciation of the facts and the evidence led, this Court is of the view that there is no perversity in the findings arrived at by the Courts below in respect to issue Nos. 12, 13 and 14. Further to that there is no evidence placed by the plaintiff whose specific case was that land conveyed by Exhibit A is different from the land described in Schedule A. Merely giving suggestions and not adducing any evidence to substantiate the same, cannot entitle the plaintiff to a decree as prayed for. The judgments of both the Courts below have duly appreciated the evidence in the proper perspective and as such it cannot be said that the findings arrived at by the Courts below suffers from perversity.

23. Consequently, all the four substantial questions of law as proposed in both the Memos of Appeal, in the opinion of this Court are not substantial questions of law involved in the instant appeals, for which the instant appeals stands dismissed. However, the parties shall bear their own cost.

JUDGE

Comparing Assistant