GAHC010049812017

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

Case No. : RSA/21/2018

ON THE DEATH OF DHARMESWAR BAISHYA HIS LEGAL HEIRS ANJAN JYOTI BAISHYA AND ORS
R/O DR. J.C. ROAD, PANBAZAR, GUWAHATI-1, DIST. KAMRUP (M), ASSAM.

VERSUS

SARVODAYA TRUST
A TRUST REGISTERED UNDER THE PROVISION OF THE INDIAN TRUST ACT 1882 REPRESENTED BY ITS SECY., SARANIA, ULUBARI, GUWAHATI-7, DIST. KAMRUP (M), ASSAM.

2:NAYAN BHANDARI SARMA
SECRETARY
SARVODAYA TRUST
SARANIA
ULUBARI
GUWAHATI-7
DIST. KAMRUP (M)
ASSAM

Advocate for the Appellants : Mr. A Sattar, Advocate.

Advocate for the Respondents : Mr. H. K. Deka, Senior Advocate
Mr. P. Choudhury, Advocate

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 07.06.2022

Date of Judgment : 22.06.2022

JUDGMENT AND ORDER (CAV)

Heard Mr. A Sattar, the learned for the appellants and Mr. H. K. Deka, the learned senior counsel assisted by Mr. P. Choudhury, the learned counsel for the respondents.

2. This is an appeal under Section 100 of the Code of Civil Procedure challenging the judgment and decree dated 14.03.2017 passed by the Court of the Civil Judge No. 3, Kamrup (M) at Guwahati in Title Appeal No. 12/2021 whereby the said appeal was dismissed thereby affirming the judgment and decree dated 17.01.2021 passed by the Court of the Munsiff No.3, Kamrup, Guwahati.

3. This Court vide an order dated 30.05.2022 admitted the instant appeal by formulating the following substantial question of law:

> *(1) Whether the concurrent finding of facts arrived at by the courts below suffers from perversity without taking into consideration that Schedule-B (Schedule-II) is not a part of Exhibit-C, i.e., the registered Gift Deed dated 30.05.1977?*

4. For the purpose of determination of the said substantial question of law, it is relevant to take into account the facts and circumstances of the case. For the sake of convenience, the parties herein are referred to in the same status as they stood before the trial court.

5. The predecessor-in-interest of the appellants herein as plaintiff had instituted a suit being Title Suit No.127/2002 against the defendants seeking declaration that (i) the plaintiff shall not be evicted without due process of law and (ii) for permanent injunction

restraining the defendants and their men, agents, servants, attorneys, successors, executors, administrators and others claiming through them from dispossessing and disposing the plaintiff from the premises described in Schedule-B.

6. The said suit was registered and numbered as Title Suit No.127/2002. The case of the plaintiff in the said suit was that the defendant No. 1 is a trust under which the schedule properties are under control. It was stated that the schedule properties were inherited by late Dr. Tilottama Rai Choudhury and late Amal Prabha Das from their late father Dr. Harekrishna Das. Upon inheriting the said properties, the daughters of late Dr. Harekrishna Das gifted Schedule-A property in favour of the defendant No. 1. As the said Schedule-A property is relevant for the purpose of deciding the substantial question of law, the said Schedule-A property is quoted herein below:-

S C H E D U L E – 'A'

All that peace and parcel of land measuring 4 kathas of land out of total 1 bigha 4 kathas 11 lechas of land covered by Dag No. 2184 and 2185 (old)/637 (new) and K. P. Patta No. 988 (old)/358 (new) under Mouza Ulubari alongwith eight Assam Type house standing thereon which is bounded and butted by:-

NORTH : J. C. Das Road

SOUTH : Land of Asif Meer, owner of Meer Market

EAST : Land of Late Habiram Deka

WEST : Land of Late Akan Das.

7. The case of the plaintiff was that while he was a child, he was brought to the schedule land by late Dr. Harekrishna Das in the year 1948 and as the plaintiff was rendering service under the deceased Dr. Harekrishna Das during his lifetime and out of love and affection, the daughters of late Dr. Harekrishna Das, namely, late Dr. Tilottama Rai Choudhury and late Amal Prabha Das even gifted a plot of land in favour of the plaintiff. Late Dr. Harekrishna Das allowed the plaintiff to stay permanently in the Schedule-B premises and permitted the plaintiff to repair and extend the said premises. Even after the death Dr. Harekrishna Das, his daughters, late Dr. Tilottama Rai Choudhury and late Amal Prabha Das honouring the commitment of their father allowed

the plaintiff to stay permanently and further allowed to extension/repairing of the suit premises. It is the further case of the plaintiff that he married in the year 1970 and in order to accommodate his family, the above mentioned daughters of late Dr. Harekrishna Das provided a bigger residential house as described in Schedule-B of the plaint which is adjacent to Dr. Harekrishna Das Memorial Library and the plaintiff and his family members were residing therein. As per the plaintiff, he was only required to pay the electricity charges to the defendant No. 1 against issuance of electricity consumption bill raised by the defendant No. 1. It was mentioned that prior to 1987, the defendant had no formal system of issuing any receipt but from the year 1987 onwards, the defendant No. 1 issued receipt towards electricity consumption which in turn was paid by the plaintiff. It was mentioned that the plaintiff is an occupier of the Schedule-B premises since 1948 and apart from the plaintiff, several other persons who were close to the family members of late Dr. Harekrishna Das were also provided accommodation in the properties as described in the Schedule. Some time in the year 1999, the defendant No. 1 vide notices dated 17.02.1999, 13.12.1999 and on several other dates, intimated the plaintiff to deliver vacant possession within one month or else would take assistance under the law to evict the plaintiff. The plaintiff upon receipt of the said notices, approached the defendant No. 2 and pleaded that since the plaintiff had been in possession of the schedule houses since the lifetime of Dr. Harekrishna Das, the plaintiff, as such, should be allowed to reside therein with his family members. In the meantime, the plaintiff came to know that the defendants in a very short circuit manner had resorted to evict the plaintiff from the schedule properties without following the due process of law. The plaintiff further stated that on 09.05.2002 and 10.05.2002, the plaintiff through some reliable sources came to know that the defendants, through some government agencies, were attempting to evict the plaintiff from the schedule premises. In paragraph No. 13 of the plaint, it was categorically mentioned that the proposed dispossession of the plaintiff from the Schedule-A premises is blatantly illegal, malafide and non-sustainable in law as the plaintiff was sought to be ejected there from without due process. It is under such

circumstances that plaintiff had instituted the suit seeking various directions.

8. At this stage, it may be relevant to take note of that from a perusal of the plaint it is seen that the plaintiff claimed that he is the occupier of the Schedule-B premises described in the plaint which is quoted herein below:-

Schedule 'B'

An Assam Type house standing on a plot of land measuring about 1 (one) katha 5 (five) lechas covered by Dag No. 2184 and 2185 (old), 637 (New) and K.P. Patta No.988 (Old) 358 (New) of Sahar Guwahati, Block No. 3 Mouza Ulubari situated at Dr. J. C. Das Road, Kamarpatty, Guwahati consisting of 4 (four) rooms with an adjacent part house consisting one room with a veranda of another A.T. House and separate one number of latrine and one number of bathroom with a passage from Dr. J.C. das Road to the suit premises 87 ft. in length and 12 ½ ft. breadth as bounded by:-

North-	Dr. H.K. Das Memorial Library
South-	Vacant Land
East-	Land of Habiram Deka
West-	Part house of suit premises presently the chamber of Dr. Ira Roy Choudhury.

9. Before proceeding further it may be relevant herein to mention that initially when the suit was filed, the Schedule-B property was described as an Assam Type house measuring approximately 800 sq. ft. consisting of four rooms and an independent house comprising of one room which is built over the Schedule-A land bounded and butted by the various boundaries mentioned therein. But in the amended plaint, the Schedule-B boundary has been described as an Assam Type house standing on a plot of land measuring about 1 (one) katha 5 (five) lechas covered by Dag No. 2184 and 2185 (Old), 637 (New) and K.P. Patta No.988 (Old) 358 (New) of Sahar Guwahati, Block No. 3 Mouza Ulubari situated at Dr. J. C. Das Road, Kamarpatty, Guwahati consisting of 4 (four) rooms with an adjacent part house consisting one room with a veranda of another A.T. House and separate one number of latrine and one number of bathroom with a passage from Dr. J.C. Das Road to the suit premises 87 ft. in length and 12 ½ ft. breadth. The boundaries of the Schedule-B land of the original plaint and the amended plaint are

also different.

10. The record further reveals that on 14.08.2002, the defendants filed a written statement with counterclaim. This written statement-cum-counterclaim is against the original plaint inasmuch as the amended plaint was filed on 17.07.2004. In the said written statement-cum-counterclaim, it has been mentioned that the schedule properties described in the Schedule-I to the counterclaim were inherited by late Dr. Tilottama Rai Choudhury and late Amal Prabha Das from their father late Dr. Harekrishna Das and upon inheriting the said properties, the daughters of late Dr. Harekrishna Das gifted the Schedule-I property in favour of the defendant No. 1. The statements made in the plaint have been denied and it was categorically stated that the suit has not been filed bonafide and the suit property has not been correctly and accurately described. A counterclaim was also included in the written statement wherein it was mentioned that Dr. Tilottama Rai Choudhury and late Amal Prabha Das, both daughters of late Harekrishna Das, created the defendants' trust by executing a Deed of Trust No.3784 dated 14.07.1959 with eight numbers of trustees. It was mentioned that the intent and purpose of the trust created by the settlers dedicated a considerable amount of immovable property by the deed of trust and also registered deed of gift in favour of the aforesaid trust. The purpose of the trust was charitable and in order to achieve amongst others execution of works for the promotion of Khadi, health, village upliftment on the lines and the manner indicated by the ideals of Mahatma Gandhi and in conception of Sarvodaya. It was mentioned that both the Dr. Tilottama Rai Choudhury and late Amal Prabha Das, during their lifetime, on 30.05.1977 made a gift in favour of the defendants trust in respect to the plot of land measuring 4 kathas out of 1 bigha 4 kathas 11 lechas of land covered by Dag Nos. 2184 and 2185 of KP Patta No. 988 of town Guwahati, Mouza-Guwahati along with portion of the holding under holding No.31 of Ward No. 20 of Guwahati Municipal Corporation by a registered deed of gift bearing deed No. 5517 dated 30.05.1977. It is relevant to mention that this property gifted is the same property as described in Schedule-A to the

plaint. It was mentioned that the said gift was accepted by the defendants trust and the possession of the said gifted property was duly handed over by the donors to the defendants trust on the very date of the gift.

11. Thereafter on 02.11.1988, the said donors and settlers, Dr. Tilottama Rai Choudhury and late Amal Prabha Das made a gift to the defendants trust of another plot of land measuring 4 kathas 11 lechas covered by Dag No. 191 of KP Patta No.159 of town Guwahati, Mouza-Guwahati with an Assam Type house under holding No.31 of Ward No. 20 of Guwahati Municipal Corporation. The said gift was also accepted and possession of the gifted property was taken over on the very date of the gift. On the basis thereof, the defendant trust acquired a total land of 1 bigha 3 kathas 11 lechas by way of gift made by late Dr. Tilottama Rai Choudhury and late Amal Prabha Das. Both the said plots of land were contiguous to each other and within the same compound. This property has been described fully in Schedule-I to the counterclaim. It was further mentioned that yet another plot of land measuring 1 katha belonging to Smti. Nandita Banerjee was also contiguous to and within the same compound of the aforesaid properties of the defendant trust acquired by way of gift. The said 1 katha of land was not gifted to nor does it belong to the defendant trust. After the gift of the total land of 1 bigha 3 kathas 11 lechas made by the aforementioned donors, the said land was mutated in the name of the defendant trust in the revenue records in respect to the aforesaid land and a separate Patta being KP Patta No.358 (new) has been issued to the defendant trust. The holding No. 20 and Ward No. 20 has also been transferred in the name of the trust in the records of the Guwahati Municipal Corporation and the old holding No.31 has also been changed to new holding No.20. It was also mentioned that the defendant trust has been enjoying and possessing the gifted property by paying the annual land revenue and municipal taxes regularly and the defendant trust has also been running a library in the name and style of Harekrishna Das Memorial Library and one health clinic in the house gifted by the aforesaid donors as mentioned above.

12. In paragraph No.31 of the said counterclaim, it was mentioned that at the time of making the gift in the year 1977, the plaintiff, who was a helper of late Dr. Harekrishna Das, was staying in the small Assam Type house (made for kitchen) measuring 26 ½ ft X 22 ½ ft in size under the permission of late Dr. Tilottama Rai Choudhury and late Amal Prabha Das. The defendant trust after having acquired the property by gift also allowed the plaintiff on his request to stay in the said house on the condition that he shall vacate the house as and when demanded by the defendant trust. It was also mentioned that late Dr. Tilottama Rai Choudhury and late Amal Prabha Das, out of love and affection, on 01.04.1971, made a gift to the plaintiff of an area of land measuring 1 katha 19 lechas covered by Dag No.54 of KP Patta No.27 of Village - Jatiya under Mouza - Beltola and possession thereof was handed over to the plaintiff.

13. In paragraph 35 of the counterclaim, it was mentioned that in the year 1998 the plaintiff in collusion with others conspired to remodel and renovate the said house by making extension. Therefore, with that end in view, the plaintiff illegally and unauthorisely in the name of making some minor repair in the house damaged the portion of the house and constructed a new room by extending the existing house without any permission or consent of the defendants. The defendants raised protest against illegal and unauthorized acts of the plaintiff, but the plaintiff paid no heed. It is under such circumstances that the defendant served a notice on 17.02.1999 upon the plaintiff whereby the defendants by withdrawing the permission for staying asked the plaintiff to quit and vacate the house and premises within two months from the date of receipt of the notice. The plaintiff, having not complied with the notice dated 17.02.1999, the defendants again served another notice on 13.12.1999 asking the plaintiff to vacate the house within a period of one month from the date of the notice and informed the plaintiff that on his failure to do so, necessary action would be taken against him for eviction and for compensation for unauthorized use and occupation of the suit premises. It was also alleged out there in the counterclaim that the plaintiff,

instead of complying with the notices, started creating trouble in the enjoyment and management to the defendants' property. The sign board which was fixed on the said property was removed in the night of 08.11.1999 and the defendants had to arrange for putting the compound gate under lock and key. But on 17.11.1999, the plaintiff's son and his 3/4 accomplices assaulted one Bidur Mahanta who was entrusted by the defendants with the duty of putting lock on the gate. The defendants, therefore, had to inform the Deputy Commissioner, Kamrup and the police by letters dated 03.12.1999 separately. Again in the first week of October, 2001, the defendants came to know that some quantity of sand and gravel were stacked in the land of the defendant trust and as such on 07.11.2001, the matter was immediately informed to Panbazar Police Station. It is under such circumstances that the counterclaim was filed seeking declaration of right, title and interest over the schedule property; recovery of the possession of the schedule property by evicting the plaintiff; removing him and his men therefrom; permanent injunction restraining the plaintiff his men, agents and servants from interfering with the defendants peaceful enjoyment and possession of the scheduled property; costs etc. To the said counterclaim, there were two schedules which, for the sake of convenience, are quoted herein below:

Schedule I

An area of land measuring 1 Bigha 4 Kathas 11 Lechas of land covered by Dag No. 2184 and 2185 (old)/637 (new) and K. P. Patta No. 988 (old)/358 (new) of village Sahar Guwahati Block 3 under Mouza Guwahati, district Kamrup which is bounded by:-

North	: J. C. Das Road.
South	: Land of Asif Meer, Meer Market.
East	: Land of Late Habiram Deka.
West	: Smt. Nandita Banerjee and land of Late Akon Das.

Schedule II

An Assam Type House measuring about 800 sq. ft. (as extended) comprising of four rooms and an independent hjouse of 1 room unauthorisely extended and

constructed on the land of Schedule I. The houses are bounded by:-

North	: J. C. Das Road.
South	: Defendants' remaining land of Schedule I.
East	: Land of Habiram Deka.
West	: Remaining land of Schedule I.

14. The record further reveals that vide an order dated 29.11.2004, the written statement filed by the plaintiff to the counterclaim of the defendants was not accepted as well as the additional written statement filed with further counterclaim to the amended plaint was also not accepted. Under such circumstances, it would be seen that the amended plaint was a pleading on behalf of the plaintiff. There was a written statement-cum-counterclaim which was the pleading on behalf of the defendants.

15. The provisions of Order VIII Rule 6 A (4) of the CPC stipulates that the counterclaim shall be treated as a plaint and governed by the Rules applicable to the plaint and Rule 6 E of Order VIII stipulates that if the plaintiff makes default in putting in a reply to the counterclaim made by the defendant, the Court may pronounce the judgment against the plaintiff in relation to the counterclaim made against him or makes such order in relation to the counterclaim as it thinks fit.

16. On the basis of the said pleadings available, the court below framed as many as seven issues which are quoted herein below:

ISSUES

1. Whether the plaintiff has right to sue?
2. Whether the suit is maintainable in its present form?
3. Whether the plaintiff is entitled to get decree as prayed for?

Issues on Counter-Claim

1. Whether the counter claim is maintainable?
2. Whether the defendant is a licensee under the defendant No.1, if so whether he has right to possess the suit land after receiving the notice issued by the defendant No. 1?
3. Whether the decadents have acquired right, title and interest over the suit property?

4. Whether the defendants are entitled to get decree for recovery of possession by evicting the plaintiff from the land and property shown in schedule-I and II in the Counter-claim?

17. On behalf of the plaintiff there were three witnesses and exhibited various documents and on behalf of the defendants there were five witnesses and various documents were also exhibited.

18. The trial court vide the judgment and decree dated 05.01.2011, dismissed the suit and decreed the counterclaim. In doing so, the trial court decided the Issue Nos. 1 & 2 in the suit in favour of the plaintiff which pertains to as to whether the plaintiff had a right to sue as well as whether the suit was maintainable in the present form and manner. The Issue No. 2 in the counterclaim which was as to whether the plaintiff is a licensee under the defendant No. 1 and if so, whether he has a right to possess the suit land after receiving notices issued by the defendant No.1, the trial court held that the plaintiff was staying in the property of the defendant as per its permission and had no right to possess the same after receiving notice issued by the defendant No. 1 for vacating the same because the defendant trust had every right to use and enjoy its own property. As regards the Issue No.3 in the counterclaim, as to whether the defendants have acquired right, title and interest over the suit property, the trial court held that on the basis of Ext.C and Ext.D, the defendants/counterclaimants had right, title and interest over the Schedule-I land and on the basis of the above findings, the trial court vide the said judgment and decree dated 05.01.2011, dismissed the suit of the plaintiff and decreed the counterclaim thereby declaring that the defendants have right, title and interest over the Schedule-I land mentioned in the counterclaim and the defendants will recover the possession of the Schedule-II property by evicting the plaintiff and his men from the said Schedule-II property. Apart from that, a permanent injunction was also granted thereby restraining the plaintiff and his men from interfering with the peaceful possession and enjoyment of the defendants over the Schedule-I & Schedule-II property.

19. Being aggrieved, the plaintiff as appellant preferred an appeal before the Court of

the Civil Judge No. 1, Kamrup (M) at Guwahati. The said appeal was registered and numbered as T.A. No.12/2001 and was endorsed to the Court of the Civil Judge No. 3, Kamrup (M) at Guwahati for disposal. The First Appellate Court took up the appeal and decided the said appeal by taking into consideration the contentions so made by the learned counsels for the parties. It appears from a perusal of the judgment and decree dated 14.03.2017 that the First Appellate Court took into consideration two points. The first, as to whether the plaintiff was entitled to remain in possession of the Schedule-B land and the second point was whether the counterclaim was maintainable as the same was filed by the defendant No. 1 and its Secretary.

20. The First Appellate Court vide the impugned judgment and decree dated 14.03.2017, dismissed the appeal holding *inter-alia* that the plaintiff was possessing the suit schedule premises as mere trespasser and the counterclaim filed by the defendants was maintainable. On the basis thereof, the First Appellate Court dismissed the appeal. It is against the said judgment and decree dated 14.03.2017, the instant appeal has been filed. This Court, vide an order dated 30.05.2022, formulated a substantial question of law which have already been mentioned in paragraph No. 3 of the instant judgment.

21. Before further proceeding on the merits of the matter, it would be relevant to take into account as to the scope of the jurisdiction under Section 100 of the CPC. Section 100 of the CPC provides for a right of second appeal by approaching a High Court and invoking its aid and interposition to redress error(s) of the subordinate court, subject to the limitations provided therein. An appeal under Section 100 of the CPC could be filed both against the 'concurrent findings' or 'divergent findings' of the courts below. Sub-section (1) of Section 100 of the CPC states that a second appeal would be entertained by the High Court only when the High Court is satisfied that the case 'involves a substantial question of law'. Therefore, for entertaining an appeal under Section 100 of the CPC, it is immaterial as to whether it is against 'concurrent findings' or 'divergent findings' of the courts below. It is needless to state that even when any concurrent

finding of fact is appealed, the appellant is entitled to point out that it is bad in law because it was recorded *de hors* the pleadings, or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against the provision of law or the decision is one which no Judge acting judicially could reasonably have reached. Once the High Court is satisfied, after hearing the appeal, that the appeal involves a substantial question of law, it has to formulate that question and direct issuance of notice to the respondent.

22. In case, the appeal does not involve any substantial question of law, the High Court has no other option but to dismiss the appeal. Upon notice being served upon the respondent, the respondent would be at liberty to show that the question formulated by the High Court was not involved in the case. It is only after hearing the parties thereafter, if the High Court is of the opinion that the substantial question of law is involved in the appeal, the High Court shall exercise its jurisdiction to pass appropriate order as the Appellate Court.

23. Now, therefore, the question which arises as to what is a substantial question of law. The Supreme Court in the case of ***Santosh Hazari Vs. Purushottam Tiwari (Dead) By Lrs.***, reported in ***(2001) 3 SCC 179*** dealt with the phrase "substantial question of law" in paragraph Nos. 12, 13, & 14 which are quoted herein below:

> ***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 v. T. Ram Ditta [AIR*

1928 PC 172 : 55 IA 235] , the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 110 CPC (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. v. Century Spg. and Mfg. Co. Ltd. [AIR 1962 SC 1314 : 1962 Supp (3) SCR 549] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju [ILR 1952 Mad 264 : AIR 1951 Mad 969] :

> "*[W]hen 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 views, 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 facts 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.*"

13. *In Dy. Commr., Hardoi v. Rama Krishna Narain [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 a certificate under (the then) Section 110 of the Code.

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, insofar 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.*

24. The above quoted paragraphs of the judgment would show that for a question of law to be a substantial question of law and involved in the case would depend on the facts and circumstances of each case and 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. It is also very pertinent to note that to be a '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, insofar as the rights of the parties before it are concerned. It is also relevant to mention that 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.

25. In the backdrop of the above, let this Court take into consideration the respective submissions made by the parties. Mr. A. Sattar, the learned counsel appearing on behalf of the appellants submitted that the property described in Schedule-B of the plaint is not a part of the Schedule-I property as described in the counterclaim. The learned counsel further submitted that a perusal of Ext.C which is the registered deed of gift dated 30.05.1977 and the property gifted by the said deed of gift does not include the Schedule-B property, and as such, both the courts below fell into error in coming to a finding that the Schedule-B property described in the plaint is a part of the Schedule-I property. This finding so arrived at, being a perverse finding, it is substantial question of law involved in the instant appeal and as such this Court ought to set aside the impugned judgment and decree dated 14.03.2017, passed in T.A. No.12/2021.

26. On the other hand, Mr. H. K. Deka, the learned senior counsel for the respondents submitted that substantial question of law so formulated by this Court on 30.05.2022 is not substantial question of law involved in the instant appeal as it is an admitted case by the plaintiff that property described in Schedule-B is a part of Schedule-A and was gifted to the defendant No. 1, i.e., the respondent No. 1 herein. The learned counsel further submitted that for being a substantial question of law involved in the appeal, there is a necessity that such question of law has a foundation laid down in the pleadings. It is submitted that here is no pleading to the effect that Schedule-B property is not a part of the Schedule-A property as described in the plaint as well as in the Schedule-I of the counterclaim. Mr. Deka, the learned senior counsel also draws the attention of this Court to the cross-examination of the plaintiff who had admitted that the house where he is residing and built as well as had extended, is a part of Schedule-I land.

27. I have heard the learned counsels for the parties and perused the materials on record. Taking into consideration the substantial question of law, which was framed on 30.05.2022, it would be relevant to take note of the scope of suit filed by the plaintiff and the counterclaim filed by the defendant. A perusal of the original plaint as well as

the amended plaint filed by the plaintiff would show that in the original plaint it was specifically mentioned that the defendant No.1 is a trust under which the schedule properties are under control. It was further mentioned that the schedule properties were inherited by late Dr. Tilottama Rai Choudhury and late Amal Prabha Das from their late father Dr. Harekrishna Das. Upon inheriting the said properties, the daughters of late Harekrishna Das, gifted the Schedule-A property in favour of the defendant No. 1. So, it is an admitted case of the plaintiff that the Schedule-A property which is a plot of land measuring 4 kathas, out of the total 1 bigha 4 kathas 11 lechas of land, covered by Dag Nos. 2184 and 2185 (Old)/637 (New) including K.P. Patta No. 988 (Old)/358 (New) under Mouza-Ulubari along with eight Assam Type houses standing thereon was gifted to the defendant No.1.

28. At this stage, if this Court takes into consideration the Ext.C which is the registered deed of gift dated 30.05.1977, it would be seen that both late Dr. Tilottama Rai Choudhury and late Amal Prabha Das had gifted the Schedule-A property to the defendant No. 1. A further perusal of the original plaint would show that late Dr. Harekrishna Das provided a residential house measuring 800 sq. ft. which was adjacent to Dr. Harekrishna Das Memorial Library for the plaintiff to reside along with his family. The Schedule-B in the original plaint has already been stated herein above, was the said Assam Type house measuring approximately 800 sq. ft. consisting of four rooms and an independent house comprising of one room which is built over Schedule-A land. Now, if this Court looks into the amended plaint it would be seen that the amended plaint had proposed for three amendments. First is the amendment to the last sentence of paragraph No. 4 of the original plaint whereby a sentence was sought to be added which is “late Dr. Harekrishna Das allowed the plaintiff to stay permanently in the Schedule-B premises and permitted the plaintiff to repair and extension of the said premises. After the death of Dr. Harekrishna Das, his daughters late Dr. Tilottama Rai Choudhury and late Amal Prabha Das honoured the commitment of their father allowed the plaintiff to

stay permanently and further allowed to extension of the suit premises". The second amendment which was made in paragraph No. 4 of the plaint is the word "measuring 800 sq. ft." was substituted by the word "as described in Schedule-B of the plaint". The third amendment was a completely different Schedule-B was substituted. The said Schedule-B had already been quoted herein above in paragraph No. 8. Relevant to mention here that while in the original Schedule-B the area of the Assam Type house was mentioned as 800 sq. ft. consisting of four rooms and an independent house comprising of one room build over Schedule-A land whereas in the amended Schedule-B, the area of the Assam Type house was not mentioned but the land on which the Assam Type house stood, has been categorically mentioned. The northern and western boundaries of the original Schedule-B and the amended Schedule-B are different.

29. It is also relevant to take note of that there was a written statement filed along with the counterclaim against the original plaint. There is no written statement filed against the counterclaim and there is also no additional written statement filed against the amended plaint. A perusal of the written statement against the original plaint duly refutes the amendment made in paragraph No. 4 of the plaint as amended. It is also relevant to take note of Schedule-I of the counterclaim which is conjoint plot of land measuring 1 bigha 3 kathas 11 lechas which was donated to the defendant No. 1 by late Dr. Tilottama Rai Choudhury and late Amal Prabha Das vide Ext.C and Ext.D. Therefore, Schedule-A to the plaint is a part of Schedule-I of the counterclaim. If this Court looks into the evidence to which the learned counsel for the respondents has drawn the attention, more particularly, to the cross-examination of the plaintiff witness No.1 who is the plaintiff himself had categorically admitted that the house he had build is in the Schedule-I land. It is also crucial for the purpose of the instant appeal to take note of that there is no challenge to Ext.C and Ext.D which are gift deeds by which the Schedule-I property was gifted to the defendant No. 1. The only case of the plaintiff as could been seen from the perusal of the plaint is that he ought not be evicted without due process of law and the

permanent injunction have been sought restraining the defendants, their men, agents, servants, attorneys, successors, executors, administrators and others claiming through that from disposing as well as dispossessing the plaintiff from the Schedule-B land.

30. Now let this Court take into consideration the scope of the said suit filed by the plaintiff. The plaintiff has admitted that the plaintiff is a gratuitous possessor who has been allowed to stay in the Schedule-B property by late Dr. Harekrishna Das and thereafter by late Dr. Tilottama Rai Choudhury and late Amal Prabha Das. He does not claim any title over the said property. The plaintiff's only fear is that on one hand the defendants had issued notice for eviction stating *inter-alia* that steps would be taken in accordance with law for his eviction but the defendants were resorting to actions which were not in accordance with law and as such he has filed a suit that he should not be evicted without following due process of law. It is, therefore, relevant to understand the concept of due process of law.

31. Due process of law means that nobody ought to be condemned unhurt. The due process of law means a person in settled possession will not be dispossessed except by the due process of law. Due process of law means an opportunity to the defendant to file pleadings including written statement and documents before a court of law. The Supreme Court in the case of ***Maria Margadia Sequeria Fernandes & Others vs. Erasmo Jack De Sequeria (D)***, reported in ***(2012) 5 SCC 370*** observed that due process does not mean the whole trial. It was further observed that due process of law is satisfied the moment rights of the parties are adjudicated upon by a competent Court. In paragraph No. 80 of the said judgment, the Supreme Court had approved the concept of due process as laid down by the Delhi High Court in the case of ***Thomas Cook (India) Ltd. Vs. Hotel Imperial.*** It being relevant for the purpose of the instant case, the paragraph No. 80 of the said judgment is quoted herein below:-

> "***80.*** *The High Court of Delhi in Thomas Cook (India) Ltd. v. Hotel Imperial held as under:*
>
> "*28. The expressions 'due process of law', 'due course of law' and 'recourse to law'*

have been interchangeably used in the decisions referred to above which say that the settled possession of even a person in unlawful possession cannot be disturbed 'forcibly' by the true owner taking law in his own hands. All these expressions, however, mean the same thing—ejectment from settled possession can only be had by recourse to a court of law. Clearly, 'due process of law' or 'due course of law', here, simply mean that a person in settled possession cannot be ejected without a court of law having adjudicated upon his rights qua the true owner.

Now, this 'due process' or 'due course' condition is satisfied the moment the rights of the parties are adjudicated upon by a court of competent jurisdiction. It does not matter who brought the action to court. It could be the owner in an action for enforcement of his right to eject the person in unlawful possession. It could be the person who is sought to be ejected, in an action preventing the owner from ejecting him. Whether the action is for enforcement of a right (recovery of possession) or protection of a right (injunction against dispossession), is not of much consequence. What is important is that in either event it is an action before the court and the court adjudicates upon it. If that is done then, the 'bare minimum' requirement of 'due process' or 'due course' of law would stand satisfied as recourse to law would have been taken. In this context, when a party approaches a court seeking a protective remedy such as an injunction and it fails in setting up a good case, can it then say that the other party must now institute an action in a court of law for enforcing his rights i.e. for taking back something from the first party who holds it unlawfully, and, till such time, the court hearing the injunction action must grant an injunction anyway? I would think not. In any event, the 'recourse to law' stipulation stands satisfied when a judicial determination is made with regard to the first party's protective action. Thus, in the present case, the plaintiff's failure to make out a case for an injunction does not mean that its consequent cessation of user of the said two rooms would have been brought about without recourse to law."

32. Therefore, once the defendant has filed the counterclaim and has initiated a proceeding for eviction through the court, the relief sought for by the plaintiff in the suit was duly addressed.

33. Now coming back to the counterclaim filed by the defendants, it would seen that the defendants have sought for declaration of right, title and interest in respect to the

schedule properties which is described in Schedule-I & II, recovery of khas possession of the schedule properties by evicting the plaintiff and removing him and his men and for permanent injunction. The record should show that though a written statement was filed to the said counterclaim but the same was not accepted. Under such circumstances, in view of the provisions of Order VIII Rule 6A (4) and Rule 6E, the court is empowered to pronounce judgment against the plaintiff in relation to the counterclaim made against him or make such order in relation to the counterclaim as it thinks fit. The power so given under Order VIII Rule 6E is akin to the powers conferred upon the court under Order VIII Rule 10. The Supreme Court in the case of ***Ramesh Chand Ardawatiya vs. Anil Panjwani***, reported in ***(2003) 7 SCC 350*** had dealt with the aspect when no written statement is being filed. Paragraph No. 33 of the said judgment, being relevant, is quoted herein below:-

> "***33.*** *So far as the plea of bar as to maintainability of suit for failure to seek further relief is concerned, we cannot find fault with the plaint as framed. The defendant was alleged to be a rank trespasser who was in the process of committing a trespass and was allegedly raising unauthorized construction over the property neither owned nor legally possessed by him. The relief of specific performance is not a further relief to which the plaintiff is entitled or which he could have sought for against this defendant. Thus, from the point of view of the present defendant, we cannot find any such defect or infirmity in the relief sought for by the plaintiff as would render the suit not maintainable and liable to be thrown out at the threshold. But there is substance in the other limb of this submission made by the learned Senior Counsel for the defendant-appellant. Even if the suit proceeds ex parte and in the absence of a written statement, unless the applicability of Order 8 Rule 10 CPC is attracted and the court acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the court cannot be dispensed with. In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex parte the court is not bound to frame issues under Order 14 and deliver the judgment on every issue as required by Order 20*

> *Rule 5. Yet the trial court should scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the "points for determination" and proceed to construct the ex parte judgment dealing with the points at issue one by one. Merely because the defendant is absent the court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence."*

34. From a perusal of the said paragraph, it would be seen that non-filing of the written statement unless the applicability of Order VIII Rule 10 is attracted and the court acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the court cannot be dispensed with. In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the court would grant the plaintiff such relief as to which he may in law be found entitled to. It was also mentioned that there was no necessity of framing any issue under Order XIV and deliver the judgment on every issue as required by Order XX Rule 5. But the trial court should scrutinize the available pleadings and documents, consider the evidence adduced, and would frame the "points for determination" and proceed to construct the *ex parte* judgment dealing with the points at issue one by one. It has also been mentioned that merely because the defendant is absent the court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence.

35. In the case in hand, it would be seen that the court below had framed as many as four issues as regards the counterclaim. The said can be very well construed to be point for determination. In the counterclaim, i.e., the pleadings it has been categorically mentioned as to how the defendant No. 1 is the owner of the Schedule-I property and why the defendant No. 1 is entitled to the relief sought for. This aspect of the matter has already been dealt herein above while discussing the pleadings of the parties. There was

no denial to the pleadings as regard how the defendant No. 1 had become the owner of the Schedule-I property as well as why the defendant No. 1 is entitled to recovery of possession of the schedule properties of the plaint.

36. Now coming to the question of evidence, it would be seen that for proving the title of the defendant No. 1, the defendant No. 1 exhibited, Ext.A1 to Ext.A4 which are the deeds of trust executed by the trustees of Sarvodaya Trust. Ext.C is the registered deed of gift bearing No.5517 dated 30.05.1977 executed by late Dr. Tilottama Rai Choudhury and late Amal Prabha Das in favour of the Sarvodaya Trust. Vide Ext.C, the Schedule-A property as described in the plaint was gifted to the defendant No. 1. Ext.D is the registered deed of gift bearing No.3019 dated 02.11.1988 executed by late Dr. Tilottama Rai Choudhury and late Amal Prabha Das in favour of the defendant No. 1 Trust. By the said deed of gift, 4 kathas 11 lechas of land was gifted to the defendant No. 1. Ext.E was the certified copy of the extract of the Assessment register of holding No. 20 of Ward No.20. Ext.F was Patta issued in favour of the defendant No. 1 in respect to Dag No. 637 of Patta No. 358, a perusal of which would show that the said Patta had 10.70 Are (4 kathas). Ext.H is the Jamabandi in respect to Dag Nos.2184 and 2185 (old)/191 (New) of Patta No.988 (old)/159 (New) and Ext.I is the Jamabandi of Dag Nos.2184 and 2185 (Old), 191/637 (New) of Patta No.988 (Old)/358 (New).

37. On the basis of the said documents, the defendants as the counter claimants proved the title over the land described in Schedule-I of the counterclaim. It was never the case of the plaintiff at any stage that the properties included in the Schedule-B of the plaint or properties mentioned in Schedule-II of the counterclaim was not a part of Schedule-A land to the plaint or Schedule-II of the counterclaim. The plaintiff duly admitted the same in paragraph No. 13 of the Amended Plaint. As already stated herein above, even during the cross-examination of the plaintiff, the plaintiff had categorically admitted that the house he had build is in Schedule-I land. Therefore, the question of law formulated by this Court in the facts of the instant case cannot be taken to be a question of law

involved in the case thereby arising in the instant case.

38. At this stage it is also relevant to take note of that the pleadings are extremely important for ascertaining the title and possession of the property in question and possession is an incidence of ownership and can be transferred by the owner of an immovable property to another such as by a mortgage or a lease. It is well established principle of law that a licensee holds possession on behalf of the owner.

39. Possession is important when there are no title documents and other relevant records before the Court. However, once the documents and records of title come before the Court, it is the title which has to be looked at first and due weightage be given to it and possession cannot be considered in vacuum. There is always a presumption that the possession of a person, other than that of the owner, if at all, is to be called possession, is permissive on behalf of the title holder. Further, possession of the past in one thing and the right to remain and continue in future is another thing and it is the later which is usually more in controversy than the former and it is the later which has seen much abuse and misuse before the courts. The Supreme Court in the case of ***Maria Margadia Sequeria Fernandes*** (supra) in paragraph Nos. 66, 67 and 68 had dealt with the question of a suit for possession. The said paragraphs, being relevant for the purpose of the instant case, are quoted herein below:-

> "***66.*** *A title suit for possession has two parts—first, adjudication of title, and second, adjudication of possession. If the title dispute is removed and the title is established in one or the other, then, in effect, it becomes a suit for ejectment where the defendant must plead and prove why he must not be ejected.*
>
> ***67.*** *In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings*

and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.

68. *In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title-holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents."*

40. A reading of the above paragraphs would show that a suit for possession has two parts - first, adjudication of title, and second, adjudication of possession. If the title dispute is removed and the title is established in one or the other, then, in effect, it becomes a suit for ejectment where the defendant must plead and prove why he must not be ejected. In other words, when pleadings and documents established title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession. It was further observed that once the title is prima-facie established, it is for the person who is resisting the title-holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the court all such documents as in the ordinary course of human affairs are expected to be there.

41. In the instant case, the plaintiff's only case in the suit is that he should not be evicted without following the due process of law. The plaintiff had not challenged the title of the defendants or claimed any right by way of adverse possession. On the other hand, the defendants had pleaded as well as proved that the defendant No. 1 trust is absolute owner of the Schedule-I property, and in such circumstances, in absence of any pleading or evidence, led to the effect to show that the plaintiff has a better right to

remain in possession, this Court is of the view that the court below has rightly passed the impugned judgment and decree declaring right, title and interest of the counterclaimant over the Schedule-I property as well as for recovery of possession of the Schedule-II property. The question of law, therefore, formulated stands answered to the effect that the said question of law does not arise in facts and circumstances of the instant case.

42. Consequently, the instant appeal stands dismissed. The respondents shall be entitled to costs. Send back the LCR.

JUDGE

Comparing Assistant