GAHC010200852018

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

Case No. : RSA/102/2019

MD SAYDUR RAHMAN MAZUMDAR AND 8 ORS
S/O LT. MAHMUD ALI, R/O VILL. RANGAUTI, P.O. RANGAUTI, P.S. AND DIST. HAILAKANDI, PIN 788155

2: MUSSTT. RAZIA BEGUM MAZUMDAR
W/O SAYADUR RAHMAN MAZUMDAR
R/O VILL. RANGAUTI
P.O. RANGAUTI
P.S. AND DIST. HAILAKANDI
PIN 788155

3: HUSSAIN AHMED MAZUMDAR
R/O VILL. RANGAUTI
P.O. RANGAUTI
P.S. AND DIST. HAILAKANDI
PIN 788155

4: ON THE DEATH OF SAYED AHMED LASKAR HIS LEGAL HEIRS
VILL. RANGAUTI

5: MRS. NOOR NEHAR (WIDOW)
R/O VILL. RANGAUTI
P.O. RANGAUTI
P.S. AND DIST. HAILAKANDI
PIN 788155

6: RUJINA BEGUM LASKAR (DAUGHTER)
R/O VILL. RANGAUTI
P.O. RANGAUTI
P.S. AND DIST. HAILAKANDI
PIN 788155

7: SAHIN BAHAR LASKAR (DAUGHTER)
R/O VILL. RANGAUTI
P.O. RANGAUTI
P.S. AND DIST. HAILAKANDI
PIN 788155

8: MAKSUDUR RAHMAN LASKAR (SON)
R/O VILL. RANGAUTI
P.O. RANGAUTI
P.S. AND DIST. HAILAKANDI
PIN 788155

9: JAHIRA KHANNAM LASKAR @ RUJNA KHANAM LASKAR (DAUGHTER)
R/O VILL. RANGAUTI
P.O. RANGAUTI
P.S. AND DIST. HAILAKANDI
PIN 788155

10: FOYAJ AHMED LASKAR
S/O LT. MASSADUR ALI LASKAR
R/O VILL. RANGAUTI
P.O. RANGAUTI
P.S. AND DIST. HAILAKANDI
PIN 78815

VERSUS

ON THE DEATH OF TUTA MIA LASKAR HIS LEGAL HEIRS FAIJUN NESSA BIBI LASKAR(WIFE) AND ORS
S/O LT. ARJU MIA LASKAR, R/O THE RANGAUTI, P.O. RANGAUTI, P.S. AND DIST. HAILAKANDI, PIN 788155

Advocate for the Petitioner : MR. M H RAJBARBHUIYAN

Advocate for the Respondent : MR. A H M R CHOUDHURY

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGEMENT AND ORDER (CAV)

Date : 22.06.2022

1. Heard Mr. M. H. Rajbarbhuiyan the learned counsel appearing on behalf of the Appellants and Ms. R. Choudhury, the learned counsel appearing on behalf of the Respondent.

2. This is an application under Section 100 of the Code of Civil Procedure, 1908 (for short the "Code") challenging the judgment and decree dated 16.05.2018 passed in Title Appeal No. 29/2017 whereby the said appeal was dismissed, thereby affirming the judgment and decree passed by learned Munsiff No.2, Hailakandi in Title Suit No.95/2010

3. The instant appeal has been taken up for consideration at the stage of Order XLI Rule 11 of the Code of Civil Procedure, 1908 (for short the "Code") as to whether there arises any substantial question of law for admission of the instant appeal to be formulated in terms with Section 100(4) of the Code of Civil Procedure. For the purpose of deciding the said aspect of the matter, it would be relevant to take note of the brief facts of the case. For the purpose of convenience, the parties before this Court are referred in the same status as they were before the Trial Court.

4. The case of the plaintiff is that one Arju Mia Laskar (since deceased) the father of the plaintiff was the owner and in possession of R.S. Patta No.5 which included Dag Nos.122/135 and R.S. Patta No.23 which included Dag No.120. The total area of the land was 3 Bighas 9 Kathas 4 Chataks. On the basis of Resettlement operation, a single patta was issued being Patta No.44 under Dag No.119/121/134 which consisted of 3 Bighas 9 Kathas 4 Chataks. The said Late

Arju Mia Laskar died leaving behind sons and daughters who inherited the said Patta i.e. Patta No.44 and the land included therein. It is stated in the plaint that there was amicable partition amongst the heirs of Late Arju Mia Laskar and the suit land fell into the share of the plaintiff. It has been further mentioned that the plaintiff was in possession of the entire Patta land till 1976 growing sali paddy over the same. The plaintiffs further have averred in the plaint that the predecessor of the Defendant Nos.3 to 5 illegally and mala fidely claimed that the suit patta land is their grandfather's land who had purchased the same vide a Sale Deed dated 20.05.1925. However, the plaintiffs refused the same stating inter alia that the deed is collusive, forged, illegal, back dated and fictitious. The predecessors of the Defendant Nos.3 to 5, one Abdul Mussabir filed a C.R. Case No.88/1976 against the plaintiff and others, however, the plaintiffs and others were acquitted on 06.04.1977. Subsequent thereto, the said Mussabir Ali filed the Case No. 41/81 under Section 145 Cr.P.C. against the plaintiff and others in respect to the Dag and Patta land. However, the said Mussabir Ali failed to get possession over the suit patta land. The Defendant Nos.3 to 5 thereafter, filed a suit being Title Suit No.7/1979 for cancellation of the khatian in respect to the suit patta land. The said suit was dismissed against which an appeal was filed being Title Appeal No.20/89 which was also dismissed with costs. Subsequent thereto, the Defendant Nos.3 to 5 again filed another suit being Title Suit No.58/1984 for declaration of their right, title and interest and recovery of possession of the entire suit patta land. The said suit was decreed against which a Title Appeal No.21/94 was filed. In Title Appeal No.21/94, the suit of the Defendant Nos.3 to 5 and others were dismissed. Against the said judgment and decree passed in Title Appeal No.21/94, an appeal was preferred before this Court. This court vide an order remanded the matter back to the Lower

Appellate Court for a fresh consideration of the matter. The Lower Appellate Court vide a judgment and decree dated 11.09.2002, allowed the appeal and dismissed the suit filed by the Defendant Nos.3 to 5.

5. It is the further case of the plaintiff that the plaintiff in the meantime sold out his various plots of land in Dag No.121, Dag No.119 in total land measuring 1 Bigha, 10 Kathas, 5 Chataks and as such the plaintiff had 7 Kathas 13 Chataks of land remaining in Dag No.119. Further to that the plaintiff have also not sold any part and parcel of the land in Dag No.134 measuring 19 Kathas 10 Chataks and he was in peaceful possession over the said land mutating his name till 27.12.2009. It is further the case of the plaintiff that Defendant Nos.3 to 5 illegally prepared a Sale Deed described in Schedule-III to the plaint with the help of other wrong doers and entered upon Schedule II land and constructed houses thereon on 27.12.2009. Being aggrieved the plaintiff initially filed the Criminal Case No.1340/09 before the C.J.M. Hailakandi, which as on the date of filing of the plaint was pending and filed the instant suit seeking declaration of right, title and interest and for recovery of possession of Schedule-II land by evicting the defendants, demolishing their houses over the same; for issuance of permanent injunction against the defendants, their agents, workmen; for declaration that the Schedule-III sale deed is illegal, collusive, void and inoperative in respect of Schedule II land; for cost of the suit etc. The said suit was registered and numbered as Title Suit No.95/2010.

6. The Defendant Nos.1 to 5 jointly filed a written statement. In the said written statement various preliminary objections were taken to the effect that the suit was bad for non-joinder and mis-joinder of essential parties; that the suit was barred by limitation, estoppels, acquiescence**.** Relevant to take note of that in Paragraph No.10 it was mentioned that the plaintiff was never in

possession of the suit land till 1976 peacefully growing "Sally" paddy over the same. It was averred that the predecessor of the Defendant Nos.3 to 5 being the rightful owner, they were in possession of the land by dint of sale deed dated 20.05.1925 which was purchased by Hydar Mia, grandfather of the defendants. It is further mentioned that the said sale deed being above 30 years old cannot be assailed. It was mentioned that prior to the disposal of the appeal, the plaintiff during the pendency of RSA No.205/95 executed one Muktinama dated 25.07.2000 in favour of answering Defendant Nos.3 to 5 and their brother Fazal Ahmed and thereafter the plaintiff relinquished his claim from the suit patta land. It was mentioned that the plaintiff adopted divide and rule policy and thereafter when this Court remanded the appeal to the First Appellate Court for fresh consideration of records, the answering Defendant Nos.3 to 5 did not pursue the matter since they have developed good relation with the plaintiff due to the aforesaid Muktinama. It was mentioned that the plaintiff managed to get the decision in his favour and thereafter, Abdul Mussabir who was contesting the suit died and no further Second Appeal prepared before this Court. The answering Defendant Nos.3 to 5 and others have realized the evil plan of the plaintiff and his fresh fight after the interval of a long period for which they are contemplating to file an Appeal before the High Court according to law.

7. It was further mentioned that the plaintiff has no ownership over the suit dag and patta land and he never occupied it. The sale of the land by the plaintiff to Karimun Nessa and Gula Mostufa Chowdury from Dag Nos.119 and 121 are having no title. It was further mentioned that the father of the plaintiff sold out his entire title over the suit patta land to the forefather of the Defendant Nos.3 to 5. It was denied that the plaintiff was in possession of the

land of Dag No.134 peacefully and was maintaining his possession till 27.12.2009. It was further mentioned that the C.R. No.1340/09 filed before the C.J.M. Hailakandi, was dismissed on the ground that the allegations made therein could not be proved beyond reasonable doubt vide an order dated 20.03.2011. It was mentioned that the Defendant Nos.3 to 5 have sold the suit land to the Defendant Nos.1 and 2 by a valid registered deed and since purchase, the said Defendant Nos.1 and 2 were in occupation of the same. At this stage, it may be relevant herein to mention that there no plea was taken as reagards to res-judicata. On the basis of the pleadings as many as 5 (five) issues were framed which are as hereinunder.

(i) Is there any cause of action for the suit?

(ii) Is the plaintiff entitled to a decree declaring his right, title and interest over the 2nd schedule land?

(iii) Whether the plaintiff was in possession of 2nd schedule land and whether he was evicted (dispossessed) there from by the defendants?

(iv) Whether the Sale Deed executed and registered on 24.12.2009 by defendants No. 3-5 in favour of defendant No.1 is illegal, collusive, void and inoperative and therefore liable to be cancelled?

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

8. On behalf of the plaintiff, there were two witnesses who adduced evidence and exhibited some documents. The defendant side neither adduced any oral evidence nor exhibited any documents. The Trial Court vide a judgment and decree dated 15.07.2017, decreed the suit in favour of the plaintiff thereby declaring that the plaintiff have right, title and interest over the suit land and

also decreed that the plaintiff is entitled to get khas possession by evicting the defendants from the schedule land. It was further declared that the Sale Deed executed and registered on 24.12.2009 by Defendant Nos. 3 to 5 in favour of defendant No.1 is illegal, collusive, void and inoperative and therefore liable to be cancelled.

9. The Trial Court while deciding the said suit in respect to Issue No.II which pertained as to whether the plaintiff was entitled to a decree declaring his right, title and interest over the 2nd schedule land had taken into consideration the Exhibit No.1 i.e. the certified copy of final order passed in Mutation Case No.153/1981-82 by S.D.C. Hailakandi; Exhibit-2 which was the order passed in Appeal Case No.5/1981-82, dated 25.03.1983 by which the appeal filed by the defendants were dismissed; Exhibit-7, the certified copy of judgment and order in Title Appeal No.20/1989 dated 17.09.1990 passed by the Additional District Judge, Hailakandi, whereby the said Title Appeal was dismissed thereby dismissing Title Suit No.7/1979. The Trial Court further took into consideration that the Defendant Nos.3 to 5 and others filed Title Suit No.158/84 for declaration of their right, title and interest and recovery of possession of the suit land and the said suit was dismissed by the judgment and order in Title Appeal No.21/1994 (Exhibit-10) wherein it revealed that the Appellate Court have set aside the decree of the Trial Court by holding that the deed dated 20.05.1925 which was exhibited as Exhibit-1 in the said suit proceedings was never acted upon and possession of the land mentioned in the said Exhibit-1 was never handed over to Haydor Mia by Arju Mia. On the basis of the said evidence, the Trial Court came to a finding that the plaintiff have consistently proved his right, title and interest over the suit land and as such decided the said issue in favour of the plaintiff. As regards the Issue No.III, the Trial Court held as the PW-1

deposed in his evidence that on 27.12.2009, the Defendant Nos.3 to 5 and others dispossessed him from the Schedule-II land, which the plaintiff have failed to establish by adducing evidence but taking into consideration that if the defendants were allowed to have possession over the land devoid of any right, title and interest that would be illegal in the eye of law, decided the issue in favour of the plaintiff. As regards, the Issue No. IV as to whether the Sale Deed executed and registered on 24.12.2009 by Defendant Nos.3 to 5 in favour of Defendant No.1 is illegal, collusive, void and inoperative, the Trial Court held that the same was illegal and hence void in view of the fact that the Defendant Nos.3 to 5 did not have any right and title over the suit land at the time of sale. It is on the basis of the above findings that the Issue No.V was decided whereby the plaintiff's right, title and interest over the suit land was declared alongwith the declaration that the plaintiff was entitled to khas possession by evicting the defendants from the suit land and further declared that the deed executed and registered on 24.12.2009 by the Defendant Nos.3 to 5 in favour of the Defendant No.1 was illegal, collusive, void and inoperative and liable to be cancelled.

10. Being aggrieved and dissatisfied, an appeal was preferred by Defendant Nos.1, 2, 3, 5 and the legal representatives of the Defendant No.4 which was registered and numbered as Title Appeal No.29/2017. The First Appellate Court by a judgment and decree dated 16.05.2018 dismissed the said appeal by affirming the judgment and decree passed by the Trial Court dated 15.07.2017 in Title Suit No.95/2010. It may be relevant to take note of that the First Appellate Court was in agreement with the findings of the Trial Court. The First Appellate Court also had taken into consideration that the defendants in their written statement stated that the plaintiff executed a Muktinama dated

25.07.2000 in favour of the Defendant Nos.3 to 5 and their brother and relinquished his claim from the suit land. Further to that, the defendants in their written statement have claimed their right, title and interest and possession over the suit land on the basis of the Sale Deed dated 20.05.1925 and the Muktinama dated 25.07.2000. However, none of these documents were produced by the defendants as evidence and as such the First Appellate Court came to a finding that the plaintiff has been able to prove his case against the defendants thereby confirmed the judgment and decree passed by the Trial Court in Title Suit No.95/2010. It is against the said judgment and decree that the present appeal has been preferred under Section 100 of the CPC of the Code.

11. Before examining as to whether a substantial question of law is involved in the case and can be formulated, this Court deems it proper to briefly refer to the scope of the Second Appeal as also the procedure for entertaining them as laid down under Section 100 of the Code. It is clear from Sub-Section (5) of Section 100 that an appeal shall be heard only on questions formulated by the High Court under Sub-Section (4) thereof. The expression "appeal" has not been defined in the Code. Black's Law Dictionary (7th Edition) defines an appeal as "a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority". An appeal is thus, a judicial examination by a Higher Court of a decision of a Sub-Ordinate Court to rectify any possible error(s) in the order under appeal. The law provides the remedy of appeal because of the recognition that those manning the Judicial Tiers commit error(s).

12. Order XLII of the Code provides for the procedure to be followed while deciding appeals from the Appellate decrees. It states that the Rules of Order XLI shall apply, so far as may be, to appeals from Appellate decrees. The words

such as "so far as may be" or "in so far as" mean "as such" or "to the extent" or "to such extent". By virtue of Order XLII Rule 1, the provisions of Order XLI are applicable to Second Appeal as well, though not in their entirety, but to certain extent, having regard to the mandate contained in Order XLII, this Court while hearing a Second Appeal, has to follow the procedure contained in Order XLI to the extent possible.

13. Section 100 of the Code provides for a right of Second Appeal by approaching a High Court and invoking its aid and interposition to redress error(s) of the Sub-Ordinate Court, subject to the limitations provided therein. An appeal under Section 100 of the Code could be filed both against "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 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 dehors 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 provisions of law or the decision is one which no Judge acting judicially can 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.

14. In case the appeal does not involve any substantial question of law, the High Court has no option but to dismiss the appeal in limine. It is well settled

that when a Second Appeal is dismissed in limine, the High Court has to record reasons. This Court is presently at that stage to find out as to whether a substantial question of law involved in the case that can be formulated in terms with Section 100(4) of the CPC.

15. As to what is a substantial question of law came up for consideration before the Supreme Court in the case of ***Santosh Hazari Vs. Purushottam Tiwari*** *reported in* ***(2001) 3 SCC 179.*** The Supreme Court in Paragraph Nos. 12, 13 and 14 dealt with the aspect as to what is a substantial question of law and when a substantial question of law can be said to have arisen in the appeal. Paragraph Nos. 12, 13, 14 are 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 v. T. Ram Ditta4, 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. 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:*
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> "*[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 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."*

16. From the above quoted paragraphs of the judgment of the Supreme Court, it would be seen that to be a substantial question of law "involved in any case", there must be first a foundation for it laid in the pleadings and the

questions should emerge from the substantial findings of fact arrived at by the 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 is in these circumstances that the Supreme Court had further observed that as to whether a substantial question of law is involved in the case or not would depend upon the facts and circumstances of each case; the paramount overall consideration being the need for striking a judicious balance between the indispensible 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, this Court therefore, would take into consideration the contentions raised by both the parties.

17. Mr. M. H. Rajbarbhuiyan, the learned counsel for the appellant submitted that although various substantial questions of law have been proposed but the substantial question of law involved in the instant appeal is as to whether the judgment and decree dated 15.12.2014 passed in Title Suit No.97/2009 whereby the plaintiffs suit challenging the deed of sale dated 20.05.1925 and the Partition Deed dated 14.12.1925 was dismissed would apply as res-judicata and accordingly bar the Title Suit No. 95/2010. The learned counsel for the appellant therefore submitted that the defendants claim over the suit patta land is on the basis of the Sale Deed dated 20.05.1925 and the Partition Deed dated 14.12.1925 and the same was put to challenge by the plaintiff in Title Suit No.97/2009 and the said suit was dismissed. Consequently, the said judgment and decree dated 15.11.2014 would apply as res-judicata and the Trial Court or the First Appellate Court could not have passed the judgment and decree in the instant suit. He further submitted that though the plea of res-judicata was not

pleaded in the written statement but during the cross-examination of the plaintiff, he was specifically admitted about the filing of Title Suit No.97/2009 and he has specifically stated that the Title Suit No.97/2009 was dismissed.

18. On the other hand, Ms. R. Choudhury, the learned counsel appearing on behalf of the Respondent submits that the plea of res-judicata has to be taken in the written statement and in absence of any pleadings to that effect the same would be a substantial question of law involved in the instant appeal. She further submitted that a perusal of the cross-examination of the plaintiff, though would show that he had admitted that he had instituted Title Suit No.97/09 against the defendant and the Title Suit No.97/09 was dismissed, but the plaintiff have denied that Title Suit No.97/09 is filed against Dag No.134 and R.S. Patta No.44 which is the subject matter of the instant suit. She further submits that although in the first appeal the said ground was taken as one of the grounds of objection but there was no amendment to the written statement sought for to introduce the plea of res-judicata. She further submits that Title Appeal No.21/94 being allowed whereby the defendant suit seeking declaration of their right, title and interest and recovery of possession of the suit land was dismissed, thereby, holding that the Deed dated 20.05.1925 was never acted upon and possession of the land was never handed to Haydor Mia by Arju Mia would apply as res-judicata. She further submitted in absence of the pleadings in Title Suit No.97/09 and the judgment passed in Title Suit No.97/09, the plea of res-judicata cannot be raised inasmuch as for attracting the plea of res-judicata, it has to be shown that the matter was directly and substantially an issue in the present suit is directly and substantially an issue in the former suit between the same parties or between parties under whom they or any of them claimed to be litigating under the same title, in a Court competent to try such

subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

19. I have heard the learned counsels for the parties and perused the materials on record. The question which arises for consideration as to whether the plea of res-judicata can be applied in the instant case which admittedly was not raised in the written statement. For the purpose of deciding the same, it would be relevant to take note of the Rule of Res-judicata. It is a settled principle of law that the Rule of res-judicata does not strike at the root of jurisdiction of the Court trying the subsequent suit. It is a rule of estoppel by judgment based on public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

20. The plea of res-judicata is founded on the proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial would not be permitted to be raised for the first time at the stage of appeal. This view was taken by the Privy Counsel in judgment rendered in the case of ***(Raja) Jagadish Chandra Deo Dhabal Deb Vs. Gour Hari Mahato*** *reported in* ***AIR 1936 PC 258.*** This view taken by the Privy Counsel was cited with the approval by the Supreme Court in the case of ***State of Punjab Vs. Bua Das Kaushal*** *reported in* ***(1970) 3 SCC 656.*** However the Supreme Court had carved out an exception and observed that a plea was permitted to be raised, though not taken in the pleadings nor covered by any issue, because the necessary facts were present to the mind of the parties and were gone into by the Trial Court as the Opposite Party had ample opportunity of leading the evidence in rebuttal of the plea.

21. It is further relevant herein to mention that not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and the judgment in the previous case. May be, in a given case only copy of judgment in previous suit is filed in proof of plea of res-judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in the case of ***Syed Mohd. Salie Labbai Vs. Mohd. Hanifa*** *reported in* ***(1976) 4 SCC 780,*** the method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what has been decided by the judgment which operates as res judicata. It was further observed that it was risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in ***Gurbux Singh Vs. Bhooralal*** *reported in* ***AIR 1964 SC 1810*** placing on at par the plea of res judicata and the plea of estoppel under Order II Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. It was also observed that such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction, which were the facts stated in the previous pleadings. Their Lordships of the Privy Council in the case of ***Kali Krishna Tagore Vs. Secy. of State for India in Council*** *reported in* ***(1887-88) 15 IA 186*** pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided.

Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.

22. The Supreme Court in the case of ***V. Rajeshwari Vs. T.C. Saravanabava*** *reported in* ***(2004) 1 SCC 551,*** at paragraph No.14 and 15 dealt with the issues as regards the plea not being taken in the written statement. The said paragraphs being relevant are quoted hereinbelow.

> "***14.*** *That apart, the plea, depending on the facts of a given case, is capable of being waived, if not properly raised at an appropriate stage and in an appropriate manner. The party adversely affected by the plea of res judicata may proceed on an assumption that his opponent had waived the plea by his failure to raise the same. Reference may be had to Pritam Kaur v. State of Pepsu and Rajani Kumar Mitra v. Ajmaddin Bhuiya and we find ourselves in agreement with the view taken therein on this point. The Privy Council decision in Sha Shivraj Gopalji v. Edappakath Ayissa Bi appears to have taken a different view but that is not so. The plea of res judicata was raised in the trial court; however, it was not pressed but it was sought to be reiterated at the stage of second appeal. Their Lordships held that being a pure plea in law it was available to the appellant for being raised. Their Lordships were also of the opinion that in the facts of that case, apart from the principle of res judicata, it was unfair to renew the same plaint in fresh proceedings. The Privy Council decision is distinguishable.*
>
> ***15.*** *Reverting back to the facts of the present case, admittedly, the plea as to res judicata was not taken in the trial court and the first appellate court by raising necessary pleadings. In the first appellate court the plaintiff sought to bring on record the judgment and decree in the previous suit, wherein his predecessor-in-title was a party, as a piece of evidence. He wanted to urge that not only he had succeeded in proving his title to the suit property by the series of documents but the previous judgment which related to a part of this very suit property had also upheld his predecessor's title which emboldened his case. The respondent thereat, apprised of the documents, still did not choose to raise the plea of res judicata. The High Court should not have entered into the misadventure of speculating what was the matter in issue and what was heard and decided in the previous suit. The fact remains that the earlier suit was confined to a small portion of the entire property now in suit and a decision as to a specified part of the property could not have necessarily constituted res judicata for the entire property, which was now the subject-matter of litigation."*

23. In the backdrop of the above, it is relevant to take into account the facts of the instant case. In the instant case, a perusal of the written statement would show that there is no pleading as regards Title Suit No.97/09 or the judgment passed on 15.11.2014. Obviously, the question of raising the said plea did not arise at the time of filing of the written statement inasmuch as the written statement was filed in the year 2011 and the judgment of the Trial Court in Title Suit No.97/2009 was passed on 15.11.2014. Thereafter, when the appeal was filed being aggrieved by the judgment and decree passed in Title Suit No.95/2010, the defendants ought to have sought for amendment of the written statement and filed appropriate applications for introducing the copy of the pleadings in Title Suit No.97/09, the issues framed thereinunder as well as the judgment and order dated 15.11.2014 whereby the Title Suit No.97/09 was dismissed. The same however was not done so. In absence of that, the question of raising the plea of res-judicata as a substantial question of law involved in the instant appeal does not arise. On the other hand, if this Court takes into consideration the pleadings as well as the evidence led, it would be seen that vide the judgment and decree passed in Title Appeal No.21/1994, (Exhibit 10), the decree of the Trial Court in T.S. Case No.158/84 was set aside by holding that the Deed dated 20.05.1925 was never acted upon and the possession of the land was never handed over to the predecessor in interest of the Defendant Nos.3 to 5 by the predecessor in interest of the plaintiff. Furthermore, the defendants have also not produced the Deed of Sale dated 20.05.1925 as well as the Muktinama dated 25.07.2000 as evidence, and as such it is not known as to whether on the basis of the said Documents any right, title or interest had accrued upon the Defendant Nos.3 to 5 in respect to the suit land.

24. Consequently, this Court therefore, does not find any infirmity in the

concurrent findings of fact of the Courts below. The substantial question of law so proposed by the learned counsel for the appellant is not a substantial question of law that can be formulated in terms with Section 100(4) of the Code of Civil Procedure for which the instant appeal stands dismissed.

25. However in the facts of the instant case, no cost is being imposed.

JUDGE

Comparing Assistant