GAHC010178182019

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

Case No. : RSA/224/2019

TAYEB UDDIN AHMED @ TAYEB ALI AND ANR
S/O- LATE AKRAM ALI, R/O- VILL.- JAYPUR, MOUZA- GHILAZARI, P.S. HOWLY, DIST.- BARPETA, ASSAM.

2: JIAUL HOQUE
S/O- TAYEB UDDIN AHMED
R/O- VILL.- JAYPUR
MOUZA- GHILAZARI
P.S. HOWLY
DIST.- BARPETA
ASSAM

VERSUS

KAZIMUDDIN AND 10 ORS.
S/O- LATE AKRAM ALI, R/O- VILL.- JAYPUR, MOUZA- GHILAZARI, P.S. HOWLY, DIST.- BARPETA, ASSAM.

2:INTAZ ALI
S/O- LATE AKRAM ALI
R/O- VILL.- JOYPUR
MOUZA- GHILAZARI
P.S. HOWLY
DIST.- BARPETA
ASSAM.

3:NUR MAHAMMAD
S/O- LATE AKRAM ALI
R/O- VILL.- JOYPUR
MOUZA- GHILAZARI
P.S. HOWLY
DIST.- BARPETA
ASSAM.

4:KHALILUR RAHMAN
S/O- ABDUR RAHMAN
R/O- HOWLY TOWN
WARD NO. 4
MOUZA- GHILAZARI
P.S. HOWLY
DIST.- BARPETA
ASSAM
PIN- 781316.

5:ON THE DEATH OF HAFIZUR RAHMAN
HIS LEGAL HEIRS MST. MALLIKA BHANU
W/O- LATE HAFIZUR RAHMAN
R/O- HOWLY TOWN
WARD NO. 4
MOUZA- GHILAZARI
P.S. HOWLY
DIST.- BARPETA
ASSAM
PIN- 781316.

6:LUTFAR RAHMAN
S/O- LATE HAFIZUR RAHMAN
R/O- HOWLY TOWN
WARD NO. 4
MOUZA- GHILAZARI
P.S. HOWLY
DIST.- BARPETA
ASSAM
PIN- 781316.

7:MAKIBUL ISLAM
S/O- LATE HAFIZUR RAHMAN
R/O- HOWLY TOWN
WARD NO. 4
MOUZA- GHILAZARI
P.S. HOWLY
DIST.- BARPETA
ASSAM
PIN- 781316.

8:SAFIZUL ISLAM
S/O- LATE HAFIZUR RAHMAN
R/O- HOWLY TOWN
WARD NO. 4
MOUZA- GHILAZARI
P.S. HOWLY
DIST.- BARPETA

ASSAM
PIN- 781316.

9:MST. FARIDA BEGUM
D/O- LATE HAFIZUR RAHMAN
R/O- HOWLY TOWN
WARD NO. 4
MOUZA- GHILAZARI
P.S. HOWLY
DIST.- BARPETA
ASSAM
PIN- 781316.

10:MST. MANZUWARA KHATUN
D/O- LATE HAFIZUR RAHMAN
R/O- HOWLY TOWN
WARD NO. 4
MOUZA- GHILAZARI
P.S. HOWLY
DIST.- BARPETA
ASSAM
PIN- 781316.

11:MST. MINUWARA PARBIN
D/O- LATE HAFIZUR RAHMAN
R/O- HOWLY TOWN
WARD NO. 4
MOUZA- GHILAZARI
P.S. HOWLY
DIST.- BARPETA
ASSAM
PIN- 781316

Advocate for the Petitioner : MR. A M KHAN

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER (CAV)

Date : 13-12-2022

1. Heard Mr. A. Mobaraque, the learned counsel appearing on behalf of the appellants.

2. The instant appeal arises out of the judgment and decree dated 04.05.2019 passed by the Court of the Civil Judge, Barpeta, Assam in Title Appeal No.58/2017 whereby the said appeal was dismissed thereby affirming the judgment and decree dated 26.09.2017 passed by the Court of the Munsiff No.2, Barpeta, Assam, in Title Suit No.74/2015.

3. The instant appeal has been taken up for consideration at the stage of Order XLI Rule 11 to ascertain as to whether there arises any substantial question of law that can be formulated in terms with Section 100(4) of the Code of Civil Procedure, 1908 (for short the "Code").

4. For ascertaining as to whether any substantial question of law is involved in the instant appeal that can be formulated, this Court would like to take note of brief facts of the instant case which led to the filing of the instant appeal. For the sake of convenience, the parties herein are referred to in the same status as they stood before the Trial Court.

5. The respondent No.1 herein as plaintiff had instituted a suit which was registered and numbered as Title Suit No.74/2015 before the Court of the Munsiff No.2, Barpeta. From a perusal of the plaint, it transpires that a plot of land measuring 1 Bigha most specifically described in Schedule-A to the plaint was settled by the Government in favour of one Late Rajendra Nath Choudhury and Sabed Ali who went on possessing the said land without partitioning the

land in any manner. Pursuant to the death of Mr. Rajendra Nath Choudhury, his sons have obtained mutation of the land along with Sabed Ali on the basis of an order dated 20.05.1970 of the SDC. The plaintiff along with his brothers i.e. Tayeb Ali (defendant No.1), Noor Mohammad (proforma defendant No.2) and Intaz Ali (proforma defendant No.1) jointly purchased the western half of the land in Schedule-A from one Mazibar Rahman who was the son of Sabed Ali vide a registered Sale Deed bearing Deed No.5699/70 dated 28.10.1970 followed by a registered rectification deed bearing No.5742/70 dated 30.10.1970. Thereupon, the plaintiff, the defendant No.1 as well as the proforma defendant Nos. 1 and 2 obtained mutation over the said plot of land. The said plot of land measuring 2 Kathas 10 Lechas had been specifically described in Schedule-B to the plaint.

6. From the plaint, it further transpires that the plaintiff, defendant No.1 and the proforma defendant Nos. 1 and 2 have been possessing the Schedule-B land jointly by holding the land by plot as per their comfort and convenience more or less to the extent of the legitimate shares but without partitioning the land in any manner. The plaintiff had specifically mentioned that the land described in Schedule-B1 is the land which the plaintiff was enjoying possession and measured 12½ Lechas with specific boundaries. The proforma defendant No.1, Intaz Ali had rights over the land described in Schedule-B2 which was also 12½ Lechas in size with specific boundaries. It has been also alleged in the plaint that taking into consideration that the plaintiff, the defendant No.1 and the proforma defendant Nos. 1 and 2 were all brothers from the common parents, all of them were holding the land in Schedule-B jointly without formally partitioning the land in any manner. Accordingly, some parts of the land in Schedule-B2 remained under the occupation of the defendant No.1. Subsequent

thereto, the proforma defendant No.1 had offered to sell the land described in Schedule-B2 to the plaintiff for valuable consideration. The plaintiff having agreed, vide a registered deed bearing Deed No.3348/2014, the proforma defendant No.1 transferred the Schedule-B2 land to the plaintiff. Upon purchase of the said Schedule-B2 land, the plaintiff asked the defendant No.1 to vacate the partial occupation in the land described in Schedule-B2 however, the defendant No.1 did not do so.

7. Subsequent thereto, the plaintiff also came to learn that on 03.11.2014, the defendant No.1 sold a part of the suit land measuring 12½ Lechas having the similar boundaries to Schedule-B2 in favour of the defendant No.2 who is his son. Under such circumstances the plaintiff instituted the suit seeking a declaration that the plaintiff had right, title and interest in the suit land (Schedule-B land) to the extent of 2 Bighas 10 Lechas i.e. the Schedule-B1 and Schedule-B2 land and the defendant No.1 did not have title in the suit land (Schedule-B land) exceeding 12½ Lechas; for declaration that the registered deed No.935/14 is fraudulent and Sham deed and inoperative in the eyes of law as well as for recovery of possession by evicting the principal defendants. Further to that, the plaintiff also prayed for partition of the suit land.

8. The defendant Nos. 1 and 2 jointly filed a written statement where various preliminary objections were taken as regards the maintainability of the suit. The case of the plaintiff was denied and in paragraph No.16 of the written statement, the contesting defendants though admitted that the purchase of the suit land jointly done by all the four brothers i.e. by the plaintiff, defendant No1., proforma defendant Nos. 1 and 2 and the four brothers were entitled to 12½ Lechas of land but it was the specific case of the defendants that the defendant No.1 and the proforma defendant No.1 used to live together in their

original house at their native village Jaypur. It was mentioned that the defendant No.1 came to the suit land about 15 years ago and the defendant No.1 has been peacefully enjoying his share of land along with the share of the proforma defendant No.1 together measuring 1 Katha 5 Lechas of land with specific boundaries. The defendants further stated that around 15 years ago, the proforma defendant No.1 orally donated his share of land measuring 12½ Lechas of land in favour of the defendant No.1 and as such the defendant No.1 has been peacefully enjoying and possessing a total land of 1 Katha 5 Lechas of land with specific boundaries. Further to that, it was mentioned that the defendant No.1 vide a registered Sale Deed bearing Deed No.935/2014 dated 03.11.2014 transferred 12½ Lechas of his land to his son i.e. the defendant No.2 and delivered the possession of the said 12½ of land with specific boundaries such as North - PWD Road, South - the remaining part of the land of defendant No.1 measuring 12½ Lechas of land, East - the plaintiff Kazimuddin, West - Altaf Master. It was denied that the proforma defendant No.1 ever sold the land to the plaintiff through the registered Sale Deed bearing No.3348/2014. Under such circumstances the contesting defendants submitted that the suit be dismissed with exemplary cost.

9. On the basis of the pleadings as many as 6 issues were framed which were as under:

(a) Whether there is cause of action for filing the suit?
(b) Whether the suit is barred by limitation?
(c) Whether the suit is not properly valued?
(d) Whether the plaintiff has right, title and interest over the Schedule B1 and B2 lands?
(e) Whether the Registered Sale Deed No.935/14 is illegal?
(f) Whether the parties are entitled to any other reliefs claimed?

10. On behalf of the plaintiff, 5 plaintiff witnesses were adduced and similarly the contesting defendants adduced the evidence of 5 defendant witnesses. The plaintiffs exhibited the certified copy of the Jamabandi under Periodic Patta No.640 (Exhibit-1), attested copy of the registered Sale Deed No.5742/70 (Exhibit-2), registered Sale Deed No.5699/70 (Exhibit-3), Registered Sale Deed No.3348/14 (Exhibit-4) and the certified copy of the Registered Sale Deed No.935/14 (Exhibit-5). The defendants exhibited the certified copy of the Jamabandi under Periodic Patta No.640 (Exhibit-Ka), Registered Sale Deed No.935/14 (Exhibit-Kha), No Objection Certificate (Exhibit-Ga), House Tax (Exhibit-Gha), Permission for Construction (Exhibit-Unga).

11. The Trial Court i.e. the Court of the Munsiff No.2, Barpeta vide a judgment and decree dated 26.09.2017 decreed the suit in favour of the plaintiffs. In doing so, the Trial Court while deciding the Issue No.(d) came to a finding on the basis of the evidence on record that there was no gift by the proforma defendant No.1 in favour of the defendant No.1 of his share of the Schedule-B2 land. It was also observed that the proforma defendant No.1 only permitted the defendant No.1 to reside in his land as a permissive occupier and upon the sale made by proforma defendant No.1 in favour of the plaintiff, the defendant became a permissive occupier under the plaintiff. The plea of the adverse possession which was also taken as an alternative defence was held to be not tenable taking into account that the defendant No.1 in his evidence have duly admitted that the proforma defendant No.1 did not sell or gift the land but only allowed him to live in the land. On the basis of the decision in Issue No.(d), the Issue No.(e) was decided holding inter alia that as the defendant No.1 did not have title over the Schedule-B2 land, he could not have transferred by way of sale in favour of the defendant No.2 vide the registered Sale Deed No.935/14

and accordingly held that the same was illegal and liable to be cancelled.

12. On the basis of the above, the Trial Court decreed the suit thereby giving a declaration that the plaintiff has right, title and interest over the Schedule B1 and B2 lands; the principal defendants did not have right, title and interest over the Schedule-B2 land; a precept was issued to the concerned Revenue Authority to make partition over the Schedule B1 and B2 land out of the Schedule-B land by creating a new Dag and Patta in favour of the plaintiff; a precept was issued to the concerned Revenue Authority to cancel the registered Sale Deed No.935/14; a decree for recovery of khas possession by evicting the defendants, their men and agents or any person claiming through the defendants and by removing the structures standing over the Schedule-B2 land. The Court further directed that a preliminary decree be drawn up accordingly and a final decree be prepared after getting the report of partition from the Commissioner.

13. Feeling aggrieved and dissatisfied, the defendant Nos. 1 and 2 preferred an appeal against the judgment and decree dated 26.09.2017 passed by the Trial Court. The said appeal was registered and numbered as Title Appeal No.58/2017. The First Appellate Court i.e. the Court of the Civil Judge, Barpeta vide a judgment and decree dated 04.05.2019 on the basis of grounds of objection framed a point of determination which is as follows:

> "Whether the judgment and decree passed by the learned Court below is required to be interfered with?"

14. The First Appellate Court vide its judgment and decree dated 04.05.2019 interfered with the finding of the Trial Court on the Issue No. (c) as to whether the suit has been properly valued and came to a finding that the plaintiff's suit was covered under Article 17(vi) of Schedule II of the Court Fees Act, 1870 and

accordingly Court Fees is to be paid according to the valuation of the subject matter in dispute and the plaintiffs were liable to pay Court Fees in both suit and appeal on the basis of the value of the Schedule-B2 land. However, while deciding the Issue Nos. (d) and (e), the First Appellate Court after taking into account the evidence on record came to a finding that the defendant No.1 did not have any right over the land of the proforma defendant No.1 and as such he had no authority to sell the land of the proforma defendant No.1. After taking into consideration the boundaries of the lands in question, the First Appellate Court came to a finding that the land sold vide Deed No.935/14 was the same land which has been described in Schedule B2 land. Under such circumstances, the First Appellate Court came to a finding that the defendant No.1 had no title over the land of Intaz Ali and therefore could not have sold vide registered Sale Deed No.935/14 to the defendant No.2. It is under such circumstances, the said appeal was dismissed thereby confirming the judgment and decree passed by the Trial Court.

15. 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).

16. 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.

17. 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 this 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.

18. 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 even when a Second Appeal is dismissed in limine, reasons are to be recorded. 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.

19. 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:*

"*[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."

20. 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 the learned counsel appearing on behalf of the appellants.

21. Mr. A. Mobaraque, the learned counsel for the appellants submitted that both the Courts below were not justified in holding that there was no gift in favour of the defendant No.1 by the proforma defendant No.1 taking into consideration that the proforma defendant No.1 allowed the defendant No.1 to live and reside in the land which fell in the share of the proforma defendant No.1. He further submitted that as the defendant No.1 was in continuous and peaceful possession over the land belonging to the proforma defendant No.1 by virtue of Article 65 of the Limitation Act, 1963 the defendant No.1's right over the share of the proforma defendant No.1's land have matured into title by dint of adverse possession. He also submitted that both the Courts below ought not

to have decreed the suit without considering the proper valuations of the suit and on the ground that it was insufficiently stamped.

22. Further to that the learned counsel for the appellants has also submitted that it is being an admitted fact that the defendant No.1 had right over the 12½ Lechas of land, both the Courts below were not justified in cancelling the registered Sale Deed No.935/2014 by virtue of which there was a sale made to the extent of only 12½ Lechas of land. On the basis of the above submissions, the learned counsel for the appellants proposed the following questions of law to be substantial questions of law that can be formulated in terms with Section 100(4) of the Code.

(I) Whether the learned Court of Appeal below is justified in upholding the Judgment and Decree dated 26.09.2017 passed by the learned Munsiff No.2, Barpeta, Assam in TS No.74/2015 without considering the applicability of gift since the Schedule B(2) land was gifted voluntarily in favour of the appellant No.1 by the Proforma Respondent No.2/Proforma Defendant No.1 and accordingly delivered possession of the B(2) Schedule land in favour of the appellant No.1 and the Respondent/plaintiff and Proforma Respondent No.2/Proforma Defendant No.1 have confirmed the possession over the suit land {Schedule B(2)} of the appellant No.1 for last 15 years which is a substantial question of law under Section 100 of the Code of Civil Procedure.

(II) Whether the learned Court of Appeal below is justified in upholding the Judgment and Decree dated 26.09.2017 passed by the learned Munsiff No.2, Barpeta, Assam in TS No.74/2015 without considering proper valuation of the suit and insufficient stamped.

(III) Whether the learned Court of Appeal below is justified in upholding the Judgment and Decree dated 26.09.2017 passed by the learned Munsiff No.2, Barpeta, Assam in TS No.74/2015 without considering the facts of

peaceful and continuous possession of the appellants over the suit land for more than the statutory period of 12 years.

(IV) Whether the learned Courts below are justified in dismissing the appeal in affirming the judgment and decree of the learned Trial Court wherein the pleadings of the Plaintiff/Respondent No.1, it is established that the Appellant No.1 has right, title and interest to the extent of 12½ Lechas of land within the "B" Schedule land and he sold his said land in favour of the Appellant No.2 through the registered Sale Deed No.935/14, hence the learned Courts below have no jurisdiction to cancel said registered Sale Deed but the learned Trial Court below declared the said registered Sale Deed No.935/14 as an illegal deed which was affirmed by the learned Appellate Court below and as such the finding arrived at by both the Courts below are perverse require interference under Section 100 of the Code of Civil Procedure.

23. In the backdrop of the above contentions so submitted by the learned counsel for the appellants, let this Court take into consideration as to whether the above questions of law as proposed can be formulated as substantial questions of law involved in the instant appeal.

24. From a perusal of both the judgments of the Trial Court as well as the First Appellate Court and the observations made in respect to the evidence on record to the effect that the defendant No.1 during his evidence duly admitted that the proforma defendant No.1 had neither sold nor gifted the land but had only allowed him to reside therein and this aspect of the matter and the findings of both the Courts below conclusively to the effect that there was no oral gift in favour of the defendant No.1 by the proforma defendant No.1 on the basis of the evidence, this Court is of the opinion that the first question of law as framed cannot be a substantial question of law involved in the instant appeal. It would also be relevant to take note of that a clear admission of the defendant No.1

during his cross-examination that he resided in the share of the proforma defendant No.1 on being allowed to reside therein by the proforma defendant No.1 renders the status of the defendant No.1 as a permissive occupier of proforma defendant No.1. This aspect of the matter has also been conclusively held by both the Courts below on the basis of the evidence on record. Accordingly, the question of the defendant No.1 residing in the share of the land of the proforma defendant No.1 for 15 years does not give him any right to claim title over the said land. Under such circumstances, the first question of law so proposed, in the opinion of this Court is not a substantial question of law involved in the instant appeal.

25. As regards the second question of law so proposed which pertains to as to whether the Courts below were justified in decreeing the suit in favour of the plaintiffs without considering the proper valuation of the suit and insufficiently stamped, it would be seen that the First Appellate Court had come to a finding that the suit of the plaintiff was covered under Article 17(vi) of Schedule II of the Court Fees Act, 1870 and accordingly the Court Fees has to be paid on the basis of the valuation of the subject matter in dispute. The First Appellate Court therefore directed the plaintiff to pay Court Fees both in suit and appeal on the basis of the value of Schedule-B2 land. It was also held that the suit/appeal necessarily do not fail because it can be cured on payment of the Court Fees and accordingly directed the plaintiff to pay Court Fee both in suit and appeal on the basis of the value of the Schedule-B2 land. The said findings as regards to Issue No. (c) in the opinion of this Court is in consonance with the provisions of law inasmuch as whether proper Court Fee is paid on the plaint is primarily a question between the plaintiff and the State and it is difficult to appreciate as to how the inadequacy of the Court Fees paid by the plaintiff, the defendant may

feel aggrieved. In this regard, this Court would like to refer to the judgment of the Supreme Court rendered in the case of ***J. Vasanthi and Others Vs. N. Ramani Kanthammal*** *reported in* ***(2017) 11 SCC 852*** wherein the Supreme Court after taking into consideration that the suit was not properly valued and the Court Fee was not paid, directed the Trial Court to grant 3 months time to the plaintiff to pay the requisite Court Fee. Paragraph Nos. 26 to 28 of the judgment being relevant are quoted hereinbelow:

> "***26.*** *In this context, we have been commended to the decision in A. Nawab John v. V.N. Subramaniyam. On a careful perusal of the said decision, we find that the said authority nowhere addresses the issue that is involved in the case at hand. Proper valuation of the subject-matter or undervaluation is an aspect which can be contested by the defendant, but the said contest is limited. In this regard, the two-Judge Bench has reproduced two passages from Rathnavarmaraja v. Vimla12 which we think seemly to reproduce: (AIR pp. 1300-01, paras 2-3)*
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> "*2. *The Court Fees Act was enacted to collect revenue for the benefit of the State and not to arm a contesting party with a weapon of defence to obstruct the trial of an action*. By recognising that the defendant was entitled to contest the valuation of the properties in dispute as if it were a matter in issue between him and the plaintiff and by entertaining petitions preferred by the defendant to the High Court in exercise of its revisional jurisdiction against the order adjudging court fee payable on the plaint, all progress in the suit for the trial of the dispute on the merits has been effectively frustrated for nearly five years. We fail to appreciate what grievance the defendant can make by seeking to invoke the revisional jurisdiction of the High Court on the question whether the plaintiff has paid adequate court fee on his plaint. *Whether proper court fee is paid on a plaint is primarily a question between the plaintiff and the State*. How by an order relating to the adequacy of the court fee paid by the plaintiff, the defendant may feel aggrieved, it is difficult to appreciate. Again, the jurisdiction13 in revision exercised by the High Court under Section 115 of the Code of Civil Procedure is strictly conditioned by clauses (a) to (c) thereof and may be invoked on the ground of refusal to exercise jurisdiction vested in the subordinate court or assumption of jurisdiction which the court does not possess or on the ground that the court has acted illegally or with material irregularity in the exercise of its jurisdiction. The defendant who may believe and even honestly that proper court fee has not been paid by the plaintiff has still no right to move the superior courts by appeal or in revision against the order adjudging payment of court fee payable on the*

plaint. But counsel for the defendant says that by Act 14 of 1955 enacted by the Madras Legislature which applied to the suit in question, the defendant has been invested with a right not only to contest in the trial court the issue whether adequate court fee has been paid by the plaintiff, but also to move the High Court in revision if an order contrary to his submission is passed by the court. Reliance in support of that contention is placed upon sub-section (2) of Section 12. That sub-section, insofar as it is material, provides:

** * **

*3. But *this section only enables the defendant to raise a contention as to the proper court fee payable on a plaint and to assist the court in arriving at a just decision on that question*. Our attention has not been invited to any provision of the Madras Court Fees Act or any other statute which enables the defendant to move the High Court in revision against the decision of the court of first instance on the matter of court fee payable in a plaint. The Act, it is true, by Section 19 provides that for the purpose of deciding whether the subject-matter of the suit or other proceeding has been properly valued or whether the fee paid is sufficient, the court may hold such enquiry as it considers proper and issue a commission to any other person directing him to make such local or other investigation as may be necessary and report thereon. The anxiety of the legislature to collect court fee due from the litigant is manifest from the detailed provisions made in Chapter III of the Act, but those provisions do not arm the defendant with a weapon of technicality to obstruct the progress of the suit by approaching the High Court in revision against an order determining the court fee payable."*

***27.** On a perusal of the decision in Rathnavarmaraja, we find that the controversy had arisen with regard to proper valuation and the stand of the defendant was that the court fee had not been properly paid and in that context, the Court has held what as we have reproduced hereinabove. The issue being different, the said decision is distinguishable. We may reiterate that proper valuation of the suit property stands on a different footing than applicability of a particular provision of an Act under which court fee is payable and in such a situation, it is not correct to say that it has to be determined on the basis of evidence and it is a matter for the benefit of the Revenue and the State and not to arm a contesting party with a weapon of defence to obstruct the trial of an action. It is because the Act empowers the defendant to raise the plea of jurisdiction on a different yardstick.*

***28.** In the ultimate analysis, we arrive at the conclusion that the appeal is to be allowed, the impugned orders passed by the trial court and the High Court, being unsustainable are to be set aside and we so direct. The trial court is directed to grant three months' time to the plaintiff to pay the requisite court fee. There shall be no*

order as to costs."

26. This Court however would like to observe that taking into consideration that the appeal was preferred by the defendants against the judgment and decree dated 26.09.2017, the saddling of liability of paying Court Fee in the appeal upon the plaintiff was not justified inasmuch as the plaintiff would only be liable to pay the Court Fee before the Trial Court only on the basis of the valuation of the Schedule-B2 land and not before the First Appellate Court.

27. The third question of law so proposed was as to whether both the Courts were justified in passing the decree in favour of the plaintiff without considering the facts of peaceful and continuous possession of the appellants/the defendant Nos. 1 and 2 for more than the statutory period of 12 years. The law as regards adverse possession is clear which stipulates that the possession has to be continuous, hostile and adverse to the interest of the true owner. The findings of the fact of both the Courts below clearly demonstrate that the defendant No.1 was only a permissive occupier under the proforma defendant No.1 and thereupon after the Deed of Sale bearing No.3348/2014 being executed, the defendant No.1 became a permissive occupier under the plaintiff. Under such circumstances, mere remaining in peaceful and continuous possession does not ripe into adverse possession and as such this Court is of the opinion that both the Courts below were justified in decreeing the suit in favour of the plaintiff. In that view of the matter, the third question of law so proposed cannot be a substantial question of law involved in the instant appeal.

28. The fourth question of law so proposed pertains to as to whether the Courts below were justified in decreeing the suit thereby cancelling the Deed of Sale bearing Deed No.935/14 executed by defendant No.1 in favour of the defendant No.2 without taking into consideration that the defendant No.1 has share of 12½ Lechas of land. The said question of law in the opinion of this

Court cannot be a substantial question of law involved in the instant appeal on two grounds. Firstly, the finding of facts arrived at by the First Appellate Court categorically demonstrates that the land which was transferred by way of the registered Deed of Sale bearing No.935/14 was the Schedule-B2 land. No perversity could be shown to the said finding of facts by the learned counsel for the appellants. Secondly, it is being a trite principle of law that to be a substantial question of law, the same has to have roots in the pleadings. However in the instant case and more particularly upon a perusal of the written statement, it was never the case of the defendants that the share of the land of the defendant No.1 of 12½ Lechas of land was transferred in favour of the defendant No.2. Moreover, the boundaries mentioned in the Deed of Sale bearing Deed No.935/2014 dated 03.11.2014 had on the south of the land belonging to the Defendant No.1.

29. Taking into account the above, this Court is of the opinion that the questions of law so proposed by the learned counsel for the appellants are not substantial questions of law involved in the appeal which can be formulated in terms with Section 100(4) of the Code.

30. Consequently, the instant appeal stands dismissed. However in the facts of the instant case, this Court is not inclined to impose any costs.

JUDGE

Comparing Assistant