



GAHC010038832019

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

Case No. : CRP(IO)/63/2019

IMRAN HUSSAIN
S/O LT. NURUL ISLAM, R/O VILL- KALYANPUR, P.S. BAGUAN, DIST.-
GOALPARA, ASSAM, PIN- 783129

VERSUS

MONNAF ALI AND 8 ORS.
S/O HAJI BASTULLA SK, R/O BHOISHMARI, P.S.- BAGUAN, DIST.-
GOALPARA, ASSAM, PIN.-783129

2:ABDUR RAHMAN
S/O HAJI BASTULLA SK
R/O BHOISHMARI
P.S.- BAGUAN
DIST.- GOALPARA
ASSAM
PIN.-783129

3:ABDUR RASHID
S/O HAJI BASTULLA SK
R/O BHOISHMARI
P.S.- BAGUAN
DIST.- GOALPARA
ASSAM
PIN.-783129

4:SADEQUE ALI
S/O HAJI BASTULLA SK
R/O BHOISHMARI
P.S.- BAGUAN
DIST.- GOALPARA
ASSAM
PIN.-783129



5:ALI HUSSAIN
S/O LT. HAJI ALTAP HUSSAIN
VILL.- BORO PAITGARI
P.S.- BAGUAN
DIST.-GOALPARA
ASSAM
PIN- 783129

6:SAGAR ALI
S/O LT. AJIM UDDIN
VILL.- LATHIMA
P.S.- BAGUAN
DIST.- GOALPARA
ASSAM
PIN.- 783129

7:ON THE DEATH OF JAMAL HUSSAIN
S/O LT. HAJI BASTULLA SK
R/O BHOISHMARI
P.S.- BAGUAN
DIST.- GOALPARA
ASSAM
PIN.-783129

7.1:RAHIMA KHATUN
W/O- JAMAL HUSSAIN
R/O- BHOISHMARI
P.S.- BAGUAN
DIST.- GOALPARA
ASSAM
PIN- 783129.

8:RAHIM UDDIN
S/O JAMAL HUSSAIN
R/O BHOISHMARI
P.S.- BAGUAN
DIST.- GOALPARA
ASSAM
PIN.-783129

9:ABDUR REZZAK
W/O HAJI ALTAP HUSSAIN
VILL.- BORO PAITGARI
P.S.- BAGUAN
DIST.- GOALPARA
ASSAM
PIN- 78312



Advocate for the Petitioner : MR. S K GHOSH

Advocate for the Respondent : MR. A MANNAF (R1-R6,R8,R9)

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT

Date : 15-11-2021

Heard Mr. SK Ghosh, learned counsel for the petitioner and Mr. M.H. Rajbarbhuiyan learned counsel for respondent Nos.1 to 4 as well as Mr. A Mannaf, learned counsel for respondent No.7(i).

2] This is an application under Article 227 of the Constitution of India, challenging the order dated 07.02.2019 passed by the learned Civil Judge, Goalpara in Title Appeal No.07/2017 whereby the application filed by the respondent No.4 for examining the thumb impression of the original defendant No.1 late Bastuallah Seikh appearing in exhibit-1 i.e., the deed of sale bearing deed No.1173/1179 dated 06.03.1978 was allowed at the appellate stage.

3] The facts of the instant case for the purpose of the disposal of the instant proceeding is that the petitioner as plaintiff has instituted a suit for declaration their of right, title and interest and for recovery of possession which was registered and numbered as Title Suit No.4/2009 before the Court of the learned Munsiff No.1, Goalpara. In the said suit, it is the case of the plaintiff that late Bastuallah Seikh had executed the deed of sale on 06.03.1978 in respect to the suit land in favour of the plaintiff and thereafter handed over the possession to the plaintiff after a few days. The plaintiffs continued to remain in possession till 06.12.2008 when the defendants dispossessed the plaintiffs for which he had instituted the aforementioned suit. The defendants in the suit, filed a joint written statement stating inter alia that the defendant No.1 neither executed any sale deed nor delivered possession in favour of the plaintiff as alleged. Issues were framed and evidences were led and thereupon the trial Court vide the

judgment and decree dated 11.04.2017 decreed the suit in favour of the plaintiff declaring that the plaintiff is the owner of the suit land and also for delivery of khas possession. It may be relevant herein to mention that the original deed of sale bearing deed No.1179/1173 dated 06.03.1978 was exhibited as exhibit-1.

4] Being aggrieved by the judgment and decree dated 11.04.2017, an appeal was preferred by the respondent Nos.1 to 4 herein which was registered and numbered as Title Appeal No.7/2017. In the said appeal, an application was filed by the respondent Nos.1 to 4 requesting the Appellate Court to exercise its jurisdiction under Order XLI Rule 27 for sending the thumb impression appearing in the exhibit-1 to the handwriting expert as it was the specific case of the respondent Nos.1 to 4 herein in the suit that the original defendant No.1 did not execute the Deed of sale dated 06.03.1978. The petitioner herein duly objected to the said application by filing a written objection stating inter alia that the deed of sale dated 06.03.1978 have been duly proved in accordance with law and consequently the question of sending the said documents to the handwriting expert does not arise and the evidence and materials before the Appellate Court was sufficient to decide the Appeal.

5] The Appellate Court at the time of hearing of the appeal vide an order dated 07.02.2019 exercised the jurisdiction under Order XLI Rule 27 in order to secure the ends of justice for the reasons assigned in the order directed that the thumb impression available in the alleged registered sale deed dated 06.03.1978 be examined by an expert of the Forensic Science Laboratory, Guwahati with the thumb impression appearing in the written statement of the original defendant No.1 and thereby fixed 15.03.2019 for expert opinion/report.

6] I have heard Mr. SK Ghosh, learned counsel for the petitioner who submits that the exercise of jurisdiction by the Court below under Order XLI Rule 27 was not in accordance with the judgment of the Supreme Court rendered in the case of ***Union of India Vs. Ibrahim Uddin*** reported in ***(2012) 8 SCC 148***, inasmuch as, the grounds shown in the petition was that the lawyer had made the mistake of not sending the signature to the handwriting expert during the

trial, would not constitute "substantial cause" within the meaning of Order XLI Rule 27(b). He also referred to the provisions of Section 90 of the Indian Evidence Act, 1872 and submits that the handwriting or thumb impressions in respect to a deed of sale aged more than 30 years there is a presumption in favour of the said signature and the thumb impression appearing in the document to be correct. He also referred to another judgment rendered in the case of **H.S.Goutham vs Rama Murthy And Anr** reported in **(2021) 5 SCC 241** and referred to paragraph 37 to canvas the point that the provisions of Order XLI Rule 27 cannot be invoked without compliance to the provisions of Order 41 Rule 27 to 29 of the CPC and the same was not done in the instant case.

7] Mr. M.H. Rajbarbhuiyan, learned counsel for the respondent Nos.1 to 4 submits that the order which has been passed by the Appellate Court was an order passed which was necessary for the court to pronounce judgment in the cause of the proceedings and as such, the question of any interference does not arise in the facts and circumstances of the case. Mr. A Mannaf, learned counsel for the respondent No.7(i) adopts the arguments of Mr. MH Rajbarbhuiyan.

8] I have heard the learned counsel for the petitioners as well as the counsel for the respondents at length.

9] A perusal of the impugned order shows that the exercise of the power made by the Court below was in exercise to find the truth in the matter which would enable it to pronounce the judgment for the following reasons.

a) The defendants in the suit have been denying the fact that the defendant No.1 had executed the impugned Deed of sale dated 06.03.1978.

b) The evidence on records shows that barring the official witnesses and the plaintiff, no plaintiff witnesses saw the execution of the purported deed of sale dated 06.03.1978 by the original defendant No.1 and no witness is there who recognize the thumb impression of the original defendant No.1 as appearing in the purported deed of sale.

c) *The evidence of Pw-5, Pw-6 could not throw any light as to whether the alleged thumb impression appearing in the purported deed of sale dated 06.03.1978 was the thumb impression of the original defendant No.1.*

d) *The proof of the contents of the documents is not ipso facto proof of the thumb impression of the original defendant No.1.*

10] In view of the above reasons, the Appellate Court in order to secure the ends of justice directed that the thumb impression appearing in Exhibit-1 which is the disputed thumb impression be sent to the Forensic Science Laboratory, Guwahati.

11] The arguments which have been placed by Mr. SK Ghosh, learned counsel for the petitioner in regard to Section 90 of the Indian Evidence Act, 1872 is misplaced in view of the fact that Section 90 of the Indian Evidence Act raises a presumption as regards the genuineness of a document to the effect that the thumb impression and the signature appears to be correct but that is a rebuttable presumption and the Court below had only given an opportunity to the plaintiff/appellant to rebut the presumption.

12] The judgment relied upon as regards the ***Union of India Vs. Ibrahim Uddin*** (supra) does not lay down the proposition of the law that under no circumstances, the appellate court is denuded of power to permit additional evidence at the appellate stage. The power to adduce evidence at the appellate stage is a discretionary power to be exercised by the appellate court within the limitations stipulated under the Provisions of order XLI Rule 27 of the CPC as have been settled by the Supreme Court in various judgments including the judgment in the case of ***Ibrahhim Uddin*** (supra). In the instant case, the Defendants/respondents herein while filing the application under Order XLI Rule 27 of CPC had mentioned that request was made to their earlier lawyer before the Trial Court to send the thumb impression for examination but he did not do so. Further to that the Defendants have been categorically requesting their earlier counsel to do what is necessary for the purpose of establishing their case that the

defendant No.1 did not execute the purported deed of sale. At this stage, it may be pertinent to note that there is a difference in recognizing a signature by a person who is accustomed to the signature of the executants from recognizing the thumb impression inasmuch as, for analyzing and giving opinion in respect to thumb impression the same can be done only by an expert with scientific technology. The question of comparison by a court of an admitted thumb impression with a disputed thumb impression cannot be made. As said, it can only be done through scientific examination.

13] Apart from the above, it is also noteworthy that from the documents on record, it appears that the Defendants are not literate and this aspect of the matter can be seen from a perusal of the written statement wherein most of the defendants had put their thumb impression. In civil litigation where parties are illiterate and not accustomed to the menaces of the technicalities of law, they rest their case absolutely at the hand of their lawyer as could be seen in the instant case. Under such circumstances, the lawyer who in *in loco parentis* decides what is to be done in the proceedings. It The defendants have been categorical in their plea that the original defendants No.1 did not execute the purported Deed of sale dated 06.03.1978 and it was for the lawyer to advise the defendants that the steps could be taken for sending the thumb impression to the expert for comparison. But this was not done. At this stage, the judgment of the Supreme Court in the case of ***Maria Margadia Sequeria Vs Erasmo Jack De Sequeria (D)*** reported in **(2012) 5 SCC 370** at paragraphs 32 to 40 may be quoted herein below:

32. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies.

33. The Truth should be the guiding star in the entire judicial process. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden

duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

34. In Mohanlal Shamji Soni v. Union of India⁸ 1991 Supp (1) scc 271, this Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done.

35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.

36. In Ritesh Tewari and Another v. State of U.P. and Others⁹ (2010) 10 scc 677 this Court reproduced often quoted quotation which reads as under:

“Every trial is voyage of discovery in which truth is the quest”

This Court observed that the power is to be exercised with an object to subserve the cause of justice and public interest and for getting the evidence in aid of a just decision and to uphold the truth.

37. Lord Denning, in the case of Jones v. National Coal Board¹⁰ [1957] 2 QB 55 has observed that:

“In the system of trial that we evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at

large, as happens, we believe, in some foreign countries."

38. Certainly, the above, is not true of the Indian Judicial system. A judge in the Indian System has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest". In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.

39. Lord Denning further observed in the said case of Jones (supra) that "'It's all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth..."

40. World over, modern procedural codes are increasingly relying on full disclosure by the parties. Managerial powers of the Judge are being deployed to ensure that the scope of the factual controversy is minimized.

The observations of the Supreme Court in paragraph 38 quoted above, in my opinion is what the Appellate Court did in exercising the jurisdiction under Order XLI Rule 27 of CPC for which I don't see any reason to interfere with the impugned order.

14] The judgment of the Supreme Court rendered in the case of *H.S.Goutham* (supra) whereby at paragraph 37, the Supreme Court observed that while exercising the power under Order XLI Rule 27 CPC, the provision of Order XLI Rule 28 and 29 needs to be also complied with. I have perused the impugned order and it appears that the same has been done.

15] Under the aforementioned facts and circumstances, I am of the view that no interference is called for in to the impugned order dated 07.02.2019 and accordingly, the petition stands dismissed.

16] It is, however, observed that as the provision of Order XLI Rule 27 as



exercised by the Appellate Court is to be read with Order XXVI Rule 10 A of CPC, the petitioner shall be at liberty to take appropriate steps as envisaged under Order XXVI Rule 10 of the CPC.

17] Further to the above, it is also observed that the Supreme Court in the case of ***Union of India Vs. K.V. Laxmanan*** reported in ***(2016) 13 SCC 124*** had categorically held that whenever appellate evidence is permitted to one of the parties in a appeal in exercise powers under Order XLI Rule 27, the other side should also be permitted to rebut the said evidence. The Appellate Court shall bear in mind the said judgment of the Supreme Court in proceeding with the appeal.

18] With the above observation the petition stands dismissed. No costs. The interim order passed on 06.03.2019 stands vacated and the parties shall appear before the Appellate Court on 30.11.2021.

JUDGE

Comparing Assistant