GAHC010174952021

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

Case No. : RSA/1/2022

MD. IMAM UDDIN AND ANR.
S/O- LATE AZI MIA, R/O- VILL.- MANIPUR PART-II, P.O. MANIPUR PART-I (B.O.), PIN- 788101, P.S. LAKHIPUR, DIST. CACHAR, ASSAM

2: BURHAN UDDIN
S/O- MD. IMAM UDDIN
R/O- VILL.- MANIPUR PART-II
P.O. MANIPUR PART-I (B.O.)
PIN- 788101
P.S. LAKHIPUR
DIST. CACHAR
ASSA

VERSUS

MD. SAREF UDDIN AND ANR.
S/O- LATE FAZIR ALI, R/O- VILL.- MANIPUR PART-II, P.O. MANIPUR PART-I (B.O.), PIN- 788101, P.S. LAKHIPUR, DIST. CACHAR, ASSAM

2:MUSTT. NURUL NESSA
R/O- VILL.- MANIPUR PART-II
P.O. MANIPUR PART-I (B.O.)
PIN- 788101
P.S. LAKHIPUR
DIST. CACHAR
ASSA

Advocate for the Petitioner : MR. S D PURKAYASTHA

Advocate for the Respondent : MR. S K GHOSH

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGEMENT AND ORDER (CAV)

Date : 22-06-2022

1. Heard Mr. S. D. Purkayastha, the learned counsel for the Appellants and Mr. S.K. Ghosh, the learned counsel appearing on behalf of the Respondents.

2. The instant appeal arises out of a judgment and decree dated 15.03.2021 passed by the Court of the Civil Judge No.1, Cachar in Title Appeal No.16/2018 whereby the judgment and decree dated 07.09.2018 passed by the Court of Munsiff, Lakhipur, Cachar in Title Suit No.79/2013 was affirmed thereby dismissing the appeal.

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 Respondents herein as plaintiffs had instituted a suit being Title Suit No.79/2013 before the Court of the Munsiff No.1 praying for a decree of declaring exclusive right, title, interest and possession of the plaintiffs in respect to the Schedule I, II and III properties; for confirmation of possession of the plaintiffs over the land described in Schedule I, II and III; for declaration that the defendants have no right, title, interest and possession over the lands described in Schedule I, II, III, VI and VII; for declaration that the names of Ayesha Bibi and Imam Uddin recorded in the concerned Jamabandi described in

Schedule IV and V are void, illegal, fraudulent and inoperative and to cancel and remove their names from the concerned Jamabandies and Chithas described in Schedule IV and V and send the copy of the decree to the Settlement Officer, Silchar, Cachar to note the fact of cancellation in the concerned Jamabandies and Chithas; for a declaration to the Deputy Commissioner, Cachar, Silchar/ Settlement Officer, Silchar, Cachar for mutation of the name of the Plaintiff No.1 by right of purchase under Rule 118 of the Assam Land and Revenue Regulation, 1886 in the suit patta in respect to the land measuring 12 Kathas 2 Chataks in favour of the Plaintiff described in Schedule I and rest inherited share in favour of the Plaintiff No.2 after cancellation of the name of Ayesha Bibi from the aforesaid Jamabandies; for permanent injunction thereby restraining the defendants, their men, employees, agents or any other persons claiming through them from disturbing the plaintiffs to peaceful possess the land described in Schedule VI and VII and/or dispossessing the plaintiffs from the same and further restraining them from alienating, encumbering the Schedules-VI and VII land by way of sale, mortgage, lease or by any mode of disposition to any 3rd party; for costs etc.

5. A perusal of the plaint shows that one Azi Mia was the original owner of the suit land. The said Azi mia had two sons namely Haider Ali and Imam Uddin (Defendant No.1) and one daughter namely Ayesha Bibi. The said Azi Mia during his lifetime gifted his entire land to his two grandsons namely Nasir Ali and Mojid Ali vide a registered deed of gift bearing Deed No.1865 dated 18.05.1944. The two sons and the daughter of Late Azi Mia did not get any land by inheritance.

6. It is relevant herein to mention that in Paragraph No.2 of the plaint, it has been specifically stated that each of the two grandsons of Late Azi Mia got 7

Bighas 8 Kathas and their names have been mutated by right of gift in the Jamabandi of R.S. Patta No.79 and 80 vide Chitha order dated 12.07.1945 and after amicable partition of the land with specific plots within specific boundaries have been in peaceful possession during their lifetime.

7. Out of the two grandsons, one Mojid Ali expired unmarried leaving behind his one brother Nasir Ali and Mother Tombi Bibi. The said mother and the brother inherited the property of Mojid Ali in the ratio of 1/3rd and 2/3rd i.e. 2 Bighas 9 Kathas 9 Chataks 6 Gondas and 4 Bighas 18 Kathas 10 Chataks 12 Gondas respectively. The mother of Mojid Ali i.e. Tombi Bibi sold out her entire share alongwith land of other pattas to (i) Gulam Rabhani and (ii) Rahim Uddin vide a registered Sale Deed No.1501 dated 08.08.1951 and Nosir Ali was peacefully enjoying the same during his life time and Rahim Uddin was in possession of his half share.

8. Rahim Uddin, as per the plaintiffs in the suit, was in possession of his share i.e. 1 Bigha 2 Katha 4 Chataks 5 Gonda during his life time. However Rahim Uddin's name was not mutated in due course. Rahim Uddin had two sons, namely (i) Bahur Uddin, (ii) Akbor Hussain and one daughter namely Humaira Bibi. The said sons and daughter Rahim Uddin after his death were peacefully enjoying the land but on account of financial crisis, they sold their shares to Saref Uddin (the plaintiff) vide a registered Deed of Sale No.534 dated 04.03.1980 and his name is mutated in the Jamabandi of the 2nd R.S. Patta No.99 vide Chitha order dated 25.08.1985.

9. It has been further averred that Gulam Rabhani who was the co-purchaser with Rahim Uddin in respect to Sale Deed No.1501 dated 08.08.1951 sold out land measuring 12 Kathas 2 Gondas out of 1 Bighas 2 Kathas 4 Chataks 5 Gonda to one Hazi Abdul Jalil, son of Late Anea Mia by a registered Sale Deed

No.1540 dated 15.06.1962 and continued to remain the owner in respect to 10 Kathas 4 Chataks 5 Gonda of the remaining land.

10. It has been further stated that Nosir Ali was in possession of land measuring 12 Bighas 6 Kathas 10 Chatak 12 Gondas and out of the aforesaid land he sold out 5 Bighas 17 Kathas 8 Chataks to Abdul Jalil son of Late Anea Mia vide a Sale Deed No.850 dated 19.05.1952 and Abdul Jalil was in possession of 6 Bighas 9 Kathas 10 Chataks after taking into consideration the purchase made vide the Sale Deed No.1540 dated 15.06.1962 and the Sale Deed No.850 dated 19.05.1952. The said Abdul Jalil died leaving behind four daughters namely (i) Musstt. Fazeren Bibi, (ii) Nurul Nessa (Plaintiff No.2), (iii) Musstt. Nena Bibi and (iv) Aziza Bibi. Late Abdul Jalil also left behind his widow namely Musstt. Chowbi Bibi. Subsequently, the said wife of Late Abdul Jalil had also expired and each daughter inherited 1 Bigha 1 Katha 4 chatak of land and their names were duly mutated in the Jamabandi of the 2nd R.S. Patta No.99 vide Chitha Order dated 25.08.1985.

11. The daughter of Late Abdul Jalil namely Musstt. Fazeren Bibi got in total 2 Bighas 12 Kathas 12 Chataks by inheritance in various lands including the Suit Patta No.99. She on account of urgent need of money sold out her entire share of 2 Bighas 12 Kathas 12 Chataks by a registered Deed of sale bearing Deed No.2062 dated 27.05.1978 in favour of Saref Uddin i.e. the Plaintiff No.1. On the basis of the Sale Deed No.534 dated 04.03.1980, the Plaintiff No.1, Saref Uddin became the owner and possessor of the Schedule-I land and on the basis of Deed of Sale bearing No.2062 dated 27.05.1978, the Plaintiff No.1 became the owner and possessor of 2 Bighas 12 Kathas 12 Chataks as described in Schedule-III to the plaint.

12. It has been further alleged in the plaint that the daughter and two sons of

Late Azi Mia did not acquire any right, title and interest or possession over the suit patta land but fraudulently and collusively mutated R.S. Patta No.79, 80 which were resurveyed into 2nd R.S. Patta No.99, Dag No.372, 373 by right of inheritance as residuary share holder from her brother's sons namely Mojid Ali but as per Mohammedan Law in succession she was not entitled any property or any share from her brother's son as paternal aunt. It was mentioned in the plaint that Mojid Ali died unmarried and left behind his only brother Nosir Ali and mother Tombi Bibi as his only heirs and as such Ayesha Bibi's name was required to be removed and cancelled from the Jamabandi of R.S Patta No.79 and 80 and subsequently from 2nd R.S. Patta No.99, Dag No.372 and 373 which was recorded vide Chitha Order dated 14.03.1947. It was further mentioned in the plaint that the Defendant No.1 in no way inherited any property in the suit patta and dags as his father Late Azi Mia did not leave any property in the suit patta and dags but fraudulently, illegally and collusively the Defendant No.1 for wrongful gain and to get possession of the land by dispossessing the plaintiffs from the suit land mutated his name in collusion with one Abdul Malik, mother of Ayesha Bibi in 3rd R.S. draft Chitha surveyed from the 2nd R.S. Patta No.99, Dag No.372, 373 for which the name of the Defendant No.1 was required to be removed and cancelled from the 3rd R.S. draft Chitha as described in Schedule-V to the plaint. It was further alleged that the Defendant No.1 falsely claiming to be the owner and possessor of land measuring 24 Kathas i.e. 1 bigha 4 Kathas in the suit patta and Dags descrbied in Schedule-VI below and trying to get possession of the said land by dispossessing the plaintiffs from the suit land. On 05.05.2013, the defendants made an attempt by applying force etc. to dispossess the plaintiff but due to timely resistance, the defendants became unsuccessful in their attempts. The defendants thereafter filed a complaint by

making concocted story before the S.D.M, Lakhipur, Cachar, under Section 133 Cr.PC by claiming false plea and created a public path by imaginary boundaries with a intention to grab the land situated in suit patta and dags by misleading the said Court. It was further averred that the defendants illegally obtained an order dated 09.05.2013 in Case No.42 M/2013 to remove the obstruction immediately i.e. boundary wall which was exclusively under the possession of plaintiffs homestead land which was described in Schedule-VI and trying to get illegal possession forcibly in Schedule-VI land. The plaintiffs preferred a Revision Petition against the order dated 09.05.2013 passed by the learned S.D.M, Lakhipur, Cachar before the Court of Sessions Judge at Silchar which was registered and numbered as C.R. Case No.50/2013 and the Court of the Additional Sessions Judge (F.T.C) stayed the order dated 09.05.2013 vide an order dated 15.05.2013 as on the date of the filing of the plaint. On account of the actions of the defendants, as the title of the plaintiffs was clouded, the plaintiffs have filed the suit seeking for various declarations and consequential reliefs as already stated hereinabove. The said suit was registered and numbered as Title Suit No.79/2013.

13. The defendants had filed a joint written statement wherein various preliminary objections were taken as regards the maintainability of the suit. Further a perusal of Paragraph No. 11 of the written statement shows that all the statements made in Paragraph Nos. 1 to 16 of the plaint were denied. However, relevant to take note of is the reply of paragraph No.2 of the plaint which is the bone of contention in the instant proceedings. In reply to Paragraph No.2 of the plaint, it was denied that Azi Mia donated total land measuring 14 Bigha 16 Kathas in R.S. Patta No.92 and 93 and 79 and 80 in the concerned mouza to his grandsons Nasir Ali and Mojid Ali or that Imam Uddin, Haidar ali

and Ayesha Bibi did not get any land from Azi Mia.

14. A further perusal of the said Paragraph No.11 of the written statement in any manner does not show that there was any specific denial as required under Order VIII Rule 3 and 5 of the Code. There was also no denial to the fact that gift deed so executed by Late Azi Mia was not in accordance with law or for that matter in accordance with the provisions of Mohammedan Law. There also no denial to the fact that the possession of the land gifted was not handed over to the donee i.e. the grandsons of Late Azi Mia. From a perusal of Paragraph No.11, it shows that the defendants have only stated that the gift by Late Azi Mia to his grandsons were not correct and true.

15. On the basis of the said pleadings, as many as 7 issues were framed which were as hereinunder.

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

(ii) Whether the suit is maintainable?

(iii) Whether the suit is barred by limitation?

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

(v) Whether the plaintiffs have right, title and interest and possession over the land as described in the Schedule-I, II, & III of the plaint?

(vi) Whether the recording of names of Ayesha Bibi and Imam Uddin as described in Schedule IV & V of the plaint as recorded in the concerned Jamabandi is void, illegal, fraudulent and inoperative?

(vii) Whether the plaintiffs are entitled to decree/relief as prayed for or to any other relief?

16. In support of the plaintiffs, 3 witnesses adduced the evidence and the plaintiffs exhibited 11 numbers of documents. The PW-1 who was the Plaintiff No.1 was cross-examined by the defendants. The PW-2 was partly cross-examined. Further cross-examination of the PW-2 and the cross-examination of the PW-3 was deemed to have been declined vide an order dated 01.06.2017 due to absence of the defendant side. The defendant side did not adduce any evidence.

17. The crucial issues in respect to the suit were the Issue Nos. V and VI. Issue No. V related as to whether the plaintiffs have right, title and interest and possession over the land as described in Schedule-I, II & II of the plaint. The Trial Court after going through the entire evidence came to a finding that the plaintiffs have acquired right, title and interest and possession over the suit land purchased by them as described in Schedule-I, II & III of the plaint. As regards the Issue No.VI as to whether the recording of the names of Ayesha Bibi and Imam Uddin as described in Schedule IV and V of the plaint was void, illegal, fraudulent and inoperative, the learned Trial Court, after perusal of the pleadings and the evidence on record held that the gift deed i.e. Exhibit No.3 was proved and the land of R.S. Patta No.79, Dag No.192 was donated by Azi Mia to his grandsons Nasir Ali and Majid Ali and the land of said dag and patta upon being resurveyed became 2nd R.S. Patta No.99, Dag No.372 and 373 and as such the mutation of the name of Defendant No.1 in the 3rd R.S. Draft Chitha as ejmali property is void, illegal, fraudulent and inoperative. On the basis of the said decision rendered in Issue No. V and VI, the Trial Court while deciding the Issue No. VII held that the plaintiffs are entitled for a decree of declaration of their right, title and interest, for confirmation of possession, cancellation of mutation of the names of Imam Uddin and Ayesha Bibi and also for permanent

injunction against the defendants as prayed for and accordingly, all the reliefs as prayed for in the suit were granted.

18. Being aggrieved, an appeal was preferred by the defendants as appellants before the Court of the Civil Judge No.1, Cachar. The said appeal was registered and numbered as Title Appeal No.16/2018. The First Appellate Court after taking into consideration the various grounds of objection framed as many as 3 (three) points for determination which were as hereinunder.

(A) Whether the Court below has rightly decided the Issue No. II holding that the suit is maintainable and is not barred under Section 9 of the Civil Procedure Code?

(B) Whether the Court below has rightly decided the Issue No. V by holding that the plaintiffs have right, title, interest and possession of the suit land?

(C) Whether the Court below has rightly decided the Issue No. VI holding that the names of Ayesha Bibi and Imam Uddin recorded in the concerned Jamabandi is void, illegal, fraudulent and inoperative?

19. The learned First Appellate Court while deciding the point of determination (A) came to a finding that there was no error committed by the Trial Court in deciding the Issue and rightly held that the suit is not barred under the provisions of the Assam Land and Revenue Regulation, 1886 and Section 9 of the Code of Civil Procedure. The First Appellate Court while deciding the point of determination (B), as to whether the Issue No. V was rightly decided or not, came to a finding that the plaintiffs were able to prove its case by adducing sufficient oral as well as documentary evidence and as such the appreciation

made by the learned Trial Court was found proper and correct and it needs no interference. As regards the point for determination (C) which pertained as to whether Issue No. VI was rightly decided, the First Appellate Court held that the learned Trial Court rightly assessed the evidence on record and came to a conclusion that Azi Mia donated the land to his grandsons and as such the mutation of the name of the defendants is void, illegal and inoperative. On the basis of the decision in respect to the three points for determination framed, the First Appellate Court dismissed the appeal. Being aggrieved and dissatisfied with the judgment and decree dated 15.03.2021, passed by the First Appellate Court, the present appeal has been filed under Section 100 of the CPC.

20. 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).

21. 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.

22. 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.

23. 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.

24. 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."*

25. 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.

26. Mr. S. D. Purkayastha, the learned counsel appearing on behalf of the appellant submits that although 5 (five) questions of law were proposed but the substantial question of law which ought to be formulated as involved in the instant case is as to whether there was a valid gift by Late Azi Mia to his grandsons i.e. Nasir Ali and Mojid Ali of the suit land in accordance with the Mohammedan Law. He submits that although the defendants did not adduced any evidence but the plaintiff have to prove that in order the gift made by Late Azi Mia to his grandsons had fulfilled the three essential requisites for a valid gift in terms with the Mohammedan Law. He submits that there is no pleadings or any proof to the effect that there was delivery of possession to the grandsons of Late Azi Mia after execution of the gift deed i.e. Exhibit-3. He submits that for a valid gift in terms with the Mohammedan Law, the three essential ingredients are (i) Declaration of the gift by the donor, (ii) Acceptance of the gift by the donee expressly or impliedly, and (iii) Delivery of possession to and taking thereof by the donee actually or constructively. He submits that the evidence on

record would show that the Defendant No.1 is still in possession of the suit land and as such, the question of the Donee having taken possession does not arise and consequently, one of the ingredients being missing, there was no valid gift as per the Mohammedan Law. This aspect of the matter having not being taken into consideration by the Trial Court as well as the First Appellate Court, the judgment and decree so impugned is bad in law.

27. On the other hand, Mr. S.K. Ghosh, the learned counsel appearing on behalf of the Respondents submits that to be a substantial question of law involved in a case, there must be first foundation for its laid down in the pleadings and the questions should emerged from the sustainable findings of facts arrived at by the Court of facts. Referring to the written statement filed by the defendants, he submitted that there was never an issue raised as regards the gift was not in accordance with the Mohammedan Law. He specifically drew the attention of this Court to Paragraph No.2 of the plaint wherein it has been mentioned that Late Azi Mia had gifted to his grandsons the entire land of the suit patta by a registered gift deed bearing Deed No.1865 dated 18.05.1944 and each grandsons got 7 Bighas 8 Kathas of land in their names and mutated the said land by way of right of gift in the Jamabandi of R.S. Patta No.79 and 80 vide Chitha Order dated 12.07.1945 and amicably partitioned the land and got specific plots with specific boundaries and have been in peaceful possession during their life time. He further drew the attention of this Court to Paragraph No.11 of the written statement filed by the defendants wherein Paragraph No.2 of the plaint was dealt with and it has only been mentioned that Late Azi Mia donated total land measuring 14 Bighas 16 Kathas in R.S. Patta No.92 and 93 and 79 and 80 in the concerned Mouza to his grandsons Nasir Ali and Mojid Ali or that Imam Uddin, Haidar Ali and Ayesha Bibi did not get any land from Azi

Mia are not correct and true. He submits that there was never a challenge to the registered gift deed or the factum as regards a gift have been made in favour of the grandsons of Late Azi Mia. He further submitted that even in the cross-examination of the Plaintiff Witness No.1 and partly of Plaintiff Witness No.2, there was not even a single question being put as to whether the gift by Late Azi Mia to his grandsons was in accordance with Mohammedan Law or for that matter as to whether the three ingredients of satisfying a valid gift under the Mohammedan was fulfilled. He further submitted that the Trial Court while deciding the Issue No. V have duly taken into consideration the Exhibits 1 and 2 which were orders of mutation of the suit land in favour of Nasir Ali and Mojid Ali in place of Late Azi Mia.

28. He further submitted that the evidence on record i.e. Exhibits 1, 2 and 3 conjointly would show that there was a declaration of the gift by the donor, the acceptance of the gift by the donee expressly or impliedly as well as the delivery of possession. He has relied two judgments of Supreme Court in the case of ***Hafeeza Bibi and Others Vs. Shaikh Farid (Dead) by LRS and Others*** *reported in* ***(2011) 5 SCC 654*** as well as ***Khursida Begum (Dead) by Legal Representatives and Others Vs. Mohammad Farooq (Dead) by Legal Representatives and Another*** *reported in* ***(2016) 4 SCC 549***. He further submitted that both the Courts below while deciding the Issue Nos. V and VI have categorically come to a finding that the gift was valid and on the basis thereof have declared that the title of the plaintiffs. These are all findings of facts which have been arrived at and as such this Court in exercise of Section 100 of the Code ought not to interfere unless there is any perversity and in the instant case, there is no perversity.

29. I have heard the learned counsels for the parties and also perused the

materials on record. First let this Court take into consideration as to whether a substantial question of law arises in the instant case. The pleadings in Paragraph No.2 of the plaint is clear and specific to the effect that Late Azi Mia donated a total land measuring 14 Bighas 16 Kathas in R.S. Patta No.92 and 93 including the suit land in favour of his two grandsons namely Nasir Ali and Mojid Ali by registered Gift Deed No. 1865 dated 18.05.1944 out of love and affection and for looking after him till his life time. It has also been mentioned that the aforesaid two grandsons each got 7 Bigha 8 Kathas and their names have been mutated by right of gift in the Jamabandi of R.S. Patta No.79 and 80 vide Chitha order dated 12.07.1945 and amicably partitioned the land and got specific plots with specific boundaries and have been in peaceful possession during their life time. To the said averments in Paragraph No.2 of the plaint, the defendants in Paragraph No.11 of their written statement have only stated that it was not correct and true that Late Azi Mia donated total land measuring 14 Bighas 16 Kathas in R.S. Patta No.92 and 93 and 79 and 80 in the concern Mouza to his grandsons Nasir Ali and Mojid Ali or that Imam Uddin, Haidar Ali and Ayesha Bibi did not get any land from Azi Mia. There is no averments made in the written statement to the effect that the gift so made was not in accordance with Mohammedan Law. There is also no denial to the statements made to the effect that the grandsons of Late Azi Mia each got 7 Bighas 8 Kathas in their names and mutated by right of gift in the Jamabandi of R.S. Patta No.79 and 80 vide Chitha Order dated 12.07.1945 and amicably partitioned the land and got specific plots with specific boundaries and have been in peaceful possession during their life time. Under such circumstances, the substantial question of law which the learned counsel on behalf of the appellant seeks to propose to be formulated cannot be said to be a substantial question of law involved in the

instant case as there is no foundation laid down in the pleadings.

30. Be that as it may, it is also relevant to take note of that the learned counsel for the appellant had submitted that the question of gift by Late Azi Mia to his grandsons goes to the very root of the matter and even without any foundation being laid down in the pleadings, the said can be formulated as a substantial question of law as it is only on the basis of the said gift that the plaintiffs claim their right, title and interest in respect to the suit land. In view of the said submission, this Court finds it relevant to take into consideration as to whether the requisites of a valid gift was satisfied in the facts and circumstances of the instant case. The Supreme Court in the case of ***Hafeeza Bibi (supra)*** had held that under the Mohammedan Law, the three essential requisites to make a gift valid are (i) Declaration of gift by the donor, (ii) Acceptance of the gift by the donee expressly or impliedly, and (iii) delivery of possession to and taking possession thereof by the donee actually or constructively. It was held that merely because the gift is reduced to writing by a Mohammedan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammedan Law orally, its nature and character is not changed because of it having been made by a written document. The Supreme Court further observed that what is important for a valid gift under the Mohammedan Law is that the three essential requisites must be fulfilled and the form is immaterial. If all the three essential requisites are satisfied constituting a valid gift, the transaction of the gift would not be rendered invalid because it has been written on plain piece of paper. In Paragraph 29 of the said judgment, it has been observed that Section 129 of the Transfer of Property Act, 1882 preserves the Rule of Mohammedan Law and excludes the applicability of Section 123 of the said Act to a gift of an

immovable property by Mohammedan Law. Paragraph 24 to 30 of the said judgment being relevant is quoted hereinbelow.

> "***24.*** *The position is well settled, which has been stated and restated time and again, that the three essentials of a gift under Mohammadan Law are: (1) declaration of the gift by the donor; (2) acceptance of the gift by the donee; and (3) delivery of possession. Though, the rules of Mohammadan Law do not make writing essential to the validity of a gift; an oral gift fulfilling all the three essentials makes the gift complete and irrevocable. However, the donor may record the transaction of gift in writing.*
>
> ***25.*** *Asaf A.A. Fyzee in Outlines of Muhammadan Law, 5th Edn. (edited and revised by Tahir Mahmood) at p. 182 states in this regard that writing may be of two kinds: (i) it may merely recite the fact of a prior gift; such a writing need not be registered. On the other hand, (ii) it may itself be the instrument of gift; such a writing in certain circumstances requires registration. He further says that if there is a declaration, acceptance and delivery of possession coupled with the formal instrument of a gift, it must be registered. Conversely, the author says that registration, however, by itself without the other necessary conditions, is not sufficient.*
>
> ***26.*** *Mulla, Principles of Mahomedan Law (19th Edn.), p. 120, states the legal position in the following words:*
>
> "*Under the Mahomedan law the three essential requisites to make a gift valid are: (1) declaration of the gift by the donor, (2) acceptance of the gift by the donee expressly or impliedly, and (3) delivery of possession to and taking possession thereof by the donee actually or constructively. No written document is required in such a case. Section 129 of the Transfer of Property Act excludes the rule of Mahomedan Law from the purview of Section 123 which mandates that the gift of immovable property must be effected by a registered instrument as stated therein. But it cannot be taken as a sine qua non in all cases that whenever there is a writing about a Mahomedan gift of immovable property there must be registration thereof. Whether the writing requires registration or not depends on the facts and circumstances of each case.*"
>
> ***27.*** *In our opinion, merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by a Mohammadan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammadan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting a valid gift, the transaction of gift would not be*

rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammadan Law.

28. *In considering what is Mohammadan Law on the subject of gifts inter vivos, the Privy Council in Mohd. Abdul Ghani stated that when the old and authoritative texts of Mohammadan Law were promulgated there were not in contemplation of anyone any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of possession of land, and that could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed.*

29. *Section 129 of the TP Act preserves the rule of Mohammadan Law and excludes the applicability of Section 123 of the TP Act to a gift of an immovable property by a Mohammadan. We find ourselves in express agreement with the statement of law reproduced above from Mulla, Principles of Mahomedan Law (19th Edn.), p. 120. In other words, it is not the requirement that in all cases where the gift deed is contemporaneous to the making of the gift then such deed must be registered under Section 17 of the Registration Act. Each case would depend on its own facts.*

30. *We are unable to concur with the view of the Full Bench of the Andhra Pradesh High Court in Tayyaba Begum. We approve the view of the Calcutta High Court in Nasib Ali that a deed of gift executed by a Mohammadan is not the instrument effecting, creating or making the gift but a mere piece of evidence, such writing is not a document of title but is a piece of evidence. We also approve the view of the Gauhati High Court in Mohd. Hesabuddin. The judgments to the contrary by the Andhra Pradesh High Court, the Jammu and Kashmir High Court and the Madras High Court do not lay down the correct law."*

31. At this stage, this Court further finds it relevant to take note of judgment of the Supreme Court in the case of ***Khursida Begum (supra)*** which was a case pertaining to a validity of a gift deed dated 24.02.1976 executed by one Hazi Azimuddin in favour of the plaintiffs and in respect to which all the Courts below had held that the same to be a gift of undivided share of property which was capable of division and thus invalid under the Mohammedan Law being Hiba-Bil-Musha. The Supreme Court while dealing with Paragraphs 152 and 160 of Mohammedan Law had held that while gift of an immovable property is not

complete unless the donor parts with the possession and the donee enters into possession but if the property is in occupation of tenants, gift can be completed by delivery of title deed or by request to tenants to attorn to the donee or by mutation. It was further held that gift of a property which is capable of division is irregular but can be perfected and rendered valid by subsequent partition or delivery. The exceptions to the Rule of delivery of possession were that whether gift is made by one co-heir to the other; where the gift is of share in a zamindary or taluka; where gift is of a share in freehold property in a large commercial town, and where gift is of share in a land company. Further to that the Supreme Court also held that the requirement of possession is also met when the right to collect rent has been assigned to the plaintiff under the gift deed itself, genuineness which stands proved. Paragraph 11 to 14 being relevant is quoted hereinbelow.

> "***11.*** *The learned counsel for the parties have referred to the principles of Mohammedan Law as compiled in Mulla's Principles of Mohammedan Law, 20th Edn. by Lexis Nexis, paras 152 and 160 of which are:*
>
> "*152. Delivery of possession of immovable property*
>
> *(1) Where donor is in possession — A gift of immovable property of which the donor is in actual possession is not complete, unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession.*
>
> *(2) Where property is in the occupation of tenants — A gift of immovable property which is in the occupation of tenants may be completed by a request by the donor to the tenants to attorn to the donee, or by delivery of the title deed or by mutation in the revenue register or the landlord's sherista. But if the husband reserves to himself the right to receive rents during his lifetime and also undertakes to pay municipal dues, a mere recital in the deed that delivery of possession has been given to the donee will not make the gift complete.*
>
> *(3) Where donor and donee both reside in the property — No physical departure or formal entry is necessary in the case of a gift of immovable property in which the*

donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. The principle for the determination of questions of this nature was thus stated by West, J. in a Bombay case. When a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession without any physical departure or formal entry.

* * *

160. Gift of mushaa where property divisible. A gift of an undivided share (mushaa) in property which is capable of division is irregular (fasid), but not void (batil). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken the gift is validated.

Exceptions.—A gift of an undivided share (mushaa), though it be a share in property capable of division, is valid from the moment of the gift, even if the share is not divided off and delivered to the donee, in the following cases—

(1) where the gift is made by one co-heir to another,
(2) where the gift is of a share in a zamindari or taluka,
(3) where the gift is of a share in freehold property in a large commercial town,
(4) where the gift is of shares in a land company."

***12.** A perusal of the above shows that while gift of immovable property is not complete unless the donor parts with the possession and donee enters into possession but if the property is in occupation of tenants, gift can be completed by delivery of title deed or by request to tenants to attorn to the donee or by mutation. It is further clear that gift of property which is capable of division is irregular but can be perfected and rendered valid by subsequent partition or delivery. Exceptions to the rule are: where the gift is made by one co-heir to the other; where the gift is of share in a zamindari or taluka; where gift is of a share in freehold property in a large commercial town, and where gift is of share in a land company.*

***13.** The courts below appear to have quoted Mohammedan Law by B.R. Verma, Law Publishers (India) (P) Ltd., 13th Edn. which is by and large to the same effect as Mulla's book on the subject.*

***14.** The courts below have held the gift to be invalid on the ground that it was gift of undivided property which is capable of division and was not covered by any of the exceptions to the rule that gift of such property is irregular. It is submitted by the learned counsel for the appellant that the property is freehold property in the city of*

Jaipur, which is a large commercial town. This has been wrongly ignored by the courts below on the ground that there was no pleading or proof to that effect. Description of property mentioned in plaint and in the gift deed itself shows that it is commercial property in the city of Jaipur which is the capital of the State of Rajasthan and is, thus, a large commercial town. Requirement of possession is also met when right to collect rent has been assigned to the plaintiff under the gift deed itself, genuineness of which stands proved."

32. Now coming to the facts of the instant case it would be seen that the Exhibit 3 is the gift deed which is a registered instrument. A perusal of the said gift deed would show that a declaration has been made by the donor to the effect that the donor i.e. Late Azi Mia had declared the gift of various lands including the suit patta to his grandsons who were the donees. A further perusal of the said gift deed would show that the grandsons of Late Azi Mia were entitled to enjoy the possession as well as the benefits of the said land gifted.

33. Exhibit 1 and 2 are the orders of mutation on the basis of which it would be seen that the names of the grandsons were duly mutated over the various lands mentioned in the suit patta. Therefore, from the above, it would be seen that there was a declaration duly made by the donor, the same was duly accepted by the donees and the possession was also duly delivered on the basis of which mutation was done in favour of the donees and the donees were also entitled to enjoy the possession and reap benefits under the said gift deed. It is also relevant to take into consideration that Exhibit 3 has not been put to challenge in any other proceedings and the Courts below have duly come to a finding that it has been duly proved. Under such circumstances, this Court is of the opinion that the said question of law so proposed cannot be substantial question of law involved in the instant case to be formulated in terms with Section 100(4) of the Code.

34. Consequently, the instant appeal stands dismissed and the Respondents

shall be entitled to the cost of proceedings.

35. Prepare the decree accordingly.

JUDGE

Comparing Assistant