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GAHC010220282021

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

Case No. : RSA/8/2022

ON THE DEATH OF NAZMUL HAQUE CHOUDHURY, HIS LEGAL HEIR
MUSSTT. FATIMA KHATUN CHOUDHURY @
FATIMA BEGUM BARBHUIYA, AGED ABOUT 51 YEARS, DAUGHTER OF LATE TABARAK ALI CHOUDHURY AND WIFE OF MD. SAFIQUR RAHMAN BARBHUIYA, R/O- VILL.- SONABARIGHAT PART-I, P.O. SONABARIGHAT, P.S. SONAI, PIN- 788103, DIST.- CACHAR, ASSAM

VERSUS

MD. FARUK AHMED LASKAR AND 10 ORS.
S/O- LATE ALIM UDDIN LASKAR, R/O- VILL.- BAHADURPUR, P.O. AND P.S. UDHARBOND, PIN- 788009, DIST. CACHAR, ASSAM

2:MD. SAJJAD AHMED LASKAR
S/O- LATE ALIM UDDIN LASKAR
R/O- VILL.- BAHADURPUR
P.O. AND P.S. UDHARBOND
PIN- 788009
DIST. CACHAR
ASSAM

3:MUSST. JULFIKA KHANAM
W/O- MD. FAIZUL HAQUE BARBHUIYA
R/O- VILL.- BALIGHAT
P.O. AND P.S. UDHARBOND
PIN- 788030
DIST. CACHAR
ASSAM

4:ON THE DEATH OF MD. SAMIR UDDIN MAZUMDER
HIS LEGAL HEIRS MUSSTT. MONOWARA BEGUM MAZUMDER
W/O- LATE SAMIR UDDIN MAZUMDER
R/O- KANAKPUR PART-I
P.O. AND P.S. SILCHAR

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PIN- 788006
DIST. CACHAR
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5:MD. ANSARUL HAQUE MAZUMDER
R/O- KANAKPUR PART-I
P.O. AND P.S. SILCHAR
PIN- 788006
DIST. CACHAR
ASSAM

6:MD. SABIR AHMED MAZUMDER
R/O- KANAKPUR PART-I
P.O. AND P.S. SILCHAR
PIN- 788006
DIST. CACHAR
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7:MD. RAKIB AHMED MAZUMDER
SONS OF LATE SAMIR UDDIN MAZUMDER
R/O- KANAKPUR PART-I
P.O. AND P.S. SILCHAR
PIN- 788006
DIST. CACHAR
ASSAM

8:MUSSTT. MAMTAJ BEGUM BARBHUIYA
DAUGHTER OF LATE SAMIR UDDIN MAZUMDER
R/O- KANAKPUR PART-I
P.O. AND P.S. SILCHAR
PIN- 788006
DIST. CACHAR
ASSAM

9:MUSSTT. MUNNI BEGUM BARBHUIYA
DAUGHTER OF LATE SAMIR UDDIN MAZUMDER
R/O- KANAKPUR PART-I
P.O. AND P.S. SILCHAR
PIN- 788006
DIST. CACHAR
ASSAM

10:MUSSTT. SIBLI BEGUM MAZUMDER
DAUGHTER OF LATE SAMIR UDDIN MAZUMDER
R/O- KANAKPUR PART-I
P.O. AND P.S. SILCHAR
PIN- 788006
DIST. CACHAR

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11:MUSTT. ZANIS ARA LASKAR
DAUGHTER OF LATE SAMIR UDDIN MAZUMDER
R/O- KANAKPUR PART-I
P.O. AND P.S. SILCHAR
PIN- 788006
DIST. CACHAR
ASSA

Advocate for the Petitioner : MR. S D PURKAYASTHA

Advocate for the Respondent : MR G N SAHEWALLA (r-4 to 11)

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER (CAV)

Date : 11-08-2022

1. Heard Mr. S. D. Purkayastha, the learned counsel appearing on behalf of the Appellant and Mr. G. N. Sahewalla, the learned Senior counsel assisted by Ms. S. Todi, the learned counsel appearing on behalf of the Respondents.

2. This is an appeal under Section 100 challenging the judgment and decree dated 28.09.2021 passed by the Court of the Civil Judge No.1, Cachar at Silchar whereby the Title Appeal No.39/2016 was dismissed thereby upholding the judgment and decree dated 31.10.2016 passed by the Court of the Munsiff No.2, Cachar, at Silchar in Title Suit No.52/2013.

3. The instant appeal was listed for hearing at the stage of Order XLI Rule 11 of the Code and the questions involved therefore is as to whether the substantial questions of law as proposed can be formulated in terms with Section 100(4) of the Code. To appreciate the substantial questions of law so

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proposed, it would be required to take into consideration the brief facts of the case. For the purpose of convenience, the parties herein are referred to as the same status as they stood before the Trial Court.

4. The predecessor of the Appellant herein as the plaintiff had instituted a suit before the Court of the Assistant District Judge No.1, Cachar at Silchar. In the said suit, it is the case of the plaintiff that the Defendant Nos.1, 2 and 3 held title (foraiz interest) over the properties described in the Schedule to the plaint. The said properties were inherited by the said Defendant Nos.1, 2 and 3 being share holders in homestead and tank and other lands. It is the specific case of the plaintiff that the Defendants were not in possession of the land as they were residents of distant villages under Udhadharband P.S. and elsewhere. The Defendant Nos.1 and 2 had entered into an agreement with the plaintiff to sale and dispose of the land mentioned in Schedule to the plaint alongwith their sister, Defendant No.3 for a consideration of Rs.42,000/- and out of which an amount of Rs.8,000/- was received by the said two defendants. Accordingly, a Bainapatra was executed on 11.02.1991 in respect to the said transaction whereby the Defendant Nos.1 and 2 promised that within 2 months from the said date they alongwith their sister, i.e. the Defendant No.3 would execute the Deed of Sale in respect to the said properties described in the Schedule to the plaint upon receipt of the balance consideration of Rs.34,000/-.

5. It was the further case of the plaintiff that the Defendant No.4 who had knowledge of the aforesaid Bainapatra dated 11.02.1991 had approached the plaintiff to give at least 3 Kathas of the road side land at Sohabarighat for construction of a shop. The plaintiff refused for which the Defendant No.4 has put a challenge to him. It was mentioned in the plaint that out of the two witnesses to the Bainapatra dated 11.02.1991, one Badiujjaman Laskar was one

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of the attesting witnesses which was won over by the Defendant No.4. The plaintiff approached the Defendant Nos.1, 2 and 3 to take permission for sale of the land in terms with Bainapatra dated 11.02.1991 but the said defendants did not apply for the permission of sale. Thereafter on 14.03.1991, the plaintiff could come to learn that a Sale Deed was executed in favour of the Defendant No.4 by Defendant Nos. 1, 2 and 3.

6. Upon enquiry, it was found that the Defendant Nos.1, 2 and 3 for a consideration of Rs.21,000/- have sold an area of 7 Kathas 12 Chataks 5 Gondas of land within a specific boundary being roadside land. It was the case of the plaintiff that he had two houses in the said land and in one of the said houses had got 4 monthly bharatias in different rooms within the boundary of the land so sold by the Defendant Nos.1, 2 and 3 to the Defendant No.4. It was mentioned that the said sale which was made subsequent to the Bainapatra dated 11.02.1991 was bad inasmuch as the Defendant No.4 was bound by the Bainapatra dated 11.02.1991. It was also mentioned that the Defendant Nos.1 and 2 held title and interest to the extent of $1/7^{th}$ share in the Dags mentioned in the Bainapatra dated 11.02.1991 without having any possession on the land, the homestead land, tank etc. but the land was in possession of the plaintiff. Under such circumstances, the plaintiff sought for specific performance of the Bainapatra dated 11.02.1991. At this stage, it may be relevant herein to mention that initially when the suit was filed, there was no challenge to the sale deed executed by the Defendant Nos. 1, 2 and 3 in favour of the Defendant No.4 and the share of the Defendant Nos.1, 2 and 3 in respect to the properties described in the Schedule was mentioned as $4/7^{th}$ share.

7. Subsequently, by way of amendment dated 12.01.1994, a challenge was made to the Sale Deed dated 12.03.1991 executed by the Defendant Nos.1, 2

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and 3 in favour of the Defendant No.4 and the share of the Defendant Nos.1, 2 and 3 was reduced to 4/7th to 1/7th in the plaint.

8. The Defendant No.4 had filed the written statement raising various preliminary issues. On merits, the Defendant No.4 has denied the entire case of the plaintiff. It was the specific case of the Defendant No.4 as stated in the written statement that the property mentioned in the Schedule to the plaint belonged to the Defendant Nos.1, 2 and 3 as owner and the said defendants were in possession and enjoyment of the same as their own openly, peacefully and to the full knowledge of all concerned. The Defendant No.4 had approached the Defendant Nos. 1, 2 and 3 to which they agreed and after due discussion and consideration, the total consideration at Rs.21,000/- was fixed. Consequently, a registered Bainapatra was executed on 02.01.1991 between the Defendant Nos. 1, 2 and 3 and the Defendant No.4.

9. Subsequently, after taking the due permission from the Deputy Commissioner, Cachar, the said Deed of Sale was executed on 12.03.1991 and the Defendant No.4 was delivered Khas possession of the land within specific boundary. It was further mentioned that the Defendant No.4 had no knowledge whatsoever about the Bainapatra dated 11.02.1991. As per the Defendant No.4, the plaintiff was the maternal uncle of the Defendant Nos. 1, 2 and 3 and taking advantage of such relationship and in order to grab the property of the Defendant No.4, the plaintiff has created a false, illegal, forged and inoperative Bainapatra in collusion with scribe, attesting witness and other persons and on the basis of such Bainapatra had instituted the suit suppressing material facts and making false statements and accordingly, the plaintiff is not legally entitled to the reliefs as made in the plaint.

10. It further appears from the records that pursuant to the amendment so

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made as already stated herein above to the plaint an additional written statement was filed jointly by the Defendant Nos.1, 2 and 4. In the amended written statement, it was specifically mentioned that the document of the Defendant No.4 was proper, legal, valid and for consideration which was executed duly, properly, fully knowing the contents thereof. It was mentioned that the Defendant Nos.1, 2 and 3 duly delivered the possession to the Defendant No.4 on the date of sale within the specific boundaries and since then the Defendant No.4 has been possessing and enjoying the said purchased land openly and peacefully to the full knowledge of all concerned including the plaintiff. It further appears from a perusal of the said amended additional written statement that all the statements made in the plaint was denied. On the basis of the pleadings, initially 5 issues were framed. Subsequent thereto, 2 additional issues were framed and again another additional issue was framed. In total therefore, 8 issues were framed which are mentioned hereinunder:

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

(ii) Whether the suit is maintainable in its present form and manner ?

(iii) Whether the suit is barred by estoppels, waiver and acquiescence and barred under limitation ?

(iv) Whether the plaintiff is entitled to get a decree, as prayed for ?

(v) To what relief or reliefs, the plaintiff is entitled ?

(vi) Is the suit property valued and stamped ?

(vii) Is the Sale Deed No.1019 dated 12.03.1991 liable to be declared void and cancelled by the Court ?

(viii) Whether on 11.02.1991 the Defendant Nos. 1 & 2 executed an agreement for sale in favour of the plaintiff in respect of the suit land, entitling him to specific performance of contract of sale by Defendant No.1 to 3 ?

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11. The plaintiff adduced evidence of 4 witnesses and exhibited various documents. The Defendant side also adduced evidence of 4 witnesses and exhibited few documents. The Trial Court vide a judgment and decree dated 31.10.2016 dismissed the suit. In doing so, while deciding Issue No. 8 which was most vital issue pertaining to as to whether the Defendant Nos. 1 and 2 executed the agreement for sale dated 11.02.1991 in favour of the plaintiff in respect to the land thereby entitling him to specific performance of the contract by the Defendant Nos. 1, 2 and 3; the Trial Court decided the said issue in negative against the plaintiff and came to a finding that the Bainapatra dated 11.02.1991 exhibited as Exhibit-2, there was no mention of any boundary of the land and the plaintiff also in his plaint did not mention any boundary although, in the Schedule of the plaint, the Plaintiff had mentioned about the dag number and the patta number and the quantum of the land respecting which he has made in his claim. It was the finding of the Trial Court that where there is no specification regarding the boundary of a plot of land in any document, that such a document is presumed to be vague one for which the Trial Court held that the plaintiff has failed to prove his claim. While deciding the Issue No. 7 which pertained to as to whether the Sale Deed No.1019 dated 12.03.1991 was liable to be declared void and cancelled by the Court, the Trial Court held the issue in negative and against the plaintiff on the basis that the defendants have been able to prove the Sale Deed No.1019 dated 12.03.1991 which was exhibited as Exhibit-B.

12. The plaintiff preferred an appeal before the Court of the Civil Judge No.1, Cachar which was registered and numbered as Title Appeal No.39/2016. The First Appellate Court framed a point of determination as to whether the Trial Court was justified in dismissing the suit and whether the impugned judgment

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and decree passed by the Trial Court needs interference in appeal. A perusal of the impugned judgment and decree dated 29.09.2021 would show that the First Appellate Court in order to determine the point of determination has taken into consideration the issues as well as the contentions so raised by the appellants. While deciding the Issue No. 8, the First Appellate Court after taking into account the evidence on record and more particularly Exhibit-A which is the registered Baina-nama dated 02.01.1991 which was prior in time to the Bainapatra dated 11.02.1991 and the Exhibit-B which was the registered Deed of Sale bearing Deed No.1019 dated 12.03.1991 and that the delivery of possession of the land was duly proved by the defendant witnesses came to a conclusion that the learned Trial Court had rightly decided that the plaintiff is not entitled to specific performance of the contract and thereby upheld the decision of the Trial Court.

13. The Issue No. 7 which relates to the validity of the Sale Deed No.1019 dated 12.03.1991, the First Appellate Court came to a finding that the plaintiff has not been able to prove that the Sale Deed No.1019 dated 12.03.1991 suffers from any fraud and accordingly affirmed the decision of the Trial Court as regards the Issue No. 7. The rest of the issues were also decided by the First Appellate Court by affirming the judgment and decree passed by the Trial Court and on the basis thereof, decided the point of determination against the appellant/plaintiff and consequently, the said appeal was dismissed.

14. Feeling aggrieved and dissatisfied, the present appeal has been filed under Section 100 of the Code of Civil Procedure, thereby proposing that the instant appeal involves substantial questions of law.

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

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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

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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.

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 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.

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*

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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*

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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 both the parties.

21. Mr. S. D. Purkayastha, the learned counsel appearing on behalf of the

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Appellant submitted that although in the Memo of Appeal there are 3 substantial questions of law which have been proposed but only 2 substantial questions of law can be formulated for the purpose of the instant appeal. He submits that both the Courts below did not take into consideration the provisions of Section 44 of the Transfer of Property Act, 1882 in dismissing the claim of the plaintiff. He submits that therebeing cogent evidence of possession and title of the plaintiff over the land of Exhibit-B, both the Courts below while deciding the Issue No. 7, ignored the provisions of Section 44 of the Transfer of Property Act, 1882. The learned counsel for the Appellant further submitted that another substantial question of law arises on the ground of perversity inasmuch as the Courts below did not take into consideration that the plaintiff has title over the land conveyed by Exhibit-B.

22. On the other hand, Mr. G. N. Sahewalla, the learned Senior counsel submits that the facts of the case would clearly show that the plaintiffs have sought for specific performance of the Bainapatra dated 11.02.1991 which on the face of it was an unregistered document. He further submits that even without going into the question of the legality or validity of the said Bainapatra dated 11.02.1991, it would be seen that there is registered Bainapatra dated 02.01.1991 whereby the Defendant Nos.1, 2 and 3 have agreed to convey a plot of land within specified boundaries to the Defendant No.4. He further submitted that subsequent thereto, after taking due permission, the Sale Deed was executed on 12.03.1991 and the Courts below have concurrently come to a finding that pursuant to the execution of the registered Deed of Sale on 12.03.1991, the possession was duly handed over to the Defendant No.4 by the Defendant Nos.1, 2 and 3. Further to that, he submits that the entire case of the plaintiff was based upon specific performance of the Bainapatra dated

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11.02.1991 which the plaintiff had failed to prove and the same has been concurrently held by the Courts below. It is on the basis of the said Bainapatra dated 11.02.1991, the plaintiff has challenged the Sale Deed dated 12.03.1991 and when the said Issue No. 8 has been decided against the plaintiff, the Issue No. 7 automatically falls apart. There was no foundation laid in the pleadings and it is a well settled principle of law that to be substantial question of law, the question should emerge from the substantial finding of fact arrived at by the Courts of facts, as it must be necessary to decide that question of law for adjudication and proper decision of the case. He further submits that when such question does not arise in the pleadings, the question of therebeing any perversity does not arise for which the question of formulating a substantial question of law on the ground of perversity also does not arise.

23. I have heard the learned counsels for the parties and also perused the materials on record. Let this Court first take into consideration the first question of law proposed to be a substantial question of law involved in the instant appeal. A perusal of the plaint which has been enclosed to the Memo of Appeal do not in any manner show that there was any foundation laid down in respect to Section 44 of Transfer of Proper Act, 1882. The suit was purely a suit for specific performance of the Bainapatra dated 11.02.1991. As already stated, initially there was no challenge to the said Deed of Sale dated 12.03.1991. But subsequently, by way of an amendment the said Deed of Sale was put to challenge. The share of the Defendant Nos. 1, 2 and 3 which was initially admitted as $4/7^{th}$ was reduced by way of an amendment to $1/7^{th}$. It further transpires from the plaintiff's case that he claims to be in possession of the lands in question but he did not have the title over the said land and for that specific reason, he had entered to an agreement of sale on 11.02.1991.

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Thereafter filed the suit for specific performance. Entering into the agreement of 11.02.1991 and filing of the suit for specific performance clearly shows that the plaintiff did not have title over the land pertaining to the Bainapatra dated 11.02.1991. It is also relevant to take note of that the Defendant Nos. 1, 2 and 3 vide Exhibit-B have sold a plot of land vide the registered Deed of Sale dated 12.03.1991. The said Sale Deed was preceded by a registered Bainapatra dated 02.01.1991 prior to the Bainapatra exhibited as Exhibit-2 dated 11.02.1991. It is also seen that it was the specific case of the plaintiff that in view of the Bainapatra dated 11.02.1991, the Sale Deed dated 12.03.1991 was to be declared void and inoperative. In other words, the plaintiff duly admits that the plaintiff did not have the title over the land as mentioned in the Bainapatra dated 11.02.1991. It also appears from the plaint that there is nothing mentioned in the plaint that the land sold to the Defendant No.4 belonged to the plaintiff or that the plaintiff was the co-sharer of the said land. It was only mentioned in the plaint that the plaintiff has two houses and in one house, he had got 4 monthly bharatias in different rooms and in the other house, the plaintiff has got his men there. It has not been spelt out in the pleadings that the said land upon which the two houses, belonged to the plaintiff.

24. Under such circumstances, this Court, therefore is of the opinion that the said substantial question of law so proposed to the effect that the scope and ambit of Section 44 of the Transfer of Property Act, 1882 was not taken into consideration by both the Courts below in the opinion of this Court, the said substantial question of law does not arise for which the said question of law cannot be formulated as a substantial question of law.

25. The second substantial question of law relates perversity on the basis that the Court below did not take into consideration that the plaintiff had right, title

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and interest over the land for which the Defendant Nos.1, 2 and 3 have transferred their right. In the opinion of this Court, the said substantial question of law also does not arise in view of the discussions made while deciding the first substantial question of law so proposed to be formulated. At the cost of prolixity, it is reiterated once again that it was never the case of the plaintiff that the plaintiff had right over the land described in the Schedule-1. Therefore, the said question also cannot be a substantial question of law involved in the instant appeal. Further to above, it is totally misconceived to contend the application of Section 44 of the Transfer of Property Act, 1882 without showing that the Plaintiff is a co-sharer of the suit land.

26. For the reasons aforesaid therefore, this Court is of the opinion that no substantial question of law can be formulated in terms with Section 100(4) of the Code for which the instant appeal stands dismissed.

27. Prepare the decree accordingly.

JUDGE

Comparing Assistant

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