



GAHC010140262022

Page No.# 1/12



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

Case No. : CRP(IO)/157/2022

PUTHIMON @ JAHIRAN NESSA AND 3 ORS
W/O- LATE MUKSHED ALI,
RESIDENT OF VILLAGE- DANAKUCHI, P.O.- SONKUCHI, DISTRICT-
BARPETA, ASSAM.

2: MUSLEMUDDIN
S/O- LATE MUKSHED ALI

RESIDENT OF VILLAGE- DANAKUCHI
P.O.- SONKUCHI
DISTRICT- BARPETA
ASSAM.

3: JABBAR MIA @ ALI
S/O- LATE MUKSHED ALI

RESIDENT OF VILLAGE- DANAKUCHI
P.O.- SONKUCHI
DISTRICT- BARPETA
ASSAM.

4: MUKHLESUR RAHMAN
S/O- LATE MUKSHED ALI

RESIDENT OF VILLAGE- DANAKUCHI
P.O.- SONKUCHI
DISTRICT- BARPETA
ASSAM

VERSUS

ABDUL MALEK
S/O- LATE RAJAB ALI,
RESIDENT OF VILLAGE- DANAKUCHI, P.O.- SONKUCHI, DISTRICT-



BARPETA, ASSAM.

Advocate for the Petitioner : DR. B AHMED

Advocate for the Respondent : MR. U C RABHA

BEFORE

HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

Date of Hearing: and date of Judgment Order : 20.3.2023 and 28.3.2023

JUDGMENT AND ORDER(ORAL)

1. Heard Mr. N. Haque , learned counsel for the petitioners.
2. This matter was heard at length on 20.3.2023 on which date Mr U.C. Rabha learned counsel for the respondent concluded his argument. Mr. Haque, learned counsel for the petitioner advanced his reply argument today.
3. The present application is filed assailing an order dated 19.4.2022 passed by the learned Munsiff No.1, Barpeta in Petition No. 193/2022 (arising out of Title Suit No.68/2017).
4. The said Petition No.193/2022 was filed by the plaintiff in Title Suit No. 68/2017 under Order 26 Rule 10 A read with Order 13 Rule 10 and Section 151 of the CPC,1908 and u/s 45 of Indian Evidence Act,1872. Such petition was rejected by the impugned order dated 19.4.2022, by the learned trial court.
5. The facts in a nutshell leading to filing of the present application can be summarised as follows:



- I. The petitioners as plaintiffs instituted a suit being Title Suit No. 68 of 2017 in the Court of learned Munsiff No. 1, Barpeta against the respondent herein for declaration of right, title and interest over the Schedule B land and for khas possession over the Schedule-B land.

- II. It is the pleaded case of the plaintiff that original pattadar one Omarjan Nessa sold 1 bigha of land from her share to one Amzad Ali by executing a registered sale deed being sale deed No.2174/1983 dated 16.12.1983 and delivered possession thereof. Subsequently said Amzad Ali sold the land to his brother Mokshed Ali i.e., the predecessor-in- interest of the plaintiff by executing a registered sale deed being Sale deed No. 2195/1984 dated 8.4.1984 and delivered the possession with specific boundary. The said 1 bigha of land is described in Schedule B of the plaint. According to the plaintiff, the defendants were the permissive possessor over the Schedule B land. However, when they collusively mutated the Schedule B land alongwith defendant Nos.2 and 3, the plaintiff asked them to vacate the land which defendants refused and accordingly, the suit was filed.

- III. The defendants appeared before the learned Trial court below and filed their written statement taking a specific plea that the predecessor in interest of plaintiff namely Mokshed Ali sold and transferred 2 kathas 10 Lechas of land within the Schedule-A by a registered Sale Deed No. 547/1987 dated 13.3.1987 and delivered the possession of the said land. It is the further case of the



defendant that the pre-decessor in interest of plaintiffs (Mokshed Ali) executed an agreement for sale on 17.4.1989 in respect of another 2 Kathas 10 Lechas of land in favour of the defendant and delivered possession. Accordingly, they filed a counter claim for specific performance of the agreement dated 17.4.1989 and declaration of their right, title and interest on the basis of sale deed No. 547/87 dated 13.3.1987.

- IV. The plaintiffs filed written statement in the counter claims and took a specific stand that their predecessor in interest Mokshed Ali has not executed Sale Deed No. 547/1987 dated 13.3.1987. They further denied the execution of deed of agreement by their father Mokshed Ali. During the trial the plaintiffs exhibited the sale deed No. 2174/1983 dated 16.12.1983 as Ext. 3 and to prove such exhibits they examined one witness namely Mowajjan Hussain as PW 6.
- V. It is also the case of the defendant that alongwith the said Mowajjan Hussain, the predecessor-in-interest of the plaintiffs namely Moksed Ali was a witness to the aforesaid sale deed dated 16.12.1983. The PW 6, Mowajjan Hussain identified the signature of the vendor of the sale deed and thumb impression of Mokshed Ali. According to said witness (PW 6), Mokshed Ali put his thumb impression in front of him, at the time of registration of the aforesaid sale deed.
- VI. In the aforesaid backdrop, the plaintiffs filed Petition No. 193/2022 as discussed hereinabove with a prayer to compare the



alleged thumb impression of Mokshed Ali, the predecessor in interest of the plaintiffs which is reflected in sale deed No. 547 of 1987 dated 13.3.1987 and in the unregistered deed of agreement for sale dated 17.4.1989 and the thumb impression of said Mokshed Ali in the registered sale deed being sale deed No. 2174/83 dated 16.12.1983.

- VII. The basic ground of filing such application was that as the plaintiffs specifically denied the execution of the sale deed No. 547 of 1987 by their predecessor in interest and as the predecessor in interest is no more to depose before the court therefore, it has become necessary to establish the signature by scientific evidence taking recourse to Order 26 Rule 10 A read with Section 45 of the Indian Evidence Act, 1872. The plaintiff also exhibited another sale deed being Sale Deed No. 2173/83 (Ext.5) which was executed by the predecessor in interest of plaintiffs namely Moksed Ali in favour of one Mazed Ali wherein the thumb impression of Mokshed Ali appears as the vendor. To prove such thumb impression, PW 6 was examined who was also a witness to the Ext. 5. Thus PW 6 was witness to both Ext. 3 and Ext. 5.
- VIII. The defendant side objected to such application on the ground that the disputed signature can only be compared and examined with admitted signature or thumb impression. As the thumb impressions are not admitted, therefore there is no question of allowing the comparison of thumb impression.
- IX. The learned trial court below dismissed the aforesaid petition upholding such contention and held that as there is no thumb

impression which is admitted to be thumb impression of Mokshed Ali, examination of thumb impression of Mokshed Ali by an expert is not proper and will cause delay in further proceeding of the suit.

6. Mr. N. Haque, learned counsel for the petitioner advances the following argument:

- i. Section 73 of the Indian Evidence Act, 1872 empowers a Court to compare signature, writing or seal or thumb impression with other signature/ writing or seal or thumb impression admitted or proved. Therefore, the learned Tribunal has committed serious error while rejecting such application inasmuch as when thumb impression is proved to be of one person, such thumb impression can be directed to be compared with other thumb impression proved. It is not always necessary that it should be admitted.
- ii. Relying on Section 3 of the Indian Evidence Act, 1872, Mr Haque submits that in the case in hand, by way of the evidence of PW 6 and through Ext 3 and 5 the thumb impression of Mokshed Ali has already been proved and therefore, there is no difficulty in comparing the proved thumb impression with the thumb impression purportedly put by Mokshed Ali in the sale deed No. 547/87 dated 13.3.1987 and unregistered agreement of sale dated 17.4.1989, as vendor.
- iii. According to Mr. Haque, learned counsel, Order 26 Rule 10A CPC empowers the court to have the thumb impression scientifically investigated to determine issues involved in the suit, which the court cannot determine but with the help of scientific investigation. In the

case in hand, as the thumb impression in sale deed dated 13.3.1987 and agreement for sale dated 17.4.1989 are disputed and the person who purportedly put such thumb impression is no more alive, then the best option is to verify such thumb impression through expert opinion. However, learned trial court below has failed to exercise its jurisdiction while rejecting such application only on the ground that only admitted signature can be compared.

- iv. In support of his contention Mr. Haque relies on the decision Hon'ble Apex Court in the case of ***Fakhruddin Vs the State of Madhya Pradesh*** reported in ***AIR 1967 (SC) 1326*** and judgment of this court in the case of ***Konsam Ningol Mikoi Devi and another vs Kumam Achouba Singh & other*** reported in ***2002 1 GLR 90***.

7. Per contra Mr. U. C. Rabha, learned counsel for the respondent submits:

- i. that the learned trial court has not committed any error of law or of fact. According to Mr. Rabha the PW 6 was brought to the witness box for proof of certain sale deeds and not for the purpose of or proof of thumb impression of the predecessor in interest of plaintiffs. Therefore, in view of the provision of Section 3 of the Indian Evidence Act, 1872 which relates to proof of a fact touching the subject matter before the Court, the proof of such thumb impression in relation to main issue in the suit can not be relied while considering an issue Order 26 Rule 10 A of CPC 1908 read with Section 45 of the Indian Evidence Act 1872.
- ii. This court in exercise of its power under Article 227 of Constitution of India should not interfere with such factual determination inasmuch

as while passing the impugned order, the learned trial court has not committed any jurisdictional error.

8. This Court has given anxious consideration to the argument advanced by the learned counsel for the parties.
9. Section 73 of Indian Evidence Act, 1872 empowers a court to compare disputed handwriting etc. and the purpose is to prove genuineness or otherwise of handwriting etc. To achieve such purpose a court is empowered to direct any person in the court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person. Such principle and power also available in respect of Thumb Impression.
10. The object of incorporation of such Section is to ascertain whether a signature or writing or seal or finger impression is that of the person by whom it purported to have been written or made. This section is a very important provision as it helps the courts to determine and ascertain authenticity of a handwriting or finger impression and such power is often used to ascertain the genuineness of disputed signature etc.
11. Section and 73 of the Indian Evidence Act permits the Court to compare a 'purported' signature, writing, or seal with one which is admitted or proved to the satisfaction of the court to be a genuine one.
12. A fact said to be proved, when after considering the matter before it, the court either believes it to be exist or considers its existence so probable that a prudent man ought, under particular facts of the case, to act upon the supposition that it exists.



13. Section 75 of the CPC also empowers the court to issue commission, amongst others, to hold a scientific, technical, or expert investigation.
14. Order 26 Rule 10 A of the CPC,1908 at the same time empowers a court to have a scientific investigation, when certain questions arise in a suit and in the opinion of the court the scientific investigation is necessary for the interest of justice and for determination of certain aspects which court itself cannot do. Such provision is also incorporated to aid a court to come into just determination inasmuch as language of Order 26 Rule 10 A of the CPC 1908, itself says that it is to be done in the interest of justice. It is also well settled that such evidence acquired, may or may not be relied upon by the Court depending upon facts of the each case.
15. From the aforesaid, it can safely be concluded that a court can exercise its power under Section 73 read with section 45 of the Evidence Act and compare a signature or handwriting impression etc., when same is proved or admitted. The Court has also power to seek scientific opinion from expert specifically skilled for that purpose, which includes comparisons of hand writing and figure impression. The object of having such expert opinion is for ends of justice and in a situation the court without such opinion can not determine the fact in dispute. It is also settled that the Trial Court may or may not rely on such scientific evidence and such reliance shall depend upon facts of each case.
16. Having considered the aforesaid settled proposition of law, now let this court look into the issues which are before the learned trial court.
17. The plaintiffs sought for declaration of right, title and interest and



recovery of possession based on the title stated to be acquired by virtue of sale deed No. 2195/84 dated 8.4.1984, the vendor of the said sale deed was one Amzad Ali, the brother of the predecessor in interest of the plaintiffs. On the other hand, the claim of the defendant is that the predecessor in interest of the plaintiffs not only executed a sale deed being the sale deed No. 547/1987, dated 13.3.1987 but also entered into an unregistered deed dated 17.4.1989. The plaintiffs on the other hand have specifically denied the execution of the subsequent sale deed dated 13.3.1987 and agreement dated 17.4.1989 by their predecessor in interest. However, the defendants have raised a counter claim relying on these two documents.

18. In that view of the matter, certainly, there shall be an issue whether the predecessor in interest of the plaintiffs had in fact executed the sale deed. Since the purported vendor, the predecessor in interest of the plaintiffs is no more alive, he cannot own or disown such thumb impression. Therefore, in the considered opinion of this court that it has become necessary to compare the thumb impression of the predecessor in interest of the plaintiffs as discussed herein above to come into a just conclusion.
19. However, the issue remains whether the thumb impression of the predecessor-in-interest of plaintiffs can be said to be proved one as required under Section 73 of the Evidence Act, 1872.
20. Now coming into the case in hand, it is correct to say that PW 6 was brought to the witness box for the proof of title deed by which the Vendor of the predecessor in interest of the plaintiffs, acquired title. In the process of examination, the PW-6 has deposed that along with him (PW6), the predecessor in interest of the plaintiffs (namely Mokshed Ali) was also a witness to a sale



deed No.547/1987 dated 13.3.1987 and 2174/83 dated 16.12.1983. The PW 6 deposed that he saw the predecessor in interest of plaintiffs putting his thumb in the aforesaid two sale deeds.

21. The plaintiffs in their Petition No. 193/2022 specifically relied on such deposition to show that the thumb impression has been proved.
22. However, the learned Trial Court has not gone into this aspect of the matter and dismissed the petition on the ground that the thumb impression of the predecessor in interest is not an admitted one. Thus, the learned trial court ignored the settled proposition of law that even proved signature/thumb impression can be compared under section 73 of the Evidence Act.
23. Therefore, in the aforesaid backdrop, this court is of the view that learned trial court has failed to exercise its jurisdiction and passed the impugned order by holding that only admitted signature or thumb impression can be compared under section 73 of the Evidence Act. Such finding is in total ignorance of settled proposition of law, which resulted in miscarriage of justice. Accordingly, the impugned order is set aside and quashed.
24. It is also well settled that in exercise of the supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution, the High Court does not act as an Appellate Court. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or re-weigh the evidence upon which the inferior court or Tribunal purports to have passed the order.
25. In the case in hand, the learned court has not even decided whether the disputed thumb impression can be said to be a proved one, in view of



evidence of PW6 for the purpose of determination of Petition No.139/2022 and proceeded that thumb impression is not admitted.

26. Therefore, the matter is remanded back to the trial Court to take a fresh decision on the Petition No.139/2022 and pass a reasoned order.

27. While parting with this record this court makes it clear that this court has not expressed anything on the validity and the genuineness of any of the sale deeds including the deeds purported to be executed by the predecessor in interest of the plaintiffs. Such determination only can be made after considering all the material/evidences.

28. In the aforesaid terms, this Revision petition stands disposed of.

JUDGE

Comparing Assistant