Abdul Jalil Laskar vs Jatish Roy & Ors on 26 August, 2014

Equivalent citations: AIR 2015 (NOC) 130 (GAU.)

Author: N. Chaudhury

Bench: N. Chaudhury

IN THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

Case No: RSA 87 of 2004

Md. Abdul Jalil Laskar,
S/o Late Samar Ali Laskar,
Village Boalipar, Part-II,
P.O: Boalipar Bazar,
P.S. Dispur,
Dist- Hailakandi, Assam.

..... Appellant

-Versus-

1. Sri Jatish Roy,
   S/o Late Jogendra Mohon Roy,
2. Sri Bakul Roy,
   S/o Late Jogendra Mohon Roy,
3. Sri Manik Roy,
   S/o Late Jogendra Mohon Roy,
   All are residents of
   Village Boalipar, Part-II,
   P.O: Boalipar Bazar,
   Dist: Hailakandi, Assam.

..... Respondents

-BEFORE-
HON'BLE MR. JUSTICE N. CHAUDHURY

For the Appellant : Mr. N Dhar
Mr. P Dutta
Advocates

For the Respondent : Mr. G Sarma
Advocates

Date of Hearing : 26.08.2014

RSA 87 of 2004

Date of delivery of
Judgment and Order : 26.08.2014

JUDGMENT AND ORDER (ORAL)

This second appeal at the instance of the plaintiff is directed against the concurrent findings of the learned Courts below. Plaintiff's suit for Specific Performance of Contract was dismissed by learned Trial court on 16.08.2001 in Title Suit No. 14/1997 and an appeal preferred there- against in Title Appeal No. 5/2001 before the learned District Judge, Hailakandi was also dismissed on 06.09.2003.

2. Plaintiff Abdul Jalil Laskar instituted Title Suit No. 14/1997 in the Court of learned Civil Judge (Senior Division) at Hailakandi claiming that defendants being owners and in possession of a plot of land measuring 4 kathas 4 chataks in dag No. 781 described in schedule to the plaint entered into an agreement for sale with the plaintiff on 10.01.1997 at a consideration of Rs. 36,000/-. They received a sum of Rs. 30,000/- at the time of execution of the agreement for sale and undertook to execute the final Kabala after receipt of the balance sum of Rs. 6,000/- within 30.05.1997. Plaintiff thereafter collected the money and tendered the same to the defendants but the defendants did not execute the sale deed. Under such circumstances, a notice on 22.07.1997 was served on the defendants requesting to be present in the Sub-Registry Office of Hailakandi on 07.09.1997, to receive the balance sum of Rs. 6,000/- and to execute registered sale deed. Defendants No. 1 and 3 duly received the notice and defendant No. 2 refused to accept the same. None of them appeared before the Sub-Registry on the appointed day and thus breached the condition of the agreement for sale dated 10.01.1997. Under such circumstances, plaintiff filed the suit praying for a decree for specific performance. The plaintiff prayed that defendants be directed to receive the balance sum of Rs. 6,000/- and to execute registered deed of sale RSA 87 of 2004 failing which plaintiff be permitted to deposit the money in the Court and get the sale deed executed through the Court in accordance with law.

3. On being summoned, defendants appeared and submitted a joint written statement. According to the defendants, plaintiff being their neighbour was approached by them for a sum of Rs. 4,000/- as loan and to secure the loan they handed over a signed blank stamp paper to the plaintiff. Subsequently, the money was returned and the defendants asked back for the signed blank stamp paper when the plaintiff informed them that the same had been lost. The defendant did not doubt bona fide of the plaintiff at that time. But according to the defendants, plaintiff breached their trust by forging a deed for agreement for sale to purchase the land fraudulently.

4. On the basis of the aforesaid rival contentions of the parties, the learned Trial court framed as many as 8 (eight) issues and they are quoted below:-

i) Whether there is a cause of action for the plaintiff's suit?

ii) Whether the suit is maintainable in the present form?

iii) Whether the suit of the plaintiff is bad for waiver, estoppels and acquiescence?

iv) Whether the defendant executed a bainanama on 10.01.1997 on acceptance of Rs. 30,000/- from the plaintiff to execute a sale deed within 30th August, 1997 as alleged?

v) Whether the alleged Bainanama said to have been executed by defendant No. 1 on 10.01.1997 is false, void, collusive and created document?

vi) Whether the defendant No. 1 put his signature on the unwritten stamp paper to obtain a loan of Rs. 4,000/- from the plaintiff as alleged?

vii) Whether the plaintiff is entitled to get a decree as prayed for?

viii) What other relief, if any, the plaintiff is entitled under the law and equity?

5. Plaintiff examined 4 (four) witnesses and defendant examined only 1 (one) witness to prove their pleadings. The learned Trial court accepted the oral testimony of the sole defendant and arrived at the finding that defendants did never execute any agreement for sale in favour of the plaintiff on 10.01.1997 and that they had handed over blank stamp paper to secure the loan of Rs. 4,000/- taken by them from the plaintiff. With RSA 87 of 2004 these findings of fact, learned Trial court dismissed the suit of the plaintiff by his judgment and decree dated 16.08.2001. This judgment of the learned Trial court was taken in the appeal by the plaintiff in T.A. No. 5/2001 of the Court of learned District Judge at Hailakandi.

6. Having heard the counsel for the parties, the learned first Appellate court dismissed the appeal mechanically adopting the view taken by the learned Trial court. The finding of the learned first Appellate court is confined to only one paragraph wherein it is held that after scrutinising evidence the learned first Appellate court did not find any reason to differ with the view taken by the trial court and so the view of the trial court that defendants did not execute Bainanama on 10.01.1997 and that blank stamp paper was signed by them was converted into Bainanama in collusion with scribe. Such finding was arrived at without considering the individual depositions made by the witnesses. The learned first appellate court is the last court of fact and law and this is why even in a judgment of affirmation, first appellate court is required to comply with the provision of Order XLI Rule 31 of the Code of Civil Procedure.

7. I have heard Mr. N Dhar, learned counsel for the appellant and Mr. G Sarma, learned counsel for the respondents.

8. The duties and jurisdiction of first appellate court has been considered by the Hon'ble Supreme Court in catena of cases. In the case of Sontosh Hazari v. Purushottam Tiwari reported in (2001) 3 SCC 179, the Hon'ble Supreme Court has laid down a guideline to the appellate courts in this regard.

The view taken by the Hon'ble Supreme Court in regard to the duties and jurisdiction of appellate courts cannot be expressed in a better way than collecting the exact recital of the judgment. The relevant paragraphs of the case of Santosh Hazari (Supra), therefore, are quoted below:-

> "11. Even under the old Section 100 of the Code (pre-1976 amendment), a pure finding of fact was not open to challenge before the High Court in second appeal. However the Law Commission noticed a plethora of conflicting judgments. It noted that in dealing with RSA 87 of 2004 second appeals, the courts were devising and successfully adopting several concepts such as, a mixed question of fact and law, a legal inference to be drawn from facts proved, and even the point that the case has not been properly approached by the courts below. This was creating confusion in the minds of the public as to the legitimate scope of second appeal under Section 100 and had burdened the High Courts with an unnecessarily large number of second appeals. Section 100 was, therefore, suggested to be amended so as to provide that the right of second appeal should be confined to cases where a question of law is involved and such question of law is a substantial one. (See Statement of Objects and Reasons). The Select Committee to which the Amendment Bill was referred felt that the scope of second appeals should be restricted so that litigations may not drag on for a long period. Reasons, of course, are not required to be stated for formulating any question of law under sub-section (4) of Section 100 of the Code; though such reasons are to be recorded under proviso to sub-section (5) while exercising power to hear on any other substantial question of law, other than the one formulated under sub-section (4).
>
> 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 Ditta, 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 RSA 87 of 2004 agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju :

> "When 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 RSA 87 of 2004 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.

15. A perusal of the judgment of the trial court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate court has, in

a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The t ask of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would RSA 87 of 2004 ordinarily suffice (See Girijanadini Devi v. Bijendra Narain Choudhary). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See Madhusudan Das v. Narayanibai) The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh) Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the RSA 87 of 2004 jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one."

9. In the case in hand, the first appellate court has fallen in the same error which is in gross defiance of the law laid down by the Hon'ble Supreme Court in paragraph 15 of the case of Santosh Hazari (Supra). The learned first appellate court has failed to consider the evidence led by the plaintiff and the defendants and also did not consider the fact of Section 92 of the Indian Evidence Act vis-a-vis

the stand taken by the defendants. The evidentiary value of the oral evidence of the defendant No. 1 also needs to be considered by the first appellate court being the last court of fact and law. Although, the said evidences are available on record but the second appellate court cannot appreciate the evidence to arrive at a different finding on fact. This being the position and being aware of the provision of Order XLI Rule 24 of the Code of Civil Procedure, this court feels inclined to set aside the judgment of the first appellate court and to remand the matter for decision of the first appeal afresh. The provision of Order XLI of the Code of Civil Procedure is applicable to a second appeal by application of Rule 1 of Order XLII. Order XLII Rule 1 provides that rules of Order XLI shall apply, so far as may be, to appeals from appellate decree. This being the position, a power and jurisdiction of High Court in appeals under Order XLII is circumscribed under Section 100 of the Code of Civil Procedure. Even if, there are sufficient evidence on record to arrive at a different finding on fact, second appellate court may not be entitled to record such finding by deriving power under Order XLI Rule 24 of the Code of Civil Procedure, inasmuch as, there is a specific indication in Rule 1 of Order XLII itself that provision of Order XLI entirely would not apply to a second appeal and only that part of Order XLI which is applicable to a second appeal would govern a second appeal. Once it is found that first appellate court committed error in exercise of jurisdiction vested on it under Section 96 of the Code of Civil Procedure and in terms of law laid down by the Hon'ble Supreme Court, only recourse open to second appellate RSA 87 of 2004 court would be to remand the case to first appellate court for doing the needful. Consequently, this appeal stands allowed.

10. Impugned first appellate judgment is set aside. Draw upon decree accordingly and send down the records immediately to the learned first appellate court for decision afresh.

11. Parties shall appear before the learned first appellate court on 20th October, 2014 to receive necessary orders.

JUDGE R. biswaS RSA 87 of 2004