

**Rama Kt. Barman (Died) Thr. Lrs.**

v.

**Md. Mahim Ali & Ors.**

(Civil Appeal No. 3500 of 2024)

21 August 2024

**[Bela M. Trivedi\* and Satish Chandra Sharma, JJ.]**

#### **Issue for Consideration**

Matter pertains to the correctness of the order passed by the High Court in second appeal wherein it created a new case for the party, framed the issues and decided them without following the procedure contemplated u/Ord. XLI.

#### **Headnotes<sup>†</sup>**

**Code of Civil Procedures, 1908 – Ord. XLI – Appeals from appellate decree – Procedure contemplated u/Ord. XLI – Compliance – High Court in second appeal framed additional substantial questions of law, which were not raised by any of the parties before the courts below and allowed the appeal without giving any opportunity of leading the evidence on the additional issues framed – Correctness:**

**Held:** Ord. XLI would apply to the appeals from the appellate decrees also, as contemplated in r. 1, Ord. XLII – As per Ord. XLI r. 25, the appellate court may, if necessary, frame issues and refer the same for trial to the court whose decree is appealed from, and direct such court to take additional evidence required – Furthermore, as per r. 27 Ord. XLI, the appellate court may allow evidence or document to be produced or witness examined, after recording the reasons for such admission of evidence – However, the appellate court cannot create a new case for the party, frame the issues and decide the issues without following the procedure contemplated u/Ord. XLI – On facts, the High Court in the second appeal had framed one substantial question of law and thereafter, three more substantial question of law, and in all framed four additional questions of law – None of the said substantial questions of law formulated by the High Court were either raised before the trial court or the appellate court as also none of parties were given

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any opportunity of leading the evidence on the said issues – Court cannot create any new case at the appellate stage for either of the parties, and the appellate court is supposed to decide the issues involved in the suit based on the pleadings of the parties – In view thereof, without examining the merits of the case, the impugned judgment and decree passed by the High Court in the Second Appeal set aside, and matter remanded to the High Court for deciding the same afresh and in accordance with law. [Paras 11-16]

### List of Acts

Code of Civil Procedure, 1908; Assam (Temporary Settled Areas) Tenancy Act, 1971.

### List of Keywords

Appeals from appellate decree; Procedure contemplated u/Ord. XLI CPC; Appellate court; Create new case for the party; Second appeal; Substantial question of law; Additional questions of law; Opportunity of leading the evidence; Appellate stage; Pleadings of the parties.

### Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3500 of 2024  
From the Judgment and Order dated 07.04.2015 of the High Court of Gauhati in RSA No. 74 of 2006.

### Appearances for Parties

Ms. Kavya Jhawar, Ms. Nandini Rai, Ms. Sneha Kalita, Advs. for the Appellants.

Azim H. Laskar, Bikas Kar Gupta, Ms. Anamika Pandey, Chandra Bhushan Prasad, Advs. for the Respondents.

### Judgment / Order of the Supreme Court

#### Judgment

**Bela M. Trivedi, J.**

1. The appellants – original plaintiffs have assailed the Judgment and Decree passed by the High Court of Gauhati in Regular Second Appeal No.74/2006, whereby the High Court had allowed the appeal preferred by the respondents – defendants, holding that the

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appellants – plaintiffs were not entitled to get the recovery of khas possession of the suit land by evicting the respondents – defendants therefrom.

2. The broad facts leading to the present appeal are that the appellants – plaintiffs had filed the Title Suit No.5/2002 in the Court of Civil Judge (Junior Division) No.2, Barpeta seeking declaration with regard to the right, title and interest over the scheduled land and for evicting the respondents – defendants from the suit land in question, as also seeking permanent injunction. The said suit was contested by the respondents – defendants by filing the written statement. From the pleadings of the parties, the Trial Court had framed the following issues: -
  - “1. Whether the suit is barred by limitation?
  2. Whether the plaintiff has right, title and interest over the suit land?
  3. Whether the plaintiffs allowed the defendants to cultivate one portion of the suit land in “Adhiar system” and on 19.11.2001 the defendant encroached into the rest portion of suit land and constructed a thatched chali?
  4. Whether the defendants have been under the possession of the suit land since 30 years?
  5. Whether the plaintiff is entitled to get a decree as prayed for?”
3. The Trial Court decided the issue Nos.1 and 4 against the defendants and issue Nos.2 and 3 in favour of the plaintiffs, and consequently issue No.5 was also decided in favour of the plaintiffs. Accordingly, the Trial Court vide the Judgment and Decree dated 19-5-2004 had decreed the suit of the appellants – plaintiffs.
4. Being aggrieved by the same, the respondents - defendants had preferred an appeal before the Court of Civil Judge (Senior Division) being Title Appeal No.35/2004, which came to be dismissed by the Appellate Court vide the Judgment and Order dated 21-11-2005.
5. The aggrieved respondents – defendants preferred the Second Appeal being Regular Second Appeal No.74/2006. The said Second Appeal was admitted by the High Court on 16-3-2007, by framing the following substantial question of law: -

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- “1. Whether the annual patta holder has the right to transfer the land for which he has only possessory right to another person?”
6. Thereafter, the High Court again framed two additional substantial questions of law on 05-02-2015 which are as follows:-
- “1. In view of the admissions contained in Paragraph 4, 5 and 6 of the plaint, whether the defendants can be said to have acquired the status of non-evictable tenants under the Assam (Temporary Settled Areas) Tenancy Act, 1971?
2. Whether the suit itself was not maintainable due to non-compliance of Section 51 and 54 of the Assam (Temporary Settled Areas} Tenancy Act, 1971?”
7. Again, the High Court framed one additional substantial question of law on 25.03.2015, which reads as follows: -
- “1. Whether the declaration of right, title and interest by the Courts below is at all legally justified in view of the position that the same was granted on the basis of Exhibit 1, i.e., the Annual Petta.”
8. As transpiring from the impugned Judgment, the appeal was partly heard on 25-03-2015 and again was concluded on 27-03-2015, however, on both the occasions, none had appeared on behalf of the appellants - plaintiffs, and the High Court vide the impugned Judgment dated 07-04-2015 allowed the said second appeal and set aside the Judgment and Decree passed by the two courts below. It has been held by the High Court inter alia that though the Courts below had dismissed the appeal of the respondents (defendants) on the ground that they had failed to prove adverse possession of the suit land, however, as per the legal position, the appellants – plaintiffs could succeed only on the strength of their own case, irrespective of the question whether the respondents – defendants really proved their case or not. The High Court further held that the courts below had not considered the provisions of Assam (Temporary Settled Areas) Tenancy Act, 1971 and had committed gross error in decreeing the suit of the appellants – plaintiffs holding the defendants to be the encroachers.
9. It is sought to be submitted by Ms. Kavya Jhawar, learned Advocate appearing for the appellants – plaintiffs that the High Court has grossly

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erred in not giving proper opportunity of hearing to the appellants, more particularly when the High Court had framed as many as four additional substantial questions of law, which were not raised by any of the parties before the Courts below. She further submitted that the respondents – defendants had claimed the ownership over the suit land by the adverse possession, and had not claimed tenancy rights over the same, however, the High Court has created a new case for the respondents – defendants by framing additional substantial questions of law and allowing the Second Appeal without giving any opportunity of leading the evidence on the additional issues framed by it.

10. Mr. Azim H. Laskar, the learned counsel appearing for the respondents has fairly submitted that the High Court having not given the proper opportunity to the parties to lead evidence on the additional substantial questions of law framed by it, he has no objection if the matter is remanded to the High Court for fresh consideration.
11. It is needless to say that Order XLI of the Code of Civil Procedure, 1809 would apply to the appeals from the appellate decrees also, as contemplated in Rule-1, Order XLII of the said Code.
12. As per Order XLI Rule 25, the appellate court may, if necessary, frame issues and refer the same for trial to the court whose decree is appealed from, and direct such court to take additional evidence required. Further, as per Rule-27 Order XLI, the Appellate Court may allow evidence or document to be produced or witness examined, in the circumstances stated therein, after recording the reasons for such admission of evidence. However, the Appellate Court can not create a new case for the party, frame the issues and decide the issues without following the procedure contemplated under Order XLI of CPC.
13. In the instant case, the High Court in the second appeal had framed one substantial question of law on 16-3-2007, and framed two another substantial questions of law on 5-2-2015 and one more substantial question of law in 2015. Thus, in all framed four additional questions of law.
14. Apart from the fact that none of the said substantial questions of law formulated by the High Court were either raised before the trial court or the appellate court, none of parties was given any opportunity of

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leading the evidence on the said issues. It is well-settled principle of law that the Court cannot create any new case at the appellate stage for either of the parties, and the appellate court is supposed to decide the issues involved in the suit based on the pleadings of the parties.

15. In view of the above, without examining the merits of the case, we deem it appropriate to set aside the impugned judgment and decree passed by the High Court in the Second Appeal, and remand the same to the High Court for deciding the same afresh and in accordance with law. While deciding the Second Appeal afresh, the High Court may reconsider the substantial questions of law framed by it earlier and decide the same in accordance with law.
16. Accordingly, the impugned judgment and decree passed by the High Court is set aside and the Appeal stands allowed accordingly.
17. Since the decree was passed by the trial court in 2004, the High Court is requested to decide the Second Appeal as expeditiously as possible.
18. It is directed that till the Second Appeal is decided by the High Court, both the parties shall maintain status-quo as regards to the possession of the suit land.

*Result of the case:* Appeal allowed.

<sup>†</sup>Headnotes prepared by: Nidhi Jain