

GAHC010008412014



2024:GAU-AS:12325

**IN THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)**

**RSA No. 116/2014**

- 1.** On the Death of Abdul Hamid (Ghari Mistry) His Legal Heirs Represented By-
  - 1.1** Abdul Matin,  
S/o-Late Abdul Hamid (Ghari Mistry),  
Village- Fancy Ali,  
Jorhat Town,  
P.S.-Jorhat,  
District- Jorhat, Assam.
  - 1.2** Abdul Waheb,  
S/o-Late Abdul Hamid (Ghari Mistry),  
Village- Fancy Ali,  
Jorhat Town,  
P.S.-Jorhat,  
District- Jorhat, Assam.
  - 1.3** Abdul Rauf,  
S/o-Late Abdul Hamid (Ghari Mistry),  
Village- Fancy Ali,  
Jorhat Town,  
P.S.-Jorhat,  
District- Jorhat, Assam.
  - 1.4** Abdul Rafik,

S/o-Late Abdul Hamid (Ghari Mistry),  
Village- Fancy Ali,  
Jorhat Town,  
P.S.-Jorhat,  
District- Jorhat, Assam.

**1.5** Rumena Begum,  
W/o- Rahen Ali,  
R/o-Rupnagar Jorhat,  
P.S.-Jorhat, District- Jorhat, Assam.

**1.6** Rukia Begum,  
W/o- Md.Abdul Ali,  
R/o-Rupnagar Jorhat,  
P.S.-Jorhat, District- Jorhat, Assam.

**1.7** Ruli Begum,  
W/o- Md.Azad Ahmed,  
Village-Rajabari,  
P.O.-Jorhat,  
P.S.-Jorhat, District- Jorhat, Assam.

**.....Appellants**

***Versus-***

- 1.** Sri Ram Nagina Gupta,  
S/o-Late Bundilal Gopta,  
R/o-Near Railway Crossing, Fancy Ali,  
Jorhat Town, P.S.-Jorhat, District- Jorhat, Assam.
- 2.** Sri Kamala Nath Sarma@Kanak Nath Sarma,  
S/o-Late Jagannath Sarma,  
R/o-Near Railway Crossing, Fancy Ali,  
Jorhat Town, P.S.-Jorhat, District- Jorhat, Assam.

**.....Respondents**

For Appellant(s) : Mr. J. Ahmed, Advocate.

For Respondent(s) : Mr. A. Das, Advocate.

Date of judgment : 05.12.2024

**BEFORE**  
**HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA**  
**JUDGMENT & ORDER (CAV)**

- 1.** Heard Mr. J. Ahmed, learned counsel for the appellants. Also heard Mr. A. Das, learned counsel for the respondents.
- 2.** This Regular Second Appeal has been filed under Section 100 of the Code of Civil Procedure, 1908, by the original appellant, Abdul Hamid (Ghari Mistry), challenging the Judgment and Decree dated 21.12.2013, passed in Title Appeal No. 05/2011 by the learned Civil Judge, Jorhat. By the said judgment, the appeal preferred by the appellants was dismissed, and the Judgment and Decree dated 28.02.2011, passed by the learned Munsiff No. 2, Jorhat, in Title Suit No. 15/2007, was upheld.
- 3.** It is pertinent to mention that during the pendency of this second appeal, the appellant, Abdul Hamid, passed away. By order dated 24.02.2023, the legal heirs of the appellant, namely, 1. Abdul Matin, 2. Abdul Waheb, 3. Abdul Rauf, 4. Abdul Rafik, 5. Rumena Begum, 6. Rukia Begum, and 7. Ruli Begum, were substituted in his place.

4. The facts relevant for consideration of the instant second appeal, in brief, are as follows:

(i) That the respondent No. 1 in this appeal, namely, Ram Nagina Gupta, had filed a Title Suit (*TS-58/1987 which was renumbered as T.S.-177/1994 and thereafter as T.S.- 15 /2007*) for declaration of his right, title and interest and for cancellation of sale deed and for recovery of khas possession of the suit land measuring 01 Katha, 04 Lechas of land covered by Periodic Patta No.268, Dag No. 3617 of Block No. 1, Jorhat Town, which has been fully described in the schedule A to the plaint filed by the plaintiff. The claim of the plaintiff before the Trial Court was that the defendant No. 6, namely, Biren Khound, had sold the suit land to the respondents/plaintiff on 30.11.1978 by executing a registered sale deed No. 9295 dated 30.11.1978. It was also averred in the plaint that the defendant No. 1, namely, Abdul Hamid @ Ghari Mistry (the original appellant in this case) was in wrongful possession of the suit land at the time when the sale deed was executed and hence, the plaintiff could not take over the possession of the suit land after execution of the sale deed. The defendant Nos. 1 and 2 in the said suit, namely, Abdul Hamid and Alauddin Hakim (Kabiraj) filed

a joint written statement wherein, they took a plea of adverse position by stating that they were in possession of the suit land since a long time. It was also stated in the written statement that defendant No. 2 came to occupy a part of the suit land as allowed by the defendant No. 1. On the basis of the pleadings of the parties, the Trial Court framed following issues: -

- i.** Whether the plaintiff has any cause of action for the suit?
- ii.** Whether the suit is barred by limitation?
- iii.** Whether the suit is hit by the principles of estoppel and/or waiver?
- iv.** Whether the suit land is also subject matter of Title Suit No. 66/1994?
- v.** Whether the suit is maintainable in law in view of the counter-claim taken by the plaintiff in Title Suit No. 66/1994?
- vi.** Whether the proforma defendant No. 6 was the absolute owner of the suit land and whether he had the right to sell the suit land to the plaintiff?
- vii.** Whether the defendant No. 1 acquired the title by adverse possession?

**viii.** Whether the plaintiff is entitled to reliefs as prayed for?

**ix.** To what reliefs the parties are entitled to?

**5.** It is pertinent to mention herein that the Title Suit No. 177/1994, was transferred by the learned District Judge, Jorhat to the Court of learned Munsiff No. 2, Jorhat and on its transfer, the suit was re-numbered as Title Suit No. 15/2007. Thereafter, by Judgment dated 16.07.2007, the learned Munsiff No. 2 decreed the suit. The predecessor-in-interest of the present appellants filed an appeal against the said Judgment before the Court of learned Assistant District Judge, which was registered as Title Appeal No. 18/2007. The Appellate Court remanded the suit back to the Trial Court for fresh disposal after framing two additional issues. The two additional issues which were framed were as follows: -

**1)** Whether the plaintiff has acquired right, title and interest over the suit land vide sale deed No. 9295/1978 dated 30.11.1978?

**2)** Whether the sale deed No. 4484/1978 dated 29.12.1978 and the rectification deed No. 100/80 dated 14.01.1980 executed by defendant No. 6 in favour of the defendant Nos. 3, 4 and 5 are void, illegal and liable to be cancelled?

**6.** Thereafter, the learned Munsiff No. 2, Jorhat heard the suit afresh and passed the Judgment, on 28.02.2011, again decreeing the suit.

**7.** Being aggrieved by the Judgment and Decree dated 28.02.2011, the predecessor-in-interest of the present appellants again preferred an appeal before the Court of learned Civil Judge, Jorhat which was registered as Title Appeal No. 05/2011. The said appeal was dismissed by Judgment dated 21.12.2013 affirming the Judgment and Decree passed by the Trial Court.

**8.** Being aggrieved by the judgment of the First Appellate Court, the present Regular Second Appeal has been preferred by the predecessor-in-interest of the present appellants before this Court.

**9.** It is pertinent to mention herein that in respect of the same suit land, which was the subject-matter of Title Suit No. 15/2007, the defendant Nos. 3, 4 and 5 of Title Suit No. 15/2007 have preferred a Title Suit earlier before the Court of Assistant District Judge, Jorhat. It was initially registered as Title Suit No. 75/1983 and subsequently re-numbered as Title Suit No. 66/1994 before the Court of learned Assistant District Judge, Jorhat.

**10.** In the said suit, the predecessor-in-interest of the present appellants was arrayed as defendant No. 1 and Alauddin Hakim was made defendant No. 2 and the respondent No. 1 of the present appeal, namely, Ram Nagina Gupta was made as proforma

defendant No. 5 (he should have been numbered as defendant No. 6 as M/s Gopal Krishna Tea Estate was made as defendant No. 5). The said suit was dismissed on 29.03.2005.

**11.** Being aggrieved by the order of the dismissal the plaintiffs of the said suit, namely, 1. Bhawrilal Kundalia, 2. Bhikram Chand Kundalia and 3. Rajkumar Kundalia preferred an appeal which was registered as Title Appeal No. 19/2005. The said appeal was also dismissed on 08.08.2006, whereby the Judgment dated 29.03.2005, passed in Title Suit No. 66/1994, was upheld.

**12.** It is pertinent to mention herein that the earlier suit, i.e., Title Suit No. 66/1994 was filed by three plaintiffs, namely, Bhawrilal Kundalia, Bhikram Chand Kundalia and Rajkumar Kundalia claiming right, title and interest over the suit land on the basis of a sale deed which was executed in their favour by one Biren Khound on 27.12.1978 bearing sale deed No. 4484/1978 dated 27.12.1978 in respect of 01 Katha 14 Lechas of land covered by Dag No. 3686 of periodic patta No. 268, which was more fully described in the schedule to the plaint.

**13.** The schedule of the land mentioned in the said sale deed was rectified later on by Sri Biren Khound by executing a deed of rectification on 14.01.1980, whereby the area of land mentioned in the sale deed No. 4484/1978 was rectified from 01 Katha 14 Lechas

to 01 Katha 04 Lechas and the Dag No. was rectified from 3686 to 3617.

**14.** In this Regular Second Appeal, after perusal of the memo of appeal as well as other materials on record, this Court, by order dated 23.05.2014, had formulated following substantial questions of law: -

- 1)** Whether in view of withdrawal of Title Suit No. 30/1980 while a counter-claim remained on record, the subsequent suit of the plaintiff was barred?
- 2)** Whether the suit of the plaintiff had abated in view of the abatement of suit as against the defendant No. 2?
- 3)** Whether the learned Courts below committed error in declaring title of the plaintiff over the suit land?

**15.** The substantial question of law No. 1 formulated hereinabove is reformulated again as hereunder: -

*"Whether in view of dismissal of Title Suit No. 75/1983 which was re-numbered as Title Suit No. 66/1994, wherein a counter-claim filed by the present respondent, namely, Ram Nagina Gupta remained on*

*record, the subsequent suit by the respondent/plaintiff namely, Ram Nagina Gupta was barred?"*

**16.** Mr. J. Ahmed, the learned counsel for the appellants has submitted that on perusal of the written statement filed by the proforma defendant No.6, namely, Ram Nagina Gupta (present respondent) in Title Suit No. 66/1994, it would appear that along with the written statement, he also filed a counter-claim praying for declaring that the proforma defendant, namely, Ram Nagina Gupta is entitled to khas possession over the suit land after evicting defendant No. 1, Abdul Hamid and defendant No. 2, namely, Alauddin Hakim on the basis of his right, title and interest over the said land. He has submitted that though by Judgment dated 29.03.2005, the Title Suit No. 66/1994 was dismissed, however, no order was passed with regard to the counter-claim filed by the present respondent, namely, Ram Nagina Gupta.

**17.** The learned counsel for the appellants has submitted that as the subject-matter of the suit in the Title Suit No. 66/1994 as well as Title Suit No. 15/2007 were same, the subsequent suit, i.e. Title Suit No. 15/2007 was barred by *Res Sub judice* as provided under Section 10 of the Code of Civil Procedure, 1908 and hence in the subsequent suit, i.e. in Title Suit No. 15/2007 decree could not have been passed in favour of the present respondent, namely, Ram Nagina Gupta.

**18.** On the other hand, the learned counsel for the respondents has submitted that though in the written statement filed by the present respondents in Title Suit No. 66/1994, he had prayed for delivery of khas possession in his favour by evicting defendant Nos. 1 and 2 on the basis of his right, title and interest over the suit land, however, the said written statement was never treated by the Trial Court as a counter-claim.

**19.** The learned counsel for the respondents has also submitted that under Order VIII Rule 6A, the defendant in a suit may file a counter-claim against the claim of the plaintiff, however, same may not be done against any of the defendants. He has also submitted that in case of a counter-claim filed under Order VIII Rule 6A, same shall have to be treated as a plaint for all purpose and same is governed by the rules which are applicable to plaint. He further submits that in the said title suit the present respondents as proforma defendants while filing the written statement never filed any court fee for the counter-claim and hence, he submits that the written statement filed by the present respondents in Title Suit No. 66/1994 may not be treated as a counter-claim, therefore, he submits that the bar of Section 10 of the Code of Civil Procedure may not be applicable in this case.

**20.** The learned counsel for the respondents has also submitted that on perusal of the case record of Title Suit No. 66/1994, it

becomes clear that when the written statement was filed by the present respondents, the next date of the said suit was fixed on 10.08.1984. The order sheet does not mention anything about the counter-claim and the written statement submitted by the present respondents was referred to as written statement and next date was fixed for framing of issues. He also submits that had it been treated as a counter-claim, the next date would have been fixed for filing of written statement against counter-claim by the plaintiff side. He also submits that from the entire record of Title Suit No. 66/1994, nowhere it is mentioned that the written statement filed by the present respondents in the said suit was treated as a counter-claim at any point of time for any purpose.

**21.** Regarding the second substantial question of law formulated by this Court as to whether the suit of the plaintiff had abated in view of the abatement of suit against defendant No. 2, it is submitted by learned counsel for the appellants that as the respondent/plaintiff was the neighbour of the defendant No. 2, namely, Alauddin Hakim, who had expired during the pendency of the suit, the said fact is supposed to be known to him, it was the duty of the respondent/plaintiff to substitute the legal representative of defendant No. 2, and by not doing so, the suit got abated not only against defendant No. 2, but as a whole.

**22.** In support of his submission, learned counsel for the appellants has cited following rulings:-

- i. "***Delhi Development Authority Vs. Diwan Chand Anand And Others,***" reported in "***(2022)10 SCC 428;***"
- ii. "***Sunkara Lakshminarasamma (Dead) By Legal Representatives Vs. Sagi Subba Raju And Others***" reported in "***(2019) 11SCC 787;***"
- iii. "***T.Gnanavel Vs. T.S.Kanagaraj And Another***" reported in "***(2009)14 SCC 294;***"
- iv. "***Budh Ram And Others Vs. Bansi And Others***" reported in "***(2010)11 SCC 476.***"

**23.** On the other hand, learned counsel for the respondents has submitted that both the defendant No. 1 and defendant No. 2 of the Title Suit No. 15/2007 were represented by the same Advocate and it was the statutory duty of the said counsel, under Order 22 Rule 10A of the Code of Civil Procedure, to inform the Trial Court regarding the death of defendant No. 2, however, same was not done by the engaged counsel.

**24.** It is also submitted by the learned counsel for the respondents that question of abatement on the death of defendant No. 2 has been raised for the first time in this second appeal.

**25.** The learned counsel for the respondent has also submitted that in the case in hand, the defendant No. 2, apart from filing a joint written statement with defendant No. 1 has not taken any steps to contest the suit. He has also submitted that the decree in

question is not indivisible, as it may be executed against defendant No. 1 (the predecessor-in-interest of the present appellants). This is because it was defendant No. 1 who claimed possession of the suit land and who asserted having acquired title over it by way of adverse possession. He has submitted that in this case, even if the suit is treated to have been abated against defendant No. 2, it would have no effect to the relief granted to the respondent/plaintiff by the Court against the defendant No. 1 (predecessor-in-interest of the present appellants).

**26.** In support of his submissions, the learned counsel for the petitioner has cited following rulings:-

- i. "***Shivshankara and another Vs. H.P. Vedavyasa Char***" reported in "***AIR 2023 SC 1780;***"
- ii. "***Deepak Tandon And Another Vs. Rajesh Kumar Gupata***" reported in "***(2019)5 SCC 537;***"
- iii. "***S. Amarjit Singh Kalra (Dead), Ram Vs. Smt. Pramod Gupta (Dead) By L.Rs. & Ors.***" reported in "***(2003) 3 SCC 272.***"

**27.** As regards the third question of law formulated in this appeal as to whether the Courts below committed error in declaring the title of plaintiff over the suit land, the learned counsel for the appellants has submitted that the Trial Court as well as First Appellate Court have failed to take into consideration the evidence regarding the fact that the predecessor-in-interest of the present

appellants was in possession of the suit land and as such, at the time of execution of alleged sale deed by defendant No. 6 in favour of the present respondents/plaintiff there was no delivery of possession to the respondents/plaintiffs.

**28.** It is also submitted by the learned counsel for the appellants that the fact of long standing and continuous adverse possession over the suit land by the predecessor-in-interest of the appellants was also overlooked by the Trial Court as well as by the First Appellate Court.

**29.** On the other hand, Mr. A. Das, learned counsel for the respondents has submitted that the courts below have rightly held that the Respondent No. 1 to be having the right, title and interest over the suit land. He submits that the ownership over the suit land was validly conveyed to the Respondent No. 1 by his vendor from whom he had purchased the same.

**30.** It is submitted by the learned counsel for the respondent No. 1 that the predecessor-in-interest of the present appellant, namely, Abdul Hamid @ Ghari Mistry as well as the defendant No. 2 of the suit, namely, Alauddin Hakim never filed any counter-claim in the plaint filed by the respondent No. 1 neither they had challenged the sale deed No. 9295/78 dated 30.11.1978 by which the title of the suit land was conveyed to the respondent No. 1. He has also submitted that the Courts below had not committed any error in

deciding the Title Suit No. 15/2007 and Title Appeal No. 05/2011 and therefore, he submits that this appeal is liable to be dismissed.

**31.** Mr. J. Ahmed, learned counsel for the appellants has also submitted that though in the memo of appeal the appellants had stated a substantial question of law regarding adverse possession, same was not formulated by this Court at the time of hearing under Order 41 Rule 11 of the Code of Civil Procedure, 1908. He submits that this Court has power to formulate substantial question of law even later on if it is satisfied that the case involves such a substantial question of law. He, therefore, prays for formulating the following additional substantial question of law: -

*"Whether the suit filed by the plaintiff is barred by limitation and the defendant Nos. 1 and 2 have acquired possessory right, title and interest over the suit land by way of adverse possession?"*

**32.** On the other hand, Mr. A. Das, learned counsel for the respondent has submitted that the additional question proposed by the learned counsel for the appellants involves question of fact and has already been answered by the Trial Court while deciding issue No. 7 in the Title Suit, as well as by the First Appellate Court. Both the Court gave concurrent finding on the said issue to the effect that the suit is not barred by limitation and the predecessor in

interest of the present appellants have no right, title and interest by adverse possession.

**33.** Learned counsel for the respondents has also submitted that in paragraph No. 23 of the judgment of the First Appellate Court in Title Appeal No. 05/2011, it gave a contrary view to the effect that the predecessor-in-interest of the present appellants was in permissive possession of the suit land and therefore, the question of adverse possession does not arise.

**34.** I have considered the submission made by the learned counsel for the appellants as well as learned counsel for the respondents and have perused the materials on record of the First Appellate Court as well as the Trial Court, which were requisitioned in connection with this second appeal.

**35.** Let, us examine the first substantial question of law formulated in this appeal as to whether in view of the dismissal of Title Suit No. 75/1983 which was re-numbered as Title Suit No. 66/1994, where a counter-claim which was filed by the present respondent, namely, Ram Nagina Gupta remained on record, the subsequent suit by the respondent/plaintiff namely, Ram Nagina Gupta was barred.

**36.** It is pertinent to note that in Title Suit No. 66/1994, Ram Nagina Gupta was arrayed as proforma defendant No. 5 and the

predecessor-in-interest of present appellants, namely, Abdul Hamid @ Ghari Mistry was arrayed as defendant No. 1 in the said suit.

**37.** Now, the question is as to whether in a suit a defendant may file counter-claim against co-defendant. The question also arise as to whether this question may be regarded as a substantial question of law in this case.

**38.** In this regard the observation made by the Supreme Court of India in the case of "**Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and others**" reported in "**(1999) 3 SCC 722**" is relevant and same is quoted herein below:-

*4. It has been noticed time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100 of the Code of Civil Procedure. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second*

*appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact. This Court in Sir Chunilal V. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd. [AIR 1962 SC 1314 : 1962 Supp (3) SCR 549 : 65 Bom LR 267] held that:*

*"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."*

39. For the sake of convenience Order 8 Rule 6A of the Code of Civil Procedure, 1908 is also quoted herein below: -

*"Counter-claim by defendant. [Inserted by the Code of Civil Procedure (Amendment) Act, 1976, Section 72 (w.e.f. 1.2.1977).]-*

**(1)A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not : Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.**

**(2)Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.**

**(3)The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.**

**(4)The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."**

**40.** A bare perusal of the above statutory provision would reveal that the counter-claim by the defendant may be directed against the claim of the plaintiff only. Counter-claim by the defendant solely

against the co-defendant is not maintainable under the aforesaid provision. The statutory provision in this regard is crystal clear and there is no ambiguity calling for any other interpretation of the said provision. As a counter-claim by a defendant against another defendant in the suit is not maintainable, this court is of considered opinion that the Trial Court as well as the First Appellate Court have rightly ignored the counter-claim filed by the proforma defendant No. 5 against the defendant No. 1 in the Title Suit No. 66/1994 while deciding the said suit.

**41.** As the statutory law applicable under the facts and circumstances of the present case which is provided for in the Order 8 Rule 6A is unambiguous, hence, the question No. 1 formulated by this Court does not involve any substantial question of law and the Trial Court as well as first Appellate Court has correctly applied the settled law by ignoring the counter-claim filed by the proforma defendant No. 5 against the defendant No. 1 in Title Suit No. 66/1994. Thus, the Title suit No.15/2007 is not barred by Section 10 of the Code of Civil Procedure, 1908.

**42.** Let us now, examine the second substantial question of law formulated by this Court as to whether the suit of the plaintiff (Title Suit No. 15/2007) has abated as a whole in view of the abatement of suit against defendant No. 2.

**43.** Though, the appellants have taken the plea that the defendant No. 2 had expired during the pendency of Title Suit No. 15/2007, however, on perusal of the case records, it appears that though the defendant No. 1 and defendant No. 2 filed a joint written statement in the said suit and though both were represented by a common Advocate, the fact of the death of defendant No. 2 was not brought to the notice of the Trial Court which was required under Order 22 Rule 10 A of the Code of Civil Procedure, 1908.

**44.** It also appears that the plea of death of defendant No. 2 has been raised for the first time in this second appeal. Moreover, apart from making a statement regarding the death of defendant No. 2, no date of the death or materials/evidence regarding the death of the defendant No. 2 has been brought on record by anyone. Therefore, there is no evidence on record to conclusively arrive at a finding of death of defendant No. 2 during the pendency of the Title Suit No. 15/2007.

**45.** Even if assuming that the defendant No. 2 has expired, the question which is relevant here is as to whether the title suit would abate against him only or as a whole. I have gone through the ruling cited by the learned counsel for the appellants as well as learned counsel for the respondents in this regard.

**46.** The observations made by the Supreme Court of India in *Budh Ram And Others* (supra) is relevant in this regard and same is quoted herein below:-

**"17. Therefore, the law on the issue stands crystallised to the effect that as to whether non-substitution of LRs of the respondent-defendants would abate the appeal in toto or only qua the deceased respondent-defendants, depends upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not interdependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject-matter in the same suit. Thus, whether the judgment/decree passed in the proceedings vis-à-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test."**

**47.** Thus, the test in this regard is whether each one of the parties has independent and distinct right of his own and not

interdependent upon one or other, nor the parties have conflicting interest *inter se*, the appeal may abate only qua the deceased respondent.

**48.** In the instant case, though a joint written statement was filed by the defendant Nos. 1 and 2 in this case in the Title Suit No. 15/2007, however, it was specifically pleaded therein that it is the defendant No. 1, who has been continuing his exclusive, continuous and peaceful possession of the suit land by constructing his dwelling houses thereon and as regards, defendant No. 2 is concerned, he only occupied a part of the suit land as was allowed by defendant No. 1. Hence, this Court is of opinion that as the defendant No. 1 had claimed to be in exclusive possession of the suit land, the death of defendant No. 2 would not abate the whole suit. Even if the defendant No. 2 has died, the decree may be executed against the successors in interest of the defendant No.1. This substantial question of law is accordingly decided.

**49.** Let us now, examine the third substantial question of law formulated by this Court, i.e. whether the Courts below committed error in declaring the title of the plaintiff over the suit land?

**50.** On a bare perusal of the aforesaid question, it appears that the aforesaid question does not involve any question of law, rather it calls for an enquiry regarding the fact whether the decision of the Trial Court as well as First Appellate Court were right or not. To

answer the above question, there shall have to be an examination as to whether the evidence on record has been properly appreciated by the Trial Court as well as First Appellate Court and whether there is proper application of law to the finding of facts arrived at on the basis of evidence on record. Such a detailed enquiry into facts is in the considered opinion of this Court is not permissible at stage of second appeal, unless there is a specific plea regarding perversity by the Trial Court or by the First Appellate Court in arriving at its conclusion.

**51.** We have seen that in the case of *Kondiba Dagadu Kadam* (supra), the Apex Court has observed that the second appeal cannot be decided on merely equitable grounds. The concurrent finding of facts, howsoever erroneous, cannot be disturbed by High Court in exercise of the powers under Section 100 of the Code of Civil Procedure, 1908 and the substantial questions of law has to be distinguished from substantial questions of facts.

**52.** In this case, no substantial questions of law as regards perversity in arriving at the decisions by the Trial Court or the First Appellate Court has been formulated. Neither anything has been pleaded specifically from where it could be inferreded that there is any perversity on the part of either Trial Court or the First Appellate Court in arriving at the decision. If the Court's below have considered the materials on record and have arrived at a finding, merely because of the fact that the finding may be erroneous or

that the higher Court may have a different view of the matter may not be a ground for invoking jurisdiction under Section 100 of the Code of Civil Procedure, 1908.

**53.** The additional substantial question of law proposed by the learned counsel for the appellants as to whether the suit filed by the plaintiff is barred by limitation and the defendant Nos. 1 and 2 have acquired possessory right, title and interest over the suit land by way of adverse possession also involves questions of facts and as there is a categorical finding by the First Appellate Court in this regard, wherein, it has held that the defendant No. 1 is a permissive occupier over the suit land under the original owner of that land on payment of rent. Moreover, there is evidence to this regard on record. During cross-examination, the DW-2 has stated that his father had taken the suit land on lease from the father of Birendra Khound and Kanak Khound. The Trial Court also came to the finding that the defendant No. 1(predecessor-in-interest of the present appellants) also categorically admitted that his father was the lessee under the original owner of the suit land and therefore, it is admitted fact that the defendant No. 1 by stepping into the shoes of his father also acquired the status of a lessee in respect of the suit land and hence, the appellants was regarded as a permissive occupier of the suit land and therefore his plea, regarding acquisition of title by way of adverse possession was rightly rejected by the Trial Court as well as by the First Appellate Court. Moreover,

as already stated hereinbefore, that this question involves an enquiry into the findings of facts, which is not permissible in the second appeal, unless it involves a substantial question of law. The proposed additional question by the learned counsel for the appellants has already been dealt with by the Trial Court as well as by the First Appellate Court, would again involve appreciation of facts and it does not involve any substantial questions of law. Therefore, no additional substantial question, as proposed by learned counsel for the appellants, is required to be formulated at this stage in this second appeal.

**54.** For the reasons mentioned hereinabove, this Court does not find any ground to interfere with the concurrent finding of the Trial Court as well as First Appellate Court and therefore, refrain from interfering with the judgment of the Trial Court as well as First Appellate Court.

**55.** This regular second appeal is accordingly dismissed.

**56.** However, there shall be no order as to cost.

**57.** Send back the records of the Trial Court as well as First Appellate Court, along with a copy of this judgment.

**JUDGE**

**Comparing Assistant**