



**THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)
PRINCIPAL SEAT AT GUWAHATI**

RSA No. 132/2018

1. Abdul Hanif Ahmed.
2. Hamidul Islam.
3. Hasibul Islam.
4. Habibul Islam.

All are sons of Late Saidur Rahman,
Resident of Village-Mankachar Miapara,
PO & Dist-Mankachar, Dhubri.
Presently South Salmara, Mankachar.

.....*Appellants.*

-Versus-

1. Md. Abdul Sahed,
S/o Late Taimuddin Sk.
2. Noor Abedin,
S/o Late Dabiruddin Sk.
3. Heirs of Late Mazibur Rahman-
(i) Nal Mia (son)
(ii) Sahera Bewa (daughter)

All are residents of Mankachar Tin Ali,
PO & PS-Mankachar, Dist.-Dhubri, Assam, Pin-783301.
4. Sahinur Rahman.
5. Mijanur Rahman @ Kamal Pasa.
Sl. Nos.4 and 5 are sons of Late Abdul Goni Sarkar,
Vill & PO-Kahilganj, PS & Dist.-Dhubri, Assam,
Pin-783301.

.....*Respondents.*

6. The State of Assam,
Represented by the Collector,
Dhubri/Mankachar.
7. Settlement Officer,
Dhubri/Mankachar.
8. Assistant Settlement Officer,
Mankachar Circle, Mankachar.

.....*Proforma Respondents.*

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

For the Appellants : Mr. A.D. Choudhury.Advocate.

For the Respondents : Ms. R. Choudhury,
Mr. T.R. Gogoi, GA, Assam.
.....Advocates.

Date of Hearing : 22.08.2024

Date of Judgment : ***11th November, 2024***

JUDGMENT AND ORDER

Heard Mr. A.D. Choudhury, learned counsel for the appellants. Also heard Ms. R. Choudhury, learned counsel for the respondent Nos.1—3 and Mr. T.R. Gogoi, learned Government Advocate, Assam, appearing for the proforma respondent Nos.6—8.

2. In this appeal under Section 100 of the Code of Civil Procedure, 1908, the appellants have put to challenge the correctness or otherwise of the judgment dated 09.09.2015 and decree dated 14.10.2015 passed

by the learned Civil Judge, Dhubri (First Appellate Court), in Title Appeal No.23/2011. It is to be noted here that vide impugned judgment dated 09.09.2015 and decree dated 14.10.2015, the learned First Appellate Court has upheld the judgment and decree dated 27.01.2011 passed by the learned Munsiff No.2, Dhubri, in Title Suit No.348/2005.

3. The back ground facts leading to filing of the present appeal is briefly stated as under:-

"The appellants herein, being the plaintiffs, had instituted a title suit being Title Suit No.348/2005 for declaration of right, title and interest and possession over the suit land. The case of the appellants was that a plot of land measuring about 7 bigha 1 katha covered by Myadi Patta No.914 and Touji No.183 of Dag No.196 situated at village Mankachar was originally owned by one Farid Sarkar and after his death the aforesaid land was inherited by his son Abdul Goni Sarkar i.e. the predecessor of the proforma defendants. Said Abdul Goni Sarkar, during his lifetime settled a plot of land measuring 10 katha in favour of the plaintiff No.1 Sri Abdul Saheed as tenant and delivered the possession of the same in the Bengali year 1362. Thereafter, sometime in the year 1973 Abdul Goni Sarkar died and thereafter, the plaintiff No.1 became the permanent tenant under the landlord Abdul Goni Sarkar under the Assam (Temporarily Settled Areas) Tenancy Act, 1971 and obtained raiyoti khatian in his name. Thereafter, the plaintiff No.1 transferred a plot of land measuring 12 lechas to plaintiff No.2, namely, Noor Abedin and another plot of land measuring 16 lechas to the predecessor of the plaintiff No.3 Mazibar Rahman and a plot of land measuring 3 katha 4 lechas remained under the occupation of the plaintiff No.1 and the plaintiffs had constructed their

residential houses in their respective plot of land and started residing therein, which is described as Schedule-'B' land. Thereafter, the defendant No.2 Md. Hamidul Islam had filed a petition on 08.12.2002 before the Settlement Officer (defendant No.6) and got the raiyoti khatian cancelled, which stood in the name of the plaintiffs and got the names of the defendant Nos.1—4 recorded therein in Misc. Case No.14/2004 and on the basis of aforesaid illegal mutation, they are claiming the land belonging to the plaintiffs and are trying to evict the plaintiffs.

The defendant Nos.1—4 had contested the suit by filing written statement along with a counter claim that the suit is not maintainable. Their case was that the plaintiffs were never allotted or settled with the suit land by Abdul Goni Sarkar and the plaintiffs are not the raiyots and they do not have any permanent and heritable right over the same. The case of the defendants is that Farid Sarkar, the original owner, had a land measuring 13 bigha 14 katha 17 dhur under the A/E Touji No.330, of which the eastern part got submerged in river Kalo and the western part was sandy, which was recorded in Dag No.196 under Khatian No.251 and the plaintiffs illegally occupied the south-west part of the aforementioned land and illegally claimed to be the tenants and got their names recorded as raiyots illegally and as such, they have cancelled the name of the plaintiffs by filing the Misc. Case No.14/2004 and that originally there were two tenants, namely, one Nazaruddin and Kasimuddin and they had defaulted in payment of rent and as such, the same was sold in auction in Case No.281/LR/73-74 and that they had inherited a plot of land measuring 7 bigha 1 katha under Dag No.196 of Khatian No.251

from Farid Sarkar, but the plaintiffs took possession of 4 katha 10 lechas of land when the land re-emerged from the river bed.

Upon the said pleadings of the parties the learned Trial Court has framed the following issues:-

1. Whether the plaintiffs have right, title, interest and possession over the land described in Schedule-B?
2. Whether the plaintiffs are entitled to get the decree as prayed for?
3. Whether the counter claim is maintainable?
4. Whether the counter claim is barred by limitation?
5. Whether the counter claim is barred by estoppel and acquiescence?
6. Whether the plaintiffs/opposite parties in the counter claim are permissive possessors over Schedule-B land and are liable to be evicted?
7. Whether the defendants/counter claimants are entitled to get khas possession of Schedule-B land?
8. To what other reliefs, the parties are entitled?
9. Whether the suit is maintainable?
10. Whether the suit is barred by limitation?

Thereafter, hearing both the parties and recording evidence, the learned Trial Court vide impugned judgment and decree dated 27.01.2011, dismissed the suit and the counter claim both. Thereafter, the defendants did not file any cross-appeal or cross-objection against the dismissal of their counter claim. But, the plaintiffs, being dissatisfied with the impugned judgment and

decree, preferred an appeal before the learned First Appellate Court. The learned First Appellate, thereafter, formulated the points for determination as under:-

(i) Whether the learned Trial Court had rightly decided the Issue Nos.1, 6 and 7 wherein it held that the plaintiffs have failed to prove their right, title and interest over the suit land and also held that the defendants are not entitled to recover khas possession of the suit land?

Thereafter, hearing both the parties and considering the evidence on the record, the learned First Appellate Court had allowed the appeal and thereby set aside the impugned judgment and decree dated 27.01.2011, passed by the learned Munsiff No.2, Dhubri and decreed the suit in favour of the plaintiffs by holding that the plaintiffs have the right, title, interest and possession over the Schedule-B land."

4. Being highly aggrieved, the appellants preferred this second appeal under Section 100 CPC, suggesting following substantial questions of law:-

(i) Whether the Exhibit-1, alleged pattanama of the year 1956-57, adduced by the plaintiffs/respondents, only it being because of 30 years old document, the presumption drawn by the learned lower appellate court as regards its admissibility against the finding of the learned Munsiff is sustainable by law?

(ii) Whether the Exhibit-2, rent receipt, admittedly having not contained the signature of alleged landlord, the learned lower appellate court has acted lawfully in accepting the same?

(iii) Whether the tenancy of the plaintiffs/respondents could lawfully be established when as per plaintiffs' own evidence on the same land one Nazimuddin and Kashimuddin were recorded tenants of the suit land?

And then, this Court was pleased to admit the appeal on the following substantial question of law:-

- (1) Whether reversal of the Issue Nos.1, 6 and 7 by the First Appellate Court with regard to the findings of the learned Trial Court are proper?
- (2) Whether the findings of the First Appellate Court that Exhibit-2, which is rent payment receipt, draws the presumption under Section 90 of the Indian Evidence Act is proper on the face of the Exhibit-2 whereon no signature of Abdul Goni Sarkar, the landlord appears?
- (3) Whether the Khatians relied by the plaintiffs/respondents can be taken into consideration by the First Appellate Court after its cancellation by the Revenue Authority and the same having not been restored back and does the said Khatians have its evidentiary value after the said cancellation?

5. Mr. Choudhury, learned counsel for the appellants submits that both the learned Courts below erred in believing Exhibit-2 and the same could not be held to be a valid document by the First Appellate Court as the same bears no signature of the landlord, and the Exhibit-1, the pattanama, could not to have been relied upon by the First Appellate Court merely because it was a document of 30 years old without there being any satisfaction in regards to the Section 90 of the Indian Evidence Act. Mr. Choudhury further submits that the learned First Appellate Court

has also relied upon the raiyoti khatians, which are exhibited as Exhibits-4, 5 and 6, as the same were already cancelled by the Revenue Authority in Misc. Case No.14/2004 and that the learned First Appellate Court has decided the Issue Nos.1, 6 and 7 in favour of the plaintiffs only on the basis of Exhibits-1, 2, 4, 5 and 6 and as such, the substantial questions of law that has been framed by this Court has to be answered in negative and the impugned judgment and decree so passed by the First Appellate Court is liable to be set aside.

6. Per contra, Ms. Choudhury, learned counsel for the respondents submits that the impugned judgment and decree, so passed by the First Appellate Court, suffers from no infirmity or illegality and the same requires no interference of this Court and no substantial question of law involves herein and therefore, it is contended to dismiss the appeal. Ms. Choudhury further submits that the learned Trial Court had dismissed the counter claim filed by the appellants and admittedly no appeal has been preferred against the said dismissal and that the possession of the suit land was all along with the respondents herein and they have exhibited the documents as Exhibits-1, 2, 4, 5 and 6 and the Exhibits-1 and 2 are 30 years old documents and as such, presumption arises in favour of the same and the First Appellate Court is not in the wrong footing and therefore, it is contended to dismiss the second appeal. Ms. Choudhury has also referred to a decision of this Court in **Bipin Chandra Kalita v. Sarama Kalita & Ors.**, reported in 2007 (2) GLT 399.

7. Having heard the submission of learned counsel for both the parties, I have carefully gone through the memo of appeal and the grounds mentioned therein and the impugned judgment and decree passed by the First Appellate Court dated 09.09.2015 and 14.10.2015

and also the judgment and decree dated 27.01.2011, passed by the learned Munsiff No.2, in Title Suit No.348/2005.

8. It appears that the Issue Nos.1, 6 and 7, so framed by the learned Munsiff No.2, Dhubri, are vital issues and the learned Trial Court had decided those issues against the plaintiffs. While dealing with the said issues, the learned First Appellate Court has held that the claim of the plaintiffs based on the pattanama (Exhibit-1) executed by owner - Abdul Goni Sarkar in favour of the plaintiff No.1, and also based on the raiyoti khatians, issued in their names i.e. Exhibits-4, 5 and 6. The learned First Appellate Court had held that the learned Trial Court had ignored the pattanama (Exhibit-1) by which the plaintiff No.1 allegedly came into possession of the suit land as a raiyat under Abdul Goni Sarkar in the year 1956-57, and though the learned Trial Court had observed in the impugned judgment that the plaintiffs' witnesses could not state as to when the aforesaid Exhibit-1 was executed and as such, did not consider the said pattanama and that the plaintiffs had not averred that they had paid rent to the landlord, the plea of tenancy of the plaintiffs are not believed by the Trial Court. But having discussed the evidence of the plaintiff No.1, Abdul Saheed (PW-1) and also considering the evidence of PW-2 Aftar Hussain and PW-3 Bosoruddin Sk. and further considering Exhibit-1 to Exhibit-6, the learned First Appellate Court arrived at a finding that the evidence and the documents so exhibited, sufficiently proved by the plaintiffs and above documents clearly proved that the plaintiffs came into possession of the suit land as tenants under the original landlord and have continued in possession of the same. The learned First Appellate Court had placed much reliance upon Exhibit-1, which is a document of 30 years old and hence, legal presumption under Section 90 of the Evidence Act can be drawn and the said document was

produced from proper custody. Further, discussing Exhibits-2 and 3, the rent payment receipt, the learned First Appellate Court held that the said documents shows that rent of the suit land was paid to Abdul Gani Sarkar and that Exhibit-2 pertains to 1956-57, and Exhibit-2 was written by Abdul Gani Sarkar, which is a document of 30 years old and produced from proper custody and as such, legal presumption is available that the same was executed by Abdul Gani Sarkar after receipt of rent. It is also held that though Exhibit-2 does not contain the signature of Abdul Gani Sarkar, yet, execution of the same by him is proved by PW-1 and mere absence of signature does not make the same inadmissible. It is also held that they are not the permissive occupier as contended by the defendants.

9. The learned First Appellate Court further held that the plaintiffs have sufficiently proved that they are the permanent tenants in respect of the suit land and they are in possession over the suit land since long back and they have occupied the suit land as raiyots under the original landlord.

10. Further, the learned First Appellate Court held that though the defendants got the raiyoti khatians, Exhibits-4 to 6 cancelled in Misc. Case No.14/2004, yet, the defendant Nos.1—4 have failed to prove their right, title and interest over the suit land and as such, the mutation of their names in respect of the suit land by cancelling the names of the plaintiffs as raiyots is illegal and liable to be declared as such and that the plaintiffs are the permanent tenants in respect of the suit land and that Farid Sarkar or for that matter his son Abdul Goni Sarkar are landlords/jotedar and as such, even if it is held that the defendants have derived any right, title and interest over the suit land, through Farid Sarkar or Abdul Goni Sarkar, then also they would step into the shoes of

Farid Sarkar or Abdul Goni Sarkar and would assume the character of landlord/jotedar, but the right, title and interest of the plaintiffs over the suit land as permanent tenants/raiyots cannot be extinguished and hence, cancellation of the names of the plaintiffs as raiyots in respect of the suit land in Misc. Case No.14/2004 is illegal and thereafter, the learned First Appellate Court has decided the Issue Nos.1, 6 and 7 in favour of the appellants and set aside the finding recorded by the learned Trial Court.

11. Thus, having considered the submission of Mr. Choudhury, learned counsel for the appellants and also the submission of Ms. Choudhury, learned counsel for the respondent Nos.1—3 and I find substance in her submission. It appears that the finding so recorded by the learned First Appellate Court is based on Exhibit-1, the pattanama allegedly issued in favour of the respondents and the rent receipts Exhibit-2 and 3 issued to them by the landlord Abdul Gani Sarkar being permanent tenants and also on the raiyoti khatians, Exhibits-4, 5 and 6. It is a fact that the raiyoti khatians, Exhibits-4, 5 and 6 were cancelled in Misc. Case No.14/2004, filed by the appellants herein. But, the same cannot extinguish their right being accrued on the basis of Exhibits-1 and 2. Even if we discard the Exhibit-2, the rent receipt, as the same bears no signature of the landlord, yet, Exhibit-1, the pattanama has not been disputed and the same is 30 years old and the same was produced from proper custody and it satisfy the requirement of Section 90 of the Indian Evidence Act. In the case of **Bipin Chandra Kalita (supra)**, referred by Ms. Choudhury, it has been held that the presumption comprehended in Section 90 of the Act is relatable to the writings, execution and the attestation of the document, the contents thereof, being subject to proof in accordance with law. Unerringly, the approach of a Court in the matter

of presumption under Section 90 of the Act has to be essentially to effectuate the purpose thereof and not to render it nugatory. Though a Court is endowed with a discretion to draw a presumption as enumerated in the section, the exercise thereof, has to be informed with objectivity to further the legislative intendment. Unless, the attending facts and circumstances on the face of the document renders its existence, execution and attestation impossible, a rebuttable presumption is raised in favour of the genuineness and authenticity thereof, casting a burden on the other side to establish the contrary.

12. Notably, in the case in hand, no effort was made by the appellants to rebut the aforesaid presumption. That being so, no fault can be found with the judgment and decree of the First Appellate Court in pressing Section 90 of the Indian Evidence Act into service.

13. In **Bholaram v. Amirchand** reported in (1981) 2 SCC 414, a three Judges Bench of Hon'ble Supreme Court reiterated the statement of law. The High Court, however, seems to have justified its interference in second appeal mainly on the ground that the judgments of the courts below were perverse and were given in utter disregard of the important materials on the record particularly misconstruction of the rent note. Even if we accept the main reason given by the High Court the utmost that could be said was that the findings of fact by the courts below were wrong or grossly inexcusable but that by itself would not entitle the High Court to interfere in the absence of a clear error of law.

14. Again in **Kshitish Chandra Purkait v. Santosh Kumar Purkait**, reported in (1997) 5 SCC 438, a three judge Bench of this court held: (a) that the High Court should be satisfied that the case involved a substantial question of law and not mere question of law; (b) reasons for permitting the plea to be raised should also be recorded; (c)

it has the duty to formulate the substantial questions of law and to put the opposite party on notice and give fair and proper opportunity to meet the point. The court also held that it is the duty cast upon the High Court to formulate substantial question of law involved in the case even at the initial stage.

15. Again, in the case of **Madhavan Nair v. Bhaskar Pillai** reported in (2005) 10 SCC 553, Hon'ble Supreme Court has observed that the High Court was not justified in interfering with the concurrent findings of fact. Hon'ble Supreme Court has observed that it is well settled that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same.

16. Keeping the aforementioned principles in mind and applying the same to the given facts and circumstances on the record, as discussed herein above, this Court finds that no substantial question of law involves in the present appeal and therefore, this Court is inclined to dismiss the appeal.

17. Send down the record of the learned Courts below with a copy of this judgment and order.

**Sd/- Robin Phukan
JUDGE**

Comparing Assistant