GAHC010006722009

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

**Case No. : RSA/183/2009**

NAGINA RAI and 2 ORS,

2: HIRALAL RAI

BOTH ARE S/O LATE RAMDAYAL RAI

3: NANDESWAR RAI

S/O SRI NAGINA RAI
ALL ARE R/O DUADHPATTY
GABHARUPATHAR
P.O.
P.S. and DIST. DIBRUGARH

VERSUS

NAGESWAR PRASAD YADAV,
S/O SRI LALMUNI YADAV, R/O GRAHAM BAZAR, P.O. , P.S. and DIST. DIBRUGARH.

**Advocate for the Petitioner** : MR.B SHARMA

**Advocate for the Respondent** :

**BEFORE**
**HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

**JUDGMENT**

**Date : 19-04-2024**

*(CAV)*

Heard Mr. G.N. Sahewalla, learned senior counsel, assisted by Ms. S. Todi, learned counsel for the appellants. Also heard Mr. P.J. Saikia, learned senior counsel, assisted by Mr. K.D. Saikia, learned counsel for the respondent.

2. By filing this appeal under section 100 CPC, the appellants-defendants have assailed the first appellant judgment and decree dated 05.09.2009, passed by the learned Civil Judge, Dibrugarh in Title Appeal No. 19/2008, thereby dismissing the appeal and affirming the judgment and decree passed dated 15.09.2008, passed by the learned Munsiff No. 2, Dibrugarh in Title Suit No. 23/2006 (previously registered as Title Suit No. 80/1999), by which the suit was decreed.

3. The appellants are the defendant nos. 1 to 3 in the suit filed by the respondent- plaintiff.

4. The appeal was admitted on the following substantial questions of law by order dated 23.12.2009:-

1. *Whether the learned Courts below are justified in not considering the report of Lat Mandal vide Ext.8 alongwith the lease deeds Exts.1 and 2 relating to the size of land in possession of the plaintiff is different to the land leased out to him by Dibrugarh Municipal Board, more so when the Dibrugarh Municipal Board was not made party in the suit and thus the suit is bad for non-joinder of necessary party?*
2. *Whether presumed permission for construction of boundary wall under section 31 of Town and Country Planning Act, 1959 due to default of Board either to issue or reject entitled to make any construction in violation of the provisions of building bye laws and whether Courts below erred in not looking into it merely on the ground of presumed permission?*

*Case of the respondent in plaint:*

5. The case of the respondent- plaintiff in the suit is to the effect that he was a lessee in respect of a plot of land morefully described in the Schedule-A of the plaint, which is owned by the Dibrugarh Municipal Board. It is claimed that the respondent- plaintiff was in possession of the said land since 1985 and with due permission, he had raised a *pucca* building on the western portion of the said land. It is projected that on measurement, it was found that the appellants had encroached 2 (two) feet of the Schedule-A land on the south-eastern boundary and then after taking permission from the Dibrugarh Development Authority, in April, 1999 the respondent had raised a pucca wall on the southern side of the suit land, by leaving 7 (seven) feet of his land on the south-eastern side in possession of the appellants without making any quarrel with him.

6. It was projected that on 01.07.1999, the appellants, who were in possession of some land outside the southern boundary of the Schedule-A land of the respondent raised a *kutcha* house with tin roof in such a manner that the *kutcha* wall and tin roof has projected and touched the *pucca* boundary wall of the respondent by 2 (two) feet inside his land and thereby rain water is inundating his land. It is pleaded that the respondent had not left the 5 (five) feet side margin as per the municipal law. It is also projected that as the appellants had not removed his *kutcha* construction and tin roof by 5 (five) feet from the boundary wall despite request and demand, the suit was filed. The prayers in the suit is to the effect that decree (i) of mandatory injunction be passed for removal of all the construction raised or extended by the appellants in the land described in Schedule-B; (ii) for permanent injunction restraining the

appellants from raising any construction on the land described in Schedule-B and keeping the same vacant all the time; (iii) for cost of the suit; and (iv) for any other relief to which the respondent may be found entitled to.

*Written statement- cum- counter claim of the appellants:*

7. The appellants- defendants had contested the suit by filing their joint written statement. Apart from taking usual plea, it was denied that they had encroached 7 (seven) feet on the south-eastern boundary of the respondent's land. It was also denied that in the month of April, 1999 the respondent had raised a *pucca* boundary wall on the southern side of the suit land leaving 7 (seven) feet land on the south- eastern side in their possession without any quarrel.

8. The appellants had pleaded that since 1960, they had started to reside in a plot of land measuring about 0B-1K-11L, described in Schedule-I of the written statement. The length and breadth of the four sides was stated and paid annual lease rent of Rs.70/- under Sital Chand Sahu (since deceased) by constructing residential house thereon. The said Sital Chand Sahu died on or about 1982 leaving behind his five sons whose names are stated in the written statement, who became the owners of the Schedule-I land and that their names were mutated in the revenue records and they started to pay rent to the said land-owners. Later on, four of the 5 (five) co-owners sold the said land to the appellants vide registered sale deed no. 632 dated 28.02.1984. Thereafter, the names of the appellants were mutated in respect of the said land. It was also stated that when the municipal land was taken by the respondent on lease, it was vacant without any *pucca* boundary wall in or around the said land and there was no dispute with regard to boundary of the land of the parties. It was stated that sometime in the first week of February, 1999 the respondent had

started constructing a *pucca* Assam type house on the leased land and he also constructed a *pucca* boundary wall on the northern side of the land of the appellants and had also encroached their land measuring 21 (twenty one) feet in breadth and 60 (sixty) feet in length. It was claimed that since the initial starting of construction, the appellants had started raising objection over the encroachment and illegal construction, but the construction was carried out which had caused the appellants to sustain irreparable loss and injury. It is projected that the appellants had tried to amicably settle their matter. Thereafter on 12.04.1999, the appellants had filed a petition before the Circle Officer, East Revenue Circle for demarcation of the land of both the parties so that the respondent would be compelled to remove the encroached portion and boundary wall. After issuance of notice by the Circle Officer, East Revenue Circle, the Lat Mandal had demarcated the land and found that the respondent had encroached land of the appellants measuring 2'6" (two feet six inches) breadth and 60 (sixty) feet in length from northern side of their land and constructed *pucca* boundary wall over Schedule-I land. Accordingly, it was denied that the respondent had any right, title or interest over the land of the appellants and as the respondent is a lessee of the Dibrugarh Municipal Board, he had no right to encroach over the *patta* land of the appellants. It was also stated that the appellants had every right to claim and recover their land as they have right, title and interest over the land encroached by the respondent by removing the boundary wall.

9. Accordingly, the appellants had prayed for (I) dismissal of the suit with cost; (II) delivery of *khas* possession of the land described in Schedule-II to the appellants by removing the *pucca* wall and property of the respondent; (III) perpetual injunction restraining the respondent, his men,

family members, etc. from interfering with the right of the appellants over land described in Schedule-I; and (IV) for any other relief to which the appellants may be found entitled to.

*Written statement of the respondent against counter-claim:*

10. By filing written statement against the counter-claim, the respondent had denied that he had encroached any part of the land of the appellants. It was stated that the respondent had raised their *pucca* boundary wall after leaving 1 (one) feet land towards the west and south and 3 (three) feet towards east and south of Municipal land and without any hindrance from any quarter including the appellants.

11. It was pleaded that the respondent had no right, title, and interest over the land of the appellants and had no right to encroach the patta land of the respondents by constructing a *pucca* boundary wall. It was further pleaded that the appellants have every right to claim the aforesaid land as they have the right, title and interest over the same and that the appellants were entitled to recover the said land from the possession of the respondent by removing the boundary wall under reference.

12. Reference was made to the admission made by the appellants in paragraphs 22 to 24 and 31 of the written statement-cum- counter claim. Accordingly, it was prayed that the counter-claim of the appellants be rejected.

*Issues:*

13. The learned Trial Court had framed the following issues for trial:-

1. *Whether there is cause of action?*
2. *Whether the suit is bad for non-joinder of necessary parties?*
3. *Whether the defendant constructed his house against the rule of Dibrugarh Development Authority i.e., not leaving 5 ft land from the boundary wall?*

4. *Whether the counter claim of the defendants is maintainable?*
5. *Whether the plaintiff is entitled to decree as prayed for?*
6. *Whether any other relief or reliefs the parties are entitled?*

*List of witnesses and exhibits:*

14. The respondent's side had examined 4 (four) plaintiff's witnesses, namely, (i) Nageswar Prasad Yadav, (ii) Md. Samiullah Ansari, (iii) Khalid Shafiul Islam, and (iv) Kulajananda Barkakoty, and had exhibited the following documents, viz., certified copy of lease deed (Ext.1), renewed deed of lease (Ext.2), permission letter from Dibrugarh Municipality (Ext.3), Sketch map of respondent- plaintiff's *pucca* wall (Ext.4), receipt of DDA in respect of raising the boundary wall (Ext.5), sketch map of boundary wall (Ext.6), demarcation report dated 05.06.2001 (Ext.7), and demarcation report dated 13.08.2003 (Ext.8).

15. The appellant's side had examined 2 (two) defendant's witnesses, namely, (i) Hiralal Rai, and (ii) Santosh Prasad Dushad, and had exhibited two documents, viz., certified copy of sale deed (Ext.A), and certified copy of *jamabandi* (Ext.B).

*Decision of the Trial Court:*

16. The learned Trial Court, by its judgment dated 15.09.2008, decreed the suit on contest by granting mandatory injunction for removal of all the construction raised or extended by the appellants on the land described in Schedule-B of the plaint and moreover, perpetual injunction was also granted restraining the appellants from raising any construction on the land described in Schedule-B of the plaint.

17. In respect of issue no. 3, the learned trial Court had discussed the evidence of the PW nos. 1 to 4 and DW nos. 1 and 2. The said learned Court by

referring to the provisions of section 13 of the Assam Town and Country Planning Act, 1959 regarding deemed grant of permission on failure of the authorities to reject the application for construction within one month of applying. By referring to Ext.5, which was a receipt dated 25.03.1999 issued by the Dibrugarh Municipal Board in respect of receipt of application by the respondent for raising *pucca* boundary wall and Ext.6, which was the sketch map of the boundary wall, it was inferred that the respondent had raised boundary wall on deemed obtaining of the necessary permission. The learned Trial Court had referred to the cross-examination of PW-2 where he had stated that house which is along with a boundary wall has a tin roof and that since his childhood he had seen the appellants residing on their land and that the PW-2 had denied the suggestion that the boundary wall was built below the roof of the appellants. Reference was also made to the cross-examination of PW-3, who had stated that the boundary wall was built below the roof of the appellants and that the appellants were residing before the respondent had taken over possession of their land. Accordingly, it was held that from the evidence on record it was found that the appellants could not rebut the evidence of the respondent that they had extended their *kutcha* house and thereby violated the rule of Dibrugarh Development authority of not leaving 5 (five) feet land from the boundary of the wall. Accordingly, it was held that the appellants had raised their *kutcha* house in such a way that its roof touched and projected over the southern boundary wall raised upon the suit land, thereby causing the rain water to fall and inundate the property of the respondent damaging the wall and making the land unsuitable for use. Thus, the issue was decided in the positive and in favour of the respondent.

18. In respect of issue no.2, the learned Trial Court had referred to

the judgment of this Court in *Ved Mitra Verma v. Dharma Deo Verma, 2007 (3) GLT 191*, and it was held that as the respondent- plaintiff was the lessee of Dibrugarh Municipal Board and is in possession of leased land in the said capacity, it was held that the suit was not bad for non-joinder of necessary party. Accordingly, the issue no. 2 was answered in the positive and in favour of the respondent.

19. In respect of issue no.4, regarding maintainability of the counter-claim, the learned Trial Court had referred to the case of the appellant-defendants whereby it was claimed that the respondent- plaintiff had encroached their land and hence, sought for the recovery of khas possession of the encroached land along with grant of perpetual injunction. In this context, the learned Trial Court had referred to the contents of Ext.7 and Ext.8, which were reports of the *Lat Mandal* dated 05.06.2001 and 13.08.2003, which did not disclose about any encroachment of appellant's/defendant's land by the respondent- plaintiff. Moreover, it was also held that in his cross-examination, the DW-1 had stated that on 12.04.1999, on an application made by his nephew, a *Mandal* report was prepared but the same was not filed in Court. The learned Trial Court had referred to the evidence of DW-2, wherein he had stated that Hira Lal (defendant no. 2) had stated that about 3 feet municipality land was in his patta. It was also found from the evidence of the DWs that appellant-defendant nos. 1 and 2 mostly stayed in Bihar and visited Dibrugarh occasionally, Moreover, by referring the evidence of PW2 and PW-3 it was observed that they had stated that the appellants- defendants had not objected when respondent- plaintiff had raised southern boundary wall. The PW-4 had also stated that no objection by anyone was received that the respondent-plaintiff had raised southern boundary wall by encroaching land and he had also

deposed that neither he had visited the site when possession was delivered to the respondent nor he was aware of the measurement of land in possession of the respondent- plaintiff. Hence, it was held that the appellants could not prove that the respondent had encroached their land and thus, the issue was decided in the negative and in favour of the respondent- plaintiff.

20. In respect of issue no.1, it was held that there was cause of action for the suit.

21. In respect of issue no.5 and 6, it was held that the appellants-defendants had not complied with the provisions of the Dibrugarh Development Authority and raised their structure without leaving 5 feet space from the boundary wall on the southern side of the land of the respondent- plaintiff, water dripped from the tin roof on the boundary wall and adjacent land of the respondent, which caused damage and rain water inundation of the land and thus, it was held that the respondent- plaintiff was entitled to decree as prayed for and accordingly, mandatory injunction was granted against the appellants-defendants for removal of all the construction over land described in Schedule-B of the plaint and for making any construction over the said land.

22. Resultantly, the suit was decreed and the counter-claim was dismissed on contest.

*Appeal by the appellant and decision by the learned First Appellate Court:-*

23. The appellant herein had preferred an appeal against the judgment and decree dated 15.09.2008, passed by the learned Court of Munsiff No.2, Dibrugarh in Title Suit No. 23/2006. The said appeal was registered and numbered as Title Appeal No. 19/2008. There is nothing on record to show that the appellant had preferred any appeal against the dismissal of their counter-

claim. Moreover, no leave was taken for filing a common appeal against decree passed in the suit and against rejection of counter-claim.

24. The learned First Appellate Court, by its impugned judgment and order dated 05.08.2009, passed in T.A. No. 19/2008, dismissed the said appeal by upholding the judgment and decree passed by the learned Trial Court.

25. It may be mentioned that the learned First Appellate Court had not formulated the point of determination of the appeal, which is the requirement of the provision of Order XLI, Rule 31(a) of the CPC. Nonetheless, the issues as framed by the learned Trial Court were re-examined.

26. In respect of issue no.1, on the perusal of the pleadings in the plaint, written statement and counter-claim, it was held that there was cause of action for the suit.

27. In respect of the plea as to whether the suit was bad for non joinder (i) Deputy Commissioner, Dibrugarh, Circle Officer, (ii) East Revenue Circle, (iii) the Director, Municipal Administration, Govt. of Assam, (iv) the Municipal Board, Dibrugarh, and (v) all *co-pattadars* of Patta No. 61 of Graham Bazar, Gabhurupathar Ward, Dibrugarh, which was issue no.2, considering the case of (i) *Ved Mitra Verma (supra)* and *Raj Kishore Sahu v. Ajit Kumar, 1999, AIHC 3083 (Orissa)*, it was held that Dibrugarh Municipal Board was not a necessary party and no relief was claimed against it and accordingly, it was held that the learned Trial Court had rightly decided issue no.2.

28. In respect of issue no.3, the learned First Appellate Court had discussed the evidence of the PW Nos. 1, 2 and 3, and it was held that the said PWs had denied the suggestion that the respondent had encroached 2 feet land of the appellant. Thus, as the appellant had made construction in a manner

which led to water falling from their tin roof on the boundary wall and inundated the land of the respondent, it was held that the learned Trial Court had rightly decided the said issue in favour of the respondent.

29. In respect of the issue nos.4 and 5, the learned First Appellate Court, after discussing the evidence on record, arrived at a same conclusion as the learned First Appellate Court and held that the appellants could not rebut the evidence of PWs. Hence, it was held that the appellants had failed to prove their counter-claim and as such, the decision of the learned Trial Court on issue no. 4 and 5 were upheld.

30. Accordingly, the appeal of the appellant was dismissed by the learned First Appellate Court.

*Submissions by the learned senior counsel for the appellants- defendants:-*

31. In support of his submissions, the learned senior counsel for the appellants has submitted that the pleaded case of the respondent- plaintiff is that he had taken a plot of land measuring 50 ft. x 40 ft. equivalent to about 2,000 square feet on lease from the Dibrugarh Municipality. The respondent claimed that he is in possession of 33 ft. land on the eastern side, 40 ft. on the western side, and 50 ft. on the northern and southern side.

32. Accordingly, it was submitted that the pleaded case of the respondent in the plaint was that the appellant had encroached the suit land described in Schedule-B of the plaint, measuring 5 ft. 30 inch in the north. However, the PW-1, in his cross-examination, had admitted that the dispute was regard to the southern boundary of his land. In this regard, it was further submitted that although the learned Trial Court had taken note of the contradictory statement made by PW-1, the suit was decreed. Hence, it was

submitted that the judgment by the learned Trial Court was perverse, which was repeated by the learned First Appellate Court.

33. It was submitted that in the impugned judgment, the learned Trial Court had referred to the following evidence of PW-2:-

> *PW-2, during his cross-examination have deposed that the wall on the south side of plaintiff's house and boundary wall are separate. He also deposed that the house which is along with the boundary wall has a tin roof. He also stated that since his days as child he has been seeing defendants residing on their land. He denied the suggestion that when plaintiff raised the boundary wall on the southern side defendants did not co-operate with him. He denied the suggestion that plaintiff have raised his house below the roof of the defendants. He denied the suggestion that plaintiff have encroached 2ft x 60ft defendant's land.*

34. Thus, it was submitted that the evidence of Md. Samiullah Ansari (PW-2) was contrary to the pleaded case of the respondent- plaintiff and that he had seen the appellants- defendants residing on their land. Thus, the respondent- plaintiff had failed to establish that the appellants- defendants had encroached their land. Moreover, it was submitted that Hiralal Rai (appellant no.2/DW-1) had denied the suggestion that the respondent did not encroach the appellants' land and accordingly, DW-1 had proved that the respondent-plaintiff had encroached their land.

35. By referring to the evidence of PW-4, it was submitted that the said witness had proved that the respondent had not obtained any permission before constructing the boundary wall.

36. It was submitted that the learned Trial Court and the learned First Appellate Court had both misread, misconstrued and/or failed to appreciate the contents of Demarcation Report (Ext.8), which reflected that the land in occupation of the respondent- plaintiff was East- 35 ft., West – 42 ft., North- 53.6 ft., South – 53.6 ft., and that the measurement of land found in possession

of the appellant- defendants was 32.6 ft., West- 40.7ft., North- 53.6 ft., South- 53.6 ft. Accordingly, it was submitted that the land taken on lease by the respondent- plaintiff was 2,000 sq.ft. out of which he was in possession of land measuring 1995.43 sq.ft. and therefore, it was submitted that the contents of Ext.8 proved that no part of the respondents' land was encroached by the appellant, which was not considered by the learned Trial Court and the learned First Appellate Court. Moreover, it was submitted that the learned First Appellate Court had decided the issue of encroachment by the appellant on the basis of pleading and evidence of PW-1, but without considering and/or discussing the contents of the demarcation report (Ext.8), for which the judgment by both the learned Courts were perverse.

37. It was submitted that in their written statement- cum- counter-claim, the appellants- defendants had specifically pleaded that their land was 1 katha- 11 lechas, i.e. North- 77.0 ft., South- 77.0 ft., East- 64.0 ft., and West- 52.0 ft. Moreover, it was also pleaded that as per the Lat Mandal's report, the respondent- plaintiff had encroached appellants' land measuring 2 ft. 6 inches in breadth and 60 feet in length from the northern side of the appellants and constructed *pucca* wall.

38. It was further submitted that the learned Trial Court and the learned First Appellate Court had failed to appreciate that the respondent-plaintiff did not prove the sketch map of the suit land and moreover, the Ext. nos. 7 and 8 were not proved by their respective authors, but were proved by Nageswar Prasad Yadav (plaintiff/PW-1), which was not endorsed and/or provided to the respondent- plaintiff.

*Submissions made by the learned senior counsel for the respondent- plaintiff:-*

39. Per contra, the learned senior counsel for the respondent- plaintiff had submitted that the pleaded case of the respondent in the plaint was that the appellants had encroached the southern boundary and therefore, it was submitted that the appellants' are incorrectly projecting that the boundary of the suit land was uncertain and disputed.

40. It was also submitted that the respondent had applied for permission to construct, which was deemed to have been granted and in this regard, reliance was placed on Ext.5, which was a receipt of applying for construction of *pucca* boundary wall and Ext.6, i.e. the sketch of boundary wall. In support of the deemed grant of construction permission, reliance has been placed on the case of *Golap Sarma v. Guwahati Metropolitan Development Authority & Ors., 1995 (2) GLT 365*.

41. Thus, it was submitted that the appellants- defendants have raised a pure disputed question of fact and no substantial question of law is required to be decided in this case.

*Reasons and decision*:-

42. At the outset, it may be stated this appeal cannot be considered to be an appeal against the dismissal of the counter-claim.

43. On a perusal of the record of the learned First Appellate Court, it is seen that the appeal was accompanied with an application for condoning the delay, which was registered as petition no. 2075/2008. Although notice was issued on the said condonation application by order dated 30.10.2003, but no order was passed thereon and the learned First Appellate Court had proceeded for appeal hearing. Thus, it *prima facie* appears that without condoning the delay, the appeal could not have been taken on board for hearing. However, this

issue has not been agitated by the respondent.

*Substantial question of law No.1:*

44. On a perusal of the trial court record (TCR for short), it is seen that vide order dated 29.08.2001, the appellant's side had prayed before the learned Trial Court for filing objection against the Survey Report received by Court from the Office of the Circle Officer. Instead of filing any objection, the learned counsel for both sides submitted before the learned Trial Court on 28.09.2001 that although in the Survey Report, it was stated that the appellants' side had encroached some portion of municipality land but it did not show the exact portion of encroached land and accordingly, on their joint prayer, the Lat Mandal of East Revenue Circle was directed to survey the encroached land and furnish the exact portion of the encroached land. The survey report was made a part of record by order dated 28.08.2003.

45. In his evidence-on-affidavit the PW-1 had only exhibited the two demarcation reports dated 05.06.2001 and 13.08.2003 (Ext.7 and Ext.8). However, the PW-1, who had exhibited the said two documents, had not proved the contents of those two reports. The appellants- defendants also did not exhibit the contents of the said Ext.7 and Ext.8.

46. None of the parties made any prayer before the learned Trial Court to examine author of demarcation report dated 05.06.2001 (Ext.7) or to examine the Circle Officer, Dibrugarh East Circle, the author of the demarcation report dated 13.08.2003 (Ext.8). It is seen that along with Ext.7 and Ext.8, a trace map of the suit land showing suit land and neighbouring land were enclosed. The said two trace maps, which were enclosed with Ext.7 and Ext.8, were not exhibited.

47. It is also seen that none of the parties raised any objection as to the admissibility of the said Ext.7 and Ext.8 in the manner as envisaged under proviso to Rule 4 of Order XVIII of the CPC. Moreover, the PW-1 was not cross-examined on the said two demarcation reports (Ext.7 and Ext.8).

48. Therefore, since the author of Ext.7 and Ext.8 were not examined and the contents of the said Ext.7 and Ext.8 were not proved by the parties, the learned Trial Court and the learned First Appellate Court cannot be said to have committed any perversity in not considering the contents of Ext.8 i.e. demarcation report dated 13.08.2003.

49. Though the learned senior counsel for the appellants had stated that the description of land was described in the lease deed (Ext.1 and 2), which could have been compared by the learned Trial Court and the learned First Appellate Court with the description of land described in the demarcation reports dated 05.06.2001 and 13.08.2003 (Ext.7 and Ext.8), which could have shown that the appellants- defendants did not encroach any part of the suit land described in Schedule-B of the plaint. However, we are unable to accept that merely because a plot of land is described in the lease deeds (Ext.1 and Ext.2), it would constitute a proof that such land was in actual and/or physical possession of the respondent- plaintiff.

50. Further, on a perusal of the TCR, it is noted that along with the plaint, a map of land of the respondent- plaintiff prepared by a Registered Designer was filed, which is in some variance with the site plan that was exhibited as Ext.6 in so far the measurement of land is concerned. The PW-1, namely, Nageswar Prasad Yadav had exhibited the sketch map of the boundary wall (Ext.6). As per the measurement given in Ext.6, the Northern boundary is 16.10 meter (converted to 52.821 feet), the Eastern boundary is 10.36 meter

(converted to 33.99 feet), the Southern boundary is 16.48 meter (converted to 54.07 feet), and the Western boundary is 12.2 meter (converted to 42.03 feet). Thus, a rough calculation shows that the respondent- plaintiff is in possession of about 188.85 square meter (converted to 2032.76 square feet). Unfortunately, there was no cross-examination of PW-1 or other PWs to discredit Ext.6. This was also not urged as a ground of first appeal.

51. From the cross-examination of PW-2 and PW-3, it is seen that the said witnesses were given suggestion that the respondent- plaintiff had constructed wall on the southern side below the roof of the existing house of the appellants, which was denied.

52. The plea of the appellants- defendants before the learned Trial Court and the learned First Appellate Court was that the suit was not maintainable for non-joinder of necessary parties. However, the appellants could not demonstrate how the Dibrugarh Municipality was a necessary party. Moreover, it is seen that the respondent- plaintiff had examined The Assistant Executive Engineer of Dibrugarh Municipality as PW-4 and through his cross-examination, the claim of the respondent- plaintiff that they were given lease of 2,000 square feet land could not be dispelled. The appellants have failed to show that if a lessor is not made a party in the suit where the lessee is seeking recovery of land from an encroacher, the suit is not maintainable on facts and in law.

53. Thus, in light of the discussions above, the appellants-defendants could not demonstrate that in this case the learned Trial Court and/or the learned First Appellate Court had committed any perversity in appreciation of the pleadings, evidence or documentary evidence.

54. The scope of examination of facts in second appeal under section 100 CPC is very limited. The scope of determination in second appeal must be limited to examine as to whether any substantial question of law is made out. In light of such principle, the Court is of the considered opinion that factual matrix and/or evidence of the parties cannot be examined in course of second appeal, merely on the premise that another view can be taken of the pleadings and evidence on record.

55. In this regard, we may refer to the case of *Hero Vinoth (Minor) v. Seshammal, (2006) 5 SCC 545: 2006 STPL 8855 SC*. The relevant paragraphs 16 to 20 (as extracted from STPL) is quoted below:-

> ***16***. *It is now well settled that an inference of fact from a document is a question of fact. But the legal effect of the terms or a term of a document is a question of law. Construction of a document involving the application of a principle of law, is a question of law. Therefore, when there is a misconstruction of a document or wrong application of a principle of law while interpreting a document, it is open to interference under Section 100 CPC. If a document creating an easement by grant is construed as an 'easement of necessity' thereby materially affecting the decision in the case, certainly it gives rise to a substantial question of law.*
>
> ***17***. *After the amendment a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the High Court is obliged to satisfy itself regarding the existence of such a question. If satisfied, the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. However, the respondent at the time of hearing of the appeal has a right to argue that the case in the court did not involve any substantial question of law. The proviso to the section acknowledges the powers of the High Court to hear the appeal on a substantial point of law, though not formulated by it with the object of ensuring that no injustice is done to the litigant where such a question was not formulated at the time of admission either by mistake or by inadvertence.*
>
> ***18***. *It has been noted 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 CPC. 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 in several cases, 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 or to enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts will not be disturbed by the High Court in exercise of the powers under this section. Further, a 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) 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."*

***19**. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence.*

***20**. The question of law raised will not be considered as a substantial question*

*of law, if it stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court. Where the facts required for a point of law have not been pleaded, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. There mere appreciation of facts, the documentary evidence or the meaning of entries and the contents of the documents cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the fact appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in Reserve Bank of India v. Ramkrishna Govind Morey [(1976) 1 SCC 803] held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference. [See: Kondiba Dogadu Kadam v. Savitribai Sopan Gujar and Others (1999) 3 SCC 722].*

56. Before answering the substantial question of law, it is required to be mentioned that the Report No. DEC-11/92-96/20 dated 23.08.2003 was issued by the Circle Officer, Dibrugarh East Circle and not by Lat Mandal. Therefore, the words "report of Lat Mandal vide Ext.8" appearing in the substantial question of law no.1 shall be read to mean "report of Circle Officer, Dibrugarh East Circle vide Ext.8".

57. Therefore, the substantial question of law no.1 is answered by holding that the learned Trial Court and the learned First Appellate Court cannot be held to have committed any perversity in not considering the report of the Circle Officer, Dibrugarh East Circle vide Ext.8 along with the lease deeds Ext.1 and Ext.2. Moreover, there is no material on record from which the appellants-defendants have been able to demonstrate that the suit was bad for non-joinder of Dibrugarh Municipality as a necessary party. Accordingly, the substantial question of law no. 1 is answered in the negative and against the appellants-defendants.

*Substantial question of law no.2:*

58. The appellants- defendants, in their counter-claim had made the following prayers:-

> i. *Suit filed by the plaintiff being Title Suit 80 of 1999 be dismissed with cost and compensation, considering all the facts, stated herein above for ends of justice.*
>
> ii. *Delivery of khas possession of the land, more fully described in the schedule-II, herein below to the defendants by removing the pucca wall of the plaintiff and his property whatsoever therefrom.*
>
> iii. *Perpetual injunction restraining the plaintiff, his men, family members, defendants whatsoever from interfering over the right, title and interest of the defendants in respect of the landed property, more fully described in the schedule-I herein below and/or harassing them and their men in any way for ends of justice.*
>
> iv. *Any other relief or reliefs to which the defendants are found to be entitled in law and equity.*

59. Thus, it is seen that the appellants- defendants have not assailed the legality of the boundary wall constructed by the respondent- plaintiff. Therefore, the reply of PW-4 in his cross-examination that no permission was taken for the boundary wall would not entitle the appellants- defendants to any relief. Be that as it may, the provision of section 13(4) of the Town and Country Planning Act, 1959 provides for deemed grant of provision. However, there is no evidence by DW-1 and DW-2 as to why "deemed permission" would not apply in this case.

60. Therefore, in the absence of any prayer in the counter-claim to question and/or assail the construction of boundary wall by the respondent-plaintiff without permission from Dibrugarh Municipality, the substantial question of law no. 2 is answered in the negative and against the appellants- defendants by holding that having not raised the issue of legality or validity of presumed/

deemed permission for construction of boundary wall under section 13(4) of the Assam Town and Country Planning Act, 1959, the learned Trial Court and the learned First Appellate Court have rightly not ventured to decide the same. Moreover, for the same reason, the issue cannot be allowed to be raised by the appellants- defendants for the first time in second appeal filed under section 100 CPC.

61. Thus, this appeal fails and the same is dismissed with cost.

62. Let a decree be prepared.

63. Let the TCR be returned.

**JUDGE**

**Comparing Assistant**