2025 INSC 1037

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 11074/2025
(@Petition for Special Leave to Appeal (C) No.2365/2022)

NILIMA DAS GUPTA (DECEASED) THROUGH ITS LRS. Appellant(s)

VERSUS

ON THE DEATH OF ABDUR ROUF HIS LEGAL HEIRS & ORS. Respondent(s)

O R D E R

1. Leave granted.

2. This appeal arises from the Judgment and Order passed by the High Court dated 15-3-2021 in the Regular Second Appeal No.35/2013 by which the Second Appeal filed by the original defendant No.3(Respondent Nos.1 to 4 – herein) (the legal heirs of Defendant No.3) came to be allowed, thereby setting aside the Judgment and Order passed by the First Appellate Court in the First appeal No.57/2011 allowing the counter-claim of the appellant – herein (original Defendant No.1).

3. It appears from the materials on record that the original plaintiff (Respondent No.6 – herein) instituted Title Suit No.75/2017 and prayed for the following reliefs:-

> *"(a) for a declaration that plaintiff is the owner of 1st schedule land and 3rd schedule land by purchase having land holder right, maliki right over the second schedule house.*
>
> *(b) for granting permanent injunction restraining the defendant not to dispossess the above named plaintiff from his bonafide land and house stated in the schedule 1 and 2 of the plaint and not to change nature and feature of the suit land and not to create any document in respect of the suit land.*

(c) for a declaration that the so called registered sale deed no. 477, dated 19.12.1965 and 4273 dated 25.11.1978 of the S.R. Office, Bhangabazar, Karimganj (Assam) are illegal, collusive without any transaction and hand over initio void and or took over possession, ab liable to be declared as cancelled and that a copy of the judgment and decree of this suit be sent to the office of the Sub Registrar, Bhangabazar to note in the volume book and other relevant records that the said so called deeds / documents as cancelled.

(d) for cost of the suit that plaintiff is entitled to his named in respect of suit land in the settlement record.

(f) for any other relief or reliefs to which the plaintiff deem fit and entitled."

4. In the Title Suit referred to above, the appellant – herein (original Defendant No.1) filed counter-claim.

5. One another Counter-Claim was filed by the original Defendant No.3 (Respondent Nos.1 to 4 herein).

6. The Suit came to be dismissed.

7. The Counter-Claim filed by the appellant – herein also came to be dismissed, whereas the counter-claim filed by Defendant No.3 came to be allowed.

8. Being dissatisfied with the Judgment and Order passed by the Trial Court, the appellant – herein preferred First Appeal No.57/2010 (Annexure 12). The First Appeal came to be allowed and the counter-claim of the appellant – herein was decreed.

9. In the counter-claim the appellant - herein had prayed for the following reliefs:-

"(i) For declaration that counter claimant / defendant has her right, title and interest over the land described in Schedule I & II below of the Counter Claim by purchase.

(ii) For cancellation of deed no. 160 dt. 24-01- 2007 the same as ab initio void, in-operative, sham and sending of this cancellation order to Sub - Registrar, Bhanga Bazar for nothing the same in cancelled book and volume.

(iii) For declaration that if any deed or deeds in respect of dag no. 83 is found from the possessing of the plaintiff showing his right title over the land under dag no. 83 same shall be treated as in-operative, ab-initio void
cancelled and sending of this cancellation order to the concerned book and volumes of concerned Sub – Registrar.

(iv) For handing over the khas possession of the land in favour of counter claimant / defendant no. 1 by the plaintiff within the time fixed by the court failing which the counter claimant / defendant no. 1 is entitle to same through court.

(v) For perpetual injunction restraining the plaintiff from interfering in peaceful possession of the land described in schedule I & II below after getting recovery of khas possession of the same by the counter claimant / defendant no. 1 and restraining the plaintiff to alienate / transfer the land describing in schedule I & II below to same other person or persons,

(vi) Any other further relief or reliefs the learned court deem fit and proper.

(vii) For cost of counter claim and for which your counter claimant / defendant shall ever pray."

10. Being dissatisfied with the Judgment and Order passed by the First Appellate Court, the Respondent No.1 – herein preferred Second Appeal before the High Court under Section 100 of the Civil Procedure Code. It appears that vide Order dated 20-6-2013 while admitting the Second Appeal, the following substantial question of law came to be formulated:-

"Whether the DW-5 is competent to depose on behalf of the DW-1, who has filed the cross-objection and, if not, whether the Court below was justified in decreeing the counter claim filed by the defendant No.1 based on his evidence?"

11. The High Court while allowing the Second Appeal took the view that Shri Gautam Dasgupta (D.W.5 i.e. the Appellant No.4 – before us) could not have entered the witness box and deposed on behalf of his mother – (Original Defendant No.1).

12. The High Court relied upon Section 120 of the Indian Evidence Act, 1872. The High Court relied upon two decisions of this Court one in the case of "*Man Kaur v. Hartar Singh Sangha*", reported in (2010) 10 SCC 512 and another in the case of "*Vidhyadhar v. Manikrao*" reported in (1999) 3 SCC 573.

13. Relying on Section 120 of the Indian Evidence Act and the two decisions of this Court, the entire oral evidence of D.W. 5 came to be eschewed from consideration. Having taken the view that the oral evidence of D.W. 5 could not have been relied upon, the Second appeal came to be allowed and the counter-claim was ordered to be dismissed.

14. In such circumstances, referred to above, the appellants are here before this Court with the present appeal.

15. We heard Mr. Kaushik Choudhury, the learned counsel appearing for the appellants and Mr. Durga Dutt, the learned counsel appearing for the Respondent Nos.1 to 4.

16. We are not happy with the manner in which the High Court decided the Second Appeal. Although the substantial question of law was formulated at the relevant time when the Second Appeal came to be admitted, yet we do not find any reference of the said substantial question of law in the entire impugned judgment of the High Court.

17. The understanding of the High Court as regards Section 120 of the Indian Evidence Act is also not correct. Over and above the reliance on the two decisions of this Court is also misconceived.

18. We may explain the principle and scope of Section 120 of the Indian Evidence Act. However, before proceeding to explain Section

120, we must highlight Section 118 of the Indian Evidence Act. Section 118 of the Evidence Act reads thus:

> ***"118. Who may testify.-All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.***
>
> ***Explanation. -- A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."***

19. Thus, under Section 118 all persons are competent to testify, unless the court considers that by reason of tender years, extreme old age, disease, or infirmity, they are incapable of understanding the questions put to them and of giving rational answers. Competency of a person to testify as a witness is a condition precedent to the admissibility and credibility of his evidence.

20. Section 120 of the Indian Evidence Act reads thus:

> ***"120. Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.-In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness."***

21. Under Section 118 referred to above, all persons except those excepted therein are competent to give evidence. Competency is the rule and incompetency the exception.

22. Section 120 declares that the parties to the suit and their husbands or wives are competent witnesses in all civil proceedings and that in criminal proceedings against any person, the husband or wife of such person is a competent witness, whether for or against.

23. Formerly under the rule which existed at common law, parties to the suit were incompetent witnesses on the ground of interest – *Nemo in propria causa testis esse debet* (No one can be a witness in his own cause). Husbands or wives were also incompetent to give evidence either for or against one another. These disabilities were swept away by the Evidence Act, 1843, the Evidence Act, 1851 and the Evidence Act, 1853. The last Act created a privilege in respect of communication between husband and wife during marriage (See: Section 122). In U.K. Section 16 Civil Evidence Act 1968 goes a step further and does away with the privilege in civil proceedings. Strictly speaking, this section is superfluous as these persons are competent witnesses under the general provision in Section 118.

24. In England, up to about the middle of the 19th century, parties to a civil proceeding were, in accordance with the maxim of the civil law, *nemo in propria causa testis er se debt*, deemed to be incompetent to testify. The rule was founded solely on the interest which the parties to the suit were supposed to have in the event of it. The husband and wives of the parties also came within the rule as husband and wife were considered in law as one and the same person. This disability to testify was, however, gradually removed by legislation and the present rule may be stated to be that in civil proceedings the parties and their husbands and wives are competent witnesses. This rule has been adopted in Section 120 of the Indian Evidence Act, with the result that given the requisite degree of intelligence to understand the questions asked and to answer them in a rational manner, a party, or the husband or wife of such party, is a competent witness. A husband is a

competent witness for all purposes, and whatever may be the law in England, he can be examined on the question of non-access to his wife, with a view to determine the legitimacy of a child born to his wife. (See: *John Howe v. Charlotte Howe*, 30 M 466; 21 IC 645.)

25. Having explained the scope and purport of Section 120 of the Indian Evidence Act, as above, we should now look into the understanding of the High Court as regards why D.W.5, i.e., the son of the Defendant No. 1 could not be said to be a competent witness to enter the box and depose. The High Court has observed as under:

> ***"8. The Court of the Munsiff dismissed the counter claim of Nilima Das Gupta because she did not appear before the Court and offered herself for cross-examination. In her place, her son deposed on her behalf. The Trial Court opined that since she failed to offer herself for cross-examination, it could be presumed that she had set up a false case. The aforesaid view of the Munsiff was based upon a ratio laid down by the Supreme Court in the case of Vidhyadhar v Manik Rao reported in (1999) 3 SCC 573. The Trial Court did not rely upon the evidence of the son of Nilima Das Gupta who examined himself as D.W. 5. No power of Attorney was given to DW 5 to depose on behalf of Nilima Das Gupta. This time, the Trial Court relied upon the decision of the Supreme Court that was rendered in Janki Vashdeo Bhojwani v. Indusind Bank Limited reported in (2005) 2 SCC 217, which held that since there is no Power of Attorney, the DW-5 is not entitled to give evidence on behalf of his mother. The appellate Court simply held that D.W. 5 is entitled to give evidence on behalf of his mother.***
>
> ***9. I have given my anxious consideration to the submissions made by the learned counsels for the parties. Here at this stage, the Section 120 of the Indian Evidence Act maybe visited. It reads has under:***
>
> > ***"120. Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.—In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife***

> ***of such person, respectively, shall be a competent witness."***
>
> ***10. In the case of Vidhyadhar (supra), in paragraph-17, the Supreme Court has held has under:***
>
> > ***"17. the son of the landlady is not a person covered under the aforesaid provision and as such is not a competent to depose on her behalf."***
>
> ***11. This view has been followed by the Supreme court in the case of Man Kaur (Dead) by LRS reported in (2010) 10 SCC 512.***
>
> ***12. DW 5 is entitled to appear as an independent witness or attorney but because of the embargo of Section 120 of the Evidence Act, he is not entitled to step into the shoes of his mother. He cannot adduce evidence on behalf of his mother."***

26. We may only clarify that by virtue of Section 120 of the Indian Evidence Act alone the D.W.5 cannot be termed as an incompetent witness. In other words, the line of reasoning assigned by the High Court gives us an impression that since son and mother do not figure in Section 120 of the Indian Evidence Act and only husband and wife figures, the son cannot depose on behalf of his mother. That understanding is not correct. It is not in dispute that Defendant No. 1 did not enter the witness box, however, D.W.5 her son entered the box and deposed.

27. At the most, it could be said that D.W.5 could not have deposed about the facts which may be within the personal knowledge of his mother i.e., Defendant No. 1. If that be so then the evidence of D.W.5 has to be appreciated accordingly. However, the same cannot be discarded *in toto* relying on Section 120 of the Indian Evidence Act.

28. Let us for the time being proceed on the footing that the oral evidence of D.W.5 is required to be eschewed from consideration. The High Court has not taken into consideration the other parts of the reasoning assigned by the First Appellate Court. While allowing the counter-claim of the appellants – herein, at least the other parts should have been taken into consideration.

29. We have reached the conclusion that we should set aside the impugned Judgment and Order passed by the High Court and remand the matter to the High Court for fresh consideration of the Regular Second Appeal No.35/2013. This time the High Court shall formulate the substantial question of law in its Judgment and decide the same in accordance with law, more particularly keeping in mind what has been observed by us in this order.

30. With the aforesaid, the appeal stands disposed of accordingly.

31. Pending applications, if any, also stand disposed of.

……J
(J.B. PARDIWALA)

……J
(K.V. VISWANATHAN)

NEW DELHI
19TH AUGUST, 2025.