



THE HIGH COURT OF SIKKIM : GANGTOK
(Civil Appellate Jurisdiction)

Dated : 8th April, 2024

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

RFA No.03 of 2023

Appellants : Mamta Gurung and Others

versus

Respondents : Chief Secretary and Others

Appeal under Order XLI, Rules 1 and 2 of
the Code of Civil Procedure, 1908

Appearance

Mr. S. S. Hamal, Senior Advocate (Legal Aid Counsel) with Mr. Tashi Wongdi Bhutia, (Legal Aid Counsel) Advocate for the Appellant No.1.

Mr. S. S. Hamal, Senior Advocate with Mr. Tashi Wongdi Bhutia, Mr. Mahesh Subba and Mr. Pradeep Sharma, Advocates for the Appellants No.2 to 6.

Mr. S. K. Chettri, Government Advocate for the Respondents No.1 to 4.

Ms. Laxmi Chakraborty, Advocate for the Respondents No.5 to 11.

Ms. K. D. Bhutia, Advocate for the Respondent No.12.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Appellants are aggrieved by the Order of the Court of the Learned District Judge, Special Division – I, Sikkim, at Gangtok, in Title Suit No.02 of 2021 (*Mamta Gurung and Others vs. The Chief Secretary, Government of Sikkim and Others*), dated 27-03-2023, which dismissed the Plaint of the Plaintiff/Appellants herein, in terms of Order VII Rule 11(d) of the Code of Civil Procedure, 1908 (hereinafter, the “CPC”). Before this Court, the Appellants contend that the suit is not barred by limitation as erroneously opined in the impugned Order.

2. Learned Senior Counsel for the Appellants advanced the argument that where a suit is based on a fraud of the



Defendant, the period of limitation will not commence until the Plaintiff has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it, or in the case of a concealed document, until the Plaintiff first had the means of producing the concealed document or compelling its production. That, a fraud was committed by the Respondent No.12 on the Appellants, by registering and mutating a portion of the suit property surreptitiously in his name. That, the Respondents No.3 and 4 are complicit in the matter having permitted the procedure of fraudulent registration. That, despite this circumstance, the Learned Trial Court was remiss in not discussing Section 17(1)(a) of the Limitation Act, 1963, (hereinafter, the "Limitation Act"), in the impugned Order although it was raised in the pleadings. That, the commission of the fraud came to the knowledge of the Appellants No.4 and 5 only in the year 2002, on the demise of their mother in 2001, who till then had remained in charge of the properties. Thereafter, on tracing the *parcha khatiyān*, dated 18-06-1992, it came to light that the land measuring 3.65 acres purchased by their father in the year 1961 was recorded only as 2.20 acres. The cause of action is a continuing one as on their knowledge of the fraud, on 25-12-2002 the Appellant No.4 took immediate steps and submitted an application to the Respondent No.4, seeking demarcation of their land. In the absence of any response, another application was filed by him on 17-05-2006 and on the continued unresponsiveness of the Respondents No.3 and 4, it was followed by one on 03-03-2008 and on 10-07-2013. That, on 12-09-2013 spot verification as called for in terms of the Notice of Respondent No.4, dated 10-09-2013, failed to materialise. Another



application dated 19-11-2014 was then filed by the Appellant No.4 and on spot verification the area of their land was found to be reduced but the Respondents No.5 to 11 failed to produce relevant documents pertaining to the recording of an area of 1.45 acres in their names, (which is the area of land reduced from that of the Appellants) or in the name of any other person, from that of late Chandra Bir Gurung *alias* Chandra Bahadur Gurung, the father of the Appellants No.4 and 5. On 31-08-2015 the Appellant No.4 filed an application before the Respondent No.4 seeking a restraining Order against the Respondents No.5 to 11, from mutating the suit land in the name of any third party, till the finalization of the dispute, which was allowed on 24-05-2016. On 04-05-2018 the Appellant No.4 filed another application before the Respondent No.3, to which, on 19-09-2019 the Appellants were directed to approach the Civil Court. That, the suit was filed on 02-03-2021 for declaration, recovery of possession and other consequential reliefs against the Respondents No.5 to 12. That, the Appellants No.4 and 5 continuously pursued their matter before the concerned authority who failed to address their grievances and the Appellants cannot be deprived of their rights on account of the passivity of the government authorities. That, on each of the dates reflected above the cause of action was continuing, apart from which as it was a case of fraud the limitation would fall within the ambit of Section 17(1)(a) of the Limitation Act.

(i) Learned Senior Counsel for the Appellants relied on ***P. V. Guru Raj Reddy represented by GPA Laxmi Narayan Reddy and Another vs. P. Neeradha Reddy and Others***¹ to bring home the assertion that rejection of the Plaint under Order VII Rule 11 of the

¹ (2015) 8 SCC 331



CPC is a drastic power which truncates civil action at the threshold and should not be resorted to on the mere asking, *sans* proof. In light of the submissions *supra* the impugned Order thereby deserves to be set aside and the suit restored to File.

3. Learned Counsel for the Respondents No.5 to 11 contesting the above submissions canvassed that the first application was filed by the Appellant No.4 on 25-12-2002 followed by another one after almost four years in 17-05-2006, revealing his lack of interest and diligence. That, contrary to the grounds put forth by the Appellants with regard to the period of limitation, the application dated 25-12-2002 reveals that they were aware of the reduced area of the suit land in the year 2002 itself but failed to furnish reasons for not pursuing the matter. *Parcha khatiyar* issued on 18-06-1992 in the joint names of the Appellants No.4 and 5 reveals the reduced area of the land but they chose not to agitate the matter before any forum. Moreover, no allegations of fraud were made in the applications of the Appellant No.4, who only sought measurement and demarcation of plot no.808, nor was the issue raised before the Learned Trial Court. That, the argument of fraud on the edifice of Section 17(1)(a) of the Limitation Act is not tenable as Article 56 of the Limitation Act specifies that to declare forgery of an instrument the period of limitation is three years from the date of knowledge. Besides, it is unimaginable that Appellant No.4 after seeking mutation of the property in 1992, as instructed, allegedly by his mother, would not pursue the matter or remained oblivious of the developments, when both Appellants No.4 and 5 were adults at the relevant time. That, the cause of action arose in the year 1992 when the



Appellants No.4 and 5 applied for the *parcha khatiyen* but the suit was filed only on 02-03-2021, which is thus clearly barred by limitation. Hence, the impugned Order of the Learned Trial Court warrants no interference.

4. Learned Counsel for the Respondent No.12 adopted and endorsed the submissions advanced by Learned Counsel for the Respondents No.5 to 11 and put forth the contention that even assuming that Appellants No.4 and 5 had knowledge of the reduction of the land from the year 2002, they failed to take timely steps. That, as the Order of the Learned Trial Court does not suffer from any infirmity, the petition seeking intervention of this Court be dismissed.

5. Learned Government Advocate for the State-Respondents No.1 to 4 had no submissions to advance.

6. To take stock of the matter and for its convenient comprehension the facts are set out briefly. The Appellants No.1, 2 and 6 are the grandchildren of one late Chandra Bir Gurung *alias* Chandra Bahadur Gurung, through his son Lok Nath Gurung *alias* Purna Kumar Gurung, the Appellant No.5. The Appellant No.3 is the grandson of late Chandra Bir Gurung *alias* Chandra Bahadur Gurung, being the son of Appellant No.4.

7. The Appellants filed a suit for declaration, recovery of possession and other consequential reliefs, contending that the Respondents No.5 to 12 have no right, title and interest over plot nos.808/1154 and 808/1155, which are portions of plot no.808. That, plot no.808 measuring an area of 3.65 acres, located at Namcheybong Block, East Sikkim, was purchased by late Chandra Bir Gurung *alias* Chandra Bahadur Gurung from one late Tika Ram



Sharma Niroula, vide a sale deed on 16-02-1961, which was duly registered on 20-02-1961. The remaining three plots of land owned by late Tika Ram Sharma Niroula i.e., plot nos.805, 806 and 807 were sold to Respondent No.12. The Respondent No.12 being a high ranking influential government officer at that time recorded an area of 1.45 acres from plot no.808 in his name, by surreptitious means in the year 1969 and later sold the plots to one Hem Karna Bhandari and his six brothers in the year 1972. In 1972, late Chandra Bir Gurung *alias* Chandra Bahadur Gurung passed and his wife became the guardian of the family but made no land transactions in respect of plot no.808. In 1992, their mother directed them to mutate the land of Chandra Bir Gurung *alias* Chandra Bahadur Gurung, jointly in the names of Appellants No.4 and 5. Accordingly they submitted an application before the relevant authority but did not pursue the matter in deference to their mother, the family head, besides they were preoccupied in discharging their respective government duties. In 2001, the mother of the Appellants No.4 and 5 passed and in 2002 the Appellants No.4 and 5 on tracing out the "*parcha khatiyen*", came to learn of the reduction of land measuring 3.65 acres purchased by their father to 2.20 acres and recorded as such in *parcha khatiyen*, dated 18-06-1992. Consequently, on 25-12-2002, the Appellant No.4 applied to the office of the Revenue Officer and Sub-divisional Officer, Pakyong, seeking demarcation of the land which the State-Respondents failed to take up. This was followed by a series of applications viz. on 17-05-2006, 03-03-2008 and 10-07-2013. The spot verification on the application filed by the Appellant No.4 on 19-11-2014 revealed that plot no.808 measured



2.20 acres only, while an additional land measuring 1.30 acres had been illegally mutated in the name of Hem Karna Bhandari. Hence, the Appellants claim that the cause of action is continuous from 2002 as already delineated hereinabove and that the suit does not fall within the ambit of Order VII Rule 11(d) of the CPC.

8. Having considered the facts and circumstances placed before me, I deem it necessary to re-produce Order VII Rule 11 of the CPC hereinbelow which reads as follows;

"11. Rejection of plaint.—The plaint shall be rejected in the following cases:—

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued but the plaint is written upon the paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;
- (e) where it is not filed in duplicate;
- (f) where the plaintiff fails to comply with the provision of rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

9. In the context of the matter under consideration it needs no reiteration that the Limitation Act prescribes a time limit for institution of all suits, appeals and applications. Order VII Rule 11(d) of the CPC provides that where a suit appears from the averments in the Plaint to be barred by any law the Plaint shall be rejected. In ***State of Punjab and Others vs. Gurudev Singh***² it was

² (1991) 4 SCC 1



observed that the Court must examine the Complaint and determine when the right to sue first accrued to the Plaintiff and whether on the assured fact the Complaint was within time. The words 'right to sue' means the right to seek relief by means of legal proceeding. The right to sue accrues only when the cause of action arises. The suit must be instituted when the right asserted in the suit is infringed, or when there is a clear and unequivocal threat to infringe such right by the Defendant against whom the suit is instituted.

(i) The rejection of a Complaint under Order VII Rule 11 of the CPC is a radical power conferred on the Court to terminate civil action at the threshold. Consequently, it is only if the averments in the Complaint *ex facie* do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law that the Complaint can be rejected.

10. In the matter at hand, in the first instance it appears that the Learned Trial Court has invoked Article 65 of the Limitation Act to reject the Complaint on the ground of limitation as provided under Order VII Rule 11(d) of the CPC. It would be beneficial at this juncture to refer to the decision of the Supreme Court in **Saroop Singh vs. Banto and Others**³, wherein it propounded as follows;

28. The statutory provisions of the Limitation Act have undergone a change when compared to the terms of Articles 142 and 144 of the Schedule appended to the Limitation Act, 1908, in terms whereof it was imperative upon the plaintiff not only to prove his title but also to prove his possession within twelve years, preceding the date of institution of the suit. However, a change in legal position has been effected in view of Articles 64 and 65 of the Limitation Act, 1963. In the instant case, the plaintiff-respondents have proved their title and, thus, it was for the first defendant to prove acquisition of title by adverse possession. As noticed hereinbefore, the first defendant-appellant did not raise any plea of adverse possession. In that view of the matter the suit was not barred.

³ (2005) 8 SCC 330



29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. (See *Vasantiben Prahladi Nayak v. Somnath Muljibhai Nayak* [(2004) 3 SCC 376].)

30. "Animus possidendi" is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See *Mohd. Mohd. Ali v. Jagadish Kalita* [(2004) 1 SCC 271], SCC para 21.)

(i) The Supreme Court in ***Madanuri Sri Rama Chandra Murthy*** vs. ***Syed Jalal***⁴ observed as follows;

"7. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint."

(ii) In light of the facts and circumstances placed before this Court, it is clear that the issue of limitation in this matter is a mixed question of law and facts, for the reason that, although at the first instance on perusal of the Complaint if the year of knowledge is to be reckoned as 2002, it would seem that the suit is barred by limitation, however as emerges from the pleadings, it is evident that the Appellants on coming to learn of the *parcha khatian* and the shortfall in the land recorded in their joint names, approached the concerned authorities in the same year. It cannot be said that the Appellants No.4 and 5 sat on their hands as the applications filed by them before the revenue authorities and relied upon by them to fortify their case, narrates a different story. The role of the State-Respondents on this count too requires consideration when computing limitation. Consequently, these aspects have to be examined on the anvil of the prevalent laws and the Complaint

⁴ (2017) 13 SCC 174



cannot be thrown out at the threshold on the basis of dates relied on by the Respondents. In such circumstances and in light of the discussions above, the Order of the Learned Trial Court is quashed and set aside.

(iii) Appeal allowed.

(iv) The suit be restored in its original number in the Register of Civil Suits and determined in accordance with law.

(v) It is clarified here that I have not expressed any opinion on the merits of the case.

11. Parties to bear their own costs.

12. Copy of this Judgment be transmitted to the Learned Trial Court forthwith along with its records.

(Meenakshi Madan Rai)
Judge
08-04-2024

Approved for reporting : **Yes**