

# THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

Dated : 12<sup>th</sup> April, 2024

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

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RSA No.02 of 2020

**Appellant** : Sarad Ghalay

**versus**

**Respondents** : Chewang Lhamu Bhutia and Others

Appeal under Section 100(1) of  
the Code of Civil Procedure, 1908

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**Appearance**

Mr. Tej Bahadur Thapa, Senior Advocate with Mr. Dewen Sharma Luitel, Mr. Ranjan Chettri and Mr. Khemraj Sapkota, Advocates for the Appellant.

Mr. Sudesh Joshi, Mr. K. T. Tamang and Ms. Gazala Parvin, Advocates for the Respondent No.1.

Mr. Rahul Rathi and Ms. Khusboo Rathi, Advocates for the Respondent No.2.

Mr. Tashi Wongdi Bhutia, Advocate for the Respondent No.3.

Mr. Yadev Sharma, Government Advocate for the Respondents No.4 to 6.

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## **JUDGMENT**

Meenakshi Madan Rai, J.

**1.** The Appellant is aggrieved by the Order dated 31-10-2019, of the Court of the Learned District Judge, Special Division – I, East Sikkim, at Gangtok, in Title Appeal No.03 of 2019 (*Sarad Ghaley vs. Chewang Lhamu Bhutia and Others*).

**(i)** Relevantly, it may be mentioned that the Learned First Appellate Court considered an Appeal preferred before it, against the Order dated 12-03-2019, of the Court of the Learned Civil Judge, East Sikkim, at Gangtok, in Title Suit No.01 of 2018 (*Sarad Ghaley vs. Chewang Lhamu Bhutia and Others*), which had rejected the Pleint of the Appellant herein, on an application filed by the

Respondent No.2, under Order VII Rule 11, read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter, the "CPC"). The Learned First Appellate Court upheld the Order of the Learned Trial Court. Assailing the Order of the Learned First Appellate Court, the Appellant is before this Court.

**2.** This Second Appeal was admitted on the following substantial question of law;

*"Whether the plaintiff has rightly been non suited by the Courts below on the ground of limitation in the facts of the present case, however (sic., or whether), the judgment and decree passed by the Courts below are in accordance with law?"*

**3.** The facts as per the Appellant are summarized hereunder;

- (a) The great grandfather of the Appellant, late Dilu Singh Ghaley, purchased landed property located at Kazi Road, Gangtok, East Sikkim, on 01-02-1924 from one Gorey Singh Subedar Lepcha, duly executing a "*Rajinama*" which described the property and its boundaries.
- (b) The boundaries *inter alia* were as follows;  
One side of the boundary extended towards the house of Dawa Sherpa Babu and Dhan Bir Babu, upwards to the house of Dorjee Bhotey and to the bamboo groove of Dakiya Muktiyar.
- (c) The mother of the said Dawa Sherpa Babu, the boundary holder (*supra*), sold the landed property of her son bearing plot no.497 measuring 0.07 acres, to one Anand Bahadur Pradhan on 02-04-1949.
- (d) Anand Bahadur Pradhan transferred the same property, i.e., plot no.497 measuring 0.07 acres on 10-12-1972, to one Chimi Lhamu Bhutia.

- (e) On 28-05-1973 Chimi Lhamu Bhutia sold a portion of plot no.497, i.e., an area of 0.0337 acres, equivalent to 1470.46 sq. ft. to the Respondent No.3.
- (f) The ancestral property registered on 07-03-1991 in the name of Jit Bahadur Ghaley, son of late Dilu Singh Ghaley, showed four plots of land bearing nos.496, 1229, 1237/1442 and 1230, measuring a total area of 0.41 acres.
- (g) The Respondent No.3 on 10-02-1997 sought mutation of plot no.497 in his name, which was objected to by the three legal heirs of Dilu Singh Ghaley, namely, Randhir Singh Ghaley, Ranjan Ghaley and Uljhan Ghaley, vide written objection, dated 31-03-1997.
- (h) That consequent site inspection and spot verification of the land holding of the Respondent No.3, as per notings in the report dated 23-04-1997, showed his landed property to be 6192 sq. ft., equivalent to 0.14 acres, instead of an area of 0.0337 acres equivalent to 1470.46 sq. ft. as purchased by him, from Chimi Lhamu Bhutia on 28-05-1973.
- (i) In the year 2001, a partition of the ancestral property of the Appellant and his siblings was effected, where the Appellant was given a share in plot no.1229. Some portion of the ancestral property remained in the name of their grandfather Jit Bahadur Ghaley and has not been partitioned. Pursuant to the partition, plot no.2059/1229 was allotted to the Appellant's share of land, measuring an area of 0.02 acres, duly mutated in his name on 31-08-2001.

- (j) The Revenue Authorities meanwhile registered the landed property bearing plot no.497, in the name of the Respondent No.3.
- (k) On a spot verification on 22-04-2006, which arose on account of a dispute between one Shanti Pradhan and the Appellant's brother Nirmal Prasad Ghaley, it emerged that plot no.497, with an area of 0.07 acres, stood recorded in the name of Anand Bahadur Pradhan, son of Laxmi Prasad Pradhan, in the Gangtok Municipal Corporation (GMC) records, dated 15-05-1950.
- (l) In the year 2009, the Respondent No.3 sold a portion of land measuring 1040 sq. ft. i.e., 0.02 acres to the Respondent No.2.
- (m) On an application under the Right to Information Act, 2005 (RTI), being filed by the Appellant's relative, one Bijoy Chandra Thapa, dated 09-10-2012, pertaining to plot nos.1229, 496 and 497, it was found that plot no.497 recorded in the name of the Respondent No.3 had an area of 0.17 acres, thereby exceeding the area of the land purchased by him from Chimi Lhamu Bhutia.
- (n) In 2016, the Respondent No.2 sold his landed property i.e., 1040 sq. ft. to the Respondent No.1, who sought for mutation of the property in her name, for which purpose, a "No Objection Certificate" (NOC) was required from the boundary holder. Nirmal Prasad Ghaley, the Appellant's brother refused to issue the NOC, while his wife lodged a Complaint objecting to the sale of 1040 sq. ft. to the

Respondent No.1 as there was a pending dispute with regard to the ancestral property of her husband.

- (o) Title Suit No.16 of 2016 was filed by the wife of Nirmal Prasad Ghaley, titled *Indra Kumari Pradhan vs. Suresh Kumar Agarwal and Others*, before the Court of the Learned Civil Judge, East Sikkim, at Gangtok, who on 28-12-2016 appointed an Advocate Commissioner for measurement and demarcation of the property in dispute in the title suit.
- (p) On such demarcation the entire ancestral property of the Appellant and his brothers was found to measure only 0.38 acres as against the 0.41 acres recorded in the *parcha* of 1991, in the name of Jit Bahadur Ghaley.
- (q) The Appellant lodged objections on 21-06-2017 and 15-07-2017 against the creation of third party rights on plot nos.497 and 497/2621 and sought for a hearing before initiation of any steps by the concerned Sub-Divisional Magistrate. On his incessant enquiries he was informed by the authorities that no steps toward the said registration had been initiated. However, on 12-08-2017 when the Appellant again visited the office of the Respondent No.4, he was informed that the disputed property was already registered in the name of the Respondent No.1 on 03-08-2017 despite his two pending objections. His application dated 12-08-2017 for deregistration of the registration effected filed before the Sub-Divisional Magistrate bore no fruit.
- (r) The Appellant claims that, the excess area indicated in the landed property of the Respondent No.3 as elucidated

(*supra*) is the illegally encroached area of land from his ancestral property.

- (s) Consequently, Title Suit bearing No.01 of 2018, *Sarad Ghaley vs. Chewang Lhamu Bhutia and Others* was filed by the Appellant in the Court of the Learned Civil Judge, East Sikkim, at Gangtok, for declaration, recovery of possession and other consequential reliefs.
- (t) A petition under Order VII Rule 11 of the CPC came to be filed by Respondent No.2 before the Learned Trial Court. The Learned Court having considered the petition opined *inter alia* that the suit of the Appellant is barred by limitation as Section 58 (*sic., Article*) of the Limitation Act, 1963 (hereinafter, the "Limitation Act"), prescribes a period of three years for any other declaration from the time when the right to sue first accrues. That, it is also barred by Section 65 (*sic. Article*) of the Limitation Act which prescribes a period of twelve years for possession of immovable property or any interest therein based on title, from the time when the possession of the Defendant becomes adverse to the Plaintiff. It was further observed that the legal heirs of late Jit Bahadur Ghaley had knowledge in the year 1997 itself that their ancestral land had reduced in area. Hence, the limitation had long expired.
- (u) Against this Order the Appellant was before the Court of the Learned District Judge, Special Division - I, East Sikkim, at Gangtok, whose Order is assailed herein.

(v) The Learned First Appellate Court concluded *inter alia* that “.....from a meaningful reading of the plaint and the documents filed by the plaintiff it is evidently clear that the suit is barred by limitation. The facts of the case clearly shows that the suit is barred and there is no hesitation in saying that the suit is barred.....” and that the Order of the Learned Trial Court required no interference.

**4.** Learned Senior Counsel advancing his arguments for the Appellant, submitted that the Appellant is the eldest son of Dil Prasad Ghaley, who had three other sons namely, Nirmal Prasad Ghaley, Ranjan Ghaley and Uljhan Ghaley, they are all the grandsons of Jai Bahadur Ghaley and great grandsons of late Dilu Singh Ghaley, whose ancestral lands have now been reduced by encroachments made by Respondent No.3.

**(i)** Inviting the attention of this Court to the impugned Order, it was urged that the Learned Courts below were of the opinion that the Appellant had knowledge of the reduction of the area of their ancestral land in 1997, based on Annexure – 8, the objection, dated 31-03-1997. That, the objection was filed by Randhir Singh Ghaley, Ranjan Ghaley and Uljhan Ghaley, protesting against the application of the Respondent No.3, seeking mutation of property bearing plot no.497. The Appellant is not one of the signatories to the objection nor was he present before the Revenue Authorities when the objection was taken up for consideration. That, the Note Sheet dated 18-10-1997 fortifies this circumstance, as it is evident from a perusal of the order therein that the Respondent No.3 who was the Petitioner in the said

matter, was present with his Counsel, while Nirmal Prasad Ghaley, the Respondent therein, entered appearance with his Counsel and sought time. The order does not reveal the presence of the Appellant whatsoever. Hence, the question of him having knowledge of the reduction of his ancestral property in the year 1997 does not arise and the Learned Courts below erroneously assumed knowledge of the Appellant, when no document substantiates such an allegation. That, the Appellant and his brothers were not in a joint family in the year 1997 as such the Appellant was not privy to the filing of the objection, thus knowledge of Annexure – 8 cannot be imputed on the Appellant. That, the Appellant came to learn of the entire circumstances only on 29-04-2017, which is evident from the objections lodged by him before the Court of the Sub-divisional Magistrate, dated 21-06-2017 and 15-07-2017 respectively. That, the correspondence/ objection, dated 21-06-2017 reveals that the Appellant had knowledge of the land reduction only when he was informed of the spot verification by the Advocate Commissioner on 29-04-2017. That thereafter, on 15-07-2017 he filed the second objection, objecting to the mortgage, sale or creation of third party rights over plot no.497/2621. That, the Learned Trial Court despite the pendency of the application of the Appellant before the Sub-divisional Magistrate dated 21-06-2017, proceeded to pronounce the Order dated 10-07-2017 rejecting the Pleint of the Appellant. That, in view of the above arguments it is clear that, the cause of action arose only in the year 2017 and the suit having been filed well within the period of limitation the order of the Learned First Appellate Court deserves to be set aside and the Suit disposed of



as per law. To fortify his submissions strength was garnered from ***G. Nagaraj and Another vs. B. P. Mruthunjayanna and Others***<sup>1</sup> and ***Sajjan Singh vs. Jasvir Kaur and Others***<sup>2</sup>.

**5.** Learned Counsel for the Respondent No.1 while opposing the contention *supra*, navigated through Paragraph 3 of the Plaint and canvassed that the averments reveal that the partition of the ancestral property between the Appellant and his brothers materialized only in the year 2001, this is indicative of the fact that in 1997, when the objection dated 31-03-1997 was submitted before the Respondent No.4, the Appellant was in a joint family with his brothers and thereby well aware of the circumstances, of which, he now feigns ignorance. That, apart the contents of the letter dated 31-03-1997, in no certain terms mentions that, Randhir Singh Ghaley, Ranjan Ghaley and Uljhan Ghaley are "*the legal heirs and successors of late Dilu Singh Ghaley*" along with "*other members*" of the their family which thereby includes the Appellant, who admittedly is the legal heir of Dilu Singh Ghaley and consequently his knowledge of the objection dated 31-03-1997 cannot be denied. Drawing the attention of this Court to Paragraphs 26 and 27 of the Plaint, it was contended that in Paragraph 27 it is averred that the landed property bearing plot no.497 was registered in the name of the Respondent No.3, in the office of the Defendant/Respondent No.4 without proper consideration of the grievances of the Appellant and his family. That, the words "*Appellant/Plaintiff and his family*" in the Paragraph are an unequivocal disclosure of the Appellant's awareness of the fact of the land transaction in 1997. To fortify his submissions, the

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<sup>1</sup> 2023 LiveLaw (SC) 311

<sup>2</sup> 2023 SCC OnLine SC 1282

attention of this Court was drawn to the Note Sheet dated 06-11-1997 wherein the Revenue Authority had observed that “*both the sides have been heard*” revealing the Appellant’s presence. That, Nirmal Prasad Ghaley, the Appellant’s brother was a witness to the execution of the Sale Deed document between the Respondent No.3 and Respondent No.2, which would thereby obviously be in the knowledge of the Appellant. As the Appellant in 1997 had knowledge of the reduction of his ancestral property, the suit filed by him is barred by limitation, as provided under Order VII Rule 11(d) of the CPC. To buttress his submissions reliance was placed on ***Khatri Hotels Private Limited and Another vs. Union of India and Another***<sup>3</sup>, ***Ramisetty Venkatanna and Another vs. Nasyam Jamal Saheb and Others***<sup>4</sup> and ***Raghwendra Sharan Singh vs. Ram Prasanna Singh (Dead) by Legal Representatives***<sup>5</sup>. That, in the facts and circumstances put forth, no error emanates in the impugned Order which should therefore not be disturbed.

**6.** Learned Counsel for the Respondent No.2 also relied on Paragraph 27 and the prayers in the Complaint and while endorsing the submissions put forth by Learned Counsel for the Respondent No.1, reiterated that the knowledge of the Appellant is evident from Paragraph 27 of the Complaint. Besides, the prayers in the Complaint reveal that the Appellant is assailing the mutation of plot no.497 which took place in 1997, augmented with an untenable claim that his ancestral land has been reduced by such transactions. His claim being time barred deserves no consideration and the impugned Order warrants no interference.

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<sup>3</sup> (2011) 9 SCC 126

<sup>4</sup> 2023 SCC OnLine 521

<sup>5</sup> (2020) 16 SCC 601

**7.** Learned Counsel for the Respondent No.3 submitted that as the property to the Respondent No.2 already having been sold, he had no arguments to advance.

**8.** Learned Government Advocate for the Respondents No.4 to 6 submitted that as the said Respondents were proforma Respondents, he had no submissions to put forth.

**9.** I have considered the rival contentions of Learned Counsel for the parties and perused the Complaint, all documents placed before me for consideration, including the impugned Order as also the citations made at the Bar. The substantial question of law framed by this Court is now to be determined.

**10.** It is now no more *res integra* that while dealing with an application under Order VII Rule 11 of the CPC, only the averments made in the Complaint and documents produced therewith are required to be considered. The defence of the opposing parties or pleas taken by the Defendants in their written statement cannot be looked into. In ***Saleem Bhai and Others vs. State of Maharashtra and Others***<sup>6</sup>, the Supreme Court while considering the provisions of Order VII Rule 11 of the CPC propounded that;

**“9.** A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the complaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit – before registering the complaint after issuing summons to the defendant at any time before conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 Order 7 CPC, the averments in the complaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, .....

**(i)** While considering whether the suit is barred by any law in ***Madanuri Sri Rama Chandra Murthy vs. Syed Jalal***<sup>7</sup>, it was expounded as follows;

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<sup>6</sup> (2003) 1 SCC 557

<sup>7</sup> (2017) 13 SCC 174

Sarad Ghaley vs. Chewang Lhamu Bhutia and Others

“7. .... If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order 7 Rule 11 CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order 7 Rule 11 CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. 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) On the aspect of the Appellant having knowledge of the land transactions in 1997 itself, it is relevant to state that a word or sentence cannot be read in isolation from the pleadings and interpretations allowed to pivot around such isolated words or sentences. The averments in the Plaint are to be considered in its entirety. Pertinently, in **Roop Lal Sathi vs. Nachhattar Singh Gill**<sup>8</sup>, the Supreme Court observed that not only a particular plea is to be considered but the Plaint is to be read as a whole. This was reiterated in **Raptakos Brett and Co. Ltd. vs. Ganesh Property**<sup>9</sup>.

(iii) In **Sopan Sukhdeo Sable and Others vs. Assistant Charity Commissioner and Others**<sup>10</sup>, the Supreme Court held as follows;

“15. There cannot be any compartmentalisation, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction or words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.”

<sup>8</sup> (1982) 3 SCC 487

<sup>9</sup> (1998) 7 SCC 184

<sup>10</sup> (2004) 3 SCC 137

**(iv)** Hence, a few words, as delineated above, by Learned Counsel for the Respondents No. 1 and 2 cannot be picked out from the objection dated 31-03-1997 or from Paragraph 27 to foist the Appellant with knowledge of facts and circumstances which he categorically denies, unless it is buttressed with positive and adequate documentary evidence.

**11.** The Learned First Appellate Court as reflected in Paragraph 18 of the impugned Order was of the view that the documents such as mutation of plot no.497 in the name of the Respondent No.3, the objection dated 31-03-1997 and the Note Sheets relied on by the Appellant, make it amply clear that the Appellant and his brothers were aware of the fact that certain portion of their ancestral property had fallen into plot no.497. That, despite their knowledge they did not file any suit for recovery of possession of the allegedly encroached land. I cannot bring myself to agree with this observation. I am of the considered view that the present suit cannot be dismissed as barred by limitation for the reason that although the Respondents No.2 and 3 have contended that the Appellant was aware of the circumstances pertaining to the recording of plot no.497 in the name of the Respondent No.3, however, the documentary evidence dated 31-03-1997 relied on by the Appellant indicates that the Appellant was not a party to the proceedings as he was evidently not a signatory to the correspondence. The Note Sheet before the Revenue Authority, dated 18-10-1997 also does not reveal the presence of the Appellant. The knowledge of the transaction and mutation of the property in the name of the Respondent No.3 cannot be foisted or imputed on the Appellant without the circumstances being

tested on the anvil of evidence. Merely reading one word from the Plaint as projected in Paragraph 27 cannot impute knowledge on the Appellant and the Court cannot assume facts on the basis of the verbal submissions canvassed by Learned Counsel for the Respondents. The contention that the Appellant and his brothers were in a joint family which thereby is conclusive of the Appellant's knowledge, as agitated by Learned Counsel for the Respondent No.1, finds no substantiation at this stage.

**12.** Reliance on ***Ramisetty Venkatanna*** (*supra*) by Learned Counsel for the Respondent No.1 is of no assistance to the case of the Respondent No.1 as in ***Ramisetty Venkatanna*** (*supra*), the facts and circumstances therein are completely distinguishable from the facts and circumstances of the instant matter. A perusal of the Judgment shows that the suit was essentially based upon the premise that there was an error in the partition deed dated 11-03-1953 and the partition deed survey number was wrongly mentioned. That consequently, the descendants of the ancestors had no right to effect transaction in respect of the land with the wrong survey number. The Supreme Court found the suit vexatious and barred by limitation, the cause of action having arisen in 11-03-1953.

**13.** Learned Counsel for the Respondent No.1 also sought to rely on ***Raghwendra Sharan Singh*** (*supra*). The facts and the circumstances in the said matter are also distinguishable from the matter at hand. The gift deed therein was registered 22 years before the suit came to be filed. The Plaintiffs case was that the gift deed was a sham document and not binding on him. The Supreme Court noted that for approximately 22 years neither the

Plaintiff nor his brother claimed at any point of time that the gift deed was a sham document. That, from the averments in the Pleat and the bundle of facts therein, the Supreme Court was of the opinion that by clever drafting the Plaintiff tried to bring the suit within the period of limitation which is otherwise barred by limitation. The Pleat was thus rejected under Order VII Rule 11 of the CPC.

**14.** In my considered opinion, the question of limitation in the matter at hand is undoubtedly a mixed question of law and facts and the present suit cannot be dismissed as barred by limitation without proper pleadings, framing of issues and recording of evidence. The Learned Court while settling the issues can undoubtedly take recourse to Sub-rule (2) of Rule 2, Order XIV of the CPC. The application of the Respondent No.2 under Order VII Rule 11 of the CPC does not fall within the purview of any of the circumstances envisaged under the said provision.

**15.** The foregoing discussions determines the substantial question of law formulated.

**16.** Appeal allowed.

**17.** Parties to bear their own costs.

**18.** Copy of this Judgment be transmitted to the Learned Courts below forthwith along with all records.

**( Meenakshi Madan Rai )**  
**Judge**

12-04-2024

Approved for reporting : **Yes**