

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

Dated : 25th May, 2023

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

RSA No.06 of 2019

Appellant : Lalita Subba (Limboo)

versus

Respondents : Silvester Rai and Others

Appeal under Section 100 of the Code of Civil Procedure, 1908

Appearance

Mr. N. Rai, Senior Advocate (Legal Aid Counsel) with Mr. Sushant Subba, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Sudipto Mazumdar, Senior Advocate with Mr. Pema Ongchu Bhutia, Advocate for the Respondents No.1 and 2.

Respondent No.3 in person.

None present for Respondent No.4.

J U D G M E N T

Meenakshi Madan Rai, J.

1. In this second appeal, the following two substantial questions of law have been framed by this Court, viz;

(1). *Whether the right of the Defendants No.1 and 2 can be decided against another Defendant i.e. Defendant No.3 in the Appeal of the Suit filed by Plaintiff, without a separate Suit being instituted by the Plaintiff against the Defendant No.3?*

(2). *Whether the Judgment of the first Appellate Court is based on misinterpretation of documentary evidence?*

2. To appreciate the matter in its correct perspective, the facts leading to the instant appeal are being summarised.

(i) The Plaintiff No.1, Ashok Subba (Limboo), in Title Suit No.04 of 2013 (earlier numbered as "Title Suit No.01 of 2012") before the Learned Trial Court, is the grandson of one Randhoj Subba (Limboo); while Plaintiff No.2, Harka Bahadur Subba (Limboo), is the son of the said Randhoj Subba (Limboo). Randhoj

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Subba (Limboo) had two brothers, namely, Lakh Bahadur Subba (Limboo) and Asar Singh Subba (Limboo). All three brothers allegedly gave the property in dispute, described in Schedule 'A' to the Plaint, to their widowed cousin Milouty Subba (Limboo), prior to 1950, for her life time, to enable her to bring up her children. During the 1951-52 survey operations, the land came to be recorded in the name of Milouty Subba unbeknownst to her brothers. The Plaintiffs' case is that in fact Tek Bahadur Rai, father of Respondents No.1 and 2 (Defendants No.1 and 2 before the Learned Trial Court) was only a *kutiadar* to the property and was paying *kut* to the Plaintiffs for a considerable time and that the property recorded in the name of Milouty Subba belongs to the Plaintiffs, i.e., the Respondents No.3 and 4 before this Court. That, it was never mortgaged to the father of the Respondents No.1 and 2 as claimed by them. The Respondents No.1 and 2 contrarily claim that the property was mortgaged by Milouty Subba to Tek Bahadur Rai, as proved by Documents, Exhibits 'D1' and 'D2' and later purchased by him by payment of auction amount for the property, as proved by Exhibit 'D3'. That, the Respondents No.1 and 2 have been the absolute owners of the disputed property since 1962. During the course of trial, vide Order dated 03-06-2015, the granddaughter of Milouty Subba, i.e., Lalita Subba (Limboo), the Appellant herein, was impleaded as Defendant No.3.

3. The Learned Trial Court on the basis of the pleadings of the parties settled fifteen issues for determination. Issues no.1, 2 and 3 were taken up together which were as follows;

- (1) *Whether the suit is maintainable?*
- (2) *Whether the suit is bad for non-joinder of necessary parties?*

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(3) *Whether the present Plaintiff has the locus standi to file present suit?*

The Learned Trial Court decided the issues in favour of the Plaintiffs.

(i) Issue no.4 *“Whether the Plaintiff has any cause of action against the two Defendants?”* was also decided in favour of the Plaintiffs.

(ii) Issue no.5 *“Whether the suit property(s) can be regarded as the ancestral property(s) of the Plaintiff?”*, the determination thereof was against the Plaintiff and in favour of the Defendant No.3 (Appellant herein).

(iii) Issues no.6 and 7 were considered together, i.e., *“(6) Whether late Milouty Limboo had the authority to mortgage the suit property(s)?”* and *“(7) Whether the mortgage created by late Milouty Limboo (between her and late Tek Bdr. Rai) in respect of the suit property(s) was/is valid in the eyes of law? If not, what was the nature of transaction between them so far as the property is concerned?”*. Both issues were decided against the Plaintiffs.

(iv) In issue no.8 *“Whether the suit property(s) was given to late Milouty Limboo by lineal ascendants/ancestors of the Plaintiff only for retaining and enjoying it for her lifetime or till her children grew up?”* was decided against the Plaintiffs.

(v) In issue no. 9 *“Whether the defendants or their late father Tek Bdr. Rai could own the suit property(s) or continue in its possession due to the failure on the part of late Milouty Limboo to pay the amount taken by her from Late Tek Bdr. Rai?”* came to be decided in favour of the Defendants No.1 and 2 by determining that Defendants No.1 and 2 were in permissive possession of the suit land.

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(vi) Issue no.10 "*Whether the suit is barred by the law of limitation?*" was decided against the Plaintiffs as the Court observed that the suit was barred by limitation as the cause of action arose in 1980.

(vii) In issue No.11 "*Whether the Defendants have perfected the title over the suit property(s) through adverse possession?*" it was found that Defendants No.1 and 2 could not claim adverse possession as it was mortgaged property.

(viii) Issue no.12 "*Whether the Plaintiff is entitled to a decree declaring that the suit property(s) is his ancestral property and that the Defendants have no right whatsoever over it?*" was decided against the Plaintiffs.

(ix) Issues no.13 and 14 were considered together, i.e., "(13) *Whether the Plaintiff is entitled to a decree for delivery of possession of the suit property(s) to him?*" and "(14) *Whether the plaintiff is entitled to the reliefs prayed for by him?*". The decision in these issues also went against the Plaintiffs.

(x) Issue no.15 "*Whether Defendant No. 3 has legal right over the suit property by virtue of being legal heir of late Milouty Limboo?*" the Learned Trial Court held that "*Since it is evident on record that the said property is still in the name of late Milouty Limboo, her legal heirs would have the right over the suit property. Hence, making defendant no.3 eligible for the same.*"

4. Aggrieved thereof by the finding of the Learned Trial Court on issue no.15, the Respondents No.1 and 2 were before the Learned First Appellate Court. The Learned First Appellate Court in Title Appeal No.19 of 2017, vide the impugned Judgment, dated 31-08-2018, set aside the finding of the Learned Trial Court on issue no.15 on grounds that;

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“42. That it is evident that the Ld. trial court without discussing the evidence led by the Defendant No.3 and affording any reasons simply making an observation that as the suit property is still in the name of Milouty Limboo, her legal heirs would have the right over the suit property, granted relief to the Defendant No.3. The finding of the Ld Trial court is against the settled position of law i.e. Records of rights (Parchas) is a mere documents of possession and not document of title as held in plethora of judgments of the Hon’ble Supreme Court as well as our own Hon’ble Sikkim High Court. In *M.T.W Tenzing Namgyal & Ors. Vs Motilal Lakhotia & Ors*, 2003 (5) SCC 1, it was held that “No presumption of truth is attached to revenue entries so as to title property”. Similarly, in *Pem Choden Bhutiani & Another Vs. Rinchen Dorjee*, 1986 AIR (Sikkim) 22 it was held that entries in such Government records are evidence of title mainly because they are good evidence of possession, but if contrary to the facts as to possession at the time they were made they carry little, if any, weight. So far as the granting of relief in favor of Defendant no.3 is concerned, even if she has proved issue no.15, she being one of the Defendant and in absence of any counter claim filed by her, reliefs cannot be granted in her favour. The said point was rightly raised by Ld. counsel Shri S. Majumdar.”

5. In this second appeal, the Appellant seeks the setting aside of the Learned First Appellate Court’s Judgment on issue no.15 as it was pronounced on an appeal which was not maintainable, for the reason that, the finding of the Learned Trial Court in issue no.15 did not manifest into a decree and that an appeal can only lie against a decree and not otherwise.

(i) The finding of the Learned Trial Court in issue no.10 that the suit was barred by limitation is unassailed.

6. Learned Senior Counsel for the Appellant submitted that the First Appeal is in the first instance not maintainable as an appeal can only be allowed against a decree, whereas in issue no.15 it was merely a finding of the Learned Trial Court. Relying on ***Deva Ram and Another vs. Ishwar Chand and Another***¹ it was urged that appeal can be filed only against a decree. It was his contention that the suit property was never mortgaged by Milouty Subba, to the father

¹ (1995) 6 SCC 733

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of Respondents No.1 and 2, nor were they able to prove such mortgage by any evidence. That, Exhibit 1 the *Parcha Khatiyani* in the name of Milouty Subba reveals that Tek Bahadur Rai was only the cultivator of the lands, thereby disproving their case of mortgage. That, Exhibit 'D1', 'D2' and 'D3' relied on by the Respondents No.1 and 2 were not proved as per law as held by the Learned Trial Court. Besides, the Sikkim Rural Indebtness Act, 1966, mentions that no property can be mortgaged in the form of (i) *Dadani* (ii) *Mashikata* (iii) *Biyaz*, if any part of a land holding of a primary holder was below 5 acres. That, the suit property in the name of Milouty Subba was in fact only 2.3220 acres and, hence could not be mortgaged. That, on the above grounds, the Judgment of the First Appellate Court on issue no.15 be set aside.

7. Learned Senior Counsel for the Respondents No.1 and 2 canvassing his case submitted that no claim was laid by Defendant No.3 with regard to the suit property and at no stage was counter-claim filed by her. That, Exhibit 'D1' was executed by Milouty Subba stating that she had taken a loan amount of ₹ 603/- (Rupees six hundred and three) only, from the Respondents' father and for the said loan she had mortgaged the property in dispute, as shown in Exhibit 'D2', a letter addressed by Milouty Subba to the Deputy Magistrate, East Sikkim, Sub-Division Gangtok, dated 20-02-1963, seeking registration of the mortgage deed, as the property was mortgaged to the father of Respondents No.1 and 2 for a sum of ₹ 700/- (Rupees seven hundred) only. Exhibit 'D3' establishes that the mortgaged land was to be auctioned by the Government for non-payment of land rent by the said Milouty Subba, which was then made good by the father of the Respondents No.1 and 2 and the auction withdrawn. Consequently, Respondents No.1 and 2 are

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the owners of the suit land. That, in fact, the Learned Trial Court could not have reached any finding on issue no.15 as the suit was found to be barred by limitation in issue no.10. On this count, he sought to rely on ***Deva Ram (supra)***. That, Order XX Rule 6 of the Code of Civil Procedure, 1908 (for short, "CPC") provides that decree has to agree with the Judgment and finding in a Judgment can be challenged in appeal only if the party filing the appeal is effected by the finding. That, the observation of the Learned Trial Court does not conclude into a finding. To buttress his arguments, he placed reliance on ***Banarsi and Others vs. Ram Phal***² and ***Alcon Electronics Private Limited vs. Celem S.A. of FOS 34320 Roujan, France and Another***³.

8. Respondent No.3 in his written synopsis of arguments put forth in detail the facts of the case and urged verbally that till date the land rent is being paid by the Respondent No.3, i.e., the Plaintiff No.1 (before the Learned Trial Court). It is submitted that the Respondent No.3 being the original owner has a constitutional right over the suit property and he cannot be denied his rights. It is submitted that the appeal be dismissed and the prayers of the Respondent No.3 in the original suit be allowed.

9. The rival submissions of Learned Counsel have been duly considered, all pleadings, documents and the impugned Judgments perused.

10. While considering the first substantial question of law, it is imperative to look into the provisions of Section 2(2) of the CPC, which provides as follows;

"2.

(1)

² (2003) 9 SCC 606

³ (2017) 2 SCC 253

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- (2) “decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include—
- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;” [emphasis supplied]

(i) Learned Senior Counsel for the Appellant relying on ***Deva Ram (supra)*** and ***Smt. Ganga Bai vs. Vijay Kumar and Others***⁴ had stated that the parties could not have approached the Learned First Appellate Court with regard to issue no.15, as the finding of the Learned Trial Court in the said issue with regard to the Appellant herein, being the owner of the suit properties, as the granddaughter of Milouty Subba, did not amount to a decree.

(ii) The relevant paragraph of ***Deva Ram (supra)*** and ***Ganga Bai (supra)*** are extracted hereinbelow for quick reference. In ***Deva Ram (supra)*** it was held as follows;

“27. Thus, an appeal does not lie against mere ‘findings’ recorded by a court unless the findings amount to a ‘decree’ or ‘order’. Where a suit is dismissed, the defendant against whom an adverse finding might have come to be recorded on some issue has no right of appeal and he cannot question those findings before the appellate court. (See *Ganga Bai v. Vijay Kumar* [(1974) 2 SCC 393].)”

(iii) In ***Ganga Bai (supra)***, the Supreme Court held that;

“17. These provisions show that under the Code of Civil Procedure, an appeal lies only as against a decree or as against an order passed under rules from

⁴ (1974) 2 SCC 393

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which an appeal is expressly allowed by Order 43 Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow that First Appeal No. 72 of 1959 filed by Defendants No.2 and 3 was not maintainable as it was directed against a mere finding recorded by the trial court.”

(iv) From a bare reading of the above paragraphs it concludes that, no appeal lies against a mere ‘finding’ of the Court. However, it also reveals with no ambiguity that should the ‘finding’ of the Court amount to a decree or order, then an appeal lies against such finding as is evident from the ratio of **Deva Ram (ibid)**.

(v) In the matter at hand, it is clear that the finding effected the merits of the action between the parties by determining the right of the Appellant herein, who was the Defendant No.3 before the Learned Trial Court. The contention of Learned Senior Counsel for the Respondents No.1 and 2, that, the Appellant made no claim for the land is belied by her evidence-on-affidavit. The opposing parties were afforded an opportunity to cross-examine her, but could not decimate her claim. An argument may be raised that there were no pleadings in that context, but this argument cannot be raised now for the first time, in a second appeal.

(vi) Appositely reference is also made to **Shanti Kumar R. Canji vs. The Home Insurance Co. of New York**⁵ wherein the Supreme Court while discussing whether any decision is a Judgment within the meaning of Clause 15 of the Letters Patent, discussed as follows;

“10. The *locus classicus* is the decision of the High Court of Calcutta in *Justice of the Peace for Calcutta v. Oriental Gas Company* [(1872) 8 Bengal LR 433] where Sir Richard Couch, C.J. said :

We think that ‘judgment’ means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or

⁵ (1974) 2 SCC 387

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suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined.”

12. In this context this Court referred to observation of the Full Bench of the High Court of Madras in *Tuljaram v. Alagappa* [ILR 35 Mad 1]. The text formulated by the Madras decision is not the form of the adjudication but its effect on the suit or proceeding in which it is made. The Madras High Court said:

If the effect is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment.

.....” [emphasis supplied]

(vii) The Learned Trial Court in issue no.15 held as follows;

“36. Issue no.15. Whether defendant no.3 has legal right over the suit property(s) by virtue of being legal heir of the late Milouty Limboo?

Since it is evident on record that the said property is still in the name of late Milouty Limboo, her legal heirs would have the right over the suit property. Hence, making defendant no.3 eligible for the same.”

(viii) Hence, it concludes that the finding of the Learned Trial Court in issue no.15 is a Judgment, as it puts an end to the suit, by determining the rights of the conflicting parties. The Learned Trial Court has finally determined that the suit property belongs to the Defendant No.3, the Appellant herein. In light of such determination, the question of an appeal not being tenable under the provisions of the CPC is an erroneous interpretation of the law by the Appellant herein. Relevantly, the Appellant herein was impleaded as Defendant No.3 in the suit, were any of the parties aggrieved by the decision they could have resorted to necessary legal remedies available to them under the CPC, but they chose not to. Consequently, once the Appellant was a party to the proceeding as Defendant No.3 and filed her written statement as also her evidence-on-affidavit, in my considered view, no legal obstacle mars

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the path of the Learned Trial Court from deciding the rights of the Defendant No.3 in the suit.

11. That having been said, I hasten to clarify and add that while addressing the second question, it is pertinent to consider whether the Learned Trial Court could and ought to have examined the merits of the matter and decided issue no.15, in view of the fact that it had been observed in issue no.10 that the suit was barred by limitation.

(i) On this facet, we may profitably look at the observation of the Supreme Court in ***Budhia Swain and Others vs. Gopinath Deb and Others***⁶ wherein it was held that;

"14. A suit or proceeding entertained and decided in spite of being barred by limitation is not without jurisdiction; at worst it can be a case of illegality. In *Ittyavira Mathai v. Varkey Varkey* [AIR 1964 SC 907] this Court has held:

"Even assuming that the suit was barred by time, it is difficult to appreciate the contention of learned counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by the time and yet the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it had acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities."

So also whether an application by way of a claim petition or an application for grant by way of lease, both were entertainable by the OEA Collector and it was for him to decide which way he chose to deal with the application. In any case, he had the jurisdiction to deal with the application."
[emphasis supplied]

⁶ (1999) 4 SCC 396

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(ii) Therefore, a Court having jurisdiction over a matter may render a decision whether right or wrong. As a corollary, while addressing the concern raised *supra* pertaining to the decision on limitation and whether thereafter the merits of the suit could be delved into apposite reference is made to ***Foreshore Cooperative Housing Society Limited vs. Praveen D. Desai (Dead) through Legal Representatives and Others***⁷ where the Hon'ble Supreme Court held as follows;

"17. After hearing the learned counsel on either side, the Division Bench held that the moment the issue of jurisdiction was raised under Section 9-A of the Code of Civil Procedure, such issue had to be decided first as the same was mandated under Section 9-A and as valuable time could be saved in case it is found that the court does not have jurisdiction. The term "jurisdiction" under Section 9-A was held to have been used in a wider sense and subject to any statutory bar on the maintainability of a suit. **The Division Bench held** [*Foreshore Coop. Housing Society Ltd. v. Praveen D. Desai*, 2008 SCC OnLine Bom 1025] **that the court was bound to dismiss a suit barred by limitation as it had no jurisdiction to entertain the same. The plea of limitation was held to be a question of law which related to the jurisdiction of the court and the court was held to be precluded from adjudicating the matter on merits when the suit was barred by limitation. The Division Bench went on to hold that the suit herein, which was filed on 18-5-1999, was barred by limitation as the cause of action arose in April 1994.** The view of the Single Judge that the plaint initially did not have any pleadings for availing the benefit under Section 14 of the Limitation Act and that the same was incorporated by way of an amendment in 2005 was upheld. The Division Bench held that the appellant was not entitled to the benefit under Section 14 of the Limitation Act as there was no proof of the earlier suit having been prosecuted with due diligence and good faith and dismissed the appeal vide the impugned judgment."
[emphasis supplied]

(iii) In ***National Thermal Power Corpn. Ltd. vs. Siemens Atkeingesellschaft***⁸ the Supreme Court observed that;

"17. In the larger sense, any refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by limitation may in a sense touch on the jurisdiction of the court or tribunal. When a claim is dismissed on the ground of it being barred by limitation, it will be, in a

⁷ (2015) 6 SCC 412

⁸ (2007) 4 SCC 451

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sense, a case of the court or tribunal refusing to exercise jurisdiction to go into the merits of the claim.
”

[emphasis supplied]

(iv) Thus, it is a settled position of law that when the plea of limitation is taken up and considered by the Court and the Court reaches a finding that the suit was barred by limitation, then the Court is precluded from adjudicating the matter further on merits. As already pointed out, the decision of the Learned Trial Court on issue no.10 on limitation is unassailed and has thereby attained finality.

12. Hence, although I do not agree with the reasons put forth by the First Appellate Court while deciding issue no.15, however, in view of the foregoing discussions, the Appeal deserves to be and is accordingly dismissed.

13. No order as to costs.

14. Copy of this Judgment be sent to the Learned Courts below for information, along with records received.

(Meenakshi Madan Rai)

Judge

25-05-2023

Approved for reporting : **Yes**

ds/sdl