

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

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

C.R.P. No. 01 of 2023

1. Bhagi Maya Gurung,
Aged about 58 years,
Wife of Deo Narayan Gurung,
Resident of Nizremang,
P.O. Perbing and P.S. Namchi,
South Sikkim-737 126.

2. Ratna Kumari Gurung,
Aged about 55 years,
Wife of Dawa Tashi Sherpa,
Resident of Nizremang,
P.O. Perbing and P.S. Namchi,
South Sikkim-737 126.

..... Revisionists/Plaintiffs

Versus

1. Mahindra Gurung,
Aged about 68 years,
Son of Late Kul Bahadur Gurung,
Resident of Nizremang,
P.O. Perbing and P.S. Namchi,
South Sikkim-737 126.

2. Kharka Kumar Gurung,
Aged about 64 years,
Son of Late Kul Bahadur Gurung,
Resident of Nizremang,
P.O. Perbing and P.S. Namchi,
South Sikkim-737 126.

3. Devi Maya Gurung,
Aged about 53 years,
W/o Late Junge Gurung,

4. Durgay Gurung,
Aged about 36 years,
Son of Late Junge Gurung,

5. Ashok Gurung,
Aged about 34 years,
Son of Late Junge Gurung,

6. Chandra Bahadur Gurung,
Aged about 30 years
Son of Late Junge Gurung
7. Lachu Gurung,
Aged about 28 years,
Son of Late Junge Gurung,
8. Deegen Gurung,
Aged about 17 years,
Son of Late Junge Gurung
9. Tara Gurung,
Aged about 24 years,
Daughter of Late Junge Gurung,
Wife of Pema Ongchu Sherpa,
Respondent no. 3 to 9 are the Residents of Nizremang
P.O. Perbing & P.S. Namchi,
South Sikkim - 737 126.
10. Renuka Gurung,
Aged about 22 years,
Daughter of Late Junge Gurung,
Wife of Rinzing Lepcha,
Resident of Palak,
P.O. Bermiok P.S. Temi,
South Sikkim - 737 134.
11. Sub-Divisional Magistrate-cum-Registrar,
Land Revenue and Disaster Management
Department, Namchi
Sikkim -737126.

.....Respondents/Defendants

**Application under Section 115 read with Section 151 of the
Code of Civil Procedure, 1908.**

(Order dated 09.11.2022 passed by the Learned District Judge, South Sikkim at Namchi in Title Appeal No. 03 of 2020, Shri Mahindra Gurung & Ors. Vs. Bhagi Maya Gurung and Anr. setting aside order dated 09.11.2022 passed by the learned District Judge, South Sikkim at Namchi in Title Appeal No. 03 of 2020, Shri Mahindra Gurung and Ors. vs. Bhagi Maya Gurung & Anr.)

Appearance:

Ms. Gita Bista, Legal Aid Counsel for the
Revisionists/Plaintiffs.

Ms. Yangzee Pinasha, Advocate for
Respondent/Defendants Nos. 1 to 10.

Mr. Yadev Sharma, Government Advocate and Ms. Pema
Bhutia, Assistant Government Advocate for
Respondent/Defendant No.11.

Date of hearing : 12.05.2023
Date of Order : 12.05.2023

ORDER (ORAL)

Bhaskar Raj Pradhan, J.

1. The present revision petition challenges the Order passed by the learned District Judge dated 09.11.2022 (impugned order) in Title Appeal No. 03 of 2020 remanding the matter for fresh disposal on merits without reversing the decree in appeal. The revision petition therefore, raises an important question on the scope of Order XLI Rule 23A of the Code of Civil Procedure, 1908 (CPC).

2. Title Suit No.12 of 2018 was preferred by the revisionists/plaintiffs against the respondents/defendants. The Trial Court framed 16 issues on 09.07.2019 and proceeded to take evidence. The revisionists/plaintiffs examined four witnesses. The respondent nos. 1 to 10/defendant nos. 1 to 7 examined seven witnesses. The defendant no.11 examined three witnesses. Various documentary evidences were also exhibited by the parties. The learned Trial Judge after examining the issues rendered her judgment and passed the decree both dated 24.12.2019. Title Appeal No. 03 of 2020 was thereafter, preferred by the respondent nos. 1 to 10/defendant nos. 1 to 10.

3. The impugned order records the rival submission of the learned counsel for the parties. It was neither the contention of the revisionists/plaintiffs nor the respondents/defendants that they had failed to understand the issues framed or were confused on whom the burden of proving the same lay. However, by the impugned Order dated 09.11.2022 the learned District Judge concluded that though 16 issues have been framed, the learned Trial Judge had failed to fix the onus upon the parties and therefore, the parties had adduced their evidence without onus being fixed. The learned District Judge was also of the opinion that for certain contentions raised by the parties i.e. the contention of the revisionists/plaintiffs that the suit land was *stridhan* of their late mother; contention of the respondent nos. 1 to 10/defendant nos. 1 to 10 that the suit land was self acquired property of their late father; and the contention of the performa respondent no.11/defendant no.11 that the suit land was mutated following due process of law, proper evidence was not placed before the learned Trial Judge owing to which it is difficult for the Appellate Court to decide the appeal. In such circumstances, the learned District Judge resorted to the provisions of Order XLI Rule 23A of the CPC and remanded the matter to the Trial Court for fresh disposal on merits. The learned District Judge directed the Trial Court to reframe the

issues, if required, for adjudication fixing onus upon the parties, conduct the trial to ascertain the issues, and to dispose the case within a period of 6 months from the date of first appearance of the parties.

4. Heard Ms. Gita Bista, learned counsels for the revisionists/plaintiffs, Ms. Yangzee Pinasha, learned counsel for the respondent nos.1 to 10/defendant nos. 1 to 10 and Mr. Yadev Sharma, learned Government Advocate for respondent no.11/defendant no.11.

5. Order XLI Rule 23A CPC reads as under:

“Remand in other cases. – Where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.”

6. In order for the Appellate Court to exercise the same powers as it has under Order XLI Rule 23, Rule 23 A of the CPC involves two pre-requisites. Firstly, the decree is required to be reversed in appeal. Secondly, the Appellate Court must conclude that retrial is necessary. The Supreme Court in **Jegannathan vs. Raju Sigamani & Anr.**¹ held that Order XLI Rule 23A provides that where the trial court has disposed of the suit on merits and the decree is reversed in appeal and the Appellate Court considers that retrial is necessary, the appellate court may remand the

¹ (2012) 5 SCC 540

suit to the trial court. In ***Shiva Kumar vs. Sharanabasappa***² the Supreme Court held that a comprehension of the scheme of the provision for remand as contained in Rule 23 and 23A of Order XLI is not complete without reference to the provisions contained in Rule 24 of Order XLI that enables the appellate court to dispose of a case finally without a remand if the evidence on record is sufficient. The Supreme Court held that a conjoined reading of Rules 23, 23A and 24 of Order XLI brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an appellate court is to follow the mandate of Rule 24 of Order XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a retrial is considered necessary that the appellate court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice.

7. The impugned order passed by the learned District Judge does not satisfy the two pre-requisites of Order XLI Rule 23A of the CPC.

² (2021) 11 SCC 277

8. The learned District Judge did not reverse the decree in appeal.

9. A perusal of the impugned judgment reflects that the learned District Judge was concerned about the Trial Court not fixing the burden of the issues on the parties. Order XIV of the CPC is an important procedure which will decide the fate of the trial. The learned Trial Judge is required to examine the material proposition of fact or law affirmed by one party and denied by the other and frame distinct issues. Issues are framed when material proposition of fact or law is affirmed by one party and denied by the other. When a material proposition of fact or law is affirmed by one party and denied by the other the burden to prove the same is cast upon the party who affirms it. To ensure that the parties who go to trial are aware that they are burdened to prove the fact asserted by them the Trial Court fixes the burden while framing the issues.

10. The Trial Court having framed issues proceeded to take evidence and render a judgment on all the issues. The Trial Court was not troubled in rendering the judgment although no burden was cast upon the parties. It is also equally clear that the parties before the Trial Court, both during the trial as well as during the hearing of the case, were clear as to which of the issues had to be proved by

whom. This is the specific submission made by the learned counsel for the parties before this court as well. If the parties were clear about their respective burden and led their evidence accordingly no prejudice would be caused even if the burden was not specifically fixed upon any of the parties while framing of the issues. This is however, not to say that the concern of the learned District Judge on the failure of the Trial Court to fix the burden of the issues framed on the parties asserting was misplaced. Although it is mandatory for the Trial Court to frame the issues and important to fix the burden it may be that sometimes the Trial Court ignores to fix the burden. When in cases, such as the present one, where in spite of the fact that the Trial Court has ignored to fix the burden, and parties have led evidence during the trial and judgment rendered by the Trial Court it would be important for the Appellate Court to examine the prejudice caused by the failure. When the parties during the trial were clear on whom the burden of proving the material preposition of fact or law lay it would not be correct for the Appellate Court to remand the matter and subject them to a de novo trial when clearly no prejudice was caused to any of the parties. After all it was a matter of not following a procedure and not an infringement of a substantive provision of law.

11. The second concern of the learned District Judge was that proper evidence was not placed before the learned Trial Judge on certain assertion made by the parties. The record reveals that specific issues have been framed by the learned Trial Judge on the said assertions and the parties have laid their evidence. Further the learned Trial Judge has also rendered her opinion on them. When specific issues have been framed and the parties are aware that they are required to establish the material proposition of fact or law it is incumbent upon them to lead material evidence before the court. Inadequacy of evidence when issues are framed would have a direct bearing on the issues. If an issue has been framed and the burden is fixed upon the person asserting it then failure to adduce evidence or lead adequate evidence would have a direct impact on the fact asserted by the party who is required to prove it. The only necessity which can be deciphered from the impugned judgment is the learned District Judge's inability to decide the appeal due to perceived lack of evidence on the specific contentions dealt above. If issues are framed and evidence led, failure to lead evidence will have its consequences. Remanding the matter for a de novo trial in such cases may permit the parties to fill up the lacunae in their case which is not permissible.

12. None of the above concerns posed by the learned District Judge, in the facts and circumstances of the case, necessitates a re-trial.

13. This court is therefore, of the view that the learned District Judge has incorrectly exercised her power under Order XLI Rule 23A of the CPC and remanded the matter to the Trial Court instead of deciding the appeal as per law.

14. Thus the impugned order dated 09.11.2022 is set aside. The revision petition is allowed. Title Appeal No. 03 of 2020 shall be placed before the learned District Judge who shall decide the same as per law. Pending interim application is also disposed of accordingly.

**(Bhaskar Raj Pradhan)
Judge**

Approved for reporting : **Yes**
Internet : **Yes**

to/