
(1998) 02 GAU CK 0048
In the Gauhati High Court
Case No : Civil Revision No. 50 (SH) of 1996

Akhil Ch. Dutta

APPELLANT

Vs

Anil Kr. Dutta

RESPONDENT

Date of Decision : 09-02-1998

Acts Referred:

Administration of Justice and Police in the Khasi and Jaintia Hills Rules, 1937 — Rule 1, 2, 36A
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 1, Order 1 Rule 2, Order 10 Rule 2, Order 14 Rule 1, Order 14 Rule 1(5)

Citation : (1998) 2 GLT 105

Hon'ble Judges : N.S. Singh, J

Bench : Single Bench

Advocate : B. Das, for the Appellant; N.K. Deb, for the Respondent

Judgement

N.S. Singh, J.—The judgment and order dated 26.9.96 passed by the learned District Judge/Addl. Deputy Commissioner, Shillong, in Civil Revision No. 1(T) of 1996 affirming the order dated 25.4.96 passed by the Asstt. to the Deputy Commissioner at Shillong in T.S. No. 1 of 1995 and Misc. Case No. 2(T) of 1995, thus dismissing the suit of the present Petitioner (Plaintiff), is the subject matter under challenge in this Revision petition under Rule 36-A of the Rules for Administration of Justice/Police in Khasi and Jaintia Hills, 1937.

The facts of the case in a very short compass are as follows:

2. The present Petitioner, Shri Akhil Chandra Dutta as Plaintiff, instituted a suit being Title Suit No. 1(T) of 1995 as against the present Respondents as Defendants and other two persons as proforma Defendants in the Court of the Asstt. to the Deputy Commissioner, Shillong, for declaration of his right, title and interest in respect of undeclared half portion approximately, of Holding No. 122 in Ward 4 of the Shillong Municipality covered by Patta dated 9.2.95 issued by Ka Twilsimai Lyngdoh of Lumdawrie, Laitumkharah, Shillong and for recovery of possession thereof. The Petitioner also filed an application for temporary

injunction under Order 1, Rules 1 and 2 read with Section 151 of the CPC under Misc. Case No. 2(T) of 1995 in the same Court. Initially, the learned Asstt. to the Deputy Commissioner, granted ad-interim temporary injunction to and in favour of the present Petitioner (Plaintiff) ex-parte vide, order dated 1.2.95 passed in Misc. Case No. 2(T) of 1995 which was later on vacated by the Asstt. to the Deputy Commissioner under his order dated 25.4.96 consequent upon the dismissal of the main suit being T.S. No. 1(T) 95. The dismissal of the main suit (T.S. No. 1(T) 95) was made by the Trial Court on the motion and on the basis of an application dated 15.5.95 filed by the Defendant No. 3, the Respondent No. 3 herein. In the said application dated 15.5.95 presented by the Defendant No. 3/ the Respondent No. 3 herein, in the connected main suit as well as Misc. Case No. 2(T)95 sought for dismissal of the suit by contending inter-alia, that the Plaintiff, the Petitioner herein, in violation of the order of the Supreme Court passed in Civil Appeal Nos. 1732-33/84 dated 21.8.87, filed the said suit and obtained an ad-interim injunction order by mis-representing the facts; and that the Plaintiff, by filing such a fresh suit on the same decided issues of die subject, committed a contempt of Court and that, die said suit should not have been filed in view of the judgment and order dated 2.6.83 passed this Court in Civil Revn. No. 40(SH) 78. The Plaintiff-Petitioner also resisted the said application of the Defendant No. 3 by filing show cause statement.

3. After hearing the parties on the said application dated 15.5.95, the Asstt. to the Deputy Commissioner namely, the learned Trial Court had dismissed the said suit of the Plaintiff-Petitioner by holding, that the suit is barred by re-judicata u/s 11 CPC and the learned Trial Court was also of the view that the said suit cannot be tried again against the decision of the High Court and the Supreme Court.

4. Being aggrieved by the impugned judgment and order dated 26.9.96 passed by the learned Addl. Deputy Commissioner, Shillong, in Civil Revn. No. 1(T) 96, the present Petitioner filed this Revision petition before this Court.

5. The case of the present Petitioner is resisted by the Respondents by filing affidavit-in-opposition dated 19.5.97 with many enclosures/documents marked Annexures I-VII.

6. At the very outset, Shri B. Das, the learned Counsel appearing for the Petitioner contended, that the Trial Court while deciding the Misc. Case, without filing of written statement and framing of issues had dismissed the main suit as well as the Misc. Case which is quite illegal and contrary to the principle of law laid down under the CPC and, as such, the impugned judgment and order cannot stand and deserves to be set aside.

7. Supporting the case of the Petitioner, Shri Das contended, that the other 50% of the Schedule-A; the suit property which was the subject matter of the original suit being Title Suit No. 18(T) 54 has not been finally decided by the High Court as well as the Supreme Court and, as such, the Petitioner had filed a fresh suit which is to be disposed of by the learned Courts below by following the

prescribed procedure of law, but, in the instant case, both the learned Courts below had violated all the procedure prescribed by law. The learned Counsel further argued, that the Trial Court upheld the plea of benami but decreed 13 share for the Petitioner against which, the Petitioner filed an appeal bearing No. 10(T) 58 before the learned Deputy Commissioner and the Respondents also filed a cross appeal. In the said appeal, the appellate Court held, that the right of the Petitioner over the land in question had been extinguished as the Respondents were admittedly in adverse possession of the property during the pendency of the appeal for 20 years, thus setting aside the judgment and decree of the Trial Court. Being dissatisfied with the judgment of the appellate Court, the Petitioner filed a Revision petition being No. 14(H) 1978 before this Court, challenging the validity of the decrees of both the Trial Court and the Appellate Court. This Court, by its judgment dated 2.6.83 passed in Civil Revision No. 14(H)78, allowed the Revision petition partly by declaring the right, title and interest of the Petitioner (Plaintiff) over 50% of Schedule "A" property.

8. Shri B. Das went on to contend, that the present Petitioner as well as the Respondents had preferred appeal before the Supreme Court of India under Civil Appeal Nos. 1732-33/84 from the said judgment and order dated 2.6.83 passed by this Court. Both the appeals preferred by the parties were dismissed by the Supreme Court of India on 21.8.87. According to Shri Das, the relief claimed by the Petitioner was for declaration of right, title and interest over the entire property under Schedule-"A" of that suit, but the relief granted to the Petitioner was to the extent of 50% of the property in dispute and, as such, the subsequent suit was for declaration of the un-declared 50% of the said property and it was not suit for partition of the property and as such, there is no bar on the part of the Petitioner to file the subsequent suit for the reliefs sought for.

9. The High Court, in Civil Revision No. 14(H)/1978 made a simple observation as follows:

Keeping in view of the entire background, relationship of the parties, and the facts and circumstances of the case, I would think division into equal halves would be fair and just; and so I declare the right, title and interest of the Plaintiff over half of Schedule-"A" property.

Shri Das further argued, that there is no decree of any Court declaring the right, title and interest of the Respondents over the remaining 50% of the suit property. In the said judgment and order dated 2.6.83, this Court held, that the Plaintiff (present Petitioner) was the real owner of the suit property and not a benamdar. The learned Addl. Deputy Commissioner lost sight of this important finding of this Court while passing the impugned judgment and order, Shri Das contended.

10. At the hearing, Shri N.K. Deb, learned Counsel appearing for the Respondents, submitted that the subjects matter/issues involved in the subsequent suit being T.S. No. 1 of 1995 had been finally decided and that, the

matter went to the Supreme Court of India and, as such, the learned Trial Court as well as the learned Addl. Deputy Commissioner, Shillong, rightly passed their respective judgments and orders and as such, there is no infirmity in the impugned order. In fact, the Petitioner cannot agitate the present matter and cannot claim the relief sought for in the subsequent suit as the matter had already been decided and, that the subsequent suit being T.S. No. 1 of 1995 is barred by the principles of res-judicata as laid down u/s 11 of the Code of Civil Procedure.

11. Supporting the case of the Respondents, Shri Deb argued, that no second revision lies from an order passed by the Revisional Court namely, the Addl. Deputy Commissioner, like the impugned order passed in Civil Revision No. 1(T)/1996; within the purview of Rule 36-A of the Rules for Administration of Justice and Police in Khasi and Jaintia Hills, 1937.

12. In reply, Shri B. Das submitted, that a mere opinion or observation of the Court on a matter not necessary for the decision of the case and not arising out of the issues before it, is not res-judicata. Giving emphasis and reliance upon the observations of this Court and the Apex Court made in the aforementioned cases, Shri Das contended that there is no specific declaration or decree of the Court declaring the right, title and interest of the remaining 50% of the suit property in Schedule-"A" to and in favour of the Respondents concerned and, as such, the subsequent suit brought by the present Petitioner is not hit by the principle of res-judicata as laid down u/s 11 of the Code of Civil Procedure.

13. It is an admitted position of the parties that the present Petitioner, as Plaintiff, filed Title Suit No. 1(T)/1995 for declaration of his right, title and interest in respect of the alleged undeclared half portion (approx) of the holding No. 122 in Ward No. 4 of Shillong Municipality covered by Patta dated 9.2.1955 and the learned Asstt. to the Deputy Commissioner had issued summons to the Defendants including the present Respondents as Defendants, as required under Order V, Rule 1 and 5 of the CPC and dates had been fixed for enabling the Defendants to file written statement for their defence as per related orders of the Court of the Asstt. to the Deputy Commissioner. Instead of filing written statement, the Defendant No. 3/the Respondent No. 3 herein, filed a petition dated 15.5.95 for dismissing the suit being Title Suit No. 1(T)/1995 by contending inter-alia, that the Plaintiff/Petitioner in violation of the order of the Supreme Court passed in Civil Appeal Nos, 1732-33/84 dated 21.8.87 filed the instant suit and obtained the ad-interim injunction order by suppression and misrepresentation of facts; the Petitioner ought not to have filed the instant suit in view of the judgment and order dated 2.6.83 passed by this Court in Civil Revn-No. 40(SH) 78 and, that the Petitioner, by filing a fresh suit on the same decided issues committed a contempt of Court. The Petitioner also filed show cause statement to the said petition dated 15.5.95.

14. It is also a fact that, by an order dated the Asstt. to the Deputy Commissioner was of the opinion that it would be just and proper to dispose of

the said petition dated 15.5.95 after a proper hearing from the parties and, accordingly, the learned Asstt. to the Deputy Commissioner had fixed a date viz., 8.6.95 for show cause, if any, and for hearing of the petition. The case was fixed on different occasions and lastly, the learned Asstt. to the Deputy Commissioner heard the parties through their respective counsel on the said petition dated 15.5.95 and fixed 29.9.95 for order. On the learned Asstt. to the Deputy Commissioner, Shillong, dismissed the suit by holding that the suit is barred by res-judicata u/s 11 of the Code of Civil Procedure. The learned Asstt. to the Deputy Commissioner also observed that on dismissal, the said suit stands disposed of on content.

15. Now, this Court is to see and examine as to whether the learned Asstt. to the Deputy Commissioner disposed of the said case in accordance with the prescribed procedure of law or not and, whether the learned Addl. Deputy Commissioner rightly affirmed the order of 25.4.96 passed by the Asstt. to the Deputy Commissioner under the impugned order dated 26.9.96.

16. On perusal of the available materials on record including the related records maintained by the learned Courts below, it has been revealed that the learned Asstt. to the Deputy Commissioner did not frame issue or issues including the preliminary issue for determination of the suit on issues of fact or of law before passing the order dated 25.4.96 resulting to the disposal of the said suit on dismissal. But, the learned Asstt. to the Deputy Commissioner had disposed of the suit on the aforementioned petition of the Defendant No. 3. Order XIV of the CPC provides for settlement of issues and determination of suit on issues of law or on issues agreed upon. As per provisions of law laid down under Rule 1 of Order XIV Code of Civil Procedure, issues arise when material proposition of fact or law is affirmed by one party and denied by the other and such proposition of the parties shall form the subject of distinct issue, may be issues of fact or issues of law. Rule 1(5) of Order XIV lays down, that:

At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and (after examination under Rule 2 of Order X and after hearing the parties or their pleaders), ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

17. As per provisions of law laid down, under Rule 1(6) of Order XIV Code of Civil Procedure, the Court/do not require to frame and record issues where the Defendant at the first hearing of the suit makes no defence. It is an enshrined principle of law that, a case may be disposed of on a preliminary issues as laid down under Rule 2 of Order XIV CPC and if the Court is of the opinion that the case or any part thereof may be disposed of on an issue of law relating to: (a) the jurisdiction of the Court or (b) a bar to the suit created by any law for the time being enforced by postponing the settlement of the other issues until after that issue of law has been determined, and it may try that issue first.

18. Order XV CPC lays down the provisions of law relating to the disposal of the suit at the first hearing. It is well settled that while deciding the suit at the first hearing, the Court is to see as to whether - (1) parties are not at issue, (2) whether one of several Defendants not at issue or, (3) parties are at issue. In the instant case, the Defendants did not file written statement despite the summons had been served to them as required under Order V, Rules 1 and 5 of the Code of Civil Procedure. However, the Defendant No. 3/the Respondent No. 3 herein, filed a petition dated 15.5.95 for dismissing the suit by containing the statements as highlighted above. On bare perusal of the said petition and date of the plaint and show cause statement of the Plaintiff, an issue of law namely, the questions of the principles of res-judicata arises and settlement and determination of it is called for to meet the ends of justice as there is no bar on the part of the Court to dispose of a case on a preliminary issue relating to an issue of law namely - (a) jurisdiction of the Court or, (b) a bar to the suit created by any law for the time being enforced, as laid down under Rule 2 of Order XIV of the Code of Civil Procedure. In other words, the parties concerned are at issue namely, "question of res-iudicata."

19. By the expression, "first hearing" of the suit, the day of appearance of the Defendants fixed under Rules 1 and 5 of Order V of the Code is meant and in a case where summons had been issued for settlement of issues only, the date mentioned in the summons is the first date of hearing of the suit. Nowhere in the Code, either expressly or impliedly it is provided that fresh summons has to be issued to the Defendant if he or she does not appear after service of summons on him/her for settlement of issues. In the instant case, summons have been duly served to all the Defendants and the Defendants have been duly represented by their lawyers and had entered appearance before the Court in connection with the instant case. Whether the parties are at issue or issues, the Court is to frame issues or issue or even a preliminary issue only on the basis of the available materials on record. If the Court is of the opinion that the case or any part thereof may be disposed of on a particular preliminary issue or, the Court is of the opinion that the disposal of issue is called for at the first hearing, as enshrined under Order XIV, Order XV and Order XXXV Code of Civil Procedure.

20. So far, the question of maintainability as raised by Shri S.K. Deb, learned Counsel for the Respondents is concerned, I am of the view that High Court has very wide powers in the matter of revision and it can go into the facts like an Appellate Court. These principles of law have been laid down by the Full Bench of the Assam and Nagaland High Court in a case between Ka I dis Mary Kharkongor, Petitioner v. Ka Theirit Lyngdoh, Respondent reported in 1969 ALR 92 and such principles has also been laid down by this Court in a case between, Ka. Mathilda Kharmalki Vs. Ka. Sabina Nengrum, Rule 36-A of the Rules for the Administration of Justice and Police in Khasi and Jaintia Hills, 1937, empower the High Court to call for proceedings of any case decided by any officer subordinate to it and pass such orders as it may deem fit and proper, on the application of the person or persons concerned or otherwise. In view of the above settled principles of law, I

hold that the present Revision petition is maintainable in the eye of law.

21. At the time of filing the suit, being T.S. No. 1(T)/95 the present Petitioner (Plaintiff) filed and appended nine(9) documents/papers marked as Annexures I to IX. Annexure I relates to a receipt-memo which is a photo copy of original Annexure II is a photo copy of a letter issued by M/s. Dutta and Co. Annexure III is a simple copy of excerpts from the deposition of one Late Ajit Kumar Dutta, Defendant No. 1 in suit No. 18(T)/54. Annexure IV is also a simple copy of the excerpts from the deposition of Shri Anil Kumar Dutta, Defendant No. 2 in Suit No. 18(T)/1954. Annexure V is a photo copy of the order dated 21.8.87 passed by the Supreme Court of India in Civil Appeal Nos. 1732-33/84. Annexure VI is a simple copy of the part of the memo of appeal containing the paragraph 7 thereof. Annexure VII is the photo copy of the counter affidavit of the Respondents filed in connection with petition for Special Leave to Appeal (Civil) No. 11292 of 1983. Annexure VIII is the photo copy of a letter issued by one officer surveyor of the Survey of India, North East Circle, Shillong. Annexure DC is also a copy of a blueprint/sketch map pertaining to the compound of Shri Akhil Chandra Dutta. These 9(nine) documents/papers are neither original copies nor certified copies of the documents concerned and, rather no required Court fees are affixed or paid to it.

22. In the related show cause statement dated 15.6.95 filed by the Plaintiff/Petitioner in Title Suit No. 1(T)/1995, the Plaintiff also appended 4(four) documents/papers which are all photo copies of the originals and no required Court fees are affixed or paid by the Plaintiff/Petitioner. On perusal of the available records maintained by the Asstt. to the Deputy Commissioner, Shillong in connection with Title Suit No. 1(T)/1995, Misc. (J) Case No. 2(T)/1995 and the records relating to Civil Revn. Case No. 1(T)/1996 maintained by the District Judge/Addl. Deputy Commissioner, Shillong, it has been revealed that neither the Plaintiff nor the Defendants produced the decree of the Trial Court passed in Title Suit No. 18(T)/1954 and the connected decrees of the Appellate Courts before the learned Courts below. But, the learned Asstt. to the Deputy Commissioner had disposed of the title suit No. 1(T)/1995 on the petition made by the Defendant No. 3 (Respondent No. 3) without ascertaining the fact that whether these documents had been admitted or not by the parties at the stage of the "first hearing" of the case. But, the present Petitioner as well as the Respondents produced many documents before this Court in connection with the present Civil Revision No. 50(SH)/1996. The Plaintiff/Petitioner produced the following documents:

1. Copy of the Plaintiff of Title Suit No. 18(T) of 1954. (page 1 to 4).
2. Copy of the Written Statement filed by the Respondent as Defendant in Title Suit No. 18(T) of 1954 (page 5 to 20).
3. Copy of the Issues framed by the Court. (page 21).
4. Copy of the Civil Revision 14(SH) of 1978. (page 22 to 33).

5. Copy of the order of the Supreme Court. (page 34 to 37).
6. Copy of the order in Title Execution Case No. 11(T) of 1988. (page 38 to 45).
7. Copy of the petition filed in T.S. No. 1(T) of 1995. (page 46 to 48).
8. Copy of the plaint of T.S. No. 1(T) of 1995. (page 49 to 66).
9. Decree in T.S. No. 18(T) of 1954.
10. Decree in T.S. Appeal 10(T) of 1958.

23. These documents are also neither originals nor certified copies of the originals. Likewise, the Respondent Nos. 1, 2, 3, 4 and 5 filed their affidavit-in-opposition in the present case by appending as many as 7(seven) documents which are all photo copies of the related documents. Most of the documents produced by both the parties before this Court in connection with the present case were not produced by the parties before the Court of Asstt. to the Deputy Commissioner and also before the learned Addl. Deputy Commissioner.

24. At this stage, I am of the view that this Court need not go further as both the learned Courts below had completely lost sight of the mandatory provision of law laid down Order V, Order XIV, particularly the provisions laid down under Rules 1, 2 of the said Rule; the provisions contemplated by Order XV and Order XXXV Rule 4 of the CPC while passing the related orders dated 25.4.96 in T.S. 1(T)/1995 and (J) Misc. Case No. 2(T)/1995 and order dated 26.9.96 passed in Civil Revision No. 1(T) of 1996. It is pertinent to mention here that, on dismissal of the suit being T.S. No. 1(T)/1995, the learned Asstt. to the Deputy Commissioner did not cause the preparation of the decree as required under the Code of Civil Procedure. The learned Addl. Deputy Commissioner had also lost sight of these important legal aspects while passing the impugned order dated 26.9.96. In my considered view, both the Courts below passed the related judgment and orders without following the prescribed procedure of law as highlighted above and, accordingly, on this ground alone, the related judgments and orders both the Courts below deserve to be set aside and accordingly, it is set aside and thus the present petition is allowed. The case is remanded/remitted to the Court of the Asstt. to the Deputy Commissioner, Shillong and as such the learned Asstt. to the Deputy Commissioner shall decide the matter afresh after affording reasonable opportunity of being heard to all the parties concerned. It is made clear that if the learned Trial Court, namely the Asstt. to the Deputy Commissioner is of the opinion that the case may be disposed of on a preliminary issue pertaining to the issue of law only, as discussed above; he may frame a preliminary issue namely on the question of jurisdiction or the question of law including the question of jurisdiction and the question of res-judicata. The parties are at liberty to file documents in support of their cases and thereafter, the learned Trial Court is to see and examine as to whether the documents are admitted by both the parties or not and, the documents, if so filed by the parties, are admissible in the eye of law or not before deciding the dispute amongst the

parties. If the Trial Court is of the opinion that the examination of the witnesses is required, the parties may be allowed to produce their witnesses in support of their cases on the related issues, to meet the ends of justice.

25. It is also further made clear that the learned Trial Court shall dispose of the case as early as possible preferably within a period of 6(six) months from the date of receipt of the judgment and order of this Court. The parties are directed to appear before the Court of Asstt. to Deputy Commissioner, Shillong, on 29.4.98 in connection with the case. It is further ordered that status quo with regard to the possession of the land in question as on today shall be maintained till the final disposal of the Title Suit No. 1(T)/1995.

Before I part with this case, I am constrained to make the following observations:

26. Universally accepted maxim, rather, principle of law is that, "justice must not only be done but must also appear to be done." This Rule has received wide recognition in several decisions of the Apex Court. One of the decisions of the Apex Court finds its place in paragraph 16 of the judgment relating to a case between Ashok Kumar Yadav and Others Vs. State of Haryana and Others, . This Court also require the learned Trial Court namely the Asstt. to the Deputy Commissioner, Shillong to bear in his judicial mind while deciding the question of res-judicata the following land marked judgments of the Apex Court reported in Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others, ... Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, ... Gulam Abbas and Others Vs. State of Uttar Pradesh and Others, ... Sheodan Singh Vs. Smt. Daryao Kunwar, It is also to be noted that a plea of res-judicata is a mixed question of law and fact and so the factual foundation of the plea must be laid in the pleadings and issues.

The parties are at liberty to produce the documents before the learned Trial Court in support of their respective cases. The Respondent/Defendants are also at liberty to file Written Statement, if so advised before the learned Trial Court.