

(1990) 04 GAU CK 0007

In the Gauhati High Court

Case No : Second Appeal No. 20 of 1979

Athokpam Ningol Leishangthem Ongbi Mangi Devi

APPELLANT

Vs

Athokpam Ningol Chonjon Devi

RESPONDENT

Date of Decision : 16-04-1990

Acts Referred:

Civil Procedure Code, 1908 — Section 100
Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (1991) 2 GLJ 235

Hon'ble Judges : Y.Ibotombi Singh, J

Bench : Single Bench

Advocate : R.K.Sanajaoba Singh, N.Kerani Singh, Advocates appearing for Parties

Judgement

1. Athokpam Ningol Chonjon Devi and Athokpam Ningol Chaobi Devi filed a suit being Original (Partition) Suit No. 11/76/9 of 1977 in the Court of the learned Subordinate Judge II, Manipur for partition of their shares in the plaint schedule properties and for separate possession thereof. The learned Subordinate Judge partly decreed that the plaint schedule A (i) be partitioned into three equal shares among the plaintiff Nos.1 and 2 and the defendant No.1. The reliefs in respect of other properties was not granted. The two respondents namely, Laishangthem Mangi Devi and Thongram Ongbi Amurei Devi appealed to the District Judge, who dismissed the appeal and affirmed the said judgment and decree of the learned Subordinate Judge II. Against that judgment and decree of the learned District Judge, the defendants have come up in second appeal. I have heard the learned counsel for both the parties.

2. The plaintiffs' case, in short, is that the plaint schedule A (i) and A (ii) lands were the absolute properties of Shri Athokpam Shonggang Sinjih, who enjoyed and possessed the same till his death. The said Shonggang Singh also enjoyed and possessed a piece of Government land covered by old Dag No. 1033 by constructing the plaint schedule B (i), B (ii) and B (iii) structures thereon during

his life time.

The plaintiff No.1 and the defendant No.1 are the daughters of Shonggang Singh and the plaintiff No.2 is the grand daughter through his predeceased son Bidhu Singh. Shonggang Singh died about 5 years before the institution of the suit in the year 1976 and on his death the plaintiffs and the defendant No.1 jointly inherited the suit properties and their shares have not been divided as yet. The proposal for partition and separate possession of the suit properties, the plaintiff's case goes further, have not been agreed to by the defendant No.1. Hence, the suit.

3. In their joint written statement the defendants admit that the plaint schedule A lands originally belonged to and possessed by the said Shonggang Singh but they assert that Shonggang Singh, during his life time, sold the plaint schedule A(i) and A (ii) in favour of his two daughters, Tombinou Devi (now dead) and Mangi Devi (defendant No.1) respectively by executing two separate registered deeds of sale dated 5.1.59. The two vendees late Tombinou Devi and the defendant No.1 Mangi Devi took possession of their respective lands from the date of sale and also got their names entered into the records of rights. Thereafter, Tombinou Devi sold her aforesaid low portion in favour of Mangi Devi (defendant No.1) who in her turn sold away the same in favour of the defendant No.2.

4. On the basis of the pleadings, the learned Subordinate Judge formulated as many as 10 issues including the following 4 issues :

"1. Did late Shonggang Singh sell the Ingkhol covered by new Dag No. 3197 (the plaint Schedule A (ii) land) and deliver possession thereof to the defendant No.1 ?

2. Did late Shonggang Singh sell the lou covered by new Dag No.3813 and deliver possession thereof to Tombinou Devi and did the latter subsequently sell the same to the defendant No.1 ?

3. Did late Shonggang Singh . leave the suit lands and suit buildings mentioned in the plaint schedule on his death ?

4. Did the plaintiff and defendant No.1 inherit the suit lands and the suit buildings ? If so, what are their respective shares ? "

5. The learned Subordinate Judge found that Shonggang Singh, during his life time, sold the plaint schedule A(i) and A(ii) lands to his two daughters Tombinou Devi and Mangi Devi (the defendant No.1) respectively by executing two separate sab d;eds; that late Tombinou Devi, during her life time, did not transfer the plaint schedule A(i) land, which she purchased from her father, to the defendant No. 1; that late Shonggang Singh did not leave the plaint schedule B structures and that on the death of Tombinou Devi the plaint schedule A(i) land devolved upon the plaintiff Nos.1 and 2 and the defendant No. 1. On the basis of the above findings, the learned Subordinate Judge partly decreed the suit in the manner as stated above and the same was affirmed by the learned District Judge.

6. In this appeal the following substantial questions of law have been raised:

- 1) Whether the reliefs granted to the plaintiff are founded on their pleadings, and if not, can they be granted by the Court ?
- 2) Whether the Hindu Succession Act under section 15 have been applied correctly in the case ?
- 3) Whether the impugned judgment and decree are bad for violation of section 153 of the M.L.R and L.R.Act, 1960?
- 4) Whether for the purposes of section 54 of the T.P.Act there is a valid settlement of possession of the agricultural lands when the concerned tenant/ actual possessor of the noncontesting vendor only acknowledged and recognised the title of the possessor and declared possession to the latter ?
- 5) Whether the decree begs for another similar proceedings on the same subject matter not covered by section 54 C.P.C. and hence inconclusive, is substantially bad in law ?

7. A short genealogy will be helpful in under standing the case

Athokpam Shonggang Singh (Father)

Tombinou Devi, Bidhu Singh, Chong Devi Mangi Devi

Daughter Son Plaintiff Defendant

(Died after the (Predeceased No.1. No.1 death of Shonggang) his father)

Chaoba Devi Plaintiff No.2.

8. I now take up the first and second points for consideration. Shri R. K. Sanajaoba Singh, learned counsel for the appellants has strenuously submitted that both the learned trial Court and the first appellate Court erred in law in granting the reliefs inasmuch as the same are not founded on the pleadings and, therefore, the impugned judgment and decree are liable to be set aside. Shri N.Kerani Singh, learned counsel for the respondents has, however, submitted that the plaint schedule A (i) land was inherited by the plaintiff Nos. 1 and 2 and the defendant No. 1 by operation of law and that, therefore, the learned Subordinate Judge was fully justified in granting the reliefs to the plaintiffs.

9. In support of his above contention, Shri R.K.Sanjaoba Singh has drawn my attention to the decision made by the Supreme Court in the case of Sheodhari Rai and others vs. Suraj Prasad Singh & others, reported in AIR 1954 SC 758.

10. In the said case, it was tersely held as follows :

"Where the defendant in his written statement sets up title to the disputed lands as the nearest reversioner, the Court cannot, on failure of the defendant to the prove his case, make out a new case for him which is not only not made in the written statement but which is wholly inconsistent with the title set up by the

defendant, namely, that the defendant was holding under Shikimi settlement from the nearest reversioner."

11. The learned counsel has also drawn my attention to the decision made by the Supreme Court in the case of *M/s Trojin & Co. vs. RM. N.N. Nagappa Chetiar*, reported in AIR 1953 SC 235. In the said case, it was held that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found and that without amendment of the plaint, the Court can not grant the relief not asked for. The same principle will also find place in the case of *Bhagwati Prasad vs. Chandramaul* (AIR 1966 S C 735). Hence, I take it that the reliefs granted are to be founded on the pleadings of the parties. Point is, whether the reliefs granted by the learned SubJudge are founded on the decree.

12. Now, the decision of the learned SubJudge that there was no valid transfer of the plaint schedule A (i) land from Tomoinou Devi to Mangi Devi (defendant No.I) has not been challenged by any of the parties. Similarly, the decision of the learned SubJudge that on the death of Tombinou Devi the said land will devolve upon her heirs has not been challenged by any of the parties. Thus, there is no dispute that on the death of Tombinou Devi the plaint schedule A(i) land will devolve upon the heirs. But the plaintiff has not taken any plea that Tombinou Devi left no heirs on her husband side and that the plaintiff Nos.I and 2 and the defendant No.I are the only heirs of late Tombinou Devi and, therefore, on her death the said land devolved upon them. It is to be noted here that under section 15 of the Indian Succession Act, on the death of Tombinou Devi the said land would devolve firstly upon her sons and daughters and the husband; secondly upon the heirs of her husband, thirdly upon the mother and the father and lastly upon the heirs of her mother.

13. But, no issue was struck on those points as the plaintiffs have not taken such a plea in their plaint and they have not also led any evidence on these points. Shri Kerani Singh, learned counsel for the respondents, with all his usual frankness, conceded at the bar on this point. Now, in considering the doctrine that reliefs should be founded on pleadings made by parties, Court must bear in mind the other principles that consideration of form cannot override the legitimate consideration of substance. If a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not taken expressly in the pleadings would not necessarily disentitle a party from relying upon it if it is proved by evidence. But in the case in hand, as discussed above, no issue was struck on the questions. Whether the plaintiff Nos.I and 2 and the defendant No.I are the only heirs of Tombinou Dsvi and whether on her death the plaint schedule A (i) land devolved upon them Further, parties have not led any evidence on this point There is thus a misapplication of law to the proof of facts of the suit. This is an error of law affecting the jurisdiction of the Court. However, both the lower appellate Court and the trial Court made a concurrent finding that on the death

of Tombinou Devi the plaintiff schedule A(i) land devolved upon the plaintiff Nos.1 and 2 and the defendant No.1. Point is, whether this concurrent finding of facts can be interfered with in this second appeal. It is well settled that if there is an error of law or the impugned decision is contrary to law the concurrent finding of facts can be interfered with in the second appeal. The proposition of law is very general and, therefore, it require no further elucidation. The learned counsel has cited a number of decisions on this point. But, I do not propose to burden my judgment with these citations as it a well settled principle of law.

For the reasons stated above, the impugned judgment and decree must not be allowed to stand. In the result, the appeal is allowed and the impugned judgment and decree is set aside. The case is sent back to the Court below with a direction to dispose of the matter in accordance with law, after giving opportunity to the plaintiffs to amend their pleadings subject of course to the law of limitation, if any. In the circumstances of the case, parties are directed to bear their respective costs.