
(1992) 01 GAU CK 0024
In the Gauhati High Court
Case No : Second Appeal No. 22 of 1973

Jamkhohen

APPELLANT

Vs

Joshep

RESPONDENT

Date of Decision : 22-01-1992

Acts Referred:

Specific Relief Act, 1963 — Section 34

Citation : (1994) 2 GLR 84

Hon'ble Judges : R.K. Manisana Singh, J;H.K. Sema, J

Bench : Division Bench

Advocate : A. Nilamani Singh, for the Appellant; Y. Imo, for the Respondent

Final Decision : Allowed

Judgement

R.K. Manisana Singh, J.—This second appeal arises from the decree of the District Judge Manipur passed in CA No. 31 of 1972 affirming the decree and judgment passed by the Subordinate Judge Manipur in OS No. 53/71/46/72.

2. Facts-the case of the Plaintiff - Appellant, in brief, was as follows. On his father's death, the Plaintiff succeeded to the Chiefship of the village Mokokching. He was a minor when his father died and, therefore, the Defendant - Respondent being his uncle was looking after the village as acting Chief. But the Defendant taking advantage of the minority of the Plaintiff surreptitiously without the knowledge and consent of the Plaintiff recorded his name in the Government record (Touzi Book) as the Chief of the village Mokokching. Therefore, the Plaintiff instituted the suit for declaration that he is the Chief of Mokokching village.

The case of the Defendant WAS thus. The father of the Plaintiff was the Chief and the Plaintiff inherited the Chiefship on the death of his father, When the Plaintiff's father died the Plaintiff was aged 10 and, therefore, he took over the management of the village as de facto Chief of the village. After the Plaintiff became major, he abandoned the chiefship of the village on his own accord in

favour of the Defendant in the year 1962 and filed a joint application (Ext-B/1) praying for transfer of the Chiefship as in favour of the Defendant. The transfer of the Chiefship was approved by the Deputy Commissioner Manipur on 4.7.64. The Defendant also pleaded that the suit was barred by limitation and was hit by Section 34 of the Specific Relief Act.

3. The trial Court held that the Plaintiff had abandoned the Chiefship of the village in favour of the Defendant. The lower appellate Court held that the Plaintiff-Appellant had surrendered the Chiefship to the Defendant-Respondent. The finding of the lower Appellant Court runs:

It is true that the Appellant was Chief and he was entitled to remain the Chief after the death of his father. But according to the custom of his tribe the Chiefship could be surrendered. In the present case, the Appellant, by his own act surrendered, the Chiefship.

4. Mr. Nilamani Singh, learned Counsel for the Appellant, has submitted that the finding of the learned District Judge to the effect that according to the custom of the Plaintiffs tribe (Kom Tribe) the Chiefship could be surrendered shall not be binding on the parties as the custom has not been pleaded nor issue has been framed. Mr. Imo Singh, learned Counsel for the Respondent, has contended that the proposition of law submitted by Mr. Nilamani Singh shall not be applicable to the facts of this case.

5. Before dealing with the rival contentions of the parties, it will be pertinent to state that, in the present case, admittedly the plea with regard to the alleged custom was not in the written statement of the Defendant. No issue was framed by the trial Judge relating to the custom. It is also not disputed that Chiefship of the village is an office and that the Chief has to perform certain functions under the relevant laws.

6. It is well settled that the general rule is that an issue not arising on the pleadings of the parties should not be determined, that is to say, in the absence of the pleadings, evidence, if any, produced by the parties cannot be considered. But the rule has no application to a case where the parties go to trial fully understanding the central facts with knowledge that a particular question is in issue and adduced evidence thereon, although no specific pleading has been raised and no issue has been framed, as it would be a mere irregularity which does not vitiate the decision. If any authority is required we may refer to the decisions of the Supreme Court in Nagubai Ammal and Others Vs. B. Shama Rao and Others, ; Bhagwati Prasad Vs. Shri Chandramaul, ; and Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others,

7. The next question which, therefore, arises for consideration is whether, on the facts and in the circumstance of the case, the parties went to trial fully understanding the case opposed to each other and led evidence. A custom is a mixed question of law and fact, and in order that a custom or customary practice may have a force of law, it is essential that it should be ancient, invariable,

certain and reasonable. But a custom which is opposed to law and public policy is not valid custom. The Plaintiff and the Defendant did not say about the custom in the witness-box. But, in the course of the cross-examination by the Defendant, two of the witnesses of Plaintiff, namely, PW - 1 Lal (h) Munsong and PW - 3 Ngulshell, have stated about the existence of custom. PW-1 (Lal (h) Munsong) has stated that according to the custom of his tribe a Chief can relinquish the Chiefship of the village in favour of one of his nearest heirs. But the Chief who relinquished the Chiefship can take back the Chiefship in whose favour he relinquished. PW - 3 Ngulshell has stated that Chiefship can be transferred and surrendered within the clan of the Chief.

8. On the facts and in the circumstances of the case, we are not satisfied that the parties knew the case and the issue upon which they went to trial and produced evidence. Therefore, the findings of the Courts below relating to the custom was vitiated and was not binding on the parties in view of the decisions of the Supreme Court in Mohammad Mustafa Vs. Sri Abu Bakar and Others, in which it has been held that a finding reached without proper pleading and necessary issue the same cannot bind any of parties to the suit.

9. Mr. Imo Singh, learned counsel for the Respondent, has further contended that the suit was barred by limitation. The trial Court has given finding that the suit was not barred by limitation. The question of limitation was not raised before the District Judge by the Defendant. The question of limitation, in the present case, is a mixed question of law and fact. Therefore, we decline to deal with the question in second appeal in the circumstance of the case.

10. Mr. Imo singh has further not contended that the suit was hit by Section 34 of the Specific Relief Act for the following reason. The suit was for declaration of title simplicitor. The Plaintiff did not pray for cancellation of the entry of the name of the Defendant in touzi Book on for declaration that the entry in Touzi book was wrong.

11. In his women statement the Defendant has sated that the sort was barred by Section 34 for want of consequential relief but it has no been states what was the consequential relief which the Plaintiff was able to seek. Proviso to Section 34 of the Specific Relief Act reads thus.

Provided that no court shall make any such declaration where the Plaintiff, being able to seek further relief, than mere declaration of title, omits to do so.

(Emphasis added).

The object of the proviso is to avoid multiplicity of the suits and to obtain a decision once for all. With regard to the expression "being able to seek further relief" employed in the proviso to Section 34, the decision on the question of ability to seek further relief would depend on the facts and in the circumstances of a particular case. Therefore, where mere declaration would be sufficient or would serve the purpose, it would not come within the expression "being able to

seek further relief". Entry in Touzi Book is a mere record of the name of the Chief of a particular village. After the declaration of title of the Plaintiff, he may approach the authority concerned for correction of the entry and the proceeding for correction of entries in the Touzi Book cannot be said to be suit. Considering the facts and circumstances of the case, we are of the view that more declaration of title would be sufficient and would serve the purpose and, therefore, the proviso is not attracted. Accordingly, the suit was not hit by Section 34. That apart, it is now settled that the Courts have the power grant declaratory decree independently of Section 34 depending upon the facts of each case See Veruareddi Ramaraghava Reddy and Others Vs. Konduru Seshu Reddy and Others, and Supreme General Films Exchange Ltd. Vs. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and Others,

12. For the foregoing reasons, the appeal is allowed, and the decrees and judgments of the Courts below are set aside. Accordingly the suit is decreed and declare that the Plaintiff is the Chief of the village Mokokching. No costs.