
(1992) 08 GAU CK 0010
In the Gauhati High Court
Case No : Second Appeal No. 3 of 1977

Ngakangnao Pashi

APPELLANT

Vs

R.K.Mayangmi & Ors.

RESPONDENT

Date of Decision : 28-08-1992

Acts Referred:

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

Citation : (1993) GLR 201 Supp

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

Bench : Single Bench

Advocate : A.Nilmani Singh, L.Nanda kumar Singh, Advocates appearing for Parties

Judgement

1. This second appeal is by the plaintiff against the judgment and decree passed by the learned Addl. District Judge, Manipur in case No. C.A. 16 of 1976/45(3) 76 setting aside the judgment and decree of the learned Munsiff, Imphal in original Suit No. 5 of 1973.

2. The case of the plaintiff appellant is that the suit land originally belonged to Late Shoknao who died in the year 1947 leaving his two sons, namely, respondents Nos. 1 and 2 and the widow, namely, respondent No. 3. The plaintiff inherited a paddy field known as Moyeley from his father and in the year 1940 there was exchange of the said paddy field with the suit land with late Shoknao who was the original owner of the suit land known as Laurie. The transaction of above exchange was through an oral agreement and the plaintiff also paid Rs. 25/ to late Shoknao. Since the date of exchange, it is alleged that plaintiff was possessing the suit land as owner and late Shoknao took over possession of the Paddy field Moyeley and he continued to possess as owner. The defendant Nos. 1 & 2 are the sons of late Shoknao and defendant No. 3 is the widow of late Shoknao. Regarding the date of death of late Shoknao there is a dispute as according to the plaintiff he died in the year 1947 whereas according to the

defendants he died in the year 1952 and this date was accepted by the learned courts below. It is alleged that some time in 1954⁵⁵ defendants tried to assert their title over the suit land and accordingly plaintiff filed a suit being misc. Case No. 45 of 1954⁵⁵ before the court of learned SubDivisional Officer, Ukhrul for declaration of his title over the suit land and the suit was decreed in favour of the plaintiff by judgment and order dated 2045⁴ vide exhibit A/1. On 28.12.54, 30.12.54 and 25.12.55, the learned S.D.O. Ukhrul passed two subsequent orders in the above misc. case No. 45 of 1954⁵⁵ vide exhibit A/2 and in misc. Case No. 78 of 1954⁵⁵ vide exhibit A/3. It may be stated that misc. case No. 77 of 1954⁵⁵ was filed by the present defendant No. 3 and the learned S.D.O., Ukhrul hold as in the earlier case of Misc. Case No. 45 of 1954⁵⁵ that the suit land namely Luirei belonged to the plaintiff and he was in occupation of the said land. By order vide exhibit A/3 the learned S.D.O. only closed the case in view of earlier two orders passed in above two cases. It may be stated that at the relevant time the C.P.C. was not in force and so also the Transfer of Property Act and Registration Act and all the S.D.Os. who were empowered to try all the civil cases. I shall refer shortly to the decision of the Apex Court in this connection.

3. It is alleged that defendant Nos. 1 and 2 committed transposes of the suit land on 341972 and a proceeding under Section 145 Cr. P.C. was drawn up and in the said proceeding the possession was declared in favour of defendants no. 1 and 2.

4. A joint written statement had been filed by the defendants Nos. 1 and 2 i.e. two sons of late Shoknao and his widow, defendant no. 3 has not contested the present suit though she instituted the misc. case No 77 of 1954⁵⁵ before the learned S.D.O. and also contested the misc. Case No. 45 of 1954⁵⁵. The contesting defendants have denied the allegations of the plaintiff and have asserted that the suit land originally belonged to their father late Shaknao and during his life time they along with their father jointly possess the suit land as owner and after his death they had been possessing the land till date openly, uninterrupted and adversely by cultivating the suit land. They have also denied the exchange alleged by the plaintiff. Further they have asserted that the paddy field known as Moyeley is a public land belonging to the villagers of Mungshang Chingtha village and land was in possession of the villagers enjoying the produce from the land for the welfare of the village. Regarding the three others passed by the learned S.D.O., Ukhrul, it has been alleged that the learned S.D.O. had no jurisdiction to try such civil suit and moreover the judgments were not binding on them as they were not parties to the suits. It has also been alleged that the suit is barred by limitation under Article 65 of the Indian Limitation Act and also by waiver, estoppel and acquiescence.

5. The learned trial court framed as many as 12 issues and after considering the evidence on record decreed the suit which was reversed by the impugned judgment and decree.

6. The learned lower appellate court held that defendants failed to prove that the

land known as Moyeley was a common village popery. It was further held that the plaintiff has failed to prove that there was an exchange of property as alleged. According to the learned lower appellate court no reliance can be placed on the evidence of P.W. 1 and there was a discrepancy as regarding time of exchange of both the plots of land. The court also expressed great doubt regarding the story of exchange. I may only add here that expressing doubt in a civil suit is not enough and the court has to give a clear finding. Accepting the evidence of D.W. 2 who has got land near the suit land, the learned lower appellate court accepted that the defendants were in possession of the suit land, but did not state the date from which defendants were possessing the suit land. Regarding the trial of the earlier cases by the learned S.D.O. the learned lower appellate court held that the said officer was competent to try all the civil suits including the dispute relating to the suit land, but held that the judgments/orders passed by the learned S.D.O., Ukhrul vide exhibits A/1, A/2 and A/3 cannot be acted upon against the defendants 1 and 2 as they were not parties. Though the order, exhibit A/1 was "relevant or admissible" as against the defendant No. 3 on the basis of the evidence on record, the learned lower appellate court held that plaintiff has failed to establish his title over the suit land and the contesting defendants who were possessing the suit land cannot be treated as trespasser and as much they can not be evicted. The learned lower appellate court also added that the contesting defendants have "perfected their claim to the land in suit by adverse possession".

7. Heard Mr. A. Nilamoni Singh, learned counsel for the appellant and Mr. L. Nanda kumar Singh, learned counsel for the respondents.

8. The first objection raised by Mr. L. Nandakumar Singh is that finding of facts of the learned lower appellate court are binding on this court in second appeal and as such this court cannot reappreciate or reappraise the evidence of record. On the other hand Mr. A. Nilamoni Singh, learned counsel for the appellant has urged that the findings of the learned courts below are perverse inasmuch as the learned court did not consider the evidence of PWs. 1 and 3 regarding possession as their evidence were not disputed in cross examination. The learned counsel has further urged that there is also substantial question of law in the second appeal. Regarding resjudicata and so this court can go into the 2nd appeal.

9. In this connection it may be stated that it is settled law that even in second appeal if the judgment is perverse, this court can interfere. According to Mr. A. Nilamoni Singh, the impugned judgment is perverse and I shall deal it at the appropriate place.

9. Reliance has been placed in a decision of the Supreme Court in Hira Lal and another vs. Gaijan and others, AIR 1990 S.C. 723 wherein it was held that even if the appreciation of evidence made is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error of defect in the procedure. However, when the first appellate court discarded the evidence as inadmissible and the High Court is satisfied that

the evidence was admissible that may introduce an error or defect in procedure and so also in a case where the court below ignored the weight of evidence and allowed the judgment to be influenced by inconsequential matters, In the case in hand relying on the above decision Mr. A. Nilamoni Singh has urged that the learned lower appellate court, ignored and did not consider the unchallenged evidence of P.Ws. 1 and 3 regarding fact of possession and as such this court can go into that aspect of the matter. I find considerable force in the submission of the learned counsel.

10. In *Dilbagrai Punjabi vs. Sharad Chandra* 1988 (Supp) S.C.C. 710, the Apex Court held that the High Court was right in pointing out in second appeal that the courts below had grossly erred in not considering the entire evidence on record including important and relevant documents. The court was of the view that under Section 100 C.P.C. High Court has no jurisdiction to reappraise the evidence and reverse the conclusion reached by the first appellate court, but at the same time its power to interfere with the finding cannot be denied if when the lower appellate court decided an issue of fact, a substantial question of law arises and the court is under a duty to examine the entire relevant evidence on record and if it refused to consider important evidence having direct bearing on the disputed issue and the error which arises is of a magnetite that it give birth to a substantial question of law, the High Court is fully authorised to set aside the finding. Mr. A. Nilamoni Singh, learned counsel for the appellant has urged that in the present appeal not only the important and relevant evidence was ignored as stated above, there was a failure on the part of the learned lower appellate court not to take into consideration the earlier judgments exhibits A/1 to A/3 and also the question of res judicata was not duly considered. This submission of learned counsel has also force.

11. Attention of this court has been drawn to a decision of this Court in *A.K. Sarkar vs. B.C. Sarkar*, AIR 1976 Gauhati 82 wherein it was held that findings of fact though erroneous cannot be upset in second appeal. Relying on this decision Mr. L. Nandakumar Singh has urged that the finding of the learned court below that there was no exchange of land as alleged by the plaintiff and that plaintiff was not in possession cannot be interfered to. As stated above, this court can definitely interfere in second appeal even in respect of findings on question of facts under the circumstances as decided by the Apex Court and as staled above.

12. After hearing the learned counsel for the parties at length, I am of the opinion that there are substantial questions of law in this second appeal which require examination by this court.

13. Before I proceed to consider the case I may state here that it is not disputed that in the year 1940 when accordingly to the plaintiff the exchange of land took place C.P.C., Registration Act and Transfer of Property Act were not in force in the State of Manipur. According to Mr. A. Nilamoni Singh, the C.P.C. came into force on 10121956, the Transfer of Property Act on 1.1.1957 and the Registration Act on 1641950. Therefore, though the exchange of land was by oral agreement

followed by celebration in the house of the plaintiff and it was not registered, it was a valid exchange of land in the eye of law. It is not disputed that all the S.D.Os of the State were exercising power of civil court and used to decide civil disputes and therefore, judgments vide exhibits A/1, A/2 and A/3 cannot be faulted.

14. The learned lower appellate court did not consider the judgments passed by the learned S.D.O. in respect of the claim of the suit land by the widow, namely, defendant No. 3. According to Mr. L. Nandakumar Singh the decision of the learned lower appellate court cannot be faulted. In this connection learned counsel has urged that the judgments are not binding on contesting defendant Nos. 1 and 2 as they were not parties before the S.D.O. The learned counsel has drawn attention of this court to the case in *Kesho Prasad vs. Mt. Bhagjogna Kuer*, AIR 1937 Privy Council 69. It was inter alia, held that the judgment is not admissible as evidence against one who is a stranger to the suit. Learned counsel has also drawn attention of this court to a decision of the Apex Court in *State of Bihar Vs. Sri Radha Krishna Singh*, AIR 1983 S.C. 684. Specific attention has been drawn to paragraphs 35,40,121 to 133, and 143. Attention has also been drawn to Sections 44 to 44 of the Indian Evidence Act. I may state here that Mr. A Nilamoni Singh in support of his contention that the earlier judgments passed by the learned S.D.O. are admissible has drawn attention of this court to Sections 13,35,40 to 43 of the Evidence Act.

15. I have perused the judgments placed before this court. It is true that the earlier judgments exhibits A/1 to A/3 were judgments in personam, but question is whether defendant Nos. 1 and 3 who were admittedly minor at the relevant time, were stranger to the suit filed by the present plaintiff and also by their mother, defendant No. 3. In the present suit defendant Nos. 1 and 2 have claimed the suit land through their father Late Shaknao. Similarly defendant No. 3 also claimed the suit land through her husband, namely, above late Shaknao. Therefore, I am unable to accept the contention that the defendant Nos. 1 and 2 were strangers to the earlier suit filed before the learned S.D.O.

16. Attention of this court has been drawn by Mr. A. Nilamani Singh to a decision of the Apex Court in *Andhra Bank Ltd. vs. R. Srinivasan* A.I.R. 1962 S.C. 232 wherein the question of legal representative was considered and it was held that persons who in law represents the estate of a deceased person can be treated as legal representative. It was also held that estate does not mean the whole of the estate and even a legatee who obtains only a part of the estate of the deceased under a will can be said to represent his estate and is, therefore, a legal representative.

17. In *Dolai Maliko vs. Krushna Chandra Patnaik*, AIR 1967 S.C. 49 it was held that even in a case where on the death of one of the appellants, his heirs apply for bringing themselves on record as his legal representatives, unless there is fraud or collusion or there are other circumstances which indicate that there has not been a fair or real trial or that against the absent heir there was a special

case which was not and could not be tried in the proceeding, there is no reason why the heirs who have applied for being brought on record could not be allowed to represent the entire estate including the heirs not brought on record.

18. In *Custodian of Branches of BANCO National Ultramarino vs. Nalini Bai Naique*, AIR 1989 S.C. 1589, it was held that legal representative includes persons who are not legal heirs but represent estate of deceased.

19. In the case in hand admittedly, the widow of deceased Shaknao was his legal representative and she became owner of one third of property after his death. At the relevant time defendants 1 and 2 his two sons were minor and therefore, their mother, defendant No. 3 was their natural guardian. I, therefore, hold that in the earlier suits before the learned SDO mother of defendant Nos. 1 and 2 i.e defendant No. 3 being the legal representative of Late Shaknao duly represented his entire estate including the shares of defendant Nos. 1 and 2. I may add here that there is nothing on record to show that there was any fraud or collusion between the plaintiff and the defendant No. 3 and there is also no finding to that effect by the courts below.

20. In view of what has been stated above, I hold that defendant Nos. 1 and 2 were not stranger in the earlier cases before the learned S.D.O. and the legal representative of Late Shaknao contested and also filed the suit and, therefore, the above judgments are admissible in evidence.

21. The plaintiff was forced to file the present suit as subsequently in the proceeding under Section 145 Cr.P.C. the possession was declared in favour of defendants 1 and 2. Mr. A. Nilamoni Singh has rightly pointed out that statements of P.Ws. and 3 (plaintiff) regarding possession was not challenged in cross examination. Therefore, the earlier judgments mainly judgment marked as exhibit A/1 are binding on all the parties in the present suit.

22. It may be stated that in civil appeal No. 659 of 1957 which was disposed of by the Apex Court on 9261 regarding a dispute from this State of Manipur, it was held that the spirit of the C.P.C. shall apply before the Code was actually brought into force. In arriving at the above decision the Apex Court referred to Section 52 of the Manipur State Hill People's (Administration) Regulation, 1947. It was also held that principle of *res judicata* applies even where it has not been made statutorily applicable and is an immemorial principle governing civil litigation.

23. Section 11 of the C.P.C., *inter alia*, provides that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or in which such issue has been subsequently raised, and has been heard and finally decided by such Court. In the case in hand there is no dispute that the Court of S.D.O. was a competent court at the relevant time and so also the present courts. Before the learned S.D.O. defendant No. 3 claimed the suit land through her late husband as his

legal representative. In the present case also the defendants are claiming the suit land through their late father Shaknao as his legal representatives. Therefore, I hold that the suit is barred by principle of res judicata and this aspect was not properly considered by the learned lower appellate court and as such the impugned judgment is liable to be set aside.

24. The, plaintiff as P.W. 3 has stated that he was in possession of the suit land and similar statement has been made by P.W. 1. But in cross-examination this has not been challenged. I, therefore, hold that the finding of the learned lower appellate court regarding possession is not acceptable inasmuch as the learned court below did not consider the unchallenged of P.Ws. 1 and 3 regarding possession.

25. For the reasons stated above I hold that the present second appeal has merit and accordingly it is allowed by setting aside the impugned judgment and order passed by the learned Addl. District Judge, Manipur in Case No. C.A. 16/76/45 (3)/76 and restore the judgment and decree of the learned trial court passed in case No. OS 5 of 1973. In other words the suit is decreed as per judgment and decree of the learned trial court. I leave the parties to bear their own costs.