

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extra Ordinary Jurisdiction)

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

W.P. (C) No. 19 of 2023

Phigu Tshering Bhutia,
Aged about 62 years,
S/o Lt. Tshering Nedup Bhutia,
R/o Lower Tathangchen Gangtok,
P.O. Raj Bhawan Gangtok-737103.

..... Petitioner

Versus

- 1.** Shri Karma Samten Bhutia,
Aged about 48 years,
S/o Lt. Passang Bhutia,
R/o Lower Tathangchen Gangtok,
P.O. Raj Bhawan Gangtok-737103.
- 2.** Shri Karma Sonam Bhutia,
Aged about 46 years,
S/o Lt. Passang Bhutia,
R/o Lower Tathangchen Gangtok,
P.O. Raj Bhawan Gangtok-737103.
- 3.** Smt. Tashi Lhamu Bhutia,
Aged about 45 years,
D/o Lt. Passang Bhutia,
R/o Lower Tathangchen Gangtok,
P.O. Raj Bhawan Gangtok-737103.
- 4.** Shri Kulzang Gyatso Bhutia,
Aged about 38 years,
S/o Lt. Passang Bhutia,
R/o Lower Tathangchen Gangtok,
P.O. Raj Bhawan Gangtok-737103.
- 5.** Smt. Tshering Doma Bhutia,
Aged about 72 years,
W/o Lt. Sonam Wangdi Bhutia,
R/o Lower Tathangchen Gangtok,
P.O. Raj Bhawan Gangtok-737103.

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6. Shri Karma Loday Bhutia,
Aged about 48 years,
S/o Lt. Sonam Wangdi Bhutia,
R/o Lower Tathangchen Gangtok,
P.O. Raj Bhawan Gangtok-737103.
7. Shri Wangyal Bhutia,
Aged about 42 years,
S/o Lt. Sonam Wangdi Bhutia,
R/o Lower Tathangchen Gangtok,
P.O. Raj Bhawan Gangtok-737103.
8. Shri Dorjee Bhutia,
Aged about 41 years,
S/o Lt. Sonam Wangdi Bhutia
R/o Lower Tathangchen Gangtok,
P.O. Raj Bhawan Gangtok-737103.
9. The Government of Sikkim,
Through the Secretary,
P.H.E. Department,
Government of Sikkim,
Gangtok-737103, Sikkim.
10. The District Collector-cum-Registrar,
District Administrative Centre,
Gangtok, Sikkim.

.....Respondents

Petition under Article 227 of the Constitution of India.

Appearance:

Ms. Laxmi Chakraborty, Mr. Dewen Sharma Luitel
and Mr. Bhaichung Bhutia, Advocates for the
Petitioner.

Mr. Jorgay Namka, Senior Advocate with Ms. Rinchen
Ongmu Bhutia, Mr. Avinash Dewan and Mr. Lahang
Limboo, Advocates for the Respondent nos. 1 to 8.

Mr. S. K. Chettri, Government Advocate for
Respondent Nos. 9 & 10.

Date of Hearing : 21.06.2024

Date of Judgment : 02.07.2024

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. This petition under Article 227 of the Constitution of India seek to challenge the Order dated 11.04.2023 passed by the learned Senior Civil Judge, Gangtok (The learned Trial Court) on an application filed by the petitioner herein as (defendant no.1) under Order XIV Rule 2 read with section 151 of the Code of Civil Procedure, 1908 (CPC) for deciding the issue framed on examination of the pleadings i.e. whether the suit of the respondents herein as (plaintiffs) is maintainable in law as a preliminary issue in view of an admission made by plaintiff no.1 during his cross examination in the trial.

2. By the impugned Order the learned Trial Court has examined the rival submissions, the cross examination of plaintiff no.1, the other evidence pointed out by the parties and the judgments referred to and opined that there is no doubt that the court has discretion to decide the question of limitation as a preliminary issue as decided by the Supreme Court in ***Sukhbiri Devi & Ors. vs. Union of India***¹. Thus, the learned Trial Court decided to take up the issue as sought for by the defendant no.1 as a preliminary issue.

¹ 2022 SCC OnLine Delhi SC 1322

Having done so and examined the issue the learned Trial Court decided the same against the defendant no.1 and in favour of the plaintiffs. The defendant no.1 is aggrieved by the impugned order and has approached this Court.

3. In *Sukhbiri Devi* (supra) the learned Trial Court had framed a preliminary issue on the question of limitation, evidently, upon forming an opinion that the case may be disposed of on an issue of law and that it warrants postponement of settlement of other issues until after the issue has been determined and to deal with the suit in accordance with the decision on that issue. The said preliminary issue was answered in the negative and accordingly the suit was dismissed. The judgment was challenged in an appeal which was also dismissed. The second appeal before the High Court was also dismissed answering the question of law against the appellant. In the appeal before the Supreme Court three substantial questions were determined and considered. The first question whether the issue of limitation can be determined as a preliminary issue under Order XIV Rule 2 (2) of the Code of Civil Procedure, 1908 (the CPC) was answered by holding that *“As held by the three Judge Bench in the decision in Nusli Neville Wadia’s Case (supra) the provisions under Order XIV Rule 2 (1) and Rule 2(2) (b) permit to deal*

with and dispose of a suit in accordance with the decision on the preliminary issue”.

4. In ***Nusli Neville Wadia vs. Ivory Properties & Ors.***² the Supreme Court held:

“51. *The provision has been carved out under Section 9-A CPC to decide, question of jurisdiction to entertain, at the stage of deciding the interim application for injunction and the very purpose of enactment of the same was that the suits were being instituted without serving a notice under Section 80, which at the time of initial incorporation of provisions could not have been instituted without serving a notice of two months. There was a bar to institute a suit. It became a practice that after obtaining injunction, suit was allowed to be withdrawn with liberty to file fresh suit after serving the notice. To take care of misuse of the provisions, Section 9-A was introduced in the year 1970 and had been reintroduced again in 1977 to consider question of jurisdiction to entertain at the stage of granting injunction or setting aside. The provision has been inserted having the narrow meaning as at the stage of granting ex parte injunction; the question can be considered. The written statement, set-off and counterclaim are not filed, discovery, inspection, admission, production and summoning of the documents stage has not reached and after the stages described above, framing of issues takes place under Order 14. As per Order 14 Rule 1, issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The issues are framed on the material proposition, denied by another party. There are issues of facts and issues of law. In case specific facts are admitted, and if the question of law arises which is dependent upon the outcome of admitted facts, it is open to the court to pronounce the judgment based on admitted facts and the preliminary question of law under the provisions of Order 14 Rule 2. In Order 14 Rule 2(1), the court may decide the case on a preliminary issue. It has to pronounce the judgment on all issues. Order 14 Rule 2(2) makes a departure and the court may decide the question of law as to jurisdiction of the court or a bar created to the suit by any law for the time being in force, such as under the Limitation Act.*

52. *In a case, question of limitation can be decided based on admitted facts, it can be decided as a*

² (2020) 6 SCC 557

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preliminary issue under Order 14 Rule 2(2)(b). Once facts are disputed about limitation, the determination of the question of limitation also cannot be made under Order 14 Rule 2(2) as a preliminary issue or any other such issue of law which requires examination of the disputed facts. In case of dispute as to facts, is necessary to be determined to give a finding on a question of law. Such question cannot be decided as a preliminary issue. In a case, the question of jurisdiction also depends upon the proof of facts which are disputed. It cannot be decided as a preliminary issue if the facts are disputed and the question of law is dependent upon the outcome of the investigation of facts, such question of law cannot be decided as a preliminary issue, is settled proposition of law either before the amendment of CPC and post amendment in the year 1976.”

5. In the present case admission was not in the pleadings made by the plaintiffs' i.e the plaint. Admittedly, it was not even in the evidence on affidavit of the plaintiff no.1. Reading of the plaint as well as the evidence on affidavit it is clear that the plaintiffs after being furnished information under the Right to Information Act by the Sub-Divisional Magistrate-cum-A.S.P.I.O. vide letter dated 13.03.2020 came to learn, for the first time, that their ancestral property i.e. the suit land which was once owned and recorded in the name of late Golay Tshering Bhutia and then mutated in the name of late Dorjee Bhutia was in fact illegally transferred and recorded in the name of defendant no.1. During cross-examination of the plaintiff no.1 which was evidently extensive he also stated:

“It is true that on 11.02.2020 plaintiff no.4 and 6 had gone to the DC Office and inquired about the suit property. It is true that I had not gone along with them. (Witness states that during the said time, his father was

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alive). It is true that paragraph 10 of Exhibit P24/PW-2 does not specifically mention that his late father had also approached the office of DC, Gangtok. It is not a fact that during 2017/18, I did not approach the DC office, Gangtok seeking information pertaining to the suit land. I cannot say for sure but I had gone to DC office, Gangtok during October-November 2017. It is true that I had gone to DC office, Gangtok during December, 2016 and January 2017. It is true that I visited the DC office, Gangtok with the sole purpose of seeking information pertaining to the status of the suit property. It is true that during this visit, I came to know that the suit property had already been transferred in the name of defendant no.1 from that of late Dorjee Bhutia.

Emphasis supplied.

6. The application under Order XIV Rule 2 of the CPC however, sought to rely upon a portion of one part of the cross-examination as underlined above to seek the examination of the issue of limitation as a preliminary issue. Evidently, the issue of limitation which was sought to be raised in the application under Order XIV Rule 2 of the CPC was a mixed question of fact and law.

7. The learned Trial Court opined that the defendant no.1 was seeking to rely upon selective lines from the cross-examination of the plaintiff no.1 and on a perusal of the cross-examination of plaintiff no.1 it would reveal that in fact he was not sure when he visited the office of the defendant no.3. Further on the perusal of the various documents referred to and relied upon by the defendant no.1 the learned Trial Court opined that neither the purported admission nor the documents would reflect that

it was an admission by them of having knowledge before 2017 and that there is no specific admission to that effect.

8. A perusal of Order XIV Rule 2 of the CPC makes it clear that where issues both of law and of fact arises in the same suit, and the court is of the opinion that the case or any party thereof may be disposed of on an “issue of law only”, it may try that issue first if that issue relates to – (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being enforced, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determine, and may deal with the suit in accordance with the decision on that issue.

9. The provision confers no jurisdiction on the court to decide a mixed question of fact and law, unless the facts are clear from the plaint itself.

10. In the facts of the present case it is absolutely certain that the question determined by the learned Trial Court could not have been determined as a preliminary issue. Therefore, the application filed by the defendant no.1 under Order XIV Rule 2 of the CPC was misconceived.

11. This Court is therefore, of the view that the final determination of the question whether the suit of the

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plaintiff is maintainable in law by the learned Trial Court was erroneous even though it was at the instance of the defendant no.1. The impugned Order dated 11.04.2023 is set aside. The application filed by the defendant no.1 under Order XIV Rule 2 of the CPC is rejected. The issue whether the suit of the plaintiff is maintainable in law may be considered along with the other issues framed and determined in the end of the trial.

12. The application under Article 227 of the Constitution of India is disposed of. Pending interim application also stands disposed.

**(Bhaskar Raj Pradhan)
Judge**

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

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