



GAHC010000152002

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/171/2002

ON THE DEATH OF MD ABDUL HAKIM, HIS LEGAL HEIRS, SMTI.
SARAKHATUN BIBI AND ORS.
VILL-NIJ-RUPAIRBALI, PO-DOLOOGRAM, DIST. CACHAR (ASSAM)

1.1: SARAKHATUN BIBI
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)

1.2: NAZIRA KHATUN
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)

1.3: ABDUL KUDDUS CHOUDHURY
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)

1.4: ANOWAR HUSSAIN CHOUDHURY
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)

2: ABDUL MANNAN
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)

3: ON THE DEATH OF ABDUL HANNAN
HIS LEGAL HEIRS
SMTI. TOMBI BIBI AND ORS.
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM



DIST. CACHAR (ASSAM)

3.1: SMTI. TOMBI BIBI
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)

3.2: ABDUL REZAK
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)

3.3: RASHIDA KHATUN
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)

3.4: RAHENA BEGUM
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)

3.5: ABIDA KHATUN
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)

4: IBETUN BIBI
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)

VERSUS

ON THE DEATH OF ABDUR RASHID CHOUDHURY HIS LEGAL HEIRS
JAHANARA CHOUDHURY(WIFE) and ORS
V.NIJ RUPAIBALI DIST.CACHAR ,ASSAM

2:SMTI. BANU BIBI
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)

3:FAIZ AHMED CHOUDHURY
VILL-NIJ-RUPAIRBALI
PO-DOLOOGRAM
DIST. CACHAR (ASSAM)



B E F O R E
Hon'ble MR. JUSTICE SANJAY KUMAR MEDHI

Advocate for the appellants : Ms. R. Choudhury,
Advocate.

Advocate for the respondents : Shri P. K. Roy,
Senior Advocate,
Shri S. K. Chakraborty.

Date of hearing : 16.08.2023

Date of judgment : 15.09.2023

JUDGMENT & ORDER

The instant appeal has been preferred against the judgment and decree dated 17.05.2002 passed by the learned Civil Judge Senior Division No. 2, Silchar in Title Appeal No. 24/2000 whereby the appeal was dismissed and the judgment and decree dated 29.04.2000 of the Civil Judge Junior Division No. 1, Silchar in Title Suit No. 58/1996 was affirmed. The appellants are the legal heirs of the original defendant in the suit which was instituted for declaration of right and confirmation of possession over the suit land which was mentioned in Schedule-A of the plaint.

2. This appeal was admitted on 11.03.2003 on the following substantial questions of law:-

“i) Whether the suit praying for cancellation of the mutation of the appellants-defendants is barred by limitation?

ii) Whether the learned court below erred in inferring fraud in the mutation

record Ext. 1 in the absence of full particulars there of as required under Order 6 Rule 4 CPC and without any proof thereof?"

3. I have heard Ms. R. Choudhury, learned counsel for the appellants whereas the respondents are represented by Shri P. K. Roy, learned Senior Counsel assisted by Shri S. K. Chakraborty, learned counsel.

4. The crux of the plaint was that the principal defendants had homestead land covered by Dag No. 650 which was contiguous to the suit land and by connivance, had made some false and incorrect entry in the mutation and was accordingly trying to dispossess the plaintiffs. The said projection was denied in the written statement.

5. Accordingly, the learned Trial Court had framed the following issues:-

“1. Is there any cause of action for the suit?”

2. Is the suit barred by limitation?

3. Is the suit bad for defect of necessary parties?

4. Is the suit property valued and requisite court fee paid thereof?

5. Had the defendants and their predecessors illegally and collusively got their names mutated in the record of rights of the suit patta?

6. Have the plaintiffs acquired right, title, interest and possession over the suit land?

7. Are the plaintiffs entitled to get the decree as claimed?

8. To what relief/reliefs the parties are entitled?”

6. Both the parties had adduced evidence and the learned Civil Judge Junior



Division No. 1, Silchar vide the judgment and decree dated 29.04.2000 in Title Suit No. 58/1996 had allowed the suit in favour of the plaintiff.

7. As indicated above, the present appellants were also unsuccessful in the first appeal instituted before the learned Court of the Civil Judge Senior Division No. 2, Silchar who had also dismissed the appeal vide judgment and decree dated 17.05.2002.

8. Ms. Choudhury, learned counsel for the appellants has submitted that the findings against Issue Nos. 2 and 5 are not in accordance with law and accordingly interference is called for from this Court. The Issue No. 2 is in connection with the objection taken by the appellants as defendants on the ground of limitation and the Issue No. 5 is in connection with the requirement to be followed under Order VI Rule 4 of the CPC.

9. Ms. Choudhury, the leaned counsel in dilating her submissions with regard to the first question of law framed with regard to the limitation has drawn the attention of this Court to paragraph 3 of the written statement and submits that a specific objection on the ground of limitation was raised. To substantiate the said ground, reference has also been made to the statements made in paragraph 7 of the plaint wherein it has been declared that with regard to the allegation of collusive entry in the records of right, objections were raised way back in the year 1912-1913. It is therefore submitted that the said issue could not have been raised afresh after about eight decades. It is submitted that by the concerned order of mutation, names of Sikandar Ali, Bakhtozzaman, Kamruzzaman who were sons of Gabru Miah were entered into the records of rights and such action was objected to by the plaintiffs. The learned counsel accordingly submits that the issue being grossly barred by time, the same could not have been taken up for adjudication by the Court.



10. With regard to the second substantial question of law which is related to the Issue No. 5, Ms. Choudhury, the learned counsel for the appellants has submitted that in a suit where statements are made regarding misrepresentation/fraud etc., Order VI Rule 4 of the CPC mandates that such particulars are necessary to be stated in the pleadings and in absence thereof, the suit would be a defective one. It is submitted that in spite of an allegation made regarding collusion, no particulars were stated in the suit and therefore the suit was hit by the aforesaid provisions of Order VI Rule 4 CPC.

11. The learned counsel for the appellants has relied upon the following case laws:-

1. AIR 1951 SC 280 (Bishundeo Narain & Anr Vs Seogeni Rai).

2. (1977) 1 SCC 279 (Varanaseya Sanskrit Vishwavidyalaya & Anr Vs Dr. Rajkishore Tripathi & Anr).

3. Judgment dated 12.07.2023 of the Hon'ble Supreme Court in Civil Appeal No. 8072 of 2010 [State of Orissa & Anr. Vs Laxmi Narayan Das (Dead) thr. LRs & Ors].

4. Judgment dated 30.11.2017 of this Court in RSA No. 9 of 2007 (Nasiruddin Ahmed & Ors. Vs Badiuz Zamal).

5. (1980) 4 SCC 258 (Ratan Lal Shinghal Vs Smt. Murti Devi).

12. The case of **Laxmi Narayan Das** (supra) has been cited to support the contention raised with regard to limitation. In paragraph 54, the Hon'ble Supreme Court has laid down that when there is a huge delay on the part of a party to avail appropriate remedy against the final publication of record of rights, such party is not entitled to any relief.

13. The other cases have been cited in support of the ground taken with regard to Order 6 Rule 4 of the CPC.

14. In the case of **Bishundeo Narain** (supra), the Hon'ble Supreme Court has laid down as follows:-

“27. We turn next to the questions of undue influence and coercion. Now it is to be observed that these have not been separately pleaded. It is true they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded.

28. It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion. See Order 6 Rule 4 of the Civil Procedure Code.”

15. In the case of **Varanasey Sanskrit Viswavidyalaya** (supra), the Hon'ble Supreme Court had reiterated the views in **Bishundeo Narain** (supra) and has laid down as follows:

“9. We do not think it is enough to state in general terms that there was “collusion” without more particulars. This Court said in Bishundeo Narain Vs Seogeni Rai (at p. 556) as under:

General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion. We have already set out the general allegations of alleged collusion by which the plaintiff-respondent seemed to imply some kind of fraud. He indicated

no reason for this and made no specific allegation against any particular person.”

16. The Gauhati High Court in the case of **Nasiruddin Ahmed** (supra) after taking into consideration the case of **Bishundeo Narain (supra)** as well as **Varanasey Sanskrit Viswavidyalaya** (supra) has laid down as follows:-

“14. The pleadings of the plaintiffs/ respondents are totally insufficient so far the fact of fraud is concerned. In (1977) 1 SCC 279 (supra), the Hon’ble Apex Court while relying the findings of the Hon’ble Apex Court in Bishundeo Narain v. Seogeni Rai reported in AIR 1951 SC 280 held that general allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion. In (2008) 15 SCC 673 (supra), the Hon’ble Apex Court while discussing the necessity of Order VI Rule 4 of the CP C held that when a fraud is alleged the particulars thereof are required to be pleaded.”

17. The case of **Madan Lal Vs Mst. Gopi and Anr** reported in **(1980) 4 SCC 255** has been cited to bring home the contention that even in case of concurrent findings of facts interference can be done even at the second appellate stage.

18. *Per contra*, Shri Roy, the learned Senior Counsel for the respondents has submitted that in the present second appeal, challenge has been made on findings of facts which have also been concurred with by the First Appellate Court and this Court in exercise of powers under Section 100 of the CPC would not like to embark upon such findings of facts.

19. Dealing with the first ground with regard to the point of limitation, the learned Senior Counsel has submitted that it is a fact that objections were raised with regard to the illegal mutation which was in fact rectified at that time itself and accordingly the

plaintiffs were all along in possession of the suit land. The fact of further change in the records of rights came to be known to the plaintiffs only in the year 1994 when there was some move of the defendants to dispossess. The learned Senior Counsel submits that it is also the findings of the learned Trial Court that the aforesaid fact of illegal mutation came to the knowledge of the plaintiffs only on obtaining the certified copy of the Jamabandi in the year 1994-95. He submits that limitation would run only from the date of knowledge and the mere fact that the plaintiffs were in possession of the suit land and one of the prayers in the plaint being for confirmation of possession, the point of limitation would not arise at all. He further substantiates his agreement by contending that when the objections were raised with respect to the mutations done in the year 1912-13, the same were actually cancelled which would be clear from the subsequent RS Patta No. 137 in which their names were not found except the name of Sikandar Ali. The said RS Patta were exhibited as Ext. No. 2.

20. With regard to the second substantial question of law involving Order VI Rule 4 of the CPC, there is a clear finding that the mutation in favour of Sikandar Ali, Bakhtozzaman, Kamruzzaman were objected to by the pattadars. The plea regarding collusion were specific and the Issue No. 5 was framed only on the basis of such statements made in the plaint which were also supported by the witnesses. He submits that the learned Trial Court had made an extensive discussion of the materials pertaining to the said issue. The Learned Trial Court had recorded that in the proceeding for insertion in the records of rights, there was no indication about service of notice and therefore the mutation order was held to be passed behind the back of pattadars, Idris Miah and Hawani Bibi. The learned Trial Court has also recorded that the application for mutation was filed on 27.06.13 whereas the report of the Lat Mondal was dated 23.08.13 (wrongly typed as 23.08.93) and the mutation order was passed on 29.08.13. It is also recorded that the pattadar had raised objections against such mutation and in the subsequent RS Patta No. 137, their names were not there

except the name Sikandar Ali. However, it appears that thereafter their names were again mutated. The aforesaid findings of the learned Trial Court were also affirmed by the learned First Appellate Court by holding that the mutation was done behind the back of pattadars, Idris Miah and Hawani Bibi and in collusion.

21. The learned Senior Counsel for the respondents has also drawn the attention of this Court to Section 17 of the **Limitation Act, 1963** which is with regard to "effect of fraud or mistake". He submits that when a fraud is involved, the period of limitation shall not run until the plaintiffs had discovered the fraud or the mistake with reasonable diligence.

22. By referring to the plaint, the learned Senior Counsel has submitted that in paragraphs 8 (a) and 8 (b), there were specific allegation of fraud and therefore the requirement of Order VI Rule 4 of the CPC stood fulfilled.

23. For ready reference, the averments in paragraphs 8 (a) and 8(b) of the plaint is extracted herein below:-

"8 (a). That after the death Kashim Ali his heirs i.e. his sons Abdul Aziz and Abdul Hai's names ought to have been mutated but instead the names of his brothers together with Sikandar Ali S/o (L) Gabru Miah was mutated most illegally. Sikander's Ali name cannot be mutated even by any stretch of imagination which is apparently fraudulent.

8 (b) That Abdul Rahim died leaving behind wife Musstt. Salima Bibi and 2 daughters namely; (1) Musstt. Shirazua Nessa and Musstt. Hayatun Begum and their names are accordingly mutated in the records of Rights maintained by the S.D.C.'s office. But most interestingly (vide entry No. 1 of R.S. Patta No. 137) it appears that names of Idrish Miah, Hayatun Nessa Abdul Rahim, Abdul Rahman

& Sikandar Ali's names were mutated by purchase. Abdul Rahima's name cannot be mutated by right of purchase as he died long before and as such the entire mutation is false, fabricated and collusive at the instance of Sikander Ali. Abdul Rahman died leaving two sons (1). Abdul Jabber alias Jabbaruddin (2) Meheruddin and daughter Samsun Nahar. Meheruddin died leaving daughter Musst. Nasar Banu."

24. The learned senior counsel submits that it is not in dispute that the plaintiffs / respondents are in possession of the suit land and mutation pre supposes possession.

25. In that view of the matter, it is contended that the challenge made in the plaint was valid, properly instituted and within time which was rightly decided by the Trial Court and affirmed by the First Appellate Court and therefore not liable for any interference by this Court exercising powers under Section 100 of the CPC.

26. In support of his submissions, Shri Roy, the learned Senior Counsel has relied upon the following decisions No. 1:-

1. 1994 2 GLR 84 (Jamkhohen Vs Joshep)

2. (2022) 8 SCC 401 (Saranpal Kaur Anand Vs Praduman Singh Chandhok and Ors.)

27. In the case of **Jamkhohen** (supra), a Division Bench of this Court has reiterated the law that the question of limitation is a mixed question of law and fact and in that case, the High Court had declined to deal with such a question in a second appeal.

28. In the case of **Saranpal Kaur Anand** (supra), the provisions of Section 17 of the Limitation Act has been elaborated. It has been held that when the suit involves a



fraud or mistake, it is only from the date when such knowledge is obtained, the period of limitation would run. He submits that in the instant case, the challenge is based on a clear allegation of fraud which were not only specifically pleaded but also proved by the witnesses.

29. Ms. Choudhury, the learned counsel for the appellant in her rejoinder has submitted that as per instructions, her clients are also in possession of the suit property. While such instructions appeared to be in conflict with the submissions made on behalf of the respondents on facts that the respondents are in possession, Ms. Choudhury, the learned counsel further submits that both the judgments suffers from perversity and therefore are liable to be interfered with by this Court in this second appeal.

30. The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been carefully examined.

31. The role of a High Court while exercising powers under Section 100 of the CPC is circumscribed. The Hon'ble Supreme Court in the case of ***Sukhdei v. Bairo***, reported in **(1999) 4 SCC 262** has held as follows

“10. The above findings of facts arrived at by the lower appellate court while concurring with the judgment of the trial court, in our opinion, cannot be faulted since the same is borne out from the records of the case. Once we come to the conclusion that the findings of fraud arrived at by the trial court and the first appellate court is based on the material on record and there is no infirmity in arriving at the said finding, the logical conclusion is that the High Court was in error in upsetting this finding while entertaining an appeal under Section 100 of the CPC.”

32. In the case of **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar**, reported in **(1999) 3 SCC 722**, it has been laid down as follows:

“3. After the amendment a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the High Court is obliged to satisfy itself regarding the existence of such a question. If satisfied, the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. However, the respondent at the time of the hearing of the appeal has a right to argue that the case in the court did not involve any substantial question of law. The proviso to the section acknowledges the powers of the High Court to hear the appeal on a substantial point of law, though not formulated by it with the object of ensuring that no injustice is done to the litigant where such a question was not formulated at the time of admission either by mistake or by inadvertence.

4. It has been noticed time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100 of the Code of Civil Procedure. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a

substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact.

33. In the aforesaid case of **Kondiba Dagadu Kadam (supra)**, the Hon'ble Supreme Court has also relied upon the earlier case of **Sir Chunilal V. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd.** reported in **AIR 1962 SC 1314**, wherein it was held as follows:

“The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.”

34. In the instant case, as noted above, the appeal was admitted on two substantial questions of law. The first question was with the objection of limitation. The findings of the learned Trial Court on the point of limitation which has been discussed

extensively above is that raising of objections by the pattadars of an illegal mutation was only an earlier instance which appears to have been taken into consideration and corrected as would be revealed by the fact that the subsequent RS Patta No. 137 did not contain the names of the earlier beneficiaries except the name of Sikandar Ali. This Court has also noticed that one of the relief sought for in the plaint was for confirmation of possession. On the other hand, an order of mutation pre supposes possession which does not appear from case projected by the defendants in the instant case. The learned Trial Court had come to a clear finding that the illegal mutation could be detected only upon obtaining of certified copy of the same which had to be done because of the attempt of the defendants to dispossess the plaintiffs from the suit land by taking advantage that their homestead land was contiguous to the suit land. The said finding being a finding of fact and affirmed by the first Appellate Court, there is hardly any scope for this Court to interfere with the said findings. Though it is true that the question of limitation is a mixed question of fact as well as of law and there cannot be any absolute bar for a High Court to interfere in exercise to powers under Section 100 of the CPC, the facts of the instant case will not at all justify such interference as the findings arrived at by the Trial Court as affirmed by the Appellate Court are based on materials on record.

35. This Court has also found force in the contentions made on behalf of the respondents by taking recourse to Section 17 of the Limitation Act as per which, in case of fraud or mistake, the period of limitation would run only from the date when such fraud and mistake is detected.

36. With regard to the second substantial question of law in connection with Order VI Rule 4 of the CPC, this Court has noticed that the mandate of the law clearly appears to be fulfilled as specific pleadings were made as would appear from paragraphs 8 (a) and 8 (b) of the plaint which have been extracted above.

37. The discussions made by the learned Trial Court on this ground which is



connected to Issue No. 5 are also based on materials on record and in the opinion of this Court will not warrant any interference.

38. Ms. Choudhury, the learned counsel for the appellants had relied upon the case of **Madan Lal** (supra) to contend that even in a case of concurrent findings of facts, interference can be made by a High Court in a second appeal. However in paragraph 8, a clarification has been given that the interference was done on the particular facts and circumstances of that case and not to be understood as a charter for interference by the High Courts with findings of facts recorded by the final court of facts. For ready reference, paragraph 8 of the judgment is extracted herein below:-

“8. May we add that this judgment, properly understood, will not be a charter for interference by the High Courts with findings of facts recorded by the final court of facts. The situation, here, was of an exceptional character where evidence which was incapable of supporting more than one conclusion was considered as justifying a conclusion which no reasonable tribunal could rationally reach.”

39. In view of the aforesaid facts and circumstances, this Court is of the opinion that there is no merit in this appeal and accordingly the same is dismissed. Both the questions of law framed in this appeal are accordingly answered against the appellants and in favour of the respondents.

40. The LCR be sent back forthwith.

JUDGE

Comparing Assistant