

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Appellate Jurisdiction)

Single Bench: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

R.F.A. No. 01 of 2020

Duk Nath Nepal,
Son of late Dilli Ram Nepal,
Resident of Tintek Busty,
P.O. Rakdong,
P.S. Singtam,
East Sikkim.

..... **Appellant**

Versus

1. Chandra Shekhar Nepal,
Son of Lt. Nandi Keshar Nepal,
Near Zero Point Tintek,
P.O. Rakdong,
P.S. Singtam,
East Sikkim.
2. The Secretary,
Water Resources & River Development Department,
Government of Sikkim,
Nirman Bhawan, Zero Point,
Gangtok,
East Sikkim.
3. The Secretary,
Irrigation and Flood Control Department,
Government of Sikkim,
Nirman Bhawan, Zero Point,
Gangtok,
East Sikkim.
4. District Collector,
District Administrative Center,
Gangtok,
East Sikkim.
5. The Sub-Divisional Magistrate,
District Administrative Center,
Gangtok, East Sikkim.

..... **Respondents**

**Appeal under Section 96 read with Order XLI rule 1 and 2 of the
Code of Civil Procedure, 1908.**

Appearance:

Mr. S.S. Hamal, Advocate with Ms Priyanka Chettri, Advocate, for the Appellant.

Mr. A. K. Upadhyaya, Senior Advocate with Ms Gita Bista, Legal Aid Counsel and Ms. Rachhitta Rai, Advocate, for the respondent no. 1.

Dr. Doma T. Bhutia, Additional Advocate General with Mr. S.K. Chettri, Government Advocate for the respondents no. 2 to 5.

Date of hearing : 07.04.2022

Date of judgment: 20.04.2022

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The present appeal assails the impugned order dated 28.08.2019 passed by the learned District Judge, Special Division-I, East Sikkim at Gangtok in Title Suit No. 15 of 2018 allowing an application (the application) under order VII Rule 11 read with section 151 of the Code of Civil Procedure Code, 1908 (CPC) rejecting the plaint.

2. The appellant had filed a suit under section 9 and 16(e) read with section 151 CPC seeking the following reliefs:-

- a. *A decree declaring to pay compensation of amount of ₹14,80,000/- (Rupees fourteen lakhs eighty thousand only) by the Defendant Nos.1, 2 and 3 to the Plaintiff, along with the interest of 5% per month from the date of filing till the date of disposal,*

- b. A decree declaring that the said old canal is an ancestral canal,*
- c. A decree declaring to open/restore the old canal by the Defendant No.1 being an easementary right,*
- d. Pass such necessary order and orders of reliefs to which the Plaintiff is entitled to in law and in equity according to law in the interest of justice.*

3. The appellant had stated in the plaint that in the end of year 2011, the respondent no.1 - a local contractor, blocked the generation old irrigation canal stating that the respondent no.3 had sanctioned an irrigation canal. The appellant further pleaded that since 2011 till the filing of the suit there was no such construction due to which the appellant's paddy field turned into uncultivable land making the appellants suffer a loss of ₹1.5 lakhs a year.

4. The records reveal that on 31.12.2018 the respondent no.1 filed the application which was ultimately allowed by the impugned order.

5. The learned District Judge held that there is no specific article in the Limitation Act, 1963 which deals with suit for declaration of right to use canal or waterways and hence, such a declaration would be covered by Article 58 thereof. The learned District Judge examined Article 85 of the Limitation Act, 1963 which provides that for a suit claiming compensation for obstructing a way or a water course the limitation prescribed is

three years from the date of obstruction. The learned District Judge also examined Article 86 of the Limitation Act, 1963 which provides that for a suit claiming compensation for diverting a water course the limitation prescribed is three years from the date of diversion. It was held that the period of limitation started running immediately from the date the right to sue accrued, i.e., the date of obstruction or diversion of the canal by the respondent no.1. The learned District Judge held that the suit filed by the appellant was barred by the law of limitation.

6. Mr. S.S. Hamal, learned counsel for the appellant, submitted that the impugned judgment was not correct in holding so since the appellant was claiming a contractual right or an implied promise as would be evident from the information provided by the respondent no.3 dated 30.2.2016 (annexure-5). He therefore submits that Article 55 of the Limitation Act, 1963 dealing with compensation for breach of any contract, express or implied not specifically provided for would be the appropriate article. He also relied upon the judgments of Supreme Court in ***Dahiben vs. Arvinbhai Kalyanji Bhanusali***¹ and ***the Church of Christ Charitable Trust & Educational Charitable Society vs. M/s Ponniamman Educational Trust***². The learned counsel also relied upon a judgment upon this court in ***Ms Dinku Khati and Another vs. Smt. Kamal Kumari Subba and Another***³. The facts in the present

¹ AIR 2020 SC 3310

² AIR 2012 SC 3912

³ SLR (2019) SIKKIM 939

case are different than what was in ***Dinku Khati*** (supra). In ***Dahiben*** (supra), the Supreme Court while examining Article 58 and 59 of the Limitation Act, 1963 on a matter relating to Order VII Rule 11(a) and (d) CPC, the Supreme Court held on examining the averments in the plaint that the cause of action arose on the non-payment of the bulk of the sale consideration and not on receipt of the index of the sale deed as pleaded. The Supreme Court was of the view that the court must determine when the right to sue first accrued and the right to sue accrues only when the cause of action arises. It held that suit must be instituted when right asserted in suit is infringed or there is clear and unequivocal threat of infringement. It also held *inter alia* that the provisions of Order VII Rule 11 is mandatory in nature as it specifies that the plaint “shall” be rejected if any of the grounds specified in clauses (a) to (e) are made out. In ***the Church of Christ Charitable Trust & Educational Charitable Society*** (supra), the Supreme Court held that the application for rejection of plaint under Order VII Rule 11 CPC has to be decided only on the basis of the averments in the plaint and the pleas taken in the written statement are immaterial.

7. Mr. A.K. Upadhyaya, learned Senior Counsel for respondent no.1, submitted that the impugned judgment was legally sound and correct and may not be interfered with.

8. The averments in the plaint read as a whole, without addition or subtraction, in conjunction with the documents relied upon makes it clear that the appellant was not seeking for compensation for the breach of any implied contract as argued by the learned counsel for the appellant. A perusal of the prayer as quoted above reflects that all the prayers prayed for by the appellant were declaratory in nature. Suits relating to declarations are covered by Part-III of the Limitation Act, 1963. As the prayers are not covered by Articles 56 and 57 thereof, all the declaratory reliefs would be covered by Article 58 as rightly held by the learned District Judge. In such a situation, the period of limitation would be three years and time would begin to run when the right to sue first accrues. On a reading of the plaint, it is clear that the right to sue first accrued in the end of the year 2011 when the respondent no.1 blocked the generation old irrigation canal. Even if one were to consider the prayer “a” to be a prayer for compensation and not a declaration as held by the learned District Judge, both under Article 85 and 86, the period of limitation is also three years from the date of obstruction or the date of diversion. Once again, the cause of action would accrue from the end of the year 2011 and therefore, the suit ought to have been filed in the year 2014. The records reveal that the plaint was filed by the appellant only in the year 2018. The suit was therefore clearly barred by limitation.

9. Accordingly, the appeal fails and is therefore rejected.

10. The registry shall transmit a copy of this judgment to the court of the learned District Judge, Special Division-I, East Sikkim at Gangtok.

**(Bhaskar Raj Pradhan)
Judge**

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

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