THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 6th January, 2023

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

RSA No.01 of 2019

Appellants : Bishnu Maya Chettri and Another

versus

Respondents : Govind Prasad Pradhan and Others

Appeal under Section 100 of the Code of Civil Procedure, 1908.

Appearance

Mr. N. Rai, Senior Advocate (Legal Aid) with Mr. Sushant Subba, Advocate (Legal Aid) for the Appellants.

Mr. B. Sharma, Senior Advocate with Mr. B. N. Sharma, Advocate for the Respondent Nos.1, 2A and 2B.

Mr. Sudesh Joshi, Additional Advocate General with Mr. Yadev Sharma, Government Advocate for the State-Respondent Nos.3 to 7.

J U D G M E N T

Meenakshi Madan Rai, J.

1. In this Second Appeal, the following substantial questions of law have been formulated for determination;

(i) Whether the Suit was barred by the Law of Limitation and the Trial Courts have read more into Article 65 of the Limitation Act, 1963, than provided?

(ii) Whether the Learned First Appellate Court could decide the issues as per Order XLI Rule 33 of the Code of Civil Procedure, 1908?

(iii) Whether Plaintiffs could have obtained a Decree without proving their actual case?

2. The Respondent Nos.1 and 2 herein were the Plaintiffs before the Learned Trial Court and Appellants before the Learned First Appellate Court. The Appellants herein were Defendant Nos.1

and 2 before the Learned Trial Court and Respondent Nos.1 and 2 in the Learned First Appellate Court. The State-Respondent Nos.3 to 7 were Defendants Nos.3 to 7 before the Learned Trial Court and Respondents in the same order before the Learned First Appellate Court. The original Respondent No.2 having passed away in the interregnum; is represented by his wife and son Respondent Nos.2A and 2B who shall for convenience be referred to collectively as Respondent No.2.

3. In order to gauge the matter in its correct perspective, it is necessary to briefly restate what the suit entails. The Respondent No.1 and Respondent No.2 sons of one Late Nar Bahadur Pradhan, resident of Kerabari, Sang Khola, East Sikkim, as Plaintiffs, filed a suit for declaration, recovery of possession, cancellation of documents, injunction and other reliefs against the two Appellants and the State-Respondent Nos.3 to 7 before the Learned Trial Court. They claimed that Schedule 'A' lands described in the Plaint were recorded in the name of their father during the Old Survey Operations of 1950-52, which he enjoyed as the absolute owner. Schedule 'B' lands are said to be the plots of land recorded in the names of the Respondent Nos.1 and 2 post 2004. Schedule 'C' lands comprising of two plots bearing Nos.1836 and 1801 are said to be lands illegally recorded in the name of Respondent No.5, the Secretary, Energy and Power Department, Government of Sikkim and Schedule 'D' lands is the area said to be illegally allotted to the Appellants by the Respondent No.5 from Plot No.1836 and is a part of Schedule 'C' land. The father of the Respondent Nos.1 and 2 passed away in 1990 without partitioning the property, thus in 2004, both of them initiated steps for

mutation of the Schedule 'A' properties in their individual names at which time they learned that Plot No.1011 of the Old Survey Operations (allegedly new Plot No.1812 as per Survey Operations of 1978-79) and Plot No.1029/1178 of the Old Survey Operations (allegedly new No.1836 as per Survey Operations of 1978-79), which belonged to their late father had been illegally recorded in the name of the Respondent No.5. The Respondent Nos.1 and 2 accordingly filed an application, Exhibit 5, under the Right to Information (RTI) Act, 2005, before the State Public Information Officer (SPIO) of the Respondent No.4 Department, on 04-08-2010. The application was responded to by the SPIO (Additional District Collector) of the Respondent No.6 Department vide Exhibit 6, which revealed that their father had never alienated the suit properties to the Respondent No.5 by way of sale, neither was any compensation ever paid to him. Despite this circumstance, a Lease Deed, Exhibit 7, was executed on 26-10-2009 by the Respondent No.5 in favour of the Appellants alienating a portion of land from plot bearing No.1836, for a period of 99 years, on payment. Hence, the following prayers in the Plaint;

> "a. A decree declaring that plaintiffs are the absolute owner of *Schedule-'A'* properties by way of inheritance.
> b. A decree declaring that the defendant no.5 has no right, title and authority over *Schedule-'C'* land.
> c. A decree declaring that the record of right pertaining to *Schedule-'C'* land in the name of defendant no.5 is illegal and the same is liable to be declared null and void and cancelled.
> d. A decree declaring that defendant no.5 has no right, title and authority to execute lease deed with respect to *Schedule-'D'* property which is part and partial of *Schedule-'C'* property.(*sic*, parcel).
> e. A decree declaring execution of lese (*sic*) deed in favour of defendant no.1 by defendant no.5 is illegal, null and void and liable to be cancelled.

f. A decree declaring the defendant no.1 cannot acquire right, title and interest over *Schedule-'D'* property by way of lease deed executed by defendant no.5.

g. A decree declaring that lease deed executed by defendant no.5 in favour of defendant no.1 be cancelled.

h. A decree declaring defendant no.1 and /or defendant no.1 and 2 have illegally entered into the *Schedule-'D'* property and illegally constructing the house in the *Schedule-'D'* by demolishing existing structure.

i. An injunction restraining the defendant no.1 and 2 from continuing the construction in the *Schedule-'D'* land.

j. An ad-interim ex-parte injunction restraining the defendant no.1 and / or defendant no.1 and 2 from continuing the construction in the *Schedule –'D'* land in terms of (i) above.

k. A decree for recovery of possession of *Schedule-'D'* property be passed in favour of the plaintiffs after demolishing the on going construction.

l. A decree declaring that the defendant no.5 and/ or each of the defendants have no right, title and interest over the property and they may be evicted from the *Schedule-'C'* property.

m. A decree for correction of record of right be passed in favor of the plaintiffs deleting the names of the defendant no.5 from the *Schedule-'C'* property.

n. A decree for permanent perpetual injunction restraining the defendant no.5 and /or each of the defendant and from raising any construction or changing the nature and the character of the *Schedule-'C'* and *Schedule-'D'* property by their agents, representatives in terms of prayer (i) above.

o. A decree for costs of the suit;

p. Any other relief or reliefs for which the plaintiffs are entitled to."

4(i). The Appellants as Defendant Nos.1 and 2 filed their Written Statement averring that, the Plaintiffs/Respondent Nos.1 and 2 are not entitled to the reliefs as the suit is misconceived and not tenable in law or facts as the Appellants had adhered to the terms and conditions laid down by the Respondent No.5 in the Lease Deed.

(ii) State-Respondent Nos.3, 4, 6 and 7 had no Written Statements to file.

5. Respondent No.5 disputing the claims of Respondent Nos.1 and 2 averred in its Written Statement that Late Nar Bahadur Pradhan in fact sold out Plot No.1011 and Plot Nos.1029/1178 to the Respondent No.5 Department during 1962-64, the Department during that period having purchased several other plots of land in and around the suit land for construction of the "Jali Hydel Project". Pursuant thereto, the Plots were recorded in the name of the Respondent No.5 as its absolute owner. On correction of the old survey records of 1950-51, the new survey records of 1976-83 reveal that the Respondent No.5 is the absolute owner of the Schedule 'C' properties upon which residential staff quarters were constructed in the early 1980s, during the life time of Nar Bahadur Pradhan to which he raised no objection, as the transaction was legal. Now, the Respondent Nos.1 and 2 cannot utilise the fact of non-availability of records pertaining to the purchase executed several decades ago, to their advantage. On 26-10-2009 on the request of Appellant No.1 the Lease Deed (Exhibit 7) was executed in her favour but her request dated 16-09-2010 for additional allotment of land, was rejected by Respondent No.5. That, the Respondent No.5 is not answerable to the Respondent Nos.1 and 2 so far as the Lease Deed is concerned. The suit being malafide be dismissed.

6. The Learned Trial Court on 03-06-2015 settled nine Issues for determination.

7(i). Issue No.2 was taken up first for discussion and decision *viz*; *2. Whether the defendant No.5 has acquired the suit property from the father of the Plaintiffs at any point of time?*

The Learned Trial Court concluded that Respondent No.5 had failed to prove that it acquired or purchased the suit property from the father of the Respondent Nos.1 and 2. The Issue was accordingly decided against the Respondent No.5.

(ii) Issue Nos.3 and 5 were taken up together;

> *3. Whether the defendant No.5 has any right, title and interest over Schedule "C" and "D" properties?*
>
> *5. Whether the Plaintiffs are the absolute owner of Schedule "C" and "D" properties being the legal heirs and descendants of Late Nar Bdr. Pradhan?*

In Issue No.3, it was held that the Respondent No.5 had possessory right and interest flowing from such possession over the suit property. In Issue No.5, it was observed that the Respondent Nos.1 and 2 failed to prove that Plot Nos.1801, 1836 or for that matter Plot No.1812 are the corresponding Plots alleged to be 1011 and 1029/1178, hence the Respondent Nos.1 and 2 are not the absolute owners of the suit properties.

(iii) Issue Nos.4 and 6 were taken up together;

> *4. Whether the defendant No.5 has authority to allot schedule "D" property in favour of defendant No.1?*
>
> *6. Whether the lease deed dated:26.10.2009 is a void document and is liable to be cancelled?*

It was found that none of the parties were able to establish their title over the property, and the possessory right of the Respondent No.5 did not lend it the authority to lease out the suit property, unless authorised to do so by the owner of the property. Thus, Issue No.4 was decided against the Respondent No.5. Issue No.6, was also decided against Respondent No.5 with the reasoning that Exhibit 7 is a void Lease Deed as it fails to comply with Article 299 of the Constitution of India.

(iv) Issue Nos.7 and 8 were considered together;

7. *Whether the defendant No.1 has been allotted with schedule "D" property by defendant No.5 by executing a Registered Lease Deed?*

8. *Whether defendant No.1 is possessing the schedule "D" property legally?*

It was found that the Lease Deed (Exhibit 7) was admittedly a registered document. Hence, the allotment to the Appellant No.1 was made by way of a registered document. In Issue No.8, it was held that the Lease Deed (Exhibit 7) is void hence no legality can be drawn on its basis. That, possession of the leased portion by Appellant No.1 is not disputed and the possession is through the permission of Respondent No.5, therefore, it cannot be said to be illegal except against the true owners. Hence, the Issue was decided in favour of the Appellant No.1.

(v) In Issue No.1;

1. *Whether the present suit is maintainable and whether the same is barred by limitation?*

It came to be decided that the Suit is not barred by limitation but that Respondent Nos.1 and 2 had failed to establish title over the suit property and therefore had no *locus standi* in the suit, which was thus not maintainable.

(vi) In Issue No.9;

9. *To what relief or reliefs parties are entitled?*

It was held that the Respondent Nos.1 and 2 were not entitled to the reliefs sought. That, Respondent No.5 had a possessory right over the said properties which however did not give them authority to lease it out to the Appellant No.1.

8(i). Aggrieved thereof, the Respondent Nos.1 and 2/Plaintiffs were before the Learned First Appellate Court in Title Appeal No.01 of 2017 (***Govind Prasad Pradhan and Another vs. Bishnu***

Maya Chettri and Others) as Appellants, assailing the said Judgment of the Learned Trial Court.

(ii) The Learned First Appellate Court took up Issue No.2 first and agreed with the findings of the Learned Trial Court. In Issue No.3, in contradiction to the findings of the Learned Trial Court, it was concluded that Respondent No.5 had no possessory right having failed to prove the means of transfer of the suit land to them and thereby it could not have leased out the disputed property to the Appellant No.1. Without going into the specifics of Issue No.5 the Learned First Appellate Court concluded that "admittedly" it was the case of Respondent Nos.1 and 2 that Schedule 'C' property covered by Plot Nos.1812 and 1836 is the corresponding Plot Nos.1011 and 1029/1178 and decided this Issue in favour of the Respondent Nos.1 and 2.

(iii) In Issue Nos.4 and 6 it was observed that as the Respondent Nos.1 and 2 did not press these issues, thus the findings of the Learned Trial Court brooked no interference.

(iv) In Issue Nos.7 and 8 reversing the findings of the Learned Trial Court it was observed that when Respondent No.5 had no authority to lease out the suit property and when the Lease Deed document (Exhibit 7), itself was void *ab initio*, the allotment of Schedule 'D' property by the Respondent No.5 in favour of the Appellant No.1 by executing a registered Lease Deed had no sanctity being an invalid deed.

(v) In Issue No.1 the finding of the Learned Trial Court on limitation was concurred with, the Learned First Appellate Court having reasoned that the limitation period started from the date of knowledge and in the case at hand the Respondent Nos.1 and 2

first came to learn of the relevant facts in the year 2004, hence the limitation fell within the ambit of Article 65 of the Limitation Act, 1963. However, with regard to the maintainability of the suit it was concluded that in view of the findings and the decision arrived at while dealing with Issue Nos.2, 4 and 6, the suit of the Respondent Nos.1 and 2/Plaintiffs is maintainable, consequently the finding of the Learned Trial Court on this count was set aside.

(vi) On Issue No.9, it was concluded that the Suit of the Respondent No.1 and 2 deserves to be decreed in terms of the Prayers made in the Plaint, the Prayers (i), (j) and (o) were however disallowed, the said prayers are extracted below for convenient reading;

> "The plaintiffs therefore pray for the following reliefs:
> ……
> i. An injunction restraining the defendant no.1 and 2 from continuing the construction in the *Schedule*-'*D'* land.
>
> j. An ad-interim ex-parte injunction restraining the defendant no.1 and / or defendant no.1 and 2 from continuing the construction in the Schedule –'D' land in terms of (i) above.
>
> ……
>
> o. A decree for costs of the suit;
> ……"

It was further observed that the Respondent Nos.1 and 2 neither filed any Counter-Claim nor Cross-Appeal. The Appeal was thus allowed and the Judgment and Decree of the Learned Trial Court was set aside in its entirety despite the Learned First Appellate Court being in agreement with the Learned Trial Court on Issue Nos.2, 4, 6 and part of Issue No.1 i.e., on the point of limitation.

9. Dissatisfied, the Appellant Nos.1 and 2 are before this Court. According to Learned Senior Counsel Shri N. Rai for the

Appellants, the Learned Trial Court had reached a finding in Issue Nos.1, 3 and 5 that the suit property was not that of the Respondent Nos.1 and 2. However, the Learned First Appellate Court interfered with the findings of the Learned Trial Court and concluded that, on the failure of the Respondent No.5 to furnish proof of acquisition or purchase of the suit property, the claim of possessory rights of the Respondent No.5 has no weight in the eyes of law. It was contended that the Court erred in holding so as the Respondent Nos.1 and 2 are required to rely on the strength of their own case and not on the weakness of the Appellants case or that of State-Respondent Nos.3 to 7. The Respondent Nos.1 and 2 failed to establish their claim over the suit properties and their case is built on the foundation of the response of Respondent No.6 to their RTI query, which cannot be the basis of their claim. That, Plot No.1836 measuring an area of 0.274 hectares is found recorded in the name of the Respondent No.5, the Secretary, Energy and Power Department, Government of Sikkim during the 1976-83 Survey Operations and no information has been provided by the Respondent Nos.1 and 2 as to how Plot No.1836 was earlier Plot No.1011 or Plot No.1029/1178 was the new Plot No.1801, considering that the measurements of the alleged old and new plots do not corroborate with each other. Besides, the Suit is barred by limitation, the Respondent No.5 having acquired the property in 1963-64 from late Nar Bahadur Pradhan, who passed away in 1990, while the partition took place in 2004. Thus, limitation begins to run from 1963-64 and cannot be computed from 2004, the year of partition of properties. That, the Learned Courts below considered Article 65 of the Limitation Act, 1963,

(hereinafter, the "Limitation Act"), in reaching their decision that the suit is not barred by limitation, however, the correct provision to be invoked is Article 58 of the Limitation Act, which deals with obtaining declaration where the period of limitation prescribed is three years from the time the right to sue first accrues. That, recovery of possession of the suit property and cancellation of documents are all subsequent prayers to the primary prayer for declaration of title, hence application of Article 65 of the Limitation Act is erroneous. Consequently, the suit is barred by limitation even if it is construed to be from the year 2004. The Learned First Appellate Court was under a misconception that limitation would begin to run from the "date of knowledge" *sans* such prescription in Article 65 of the Limitation Act. Limitation commences from the date on which Respondent Nos.1 and 2 were entitled to approach the Court for relief. Reliance was placed on ***Bhavnagar Municipality*** vs. ***Union of India and Another***[1]. That, the claim of the Appellants and that of Respondent Nos.1 and 2 are on the same footing both being without documents of title, nevertheless the Appellants have a stronger claim in view of the fact that Respondent No.5 who allotted them Schedule 'D' lands was in possession of the disputed property from around the year 1963 onwards. To drive home this point the ratio in ***Shri K.B. Bhandari*** vs. ***Shri Laxuman Limboo and Another***[2] was referred to, besides, the Respondent Nos.1 and 2 were not even in possession of the suit property nor were they in possession of documents to substantiate their claim that their father had not sold the suit property to Respondent No.5. Hence, the Appeal be allowed.

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[1] AIR 1990 SC 717
[2] SLR (2017) SIKKIM 41

10. Learned Additional Advocate General Shri Sudesh Joshi advancing his submissions for the State-Respondent Nos.3 to 7, admitted that, there were no Written Statements, Counter-Claim or Cross-Objection filed by the State-Respondent Nos.3, 4, 6 and 7 however relying on ***Mahant Dhangir and Another*** vs. ***Madan Mohan and Others***[3], it was urged that Courts can consider the verbal submissions of such Respondents under Order 41 Rule 33 of the Code of Civil Procedure, 1908 (hereinafter, the "CPC") and the Appellate Court can exercise the power under Rule 33 even if the Appeal is only against a part of the Decree of the Lower Court. That, the Supreme Court in the above ratio has clearly held that the sweep of the power under Rule 33 is wide enough to determine any question not only between the Appellant and the Respondent, but also between Respondent and Co-Respondents. The Appellate Court can therefore pass any Decree or Order which ought to have been passed in the circumstances of the case. It was next urged that the Respondent Nos.1 and 2 were not in possession of the suit property and in any event are restrained by the provisions of Sections 6 of the Specific Relief Act, 1963 (hereinafter, the "Specific Relief Act") from filing the suit against the State-Respondents. That, Section 6(4) of the Specific Relief Act also does not come to the aid of the Respondent Nos.1 and 2, as they have failed to prove title and are thereby hit by the provisions of Section 6(2)(b) of the said Act. Consequently, the suit is not maintainable. That, the cross-examination by the Respondent No.5 would indicate that during the year 2004 when the family partition took place, the Respondent Nos.1 and 2 came to learn that Plot No.1836 was recorded in the name of the Respondent

[3] 1987 (Supp) SCC 528

No.5 Department, if that be so, it is evident that the possession was forcible and open. That, Article 64 and not Article 65 of the Limitation Act is applicable in the instant matter as the Respondent Nos.1 and 2 did not have title and the suit was filed in an effort to circumvent the provisions of Section 6 of the Specific Relief Act. Article 64 of the Limitation Act would indicate that limitation would run from the admitted date of dispossession, which is 1973, therefore the suit is barred by limitation. Garnering strength from ***Ramiah*** vs. ***N. Narayana Reddy (Dead) by LRs.***[4], it was contended that the Hon'ble Supreme Court propounded that, when the Appellant was ousted in 1971 and the suit filed only in 1984 the suit was barred by limitation and dismissed it. Reliance was also placed on ***Nazir Mohamed*** vs. ***J. Kamala and Others***[5] on this aspect. That, in ***Poona Ram*** vs. ***Moti Ram (Dead) through Legal Representatives and Others***[6], it was held that settled possession or effective possession of a person without title entitles him to protect his possession as if he were a true owner. That, the Learned Trial Court had correctly held that Respondent No.5 had possessory rights and the Respondent Nos.1 and 2 had no *locus standi* to file the suit and correctly dismissed the suit of the Respondent Nos.1 and 2, which was erroneously set aside by the Learned First Appellate Court despite the Respondent Nos.1 and 2 having failed to establish title over the suit property. Hence, the Judgment of the Learned Trial Court be restored.

11. Learned Senior Counsel for the Respondent Nos.1 and 2 Shri B. Sharma, placing his arguments contended that the provisions of the Specific Relief Act invoked by State-Respondent

[4] (2004) 7 SCC 541
[5] (2020) 19 SCC 57
[6] (2019) 11 SCC 309

Nos.3 to 7 are not applicable in the instant matter which envisages a summary suit for possession of property. That, the suit is not barred by limitation as specifically held by both the Learned Courts below. Limitation runs from the date of 'knowledge' of dispossession i.e., 2004 as concluded by the Learned First Appellate Court and not from the 'date' of dispossession. On this count reliance was placed on ***Gottumukkala Sundara Narasaraju*** vs. ***Pinnamaraju Venkata Narasimharaju***[7]. Relying on the ratio in ***Eastern Coalfields Limited and Others*** vs. ***Rabindra Kumar Bharti***[8], Learned Senior Counsel urged that Order 41 Rule 33 of the CPC is a rare jurisdiction and is to be applied for the purpose of reaching justice on the special facts of a case and is not to be applied across the board. That, as the Appellants and the State-Respondents failed to file Cross-Appeals before the Learned First Appellate Court although they were not debarred from doing so, therefore, they cannot now turn around and invoke the provisions of Order 41 Rule 33 of the CPC before this Court. That, the Respondent Nos.1 and 2 have proved their case by furnishing relevant documents and the finding of the Learned First Appellate Court is not erroneous. The ratio on ***State of Haryana*** vs. ***Mukesh Kumar and Others***[9], was invoked on the point of adverse possession. That, it is proved that the property was recorded in the name of the father of Respondent Nos.1 and 2 and in the absence of documentary evidence indicating the mode of transfer to the Respondent No.5, the Respondent Nos.1 and 2 were the owners of the suit property.

12(i). Before delving into discussions on the substantial questions of law it is essential to first consider the legal limitations

[7] 2015 SCC OnLine Hyd 470
[8] 2022 SCC OnLine SC 445
[9] AIR 2012 SC 559

prescribed in determining a Second Appeal under Section 100 of the CPC. In ***Narayan Sitaramji Badwaik (Dead) through LRs.*** vs. ***Bisaram and Others***[10], it was held as follows;

> "**10.** It is a settled position of law that a second appeal, under Section 100 of the Code of Civil Procedure, lies only on a substantial question of law [refer Santosh Hazari v. Purushottam Tiwari (deceased) by LRs, (2001) 3 SCC 179 : *(AIR 2001 SC 965)*]. **However, this does not mean that the High Court cannot, in any circumstance, decide findings of fact or interfere with those arrived at by the Courts below in a second appeal. In fact, Section 103 of the Code of Civil Procedure explicitly provides for circumstances under which the High Court may do so.** Section 103 of the Code of Civil Procedure is as follows:
>
> **Section 103 . Power of High Court to Determine Issue of Fact**
>
> **In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,**
>
> **(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or**
>
> **(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in section 100.**
>
> **11.** A bare perusal of this section clearly indicates that it provides for the High Court to decide an issue of fact, provided there is sufficient evidence on record before it, in two circumstances. First, when an issue necessary for the disposal of the appeal has not been determined by the lower Appellate Court or by both the Courts below. And second, when an issue of fact has been wrongly determined by the Court(s) below by virtue of the decision on the question of law under Section 100 of the Code of Civil Procedure. This Court, in the case of Municipal Committee, Hoshiarpur v. Punjab State Electricity Board, (2010) 13 SCC 216 : (*2010 AIR SCW 7020)*, held as follows;
>
> "26. Thus, it is evident that Section 103 CPC is not an exception to Section 100 CPC nor is it meant to supplant it, rather it is to serve the same purpose. Even while pressing Section 103 CPC in service, the High Court has to record a finding that it had to exercise such power, because it found that finding(s) of fact recorded by the court(s) below stood vitiated because of perversity. More so, such power can be exercised only in exceptional circumstances and with circumspection, where the core question involved in the case has not been decided by the court(s) below.
>
> 27. There is no prohibition on entertaining a second appeal even on a question of fact provided the court is satisfied that the finding of fact recorded by

[10] AIR 2021 SC 2438

> the second appeal stood vitiated by nonconsideration of relevant evidence or by showing an erroneous approach to the matter i.e. that the findings of fact are found to be perverse. …….
>
> 28. If a finding of fact is arrived by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law. ……."……." (emphasis supplied)

(ii) In ***Maharashtra State Electricity Distribution Company Limited*** vs. ***Maharashtra Electricity Regulatory Commission and Others***[11], by reference to plethora of decisions of the Supreme Court itself, it was reiterated that interference with concurrent findings of lower Courts in Second Appeal must be avoided under Section 100 of the CPC, unless warranted by compelling reasons.

(iii) In ***Diety Pattabhiramaswamy*** **vs.** ***S. Hanymayya and Others***[12]***,*** the Supreme Court observed as follows;

> "**13.** ……. As early as 1891, the Judicial Committee in Durga Chowdhrani vs. Jawahir Singh, 17 Ind. App 122 (PC), stated thus:
>
> "There is no jurisdiction to entertain a second appeal on the grounds of erroneous finding of act, however gross the error may seem to be."……"

Thus, the parameters of Section 100 of the CPC have been succinctly laid down in the Judgments referred to above which being self explanatory require no elucidation.

13(i). Bearing the above settled position of law in mind, the first substantial question of law is taken up for determination;

> *(i) Whether the Suit was barred by the Law of Limitation and the Trial Courts have read more into Article 65 of the Limitation Act, 1963, than provided?*

Before embarking on a discussion on the question, a typographical error is noticed in the question in as much as the

[11] (2022) 4 SCC 657
[12] AIR 1959 SC 57

Courts below have been referred to as the "Trial Courts" instead of the "Learned Trial Court" and "Learned First Appellate Court". Accordingly, the word "Trial Courts" in the question extracted *supra* shall be read and construed as Learned Trial Court and Learned First Appellate Court.

(ii) The provisions of Articles 58, 64 and 65 of the Limitation Act are extracted hereinbelow for quick reference.

"Description of suit	Period of Limitation	Time from which period begins to run
58. To obtain any other declaration.	Three years	When the right to sue first accrues.

Description of suit	Period of Limitation	Time from which period begins to run
64. For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	Twelve years	The date of dispossession.

Description of suit	Period of Limitation	Time from which period begins to run
65. For possession of immovable property or any interest therein based on title.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff."

(iii) Indubitably, in a suit only for declaration of title, the limitation is three years under Article 58 of the Limitation Act and the time from which the period of limitation commences is the time when the right to sue first accrues. Thus, when the suit is only for declaration of title *sans* other reliefs, the period of limitation is as prescribed under Article 58 of the Limitation Act. It is admitted by the parties opposing Respondent Nos.1 and 2 herein that, the suit is not merely for declaration of title. The Respondent Nos.1 and 2 have, besides seeking declaration of their title over the suit

properties also sought for a Decree for recovery of possession of Schedule 'D' property and a Decree for correction of records of rights. Article 64 of the Limitation Act as per Shri Sudesh Joshi, Learned Additional Advocate General for the State-Respondents is the correct article for the purposes of the instant suit. However, a bare reading of the provision would indicate that it is not applicable to the circumstances of the case of Respondent Nos.1 and 2 as their specific claim is that their predecessor in interest had title to the suit properties. Article 64 of the Limitation Act deals with suits based on "possession" and not on "title", in such a case the Plaintiff who while in possession had been dispossessed can file a suit within a period of 12 years from the date of dispossession. For the purpose of Article 64 of the Limitation Act there is no question of proving any title. A cursory reading of Article 65 on the other hand indicates that it relates to a suit for possession based on title. If the Defendant seeks to defeat the rights of the Plaintiff he has to establish his adverse possession for a period of 12 years which has the effect of extinguishing the title of the owner by the operation of Section 27 of the Limitation Act. On such failure the Plaintiff cannot be non-suited merely because he was not able to prove possession within 12 years.

(iv) In ***Sopanrao and Another*** vs. ***Syed Mehmood and Others***[13], the Supreme Court *inter alia* observed as follows;

> "**9.** ……. In a suit filed for possession based on title, the plaintiff is bound to prove his title and pray for a declaration that he is the owner of the suit land because his suit on the basis of title cannot succeed unless he is held to have same title over the land. However, the main relief is of possession and, therefore, the suit will be governed by Article 65 of the Limitation Act, 1963. This Article deals with a suit for possession of immovable property or

[13] (2019) 7 SCC 76

> any interest therein based on title and the limitation is 12 years from the date when possession of the land becomes adverse to the plaintiff……..."

(v) The arguments of Learned Additional Advocate General regarding Section 6 of the Specific Relief Act are not tenable in view of the provisions of Section 5 of the Specific Relief Act. The object of Section 6 of the Specific Relief Act is to provide a special and speedy remedy for a particular kind of grievance, to replace in possession a person who has been evicted, from immovable property of which he had been possessed otherwise than by process of law. The Section only contemplates a summary suit for possession of immovable property and the question of title is wholly outside its scope.

(vi) It thus obtains that when a suit is based on title the Plaintiff need not prove that he was in possession of the land sought to be recovered within 12 years of the suit. In light of the foregoing discussions it is evident that the period of limitation for institution of a suit for declaration of title seeking the further relief of recovery of possession based on title falls within the ambit of Article 65 of the Limitation Act. Hence, the suit is not barred by limitation.

14(i). The second substantial question of law is taken up next for consideration which reads as follows;

> *(ii) Whether the Learned First Appellate Court could decide the issues as per Order XLI Rule 33 of the Code of Civil Procedure, 1908?*

In this context the provisions of Order 41 Rule 33 of the CPC which are extracted hereinbelow are required to be considered. Order 41 Rule 33 of the CPC as follows;

> "**33. Power of Court of Appeal**– The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:
>
> Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

(ii) Illustration to Order 41 Rule 33 provides as follows;

> "*Illustration*
>
> *A* claims a sum of money as due to him from *X* or *Y*, and in a suit against both obtains a decree against *X*. *X*, appeals and *A* and *Y* are respondents. The Appellate Court decides in favour of *X*. It has power to pass a decree against *Y*."

(iii) Section 35A referred to above deals with Compensatory costs in respect of false or vexatious claims or defences.

(iv) The provision clarifies that the Appellate Court is clothed with the fullest power to do complete justice between the parties though the Appeal does not extend to the whole of the Decree and though some of the parties Appeal and others do not. The Court has ample power to pass any order as may be necessary for the ends of justice and when doing so a party who has not appealed may be benefitted by the order. In ***Banarsi and Others*** vs. ***Ram Phal***[14], the Supreme Court while discussing the ambit of Order 41 Rule 33 of the CPC held that;

> "**15.** ……. Usually the power under Rule 33 is exercised when the portion of the

[14] AIR 2003 SC 1989

> decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the court; secondly, a claim given up or lost cannot be received; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. ……..”

The powers in this rule are ordinarily limited to those cases where as a result of the Appellate Courts interference with a Decree in favour of the Appellant, a further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience [See ***Bajranglal Shivchandrai Ruia*** vs. ***Shashikant N. Ruia and Others***[15]].

(v) The Learned Additional Advocate General for the State-Respondents would invoke this provision by way of abundant precaution as the State-Respondents, except Respondent No.5, failed to file Written Statements/Counter-Claims before the Learned Trial Court and Cross-Appeal before the Learned First Appellate Court. It was contended by the Learned Additional Advocate General that despite such a circumstance the Appellate Courts could hear the arguments advanced by such Respondents and grants reliefs to meet the ends of justice. The pivotal claim of Respondent Nos.1 and 2 was against Respondent No.5 on the contention that Respondent No.5 was in illegal possession of their land. The Learned First Appellate Court has considered all the Issues settled and determined by the Learned Trial Court and no

[15] AIR 2004 SC 2546

specific argument has been raised on this count that the Learned First Appellate Court failed in its duty. In light of this position nothing further remains for discussion on this count.

15(i). The third substantial question of law is thus taken up for consideration which reads as follows;

> *(iii) Whether Plaintiffs could have obtained a Decree without proving their actual case?*

The Learned Trial Court while arriving at its findings in Issue Nos.3 and 5 examined *inter alia* Exhibit D1/A, admittedly a duplicate copy of the original "Parcha" furnished from the records of the Respondent No.5, by the Appellants. Pausing here for a moment, legally the document could not have been admitted in evidence in view of the provisions of Section 64 and Section 65 of the Indian Evidence Act, 1872 and was thus beyond the scope of consideration of both Learned Courts below. At the same time it is worth noticing that no reasons were sought either by the opposing parties or by the Learned Trial Court for non-furnishing of the original document. It needs no reiteration here that a proper foundation must be laid to establish the right to adduce secondary evidence, besides, the well known principle with regard to proof of documents being that best evidence must come before the Court, which of course is the original document, thereby furnishing an opportunity to the Court to examine its various aspects. Needless to clarify that, although the law insists upon production of the best evidence, yet it permits with proper safeguards the production of the secondary evidence of the original, if the requisite conditions laid down by law are satisfied. The requisite safeguards have not been followed in the production of Exhibit D1/A, however in the light of the settled position of law that documents admitted and

considered by Courts below cannot be questioned at the appellate stage, nothing further needs to be discussed on this facet at the stage of Second Appeal.

(ii) The Learned Trial Court on examining Exhibit D1/A concluded that errors emanated in the areas between the old plots and the corresponding new plots. That, the mismatch clearly showed that Plot No.1011 and Plot No.1029/1178 cannot be either Plot Nos.1801, 1812 and 1836, as the difference in area could not be ignored. The Learned Trial Court was also of the view that the Respondent Nos.1 and 2 did not furnish any evidence to prove that Plot Nos.1801 and 1836 are the Plots 1011 and 1029/1178. The Learned Trial Court was not inclined to rely on Exhibit 6 the response to the RTI query of the Respondent Nos.1 and 2 in view of the fact that no records were available with Respondent No.5 when Exhibit 6 was prepared and the response also erroneously mentioned that the area of Plot No.1011 was 1.14 acre whereas Exhibit 1 indicated the area to be 0.14 acre, thereby making Exhibit 6 inherently unreliable. That, late Nar Bahadur Pradhan owned a total of 3.44 acres while the Respondent Nos.1 and 2 presently owned 3.25 acres, the difference thereby being about 0.19 acres, which nearly corresponds to the area of Plot No.1029/1178 in 1950-52. That, admittedly their father had alienated two plots of land, one to Norden Tshering and another to Padam Bahadur Rai respectively, while the Respondent Nos.1 and 2 had also alienated a portion of Schedule 'A' property. The Respondent Nos.1 and 2 in their evidence failed to indicate which plots were alienated by their father and which plots by them from Schedule 'A' property. Thus, a calculation regarding the area of

land presently held by the Respondent Nos.1 and 2 with the addition of areas covered by Plot No.1801 and 1836 would add up to 4.54 acres, which exceeds the total lands held by their father *viz.* 3.44 acres, hence it was concluded that new plots being Plot No.1801 and Plot No.1836 are not the old plots, *viz* Plot Nos.1011 and 1029/1178.

(iii) The Learned First Appellate Court disagreed with the findings of the Learned Trial Court observing that the Respondent No.5 had admitted that the corresponding plots after the New Survey Operations are indeed Plot Nos.1011 and 1812, apart from which the Respondent No.5 failed to bring on record evidence to establish that the suit property was purchased or acquired or transferred by way of any legal documents, from late Nar Bahadur Pradhan to Respondent No.5 at any point of time. That, it was an admitted case that as per the old survey of 1950-52 the suit property was recorded in the name of the father of the Respondent Nos.1 and 2. Thus, the claim of possessory right of the Respondent No.5 was not legally tenable. It was further observed that the State-Respondents had failed to deny the averments made in the Plaint which tantamounts to admission and that admitted facts need not be proved. Hence, the findings of the Learned Trial Court on Issue Nos.3 and 5 were set aside and decided in favour of the Respondent Nos.1 and 2.

(iv) Having considered the differing opinions of the Learned Courts below it is pertinent to mention that the bedrock in a suit for title is that the Plaintiffs are to succeed on the strength of their own case and not rely on the weakness of the Defendants case. On this facet the Supreme Court in ***Jagdish Prasad Patel (Dead)***

Through Legal Representatives and Another vs. ***Shivnath and Others***[16], held as follows;

> "**44.** …….. **In a suit for declaration of title and possession, the respondent-plaintiffs could succeed only on the strength of their own title and not on the weakness of the case of the appellant-defendants. The burden is on the respondent-plaintiffs to establish their title to the suit properties to show that they are entitled for a decree for declaration.** The respondent-plaintiffs have neither produced the title documents i.e. patta-lease which the respondent-plaintiffs are relying upon nor proved their right by adducing any other evidence. As noted above, the revenue entries relied on by them are also held to be not genuine. In any event, revenue entries for a few khataunis are not proof of title; but are mere statements for revenue purpose. They cannot confer any right or title on the party relying on them for proving their title.
>
> **45.** The observations that in a suit for declaration of title, the respondent-plaintiffs are to succeed only on the strength of their own title irrespective of whether the appellant-defendants have proved their case or not, in *Union of India v. Vasabi Coop. Housing Society Ltd.*[17] it was held as under; (SCC p.275, para 15)
>
> "15. It is trite law that, in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff."." (emphasis supplied)

(v) In light of the settled position of law, it is now to be determined whether the Learned First Appellate Court correctly decreed the suit of the Respondent Nos.1 and 2. In ***Poona Ram*** vs. ***Moti Ram (Dead) through Legal Representatives and Others***[18], the Hon'ble Supreme Court referred to the decision in ***Nair Service Society Ltd.*** vs. ***Rev. Father K. C. Alexander and Others***[19] where the Court ruled that when the facts disclose no title in either party, possession alone is the decisive factor. It was further observed in ***Nair Service Society Ltd.*** (*supra*) that a person in possession of land

[16] (2019) 6 SCC 82
[17] (2014) 2 SCC 269
[18] (2019) 11 SCC 309
[19] AIR 1968 SC 1165

in assumed character of owner and exercising peaceably the ordinary rights of ownership, has a perfectly good title against the entire world except the rightful owner. In such a case, the Defendant must show in himself or his predecessor a valid legal title and probably a possession prior to the Plaintiff's and thus be able to raise a presumption prior in time. In ***Rame Gowda*** vs. ***M. Varadappa Naidu***[20], a three-Judge Bench of the Supreme Court *inter alia* held that in the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with title unless rebutted.

(vi) In view of the above pronouncements concerning possessory title, while examining the documents relied on by the parties, it is seen that Exhibit 1 is the "Parcha Khatiyan" in the name of the father of Respondent Nos.1 and 2 said to be records of land pertaining to the year 1950-51, confirmed by Exhibit 6 the response of Respondent No.6 to the RTI query, Exhibit 5, of Respondent Nos.1 and 2. Undoubtedly there is a discrepancy in the area in Plot No.1011 which as per Exhibit 1 measures "0.14 acres" but as per Exhibit 6 measures 1.14 acres. However, Exhibit 6 informs that Plot No.1011 and Plot No.1029/1178 measuring 1.45 acres were recorded in the name of late Nar Bahadur Pradhan during 1950-51 survey from which areas measuring 0.53 acres and 0.29 acres respectively from the above plots were deducted and recorded in the name of "Power Project" and mutated in the name of Respondent No.5 Department. This was done before 1976-83 survey operations. As per Exhibit 6, Plot No.1836 measuring 0.2740 hectares was found recorded in the name of Respondent No.5 Department during 1976-83 survey operation. Admittedly, no

[20] (2004) 1 SCC 769

document of sale or agreement executed between the owner and the Respondent No.5 Department were found to establish mode of acquisition of the suit properties by Respondent No.5 from the father of Respondent Nos.1 and 2.

(vii) The suit properties have been described by Respondent Nos.1 and 2. Schedule 'C' to the Plaint mentions the old plot numbers and the corresponding new plot numbers. Respondent No.1 filed his evidence on affidavit, Exhibit 15 and claimed that in the year 2004 when he and his brother sought mutation of Schedule 'A' property in their individual names they came to learn that Plot No.1011 (Old Survey) corresponding to new Plot No.1812 and 1029/1178 corresponding to new Plot No.1836 were illegally recorded in the name of the Respondent No.5 Department. They have relied on the title deeds recorded in the name of their father to establish ownership and title over the suit properties. Their claims have not been demolished by way of cross-examination and the officer representing Respondent No.5 has admitted in evidence that the old plot numbers correspond to the new plot numbers. The Learned Trial Court detailed in its observation as to how the disputed land could not belong to Respondent Nos.1 and 2 by way of mathematical calculations, in view of the discrepancies in the measurement of the old and the new plot numbers. In the first instance when Respondent No.5 has failed to contradict the case of Respondent Nos.1 and 2 on this aspect, the Courts cannot embark on a solitary investigation of the truth. Secondly, it is essential to mention that in case of discrepancy between dimensions and boundaries, the rule of interpretation is that boundaries must

prevail as against the measurement. In ***Subbayya Chakkiliyan*** vs. ***Maniam Muthiah Goundan and Another***[21], it was held that;

> "……. Ordinarily when a piece of land is sold with definite boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurements. ……"

On the same lines in ***T. Rajlu Naidu*** vs. ***M.E.R. Malak***[22], it has been held as follows;

> "……. In case of discrepancy between dimensions and boundaries the area specified within the boundaries will pass, whether it be less or more than the quantity specified. ……."

The boundaries of the Schedule lands put forth by the Respondent Nos.1 and 2 have not been challenged or demolished by the opposing parties. The claim that their father was their predecessor in interest of Schedule 'A' properties has not been demolished. The contents of Exhibit 1 relied on by Respondent Nos.1 and 2 have not been contradicted, in fact Respondent No.5 confirmed that numbers of the old plots in the name of the father of Respondent Nos.1 and 2 are the corresponding new plot numbers.

(viii) In ***D.B Basnett (Dead) through Legal Representatives*** vs. ***Collector, East District***, ***Gangtok***, ***Sikkim and Another***[23], the facts by and large were similar. The suit property was said to belong to one Man Bahadur Basnett who passed away in 1991 whereupon the property fell to the share of the Appellant. When the Appellant visited the suit property in March 2002 he found that the Respondents had wrongly encroached and trespassed the same and were using it as an agricultural farm. The sum and substance

[21] AIR 1924 MADRAS 493
[22] AIR 1939 NAGPUR 197
[23] (2020) 4 SCC 572

of the claim was that the procedure envisaged under the Sikkim Land (Requisition and Acquisition) Act, 1977, had not been invoked and followed. The Respondents case therein was not of adverse possession but that they had acquired the land through due process and paid compensation for the same. This is the exact same contention of the Respondent No.5 in this Appeal hence reliance by Learned Senior Counsel for the Respondent Nos.1 and 2 on the ratio of ***State of Haryana*** vs. ***Mukesh Kumar and Others*** (*supra)* is misplaced. The Supreme Court in ***D.B Basnett*** (*supra*) while referring to a plethora of Judgments on the point held that to forcibly dispossess a person of his private property without following due process of law would be violative of a human right as also the constitutional right under Article 300 A of the Constitution and ruled as follows;

> "**19.** The result of the aforesaid would be that the respondents have failed to establish that they had acquired the land in accordance with law and paid due compensation. The appellant would, thus, be entitled to the possession of the land as also damages for illegal use and occupation of the same by the respondents, at least, for a period of three (3) years prior to the notice having been served upon them. We are strengthened in our observations on account of the judgment of this Court in *LAO v. M. Ramakrishna Reddy*[24], wherein it was held that the owner can be entitled to damages for wrongful use and possession of land in respect of which no notification is issued under Section 4 of the Land Acquisition Act, from the date of possession till the date such notification is finally published."

(ix) Although Respondent No.5 has been in possession of the suit properties, in the absence of documentary evidence to establish the mode of conveyance and thereby title, it falls to reason that when the rights of the Respondent Nos.1 and 2 are

[24] (2011) 11 SCC 648

juxtaposed with that of Respondent No.5 as also the comparative documentary evidence, it is clear that Respondent Nos.1 and 2 have proved their title over the suit property by furnishing evidence disclosing title of their predecessor in the interest which is undisputed, hence, mere possession by Respondent No.5 cannot be the decisive factor. Even though Respondent No.5 may have had a prior, peaceful, settled possession, Respondent Nos.1 and 2 are the rightful owners. The foregoing discussion thereby lends a quietus to the third substantial question raised.

(x) Before concluding it is apposite to notice that in Issue No.3 the Learned First Appellate Court held that Respondent No.5 had no possessory right over the suit property, it is thus unfathomable as to how it subsequently opined that the findings of the Learned Trial Court in Issue Nos.4 and 6 brooks no interference when the Learned Trial Court had earlier opined that Respondent No.5 had possessory right. Added to the above, the reasoning of the Learned First Appellate Court on the issue of maintainability is also nebulous. Be that as it may, the findings of the Learned Trial Court on maintainability cannot be sustained as all suits of civil nature are maintainable under Section 9 of the CPC unless specifically barred by a particular statute or by implication of law.

16. In the end result, the Judgment and Order of the Learned First Appellate Court is upheld subject to modifications as detailed below.

17. The Appeal fails and stands dismissed.

18. It is clarified here that although prayers (i) and (j) along with prayer (o) to the Plaint were rejected by the Learned First Appellate Court, rejection of prayers (i) and (j) would lead to

an absurdity, when the prayer for possession of the suit properties by Respondent Nos.1 and 2 are granted but the Appellant Nos.1 and 2 are not injuncted from continuing construction on Schedule 'D' land. The Order of the Learned First Appellate Court rejecting prayers (i) and (j) are accordingly set aside.

19. Pending applications, if any, stand disposed of.

20. No order as to costs.

21. Records of the Learned Courts below be remitted forthwith.

(Meenakshi Madan Rai)
Judge
06-01-2023

Approved for reporting : **Yes**

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