

THE HIGH COURT OF SIKKIM: GANGTOK

(Civil Appellate Jurisdiction)

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

R.S.A. No. 01 of 2017

Shri Chandra Bir Gurung,
S/o late Nar Bahadur Gurung,
R/o Labdang,
P.O. Tashiding,
West Sikkim.
Presently residing at Sirwani,
P.O. Singtam, East Sikkim. **Appellant**

Versus

1. Shri Pratap Singh Gurung,
S/o late Nar Bahadur Gurung,
R/o Labdang,
P.O. Tashiding,
West Sikkim.
 2. The Secretary,
Land Revenue & Disaster Management Department,
Government of Sikkim,
New Secretariat,
Gangtok,
P.O. Gangtok,
P.S. Sadar, East Sikkim.
 3. The Revenue Officer,
District Collectorate, Gyalshing,
P.O. Gyalshing,
West Sikkim.
- **Respondents**

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

Appearance:

Mr. U.P. Sharma, Advocate with Mr. Krishna Bhandari,
Advocate for the Appellant.

Mr. A. Moulik, Senior Advocate with Ms. K. D. Bhutia,
Advocate, for the respondent no. 1.

Mr. S. K. Chettri, Government Advocate for the respondent nos. 2 and 3.

Date of hearing : 06.10.2021 & 08.10.2021

Date of judgment: 20.10.2021

JUDGMENT

Bhaskar Raj Pradhan, J.

1. A second appeal is maintainable before the High Court if the High Court is satisfied that the case involves a substantial question of law. The Supreme Court in ***Union of India vs Ibrahim Uddin & Another***¹, held that the existence of substantial question of law is *sine qua non* for the exercise of jurisdiction under the provisions of section 100 of the Code of Civil Procedure, 1908 (CPC). The court, for the reasons to be recorded, may also entertain a second appeal even on any substantial question of law, not formulated by it, if the court is satisfied that the case involved such a question. Second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence. In ***Govindaraju vs Mariamman***², the Supreme Court held that to be a substantial question of law it must be debatable, not previously settled by law of the land or by any precedent or answer to the same will have a material bearing as to the rights of the parties before the court. There must be first a foundation for the question laid in the pleadings and the

¹(2012) 8 SCC 148

²AIR 2005 SC 1008

question should emerge from sustainable findings of facts arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision between the parties. In ***Karnataka Board of Wakf vs. Anjuman-E-Ismail Madris-Un-Niswan***³, the Supreme Court held that the High Court should not interfere with the concurrent finding of fact in a routine and casual manner by substituting its subjective satisfaction in place of lower courts. In ***Smt. Bismillah Begum (dead) by LRs vs Rahmatullah Khan (dead) by LRs***⁴, the Supreme Court held that the findings of fact arrived at by the courts below are binding in second appeal. The concurrent findings of the learned trial court and the learned first appellate court can be interfered only in cases where (i) material evidence were ignored or the courts acted on no evidence; (ii) there is wrong inferences from proved facts by erroneously applying the law; or (iii) the courts have passed the burden of proof wrongly.

2. The present dispute is between two brothers—the plaintiff and the defendant no.1, amongst the six sons of late Nar Bahadur Gurung. The dispute relates to plot no. 302/472 and plot no. 90/473 (suit property) recorded in ‘*parcha khatiyan*’ no. 121 in the name of the defendant no.1. According to the plaintiff, the properties of late Nar Bahadur Gurung had been divided between the sons without any formal partition deed. Plot no.302

³AIR 1999 SC 3067

⁴AIR 1998 SC 970

fell in his share. Plot no. 90 fell in the joint share of his brother late Kharga Bahadur Gurung and defendant no.1. As the plaintiff was staying away from the suit land, the defendant no.1 in connivance with some employees of the District Collectorate mutated the plots in his name without any notice or no objection from the brothers. The plaintiff prayed for declaratory reliefs and recovery of possession of the suit property.

3. In a suit for declaration and possession, the burden is on the plaintiff to establish its case.

4. The defendant no.1 also admitted that there was partition of the properties of late Nar Bahadur Gurung but the suit property fell in his share.

5. The suit was dismissed by the learned Trial Judge holding that the plaintiff had failed to substantiate his plea that the suit property fell in his share.

6. The learned first Appellate Court upheld the findings of the learned Trial Court.

7. Both the courts examined the '*parcha khatiyan*' (exhibit-1) in substantial detail contrary to what has been pleaded in the appeal.

8. Section 101 of the Indian Evidence Act, 1872 states that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, he asserts,

must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

9. Pleading the material facts clearly and precisely on which the plaintiff relies for his claim is necessary. In a case like the present one, it was also necessary for the plaintiff to plead particulars of how and with whom the defendant no.1 connived. Allegation of connivance must be clearly pleaded with material particulars and proved. The plaintiff did not also plead how exactly the partition took place and what was the share of each of the brothers of the plaintiff. The plaintiff examined himself, his brother Ganga Gurung (PW-2) and Hasta Bahadur Gurung (PW-3). During his cross-examination, the plaintiff admitted that he did not know the measurement of the properties mentioned in the '*parcha khatiyan*' (exhibit-1) and that all his brothers have their respective share of the properties belonging to late Nar Bahadur Gurung. Besides oral evidence, the plaintiff exhibited eight documents. No evidence has been led by the plaintiff to establish what he asserted in the plaint that the suit property fell in his share and the defendant no.1 in connivance with the employees of the District Collectorate surreptitiously and illegally mutated the suit properties in his name. S.K. Limboo (defendant no.3) examined himself. He was the concerned Revenue Officer. His cross-examination by the plaintiff reflects that it was not even put to him that the employees of the District Collectorate

had in connivance with defendant no.1 mutated the plots in his name.

10. Consequently, this court is of the view that the solitary question of law framed by this court, that the learned First Appellate Court had not considered the '*parcha khatiyan*' (exhibit-1) correctly and the impugned judgment was based on its misinterpretation, must be answered in the negative. Further it is held that this is not a fit case for interference with the concurrent findings of fact passed by the district judiciary.

11. The appeal is dismissed.

12. No orders as to costs.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting: **Yes/No**
Internet : **Yes/No**

Bp