

GAHC010015972023



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

**Case No. : CRP(IO)/28/2023**

RUPJAN BEGUM  
W/O- SAYED BABUL ISLAM, VILL- PIYALIKHATA, P.O- BAIHATA  
CHARIALI, DIST- KAMRUP, ASSAM, PIN- 781381

VERSUS

MD. AZIZUR RAHMAN SAIKIA  
S/O- LATE HAJI ABBAS ALI, VILL- PIYALIKHATA, P.O- BAIHATA CHARIALI,  
DIST- KAMRUP, ASSAM, PIN- 781381

**Advocate for the Petitioner : MR F U BARBHUIYA**

**Advocate for the Respondent : MR. R K BHUYAN**

**BEFORE**  
**HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY**

**ORDER**

**Date : 8.5.2023**

1. Heard Mr. F. U. Borgbhuiyan, learned counsel for the petitioner and Mr. R. K. Bhuyan, learned counsel for the respondent.
2. The present application is filed assailing an order dated 26.10.2022 passed

by the learned Appellate Court in Petition no. 3612/2018 arising out of Title Appeal No. 115/2014.

3. The petitioner as appellant preferred the aforesaid Title Appeal No.115/2014 against the judgment and decree dated 31.8.2013 passed by the learned Munsiff No.3, Kamrup in Title Suit No. 281/2017.
4. The petitioner filed an application under Order 41 Rule 2 of the CPC which was registered as Petition No. 3612/2018, with a prayer that he may be granted leave to take an additional ground in his appeal memo to the following effect:

*“For that while passing the impugned judgment and decree the learned trial court did not consider the question of Limitation as per Article-97 of the Limitation Act 1963 inasmuch as the counter claimant/defendant ought to have file the counter claim within one year from the date of registration of the registered sale deed No. 1656/2001, 1660/2001, 1662/2001, 1715/2001, 1716/2001,1719/2001 and 1720/2001, when the subject matter of the sale does not admit of physical possession of the whole or in part of the property. Owing to non consideration of the said vital legal aspect, the impugned judgment and decree suffer from illegality for which the same is bad in law and liable to be set aside.”*

5. The learned appellate court after hearing both the parties by the impugned order rejected such prayer.
6. Mr. Borbhuiyan, learned counsel for the petitioner submits that learned court has decided the issue raised finally in an interlocutory application entering into the merit of the ground. Therefore , the learned appellate court below not only failed to exercise its jurisdiction but also exceeded its jurisdiction in determining an issue in an interlocutory stage which will have serious effect on the final outcome of the appeal. Therefore, such order is liable to be interfered with.

7. Per contra, Mr. Bhuyan , learned counsel for the respondent submits that the issue was such that there was no option of the learned appellate court but to take a call on merit of such ground for the reason that whether the said ground can be taken up as a ground in the appeal relates to the pleading of the parties regarding the limitation. Therefore, it cannot be said that the court has exceeded its jurisdiction rather the court was left with no option but to determine merit of such ground.
8. Heard the learned counsel for the parties. This court is of the view that the petitioner sought a leave to take an additional ground that the suit /counter claim was barred by limitation. Whether such ground is a good ground can be determined at the final hearing of the appeal. The learned appellate Court had entered into merit of such ground and determined that such ground is liable to be rejected. However, there is nothing in the order which touches the issue whether leave to take such ground shall be granted. Thus, the appellate court has decided the merit of the ground raised by the appellant without taking any decision on leave sought for.
9. In the considered opinion of this Court, if the petition seeking leave to adduce such additional ground is allowed, the same would not prejudice the respondent inasmuch as the respondents would get a chance to reply to such argument.
10. In that view of the matter, this court is of considered opinion that the learned appellate court has failed to exercise its jurisdiction properly which resulted in gross miscarriage of justice. Accordingly the impugned order dated 26.10.2022 passed by the learned Appellate Court in Title Apple No.

115/2014 is set aside and the petitioner is allowed to take the ground of limitation as proposed in Petition No.3612/2018. Accordingly, necessary measure be taken by the learned Appellate Court, for incorporation of the additional ground in the Appeal Memo.

11. While parting with the record, it is made clear that this court has not commented on the merit of such claim and learned appellate court shall be at liberty to decide the issue of limitation, at the final hearing of the case.
12. In the aforesaid terms, this revision petition stands disposed of.

**JUDGE**

**Comparing Assistant**