

GAHC010107802010



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

Case No. : RFA/62/2010

SMTI. RUPA DHAR and ANR,
W/O LATE SUDHIP DHAR, VILL. DHARIARGHAT, P.S. KATLICHERRA, DIST.
HAILAKANDI, ASSAM.

2: SANGHITA DHAR @ RIMA DHAR

D/O LATE SUDHIP DHAR
VILL. DHARIARGHAT
P.S. KATLICHERRA
DIST. HAILAKANDI
ASSAM
APPELLANT NO. 2
BEING THE MINOR REPRESENTED BY HER MOTHER APPELLANT NO. 1

VERSUS

THE STATE OF ASSAM and 8 ORS,
REPRESENTED BY THE DEPUTY COMMISSIONER, HAILAKANDI, ASSAM

2:THE SECY.

MINISTRY OF HOME AFFAIRS
DISPUR
GUWAHATI-6
ASSAM.

3:THE INSPECTOR GENERAL OF POLICE

ULUBARI GUWAHATI
ASSAM.

4:THE SUPRINTENDENT OF POLICE

HAILAKANDI

ASSAM.

5:JEVON SINGH

ABC NO. 50
ASSAM POLICE
C/O SUPERINTENDENT OF POLICE HAILAKANDI.

6:KAMAL BARMAN

ABC 48 ASSAM POLICE
C/O SUPERINTENDENT OF POLICE
HAILAKANDI.

7:M.C. BASIR UDDIN LASKAR

I/C KARICHERRA POLICE STATION
C/O SUPERINTENDENT OF POLICE
HAILAKANDI

8:DINOMATH RAJBANGSHI

CONSTABLE KARICHERRA PP
C/O SUPERINTENDENT OF POLICE
HAILAKANDI.

9:GUPAL PAUL

VILL. KARICHERRA
P.S. KATLICHERRA
DIST. HAILAKANDI

Advocate for the Petitioner : MR.S P CHOUDHURY

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 10-10-2023

Heard Mr. S.K. Ghosh, learned counsel for the appellant and Mr. D. Mozumder, learned Addl. Advocate General for the State of Assam, assisted by

Ms. D.D. Barman, learned Addl. Senior Govt. Advocate, appearing for the State respondent nos. 1 to 4. None appears on call for the respondent nos. 5, 6, 8 and 9.

2. The appeal under section 96 CPC read with Order XLI, Rule 1 CPC is directed against the judgment and decree dated 21.08.2010, passed by the learned Civil Judge, Hailakandi in Money Suit No. 1/2007 filed by the appellants/ plaintiffs by which the suit was dismissed.

Pleadings, in brief, in the plaint:

3. In brief, the case of the appellants-plaintiffs in the amended plaint is that the husband of the appellant no.1 and father of the appellant no.2 was a rifleman in Assam Rifles. On 02.02.2005, the husband of the appellant no. 1 had come to his home on leave, and he had gone to a *naam-kirtan* and that at about 11 p.m., without provocation, the respondent nos. 6, 7 and 8 had killed her husband by firing at him with their service rifle. It was pleaded that on hearing the gun shot, several persons had assembled at the place of occurrence. On 03.02.2005, inquest of the dead body was conducted and the dead body was sent to Hailakandi Civil Hospital for post-mortem examination. As per the post-mortem examination report, the death had occurred due to massive hemorrhage following grievous damage to the liver caused by a bullet wound in the chest fired from a high velocity rifle. As per the plaint, the respondent nos. 5 to 9 were the tortfeasors and were responsible for killing her husband and being their employer, the State respondent nos. 1 to 4 were vicariously liable for such acts. Accordingly, alleging that the cause of action for the suit arose within the territorial jurisdiction of the Court, the appellants had prayed for decree of compensation of Rs.30.00 lakh, jointly and severally,

against the respondents.

Written statement of the respondent nos. 1 to 8:

4. A joint written statement was filed on behalf of the respondent nos. 1 to 8, wherein the said respondents had taken a plea that the husband of the appellant no.1 was not killed by any of the respondents, rather the deceased had invited his own death because he along with some other associates were at the place of occurrence armed with weapons and were creating trouble and nuisance in front of the Katlicherra Durgabari and the members of the *Kirtan* Committee along with the President of the Gaon Panchayat had reported the matter to the In-charge of the police camp with a request to control the trouble mongers and accordingly, the respondent nos. 5 to 8 had gone to the place of occurrence and that the police personnel had tried to control them but in vain. The said respondents had admitted in their written statement that the respondent no.7 was armed with a lathi and the respondent nos. 5, 6 and 8 were armed with rifles issued to them. At around 12.00 midnight, the deceased along with others had attacked the police party and that the respondent nos. 5 to 8 saved themselves with their rifles as a result the rifle of respondent nos. 5 and 6 got damaged by a dagger. It was also pleaded that both the said police personnel also got cut by the dagger. Thus, finding no alternative, the said two constables had opened five rounds of fire on the deceased who sustained injuries which led to his death. Accordingly, Katlicherra U.D. Case No. 3/2005 was registered. Moreover, Katlicherra P.S. Case Nos. 5/2005, 16/2005 and 17/2005 were also registered. It was further stated that after the investigation, all the cases ended in submission of a final report on the ground that the death of the husband of the appellant no.1 was accidental for which none of the respondents were liable and accordingly, it was prayed that

the suit filed by the appellants is liable to be dismissed.

Issues for trial:

5. The learned trial Court had framed 5 (five) issues for trial which are as follows:

- 1) *Whether the instant suit is maintainable in its present form and circumstances?*
- 2) *Whether there is any cause of action for the suit?*
- 3) *Whether the deceased i.e. the husband of the plaintiff No.1 was killed by the defendant nos.5 to 8 in disguise of maintaining law and order?*
- 4) *Whether the State of Assam is vicariously liable for the act of the defendant nos.5 to 8?*
- 5) *To what relief or reliefs, the parties/ plaintiffs are entitled to get under the law and equity?*

Discussions and decision by the learned Trial Court:

6. The appellants- plaintiffs had examined 5 (five) witnesses, being the appellant-plaintiff no.1 (PW-1), Mihir Deb (PW-2), Swapan Nath Bhowmick (PW-3), S.K Dhar (PW-4), Dr. K.Z. Choudhury, Senior Health & Medical Officer (PW-5). The following documents were marked as exhibits, viz., (i) certified copy of the FIR in Katlicherra P.S. Case No. 16/2005 (Ext.1), (ii) certified copy of the FIR Katlicherra P.S. Case No.17/2005 (Ext.2), (iii) certified copy of the FIR in Katlicherra P.S. Case No. 5/2005 (Ext.3), (iv) certified copy of first information sent to Magistrate in Katlicherra Unnatural Death Case No. 3/2005 (Ext.4), (v) certified copy of a report dated 03.02.2005, in U.D. Case No.3/2005 (Ext.5), (vi) certified copy of the inquest report (Ext.6), (vii) certified copy of the police report in CR Case No. 59/2005 (Ext.7), (viii) certified copy of the post- mortem report (Ext.8), (ix) copy of notice under section 80 CPC (Ext.9), (x) postal receipts [Ext.9(1) to Ext.9(8)], (xi) salary statement of Sudip Dhar (deceased),

issued by the Superintendent, Unit Pay and Accounts Office, Director General of Assam Rifles, Shillong (Ext.10), (xii) SMCH Discharge certificate of Swapan Nath Bhowmik (Ext.11).

7. The learned trial Court had discarded the evidence of eye witnesses as it appeared that the incident took place in front of Dariarghat Durgabari and that it was held on appreciating the evidence of PW-1 and PW-4 that a river runs between the Durgabari and the house of the deceased. As the deceased was the husband of PW-1 and brother of PW-4, it was held that it was obvious that they lived in the same house. i.e. on the opposite bank of river Dholeswari, where the Durgabari was situated. From the cross-examination of PW-1, it was observed that the distance between the Durgabari and the house of the deceased was 1 k.m. It was held that from the cross-examination of witnesses, it appeared that at the time of the incident it was a dark night and the witnesses who had allegedly seen the incident could not be telling the truth as it was difficult to ascertain who was chasing whom and who was firing and who was assaulting whom. The testimony of PW-2 was found to be contradictory by the learned Trial Court as he had stated in his cross-examination that he could not see who fired the gun as he did not know whether the respondent nos. 5, 6 and 7 were performing law and order duty with arms or not, whereas in his evidence-on- affidavit he had stated that he had seen the said persons who had opened fire on the deceased. The evidence of PW-3 was disbelieved because the said witness had referred to the bullet injuries sustained by the deceased when the police personnels had resorted to firing but in his cross-examination he had stated that he did not know who had fired the guns and he had also stated that at that time he was having dinner when he heard the sound of firing. His evidence was also disbelieved because

between his house and the place of occurrence, Dhaneswari river was flowing and that the alleged incident had occurred on the other side of the river bank. The evidence of PW-1 was not accepted as an eye witness because she had stated in her cross-examination that she had not visited the place of occurrence and she did not know who had shot her husband. Accordingly, the learned trial Court had referred to the police version of the incident and accepted that the firing took place to control the law and order situation and in self-defence. Accordingly, the issue no.3 was decided in the negative and against the appellants. Moreover, In view of the discussion and decision on issue no. 3, the other issue nos. 1, 2, 4 and 5 were also decided against the appellants and the suit was dismissed.

Submissions by the learned counsel for the appellants:

8. The learned counsel for the appellants had relied on the trial Court records (LCR for short) and had submitted that in so far as the documentary exhibits nos. 1 to 8 are concerned, those were certified copies. It was submitted that by order dated 01.12.2008, passed by the learned Trial Court to call for the documents as prayed for and thereafter, the witnesses of the appellant had tendered their evidence and the certified copies of exhibit nos. 1 to 8 were proved. It was further submitted that by order dated 25.01.2010, the Court had allowed cross examination of the remaining PWs on the strength of certified copy of records of S.C. Case No. 50/2006. It was also submitted that it was not in dispute that on the date of occurrence, the husband of the appellant no. 1 was killed by the respondent nos. 5 to 8 without existence of any adverse law and order situation, in conspiracy with respondent no. 9 and therefore, the State respondent nos. 1 to 4 were liable to compensate the appellants.

9. It was further submitted that although the respondent nos. 1 to 8 had filed their written statement to contest the suit, but no evidence was led by the respondents to prove their stand. Hence, it was submitted that the respondents deemed to have accepted the claim of the appellants and therefore, the suit ought to have been decreed by taking recourse to the provisions of Order XII, Rule 6 CPC. It was submitted that in their written statement, the respondent nos. 1 to 8 had admitted that the husband of the appellant no.1 was shot dead and that the firing was necessitated because of violent action on part of the husband of the appellant no.1. However, despite such admission, the learned Trial Court had shifted the burden of proof on the appellants to prove the conduct of the deceased when he was shot dead by the police personnel. In the same context, it is also submitted that if it was a law and order problem it was for the respondent nos. 1 to 8 to prove it and also to prove that adverse law and order situation was created by the deceased, i.e. predecessor-in-interest of the appellants. It was also submitted that the respondents had made no attempt to prove as to why the respondent nos. 5 to 8, who were police personnel, were at the place of occurrence and what was the compelling reasons to open fire and kill the deceased. It was also submitted that in their written statement, the respondent nos. 1 to 8 had stated that the rifles of the respondent nos. 5 and 6 were damaged by a dagger cut by the deceased, but no evidence was led to prove the said allegations. Hence, it was submitted that the learned trial Court ought to have taken adverse presumption against the respondents on their failure to prove their pleadings in the written statement of the respondent nos. 1 to 8.

10. Similarly, it was submitted that though the respondent no. 9 had filed his written statement, but did not give any evidence to support his stand.

11. Accordingly, it was submitted that while the appellants had proved their case the respondents had failed to prove their defence and therefore, the dismissal of the suit was not sustainable on facts and in law and therefore, the appeal was liable to be allowed by decreeing the suit. In other words, it was submitted that the respondent nos. 1 to 8 had miserably failed to justify the police firing at the husband of the appellant no.1 and accordingly, it was submitted that this is a fit and proper case where the decree for dismissal of the suit by the learned Trial Court was liable to be reversed by allowing the appeal and resultantly decreeing the suit.

Submissions made by the learned Addl. Advocate General:

12. The learned Addl. Advocate General had referred to the judgment impugned in this appeal and has supported the same by stating that the so called eye-witnesses examined by the appellants had failed to prove that the deceased was intentionally killed by the respondent nos.5 to 8 and accordingly, he had submitted that the dismissal of the suit was justified. By referring to the evidence of the PWs, it was submitted that the burden of proof was on the appellants to prove that the husband of the appellant no.1 was not shot while performing their duties. It was submitted that there was *naam-kirtan* (religious programme) and that the organizing committee had called police for controlling adverse law and order situation that was created by the deceased. Accordingly, it was submitted that the appeal was without any merit and same is liable to be dismissed.

Discussion on point of determination and decision:

13. The suit being only for claiming monetary compensation, the only point of determination which arises for decision in this suit is whether the

decree for dismissal of the suit is sustainable on facts and in law.

14. Perused the LCR carefully and also considered the submissions made by the appellants and the respondents.

15. It may be mentioned that in course of submissions, the learned Addl. Advocate General had submitted that the proceedings arising out of Katlicherra PS Case Nos. 16/2005, 17/2005, and 5/2005 as well as Katlicherra U.D. Case No. 3/2005 had all resulted in the submission of the final report, exonerating the respondent nos.5, 6, 7 and 8 of all accusations. Moreover, it was also submitted that the trial of Sessions Case No. 50/2006, against the respondent nos.5, 6, 7 and 8, who were tried for the commission of the alleged offence of the murder of the deceased husband of the appellant no.1, the respondent nos.5, 6, 7 and 8 had been acquitted. Accordingly, it is submitted that the State would not be liable to pay any compensation merely on presumption alone. Unfortunately, no such document had been brought on record by the respondents by way of evidence in appellate stage. Therefore, the said submission cannot be considered.

16. On appreciation of the evidence on record, the Court finds that the learned trial Court had made no error in discarding the evidence of PW-1 and PW-2 to PW-4, who were purportedly eye witnesses.

17. It is deemed appropriate to examine the evidence of the PWs.

18. PW-1 is not an eye witness to the incident of shooting down her husband. In her cross-examination, she had stated that she had first seen the dead body of her husband on 03.02.2005 when it was taken home after post mortem. In her cross-examination she had also stated that in her affidavit, she

had kept out the name of the respondent- defendant no.9 and she had also stated that it was not a fact that her husband was killed by the respondent/ defendant no.9. Therefore, from the cross-examination of PW-1, it emerges that her plea that the respondent nos. 5 to 8 had killed her husband in conspiracy with the respondent no.9 had miserably failed.

19. As per the evidence-on- affidavit, the PW-2 had stated that he was a resident of Karicherra and he had stated that a *naam-kirtan* was organized in Dariarghat Durgabari. In his cross-examination, the PW-2 had stated that the occurrence took place in front of Dariarghat Durgabari and his house was at Karicherra. He had also stated that Dariarghat and Karicherra are in the opposite bank of river. There was no light in the street and it was a dark night. He was inside the *mandap*. Therefore, he could not be an eye witness to the incident, if he was inside the *mandap*. Moreover, he had stated in his cross-examination that he did not see whether the respondent nos. 5, 6 and 7 were performing law and order duty with arms and that he did not see who fired the gun.

20. The PW-3 is purportedly one of the victim of gun-shot. His medical report of gun-shot injury was proved vide Ext.11. Yet in his evidence-on-affidavit, PW-3, who is a resident of Karicherra, had stated that the *naam-kirtan* was being performed at Dariarghat Durgabari, where the incident of firing took place. He had stated in his cross-examination that at the time of firing, he came to his house for dinner and while taking meal, he heard the sound of firing. He had further stated that there were other houses in between Durga *Mandap* and his house. He had further stated that there was no street light there and he did not see who had fired.

21. PW-4, who is the brother of the deceased, had also stated in his evidence-on-affidavit that a *naam-kirtan* was being held at Dariarghat Durgabari, where the incident of police firing had taken place. However, in his cross-examination, he had stated that he had not stated in his affidavit that the occurrence took place at Dariarghat Durgabari. He had also stated that before the occurrence, he had gone home for dinner. In his cross-examination on behalf of respondent no. 9, PW-4 had stated that the deceased was involved in chopping of hand of a policeman in Karicherra bazaar and the case was pending when he died. He had admitted that the deceased used to do unruly things at Karicherra in festival time or in other festivities. He had also stated that he had not seen respondent no. 9 in the market.

22. Thus, it is seen that in cross-examination, the PW Nos. 1 to 4 have not been able to establish the case of the appellants. The appellants had also not been able to prove that the respondent nos.5, 6, 7 and 8, were not on duty when her husband was shot by police rifle.

23. The PW-5, who was the Medical Officer who had performed the post mortem examination had stated in his cross-examination that the original post mortem report was not on record.

24. Thus, it is seen that along with the evidence-on-affidavit, the appellant no.1 as PW-1 had marked some documents as Ext. nos. 1 to 8, which are more elaborately mentioned herein before. The learned counsel for the appellant could not show from the order-sheet of the LCR that steps was taken to call for the original records thereof and/ or that the learned Trial Court had permitted the appellants to prove Ext. nos. 1 to 8 by secondary evidence.

25. None of the signature on any of the Ext. nos. 1 to 9 and Ext.11 were proved by summoning their authors. Nonetheless, though the documents covered by Ext. nos. 1 to 8 were not proved in original, the evidence of the appellants was not rejected by the learned trial Court on the said count.

26. It appears that although by an order dated 25.01.2010, the learned trial Court had allowed the prayer to submit the certified copies of documents relating to Sessions Case No.50/2006, the appellants had not proved any document in connection with the said trial. It is seen that the learned trial Court by an order dated 01.12.2008 had allowed the prayer made by the appellants to call for the documents but there is nothing on record to show that the appellants had taken steps to call for the original records. In the LCR, the copies of the summons issued to PW-5, i.e. the doctor is available, but he was not summoned to produce the original record relating to post mortem report.

27. Nonetheless, it is seen that the respondents did not raise any objection regarding inadmissibility of Ext. nos. 1 to 8, or admissibility of Ext.9 and Ext.11 without calling for their respective authors and/or signatory to prove their respective signatures. Therefore, as those exhibits were admitted in evidence without any objection being raised, the Court is disinclined to non-suit the appellants for non-production of the original records for which certified copies were exhibited as Ext. nos.1 to 8.

28. In the considered opinion of the Court, in the present suit for damages and compensation, as a plea had been taken by the appellants that the assailants of her husband were not in duty, on failure to led any evidence to show that the respondent nos. 5, 6, 7 and 8 were not on duty in the place of occurrence, the suit would fail.

29. It may be mentioned that in their written statement, the respondent nos. 1 to 8 had admitted that the husband of the appellant no. 1 was killed from the gun of the respondent nos. 5 and 6, who had fired 5 (five) rounds from their rifle. No prayer was made for passing a decree in the suit on admission. Moreover, the said admission made by the respondent nos. 1 to 8 was not reiterated by the PW-1 in her evidence-on-affidavit. No attempt was made to call for armoury report to prove whose rifle was used for firing bullet on 02.02.2003.

30. From the entries made in the certified copy of the post-mortem report (Ext.8), the following finding are recorded:

The findings are ante mortem in nature, the nature of the wounds signify that they are caused by fire arm. The wounds no.(1) and no.(3) are the entry wounds caused by entry of projectiles from a firearm. The wounds no.(3) and no.(4) are exit wounds caused by exit of projectiles from a fire arm. The wounds no.(3) was caused when the victim was facing the assailant. It appears that when the victim turned his back to the assailant he was shot on his back. The Cuplams, The cause of the wound no.1. The projectile that caused the wound no.(1) destroyed the liver and caused massive damage to the lower lobe of the right lung and the stomach after finding resistance of the ribs on the exterior chest wall. The damage to the liver resulted in massive haemorrhage inside the illegible and this resulted in the victims death. Death must have occurred very soon after the victim was shot on the back of the chest. No projectile could be found inside the body.

31. Despite such entry, no attempt was made to ascertain as to whether the deceased was shot on his chest or in his back, which has some relevance because if the bullet had hit the deceased in the chest, it would mean that the deceased was facing his assailants, but if the gun-shot was in his back, then the back of the deceased was facing the assailants, when he was shot. Therefore, the appellants had not made any attempt to prove that the

respondent nos. 5 to 8 had exceeded their right of defence.

32. Coming to judgment and decree impugned in this appeal, it is observed that the learned trial Court took into account the pleadings made by the respondents in their written statement, which was despite the fact that none of the respondent nos.1 to 9 had adduced any evidence. In this regard, it is seen that the learned Trial Court had taken into consideration that the respondent no.9 was a signatory to an *ejahar* lodged at the Katlicherra Police station against the deceased Sudip Dhar, which was not proved. The plea of the respondent nos. 1 to 8 that the deceased used to create menace in the said Karicherra Bazar by consuming liquour and gambling with his associates, was not supported by any evidence. Therefore, the Court has no hesitation to hold that the reliance on the written statement by the learned Trial Court, justifying the killing of the deceased is not sustainable.

33. The learned trial Court had also committed an error by putting the burden on the appellants to prove that the police personnel had opened fire on the deceased intentionally and without any provocation, which was a stand of the respondent nos. 1 to 8 and therefore, it was the burden of the said respondents to prove that the respondent nos. 5 and 6 had to shoot the deceased on grave and sudden provocation by him. The burden of proof is found to have wrongly shifted on the appellants to prove that the deceased was shot without any grave and sudden provocation.

34. The learned trial Court had heavily relied on the circumstances as stated in the written statement, which is *ex facie* erroneous. Nonetheless, as the appellants had not been able to prove the essential foundational facts, no purpose would be served to remand the matter for a fresh decision based on

evidence on record.

35. In light of the discussions above, the judgment and decree passed by the learned Trial Court, assailed in this appeal warrants no interference.

On maintainability of suit on point of limitation:

36. Although the maintainability of the suit has not been questioned by the respondents and no submissions thereon was made by the learned Addl. Advocate General, in course of hearing on 03.10.2023, this Court, while examining the plaint had observed that the husband of the appellant no. 1 was killed on 02.02.2003 and the plaint was filed on 26.02.2007. Accordingly, the hearing was adjourned to 04.10.2023 so as to enable the learned counsel for the appellants and the learned Addl. Advocate General to address the Court as to whether the plaint was barred by limitation in light of the provisions of Article 72 and 82 of the Schedule of the Limitation Act, 1963.

37. Accordingly, both sides had addressed the Court on 04.10.2023. The learned counsel for the appellants had submitted that in this case, Article 113 of the Schedule of Limitation Act, 1963 would be applicable and in support of the submissions, reliance is placed on the case of *State of Andhra Pradesh v. Challa Ramkrishna Reddy & Ors.*, (2000) 5 SCC 712. Per contra, the learned Addl. Advocate General had submitted that this was a case of fatal accident and therefore, Article 82 of the Schedule to the Limitation Act, 1963 would be attracted. In support of his submissions, reliance has been placed on the following cases, viz., (i) *Ramji Singh Patel v. Gyan Chandra Jaiswal*, (2018) 14 SCC 120, (ii) *V.M. Salgaocar and Bros. v. Board of Trustees of Port of Mormugao & Anr.*, (2005) 4 SCC 613, (iii) *Khiradabala Nath & Ors. v. Assam State Electricity*

Board & Ors., (2008) 3 GLR 24: 2018 (4) GLT 116, (iv) State of Tripura & Ors. v. Swapna Chakraborty & Anr., (2007) 1 GLR 254.

38. The relevant paragraphs 6 to 8 of the judgment of *State of Andhra Pradesh (supra)*, relied upon by the learned counsel for the appellants are extracted below:-

6. *We will first take up the question of limitation. Article 72 of the Limitation Act, 1963 is quoted below:-*

"Description of suit

For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends.

Period of limitation One year

Time from which period begins to run

When the act or omission takes place.

The above Article corresponds to Article 2 of the Limitation Act, 1908 which is quoted below:-

"For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in India.

Ninety days

When the act or omission takes place."

Article 113 of the Limitation Act, 1963, upon which reliance has been placed by the respondents, is quoted below:-

"Description of suit Period of limitation Time from which period begins to run Any suit for which no period of limitation is provided elsewhere in this Schedule.

Three years.

When the right to sue accrues.

These Articles, namely, Article 72 and 113 are applicable to different situations. In order to attract Article 72, it is necessary that the suit must be for compensation for doing or for omitting to do an act in pursuance of any enactment in force at the relevant time. That is to say, the doing of an act or omission to do an act for which compensation is claimed must be the act or omission which is required by the statute to be done. If the act or omission complained of is not alleged to be in pursuance of the statutory authority, this Article would not apply. This Article would be attracted to meet the situation where the public officer or public authority or, for that matter, a private person

does an act under power conferred or deemed to be conferred by an Act of the Legislature by which injury is caused to another person who invokes the jurisdiction of the court to claim compensation for that act. Thus, where a public officer acting bona fide under or in pursuance of an Act of the Legislature commits a "tort", the action complained of would be governed by this Article which, however, would not protect a public officer acting mala fide under colour of his office. The Article, as worded, does not speak of "bona fide" or "mala fide" but it is obvious that the shorter period of limitation, provided by this Article, cannot be claimed in respect of an act which was malicious in nature and which the public officer or authority could not have committed in the belief that the act was justifiable under any enactment.

7. *In State of Punjab v. M/s. Modern Cultivators, AIR 1965 SC 17, Hidayatullah, J. (as he then was) while approving the earlier decisions in Mohammad Sadat Ali Khan v. Administrator, Corporation of City of Lahore, AIR 1945 Lahore 324, and Secretary of State v. Lodna Colliery Col. Ltd., AIR 1936 Pat 513, observed as under:-*

"(25) This subject was elaborately discussed in ILR (1945) Lah. 523: AIR 1945 Lah 324 (FB) where all ruling on the subject were noticed. Mahajan, J. (as he then was) pointed out that "the act or omission must be those which are honestly believed to be justified by a statute." The same opinion was expressed by Courtney Terrell C.J. in Secretary of State v. Lodna Colliery Co. Ltd., ILR 15 Pat. 510: AIR 1936 Pat. 513 in these words :-

"The object of the article is the protection of public officials, who, while bona fide purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act; it resembles in this respect the English Public Authorities Protection Act. If the act complained of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong. The protection is needed when an actionable wrong has been committed and to secure the protection there must be in the first place a bona fide belief by the official that the act complained of was justified by the statute, secondly the act must have been performed under colour of a statutory duty, and thirdly, the act must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection."

(26) These cases have rightly decided that Art. 2 cannot apply to cases where the act or omission complained of is not alleged to be in pursuance of statutory authority."

8. *In Jailal v. The Punjab State & Anr., AIR 1967 Del 118, it was held by the Delhi High Court that protection under Article 72 could be claimed only when the*

act was done under the colour of statutory duty but if the person acted with the full knowledge that it was not done under the authority of law, he could not claim the benefit of the shorter period of limitation prescribed under this Article.

39. In the present case in hand, the appellants had failed to prove before the learned Trial Court that the respondent nos. 5 to 8 in conspiracy with respondent no. 9 had killed the deceased. The appellants also did not prove that the respondent nos. 5 to 8 in conspiracy with the respondent no. 9 had shot dead the deceased with full knowledge that they did not have authority of law to shoot while on duty. The initial burden is on the appellants- plaintiff to prove the same and the onus would then shift on the respondents to repel such evidence.

40. Therefore, in the absence of proof regarding existence of malice in the killing of the deceased, as per the decision rendered in the case of *State of Andhra Pradesh (supra)*, Article 72 of Schedule to the Limitation Act, 1963 gets attracted, which prescribes the period of limitation of one year for filing the suit.

41. It may be mentioned that it is well settled law that even if limitation is not agitated as a defence, in view of the provisions of Section 3 of the Limitation Act, 1963, the issue of limitation can be taken up for adjudication before the first appellate Court.

42. Therefore, the inevitable conclusion, based on the judgment cited by the learned counsel for the appellants is that the suit filed by the appellants was barred by limitation prescribed under Article 72 of the Schedule to the Limitation Act, 1963 and that the suit was barred even under Article 82 of the Schedule to the Limitation Act, 1963 where the period of limitation prescribed is

for two years.

ORDER

43. In light of the discussions above, this appeal fails on merit as well as on the ground of the suit being barred by limitation and therefore, this appeal is dismissed.

44. Let a decree of dismissal of appeal be prepared.

45. Let the LCR be transmitted back to the Court of the learned Civil Judge, Hailakandi together with a copy of this judgment. The Registry is permitted to transmitted the appellate decree to the learned Trial Court as and when the same is prepared.

46. The parties are left to bear their own cost.

JUDGE

Comparing Assistant