

**HIGH COURT OF TRIPURA
AGARTALA**

RSA 50 OF 2005

Md. Arab Ali,
S/o Late Abdul Wahid,
Dhupirbond, P.S. Dharmanagar,
Distt. North Tripura.

Represented by his Attorney & cousin brother
Cherag Uddin, S/o Late Abdul Jalil of
Dhupirband, P.S. Dharmanagar by registered
Deed of Power of Attorney dated, 06-10-1994 bearing
No.IV-564.

.. Plaintiff-Appellant.

- Vrs -

- 1. The District Magistrate & Collector,**
North Tripura, Kailashahar,
P.O. Gournagar.
- 2. The Sub-Divisional Officer,**
(Now Sub-Divisional Magistrate),
Kanchanpur, P.O. Kanchanpur,
North Tripura.
- 3. The Officer-in Charge,**
Vangmun Police Station,
P.O. Vangmun, North Tripura.
- 4. The State of Tripura,**
Represented by the Chief Secretary,
(Incharge Forest Department)
Govt. of Tripura, Agartala.

.. Principal defendant-Respondents

- 5. The Divisional Forest Officer,**
Kanchanpur Forest Division,
P.O. & P.S. Kanchanpur,
Distt. North Tripura.
- 6. The Chief Wild Life Warden,**
Department of Forest,
Arannya Bhavan,
Gurkhabasti, Agartala.

..Proforma Defendant-Respondents.

**BEFORE
THE HON'BLE MR. JUSTICE S.C. DAS**

For the appellant : Mr. D.K.Biswas &
Mr. S. Lodh, Advs.

For the respondents : Mr. S. Chakraborty, Addl. G.A.

Date of hearing : 13.01.2015

Date of delivery of judgment and order : 21.01.2015

Whether fit for reporting : No

JUDGMENT & ORDER

This second appeal, under Section 100 of the Code of Civil Procedure, 1908 is directed against the appellate judgment and decree dated 28.04.2005, passed by learned Addl. District Judge, North Tripura, Dharmanagar, in Money Appeal No.04/04 where-under the learned Addl. District Judge upheld the judgment and decree of dismissal of the suit dated 29.07.2004 and 30.07.2004 respectively passed by learned Civil Judge, Sr. Division, North Tripura, Dharmanagar in Money Suit No.8/95.

2. Heard learned counsel Mr. D. K. Biswas for the appellant and Mr. S. Chakraborty, learned Addl. G.A. for the respondents.

3. The second appeal has been admitted for hearing on the following substantial questions of law.

“(i). Whether the appellate court can set aside the findings of the learned trial court in the absence of any challenge to the question of maintainability?

(ii). Whether the findings of the courts below that the Chief Wild Life Warden has the authority to kill the elephant under the Wild Life Protection Act are legally correct in terms of the provision of the said Act?

4. The appellant Arab Ali as the plaintiff (hereinafter mentioned as plaintiff) through his constituted Attorney Cherag Uddin instituted Money Suit No.08/95 in the Court of Civil Judge, Sr. Division, Dharmanagar seeking a decree of Rs.4,50,000/- along with compensation @10% per annum from the defendant-respondents (herein-after mentioned as defendants).

5. The plaintiff, inter alia, contended that he was owner of the elephant mentioned in the schedule of the plaint and that he purchased the elephant from one Haji Md.Jahir Uddin of Chapra, P.S. Badarpur, Cachar on 04.02.1968 for a price of Rs.3,250/- and there was a transit pass No.92085 dated 04.02.1968 in the name of Haji Md. Jahir Uddin. The plaintiff after purchase of the elephant brought it in Tripura and it was used for the purpose of carrying/dragging timbers in the forest. The plaintiff time to time obtained passes from

the Forest authority for grazing, keeping and movement of the elephant in the forest on payment of legitimate fees. The elephant was tamed, well trained, faithful and domestic and it was utilized for dragging/carrying of timbers in the forest. In the year 1993 it was engaged in carrying of logs at Vangmun area. Around the month of May, 1993 a female heated elephant appeared there at Vangmun and it attracted the male elephant of the plaintiff. Another elephant belonged to one Shahid Master of Kailashahar also assembled there. It was alleged by the local people of Vangmun area that those elephants went wild and they damaged crops and other properties and created panic in the locality and subsequently one H.T.Khuma, a Mizo inhabitant of Vangmun area lodged a complaint at Vangmun P.S. on 26.05.1993. The Attorney of the plaintiff, Cherag Ali alias Cherag Uddin went there and made extensive search for the elephant but at that time, he was arrested by the police of Vangmun P.S. in connection with Vangmun P.S. case No.2(5)/93 u/S 289,34 and 437 of IPC (GR Case No.357/93) and Vangmun P.S. Case No.1(5)/93 u/S 174 Cr.P.C. Subsequently Cherag Uddin was released from the custody on 01.06.1993. He was not co-operated by the defendant Nos. 1 to 3 to manage the elephants and the elephant of the plaintiff along with wild female elephant were killed by the police and forest staff at the instance of defendant Nos. 1, 2 and 3 on 04.06.1993 causing heavy loss to the plaintiff. The plaintiff, through his Attorney, Cherag

Uddin, issued notice under Section 80(1) of CPC but the defendants did not respond to that notice and therefore, the plaintiff through his Attorney Cherag Uddin instituted the suit seeking decree of Rs.4,50,000/- towards price of the killed elephant and compensation @ 10% per annum upon the amount.

6. The defendants, inter alia, contended that the plaintiff Arab Ali was never owner of the elephant and that Arab Ali never appointed Cherag Uddin as his Attorney. Arab Ali left India in the month of June, 1993 permanently and living in Bangladesh. So the alleged Attorney Cherag Uddin has no right to institute the suit on behalf of Arab Ali seeking compensation. The defendants also contended that the suit elephant and the wild female elephant killed four persons in the Jampui hill area and damaged property of the people and created huge panic in the area. Local people reported it to the O.C. Vangmun P.S. and O.C., P.S. took up the issue with the S.D.O., Kanchanpur (defendant No.2) who took up issue with the District Magistrate and Collector (defendant No.1) and thereafter the issue was taken up with the Chief Wild Life Warden of the Govt. of the Tripura and the Chief Wild Life Warden issued an order to kill the hostile elephants as those elephants could not be controlled by using other means such as mobilizing people of the locality and blasting of crackers etc. to drive them away. The suit elephant and the wild elephant were thereafter shot dead since there was no other

alternative. The plaintiff even did not appear before the P.S. after issuance of notice and institution of criminal case since the plaintiff left for Bangladesh permanently and so the Attorney Cherag Uddin had no right to continue the suit.

7. Considering the pleadings of the parties, the trial Court framed four issues for decision those are:-

- i. Whether the suit is maintainable in its present form?
- ii. Whether Cheraguddin is the Attorney of Arab Ali and has authority to institute the suit?
- iii. Whether Arab Ali is/was the owner of the elephant which was subjected to death by firing by the defendants?
- iv. Whether the plaintiff is entitled to get the decree as prayed for?

8. In course of trial, the plaintiff did not turn up. The Attorney of the plaintiff Cherag Uddin has been examined as P.W.1 and on behalf of the plaintiff, four more witnesses were examined namely P.W.2 Abdul Mannan, P.W.3 Md. Sirai Miah, P.W.4 Alaich Miah and P.W.5 Abdul Kalam.

In support of the case of the plaintiff, the following documents were proved:-

- i. Registered copy of Power of Attorney—Exbt.1;
- ii. Sale Note dt.4.2.68—Exbt.2;
- iii. Grazing Pass issued by Forest Deptt. (5 Nos.)—Exbt.3 (series);

- iv. Certified copy of F.I.R.—Exbt.4;
- v. Notice U/s. 80 C.P.C. – Exbt.5;
- vi. Postal Receipt with A/D Card – Exbt.6 (series);
- vii. Sig. of P.W.-2 in the Power of Attorney – Exbt.7;
- viii. Sig. of P.W.-5 in the Power of Attorney – Exbt.8.

9. On behalf of the defendants, 3 (three) witnesses were examined those are D.W.1 Md. Kutub Ali, S.D.O. of Kanchanpur, D.W.2 Nandalal Das, O.C. of the P.S. and D.W.3, H.T. Khuma, a resident of Vangmun.

On behalf of the defendants following documents were proved—

- a. Copy of Message issued by Chief Wild Life Warden – Exbt.A;
- b. Copy of W/T message of O/C, Dharmanagar P.S. – Exbt.B;
- c. Copy of undertaking given by Cherag Ali in C/w. G.R. 350/93 – Exbt.C;
- d. Copy of notice in c/w VGM, P.S. 2(5)/93— Exbt.D; and
- e. Copy of F.I.R. – Exbt.E.

10. The trial Court decided issue Nos. 1 to 3 in favour of the plaintiff but decided issue No. 4 against the plaintiff and accordingly dismissed the suit.

11. Aggrieved, the plaintiff preferred Money Appeal No.4/04 and by impugned judgment dated 28.04.2005, learned Addl. District Judge dismissed the appeal and upheld the judgment and decree of dismissal passed by the learned Civil Judge, Sr. Division and while deciding the appeal, the learned Addl. District Judge set aside the finding of trial Court in respect of issue No.1 and decided that issue against the plaintiff and upheld the decision of the trial Court in respect of other issues.

12. Learned counsel Mr. D. K. Biswas appearing for the appellant has submitted that no appeal was filed by the defendants against the decision of the trial Court in respect of issue Nos. 1, 2 and 3. The appellate Court in the absence of any such appeal would not touch the decision of the trial Court in respect of issue Nos. 1, 2 and 3 but the appellate Court set aside the finding of the trial Court in respect of issue No.1 and decided it against the plaintiff which was wrong.

13. Learned Addl. G.A. has conceded that the State did not prefer any appeal against the decision of the trial Court in respect of issue Nos., 1, 2 and 3 and so, he has nothing to submit on that issue.

14. On perusal of the judgment passed by the appellate Court, I find that the appellate Court unnecessarily took up issue No.1 for further decision though there was no argument advanced on behalf of either side. While a particular

issue was decided by the trial Court and no appeal preferred by either party against that decision, the appellate Court in the absence of any argument advanced would not interfere in the decision of the trial Court in respect of such particular issue. Therefore, I find merit in the submission of learned counsel Mr. Biswas that the appellate Court was wrong in interfering with the decision of learned trial Court in respect of issue no.1.

15. Learned counsel Mr. Biswas for the appellant has submitted that even if it is admitted that the elephant of the plaintiff went hostile, rough and violent it would not have been killed in the manner as it is done by the defendants. No notification was issued and no publicity was made that the elephant should be killed if the elephant was not controlled by the owner. The Attorney of the plaintiff Cherag Uddin was arrested when he went to Vangmun and he was not co-operated by the administration to control the elephant. Under such circumstances, issuance of an order by the Chief Wild Life Warden under Section 11 was totally uncalled for. The hostile elephant was actually a domestic and tamed elephant of the plaintiff and since a wild female heated elephant arrived it may happen that temporarily the elephant of the plaintiff was rough but for that reason it should not have been killed. The order passed by the Wild Life Warden, therefore, was wrong and there was no justification at all for issuing such order of killing.

16. Learned Addl. G.A., on the other hand, has submitted that the evidence on record is speaking enough that the alleged elephant of the plaintiff went wild and it damaged properties of the local people, killed 3 persons in the jungle who were 'Mahuts' and a panic situation was created by the hostile elephants. The administration took step to move out the elephants from the area by blasting crackers and the local people were also gathered to drive out the elephants but all attempts had been failed and therefore, the Chief Wild Life Warden was approached for killing the elephants and considering the situation the order was passed by the Chief Wild Life Warden under Section 11 of the Wild Life Protection Act.

17. The oral and documentary evidence, as it appears, has been carefully considered by the trial Court and the appellate Court while deciding issue No.4. The concurrent finding of both the Courts in respect of issue No.4 appears to be based on proper appreciation of the pleadings and the evidence. Concurrent finding of fact by the trial Court and the appellate Court cannot be interfered in the second appeal by the High Court.

18. The Supreme Court in the case of **Gurdev Kaur & Ors. V. Kaki & Ors.** reported in **2006 AIR SCW 2404** in para 68 and 69 has observed thus:-

"68.The analysis of cases decided by the Privy Council and this Court prior to 1976 clearly indicated the scope of interference under Section 100 C.P.C. by this Court. Even prior to amendment, the consistent position has been that the Courts should not interfere with the concurrent findings of facts.

69. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question."

19. In view of the concurrent finding of fact on issue No.4 by the trial Court and the appellate Court, I find no justification at all to re-consider the factual aspects and the evidence to arrive at a contrary finding.

20. Regarding issuance of order by the Chief Life Warden, it is in the evidence on record that the domestic elephant of the plaintiff went hostile and got wild while it came into association with a wild female elephant and damaged properties of the people and also killed 3(three) people. Under such circumstances, the Chief Wild Life Warden was approached by the Administration for killing the hostile elephants.

21. Section 11 of the Wild Life (Protection) Act,1972 prescribes thus:-

11. Hunting of Wild animals to be permitted in certain cases.- (1)
Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of Chapter IV, -

(a) the Chief Wild Life Warden may, if he is satisfied that any wild animal specified in Schedule I has become dangerous to human life or is so disabled or diseased as to be beyond recovery, by order in writing and stating the reasons therefor, permit any person to hunt such animal or cause animal to be hunted;

[Provided that no wild animal shall be ordered to be killed unless the Chief Wild Life

Warden is satisfied that such animal cannot be captured, transquilised or translocated:

Provided further that no such captured animal shall be kept in captivity unless the Chief Wild Life Warden is satisfied that such animal cannot be rehabilitated in the wild and the reasons for the same are recorded in writing.

Explanation—For the purposes of clause (a), the process of capture or translocation, as the case may be, of such animal shall be made in such manner as to cause minimum trauma to the said animal.]

- (b) the Chief Wildlife Warden or the authorised officer may, if he is satisfied that any wild animal specified in Schedule II, Schedule III or Schedule IV, has become dangerous to human life or to property (including standing crops on any land) or is so disabled or diseased as to be beyond recovery, by order in writing and stating the reasons therefor, permit any person to hunt [such animal or group of animals in a specified area or cause such animal or group of animals in that specified area to be hunted].*

(2) The killing or wounding in good faith of any wild animal in defence of oneself or of any other person shall not be an offence;

Provided that nothing in this sub-section shall exonerate any person who, when such defence becomes necessary, was committing any act in contravention of any provision of this Act or any rule or order made thereunder.

(3) Any wild animal killed or wounded in defence of any person shall be Government property."

22. The above provision clearly stipulates that a wild animal which become dangerous to human life may be

permitted to hunt by the order of the Chief Wild Life Warden. In the present case the oral and documentary evidence as considered by the trial Court and the appellate Court shows that the elephant of the plaintiff became hostile to the human life, it damaged property of the people and killed three persons and so having no other alternative it was shot dead and there was nothing to blame the defendants for killing the animal.

23. The Chief Wild Life Warden has been vested the power under Wild Life Protection Act and there is nothing to show that any other formalities as claimed by the plaintiff was supposed to be considered by the defendants before killing the animal.

24. In view of the discussions made above, the second appeal is found to be devoid of any merit and accordingly it stands dismissed.

25. Send down the L.C. records along with a copy of this judgment.

JUDGE