IN THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appelllate Jurisdiction)

R.F.A. No. 05 of 2015

Mrs. Devi Maya Chettri,
Wife of Late Karna Bahadur Chettri,
Resident of Middle Sichey,
Gangtok, East Sikkim.

… Appellant

Versus

1. Mr. Mahesh Chettri, aged about 50 years,
Son of Late Lal Bahadur Chettri,
Resident of Ipsing, Samdong,
P.O. Makha & P.S. Singtam,
East Sikkim.

2. Mr. Naresh Chettri, aged about 46 years
Son of Late Lal Bahadur Chettri,
Resident of Ipsing, Samdong,
P.O. Makha & P.S. Singtam,
East Sikkim.

3. Shri Rajendra Chhetri,
Son of Late K.B. Chettri,
Resident of Middle Sichey Busty,
P.O. & P.S. Gangtok,
East Sikkim.

… Respondents

BEFORE
HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.

For the appellant : Mr. T.B. Thapa, Senior Advocate with Mr. B.K. Gupta, Advocate.

For the respondent No. 1 & 2 : Mr. N. Rai, Senior Advocate with Ms. Malati Sharma, Advocate.

For the respondent No.3 : None appears

Date of hearing : 20.10.2020 and 21.10.2010

Date of judgment : 23.11.2020

JUDGMENT

(Arup Kumar Goswami, CJ)

This appeal is preferred against the judgment and decree dated 30.07.2015 passed by the learned District Judge, Special Division-II, at Gangtok in Title Suit No.10/2014 dismissing the suit, which was filed for

:claration of right , title and interest in respect of the suit properties described in the Schedule- A,B and C to the plaint and for recovery of khas possession of the suit properties by evicting the defendant and his family members, agents, etc., for permanent injunction and for compensation of Rs.10,000/- per annum from the date of filing of the suit till recovery of possession.

2. The Schedule of the plaint reads as follows:

"(A) All that land measuring .7440 hectares being Plot No.1077 of Samdong Block (East Sikkim) with two storied building (new house) puja ghar, servant's quarter and cow shed, latrine etc. recorded in Khatian No.103 in the name of the Plaintiff.

(B) All that piece or parcel of land measuring .320 hectares in Plot No.1068 with one kacha house standing thereon in Samdong Block (East Sikkim) recorded in Khatian No.103 in the name of the Plaintiff.

(C) All that land measuring .1700 Hectares in Plot No.1076 in Samdong Block (East Sikkim) recorded in Khatian No.103 in the name of the Plaintiff.

All the above properties are in Samdong Block Khatian, Samdong Elaka, East Sikkim and are recorded in Khatian No.103 in the name of Plaintiff."

3. The suit was filed by Karna Bahadur Chhetri, husband of the appellant, against Lall Bahadur Chettri in the court of District Judge, East and North Sikkim, wherein the same was registered as Title Suit No 12/2008. Subsequently, the suit was numbered as Title Suit No 10/2014 on being transferred to the Court of District Judge, Special Division-II, at Gangtok. The plaintiff had earlier filed a suit being Civil Suit No.28/1997 in the Court of Civil Judge, East Sikkim. The suit was valued at Rs.1501/-. It appears from an order dated 30.05.1998 passed in the suit that the defendant had raised a preliminary objection with regard to the valuation of suit and had filed a petition for rejection of the plaint. However, by the order

:ed 30.05.1998, the learned Court returned the plaint with a direction that suit be valued correctly and filed in an appropriate forum.

4. The subsequent suit came to be filed on 29.08.2008 and it is stated that the plaint was not returned with necessary endorsement as required under Order VII Rule 10 CPC and only after an application dated 28.02.2008 was filed before the learned Civil Judge, East Sikkim to return the plaint, by an order dated 29.08.2008 the plaint was returned to the plaintiff on 29.08.2008 with necessary endorsement.

5. The pleaded case as set out by the husband of the appellant is that Purna Bahadur Chettri, who had considerable landed properties in Samdong Block in East district, had three sons, namely, Jangbir Chettri, Lall Bahadur Chettri (defendant no.1) and the plaintiff, who was the youngest. During the minority of plaintiff and Lall Bahadur Chettri, Jangbir Chettri had taken his share by separating from his father in the year 1951. The plaintiff and Lall Bahadur remained joint in mess and properties with their father till his death in 1975 and after about one year of his demise, they mutually partitioned the properties left behind by their father and started possessing the properties which fell in their respective shares.

6. Further case of the plaintiff is that on partition, he became the owner of 5.0280 hectares of land in Plot nos.1035, 1036, 1064, 1065, 1066, 1067, 1068, 1069, 1071, 1076 and 1077 recorded in Khatian no.103 and the defendant became the owner of 6.0920 hectares in Plot nos.1006, 1007, 1011, 1031, 1032, 1034, 1073, 1074, 1075, 1096, 1097, 1098, 1099 and 1100. During the survey of 1979, properties were recorded in the name of the plaintiff and Lall Bahadur based on partition and possession and the same was accepted by the parties as final. Accordingly, Daddha/Parcha was issued in the name of the plaintiff and defendant separately. Though Jangbir Chettri had made some untenable claim about the partition, such claim was rejected.

It is pleaded that two old and dilapidated dwelling houses adjacent to each other, constructed by their father in Plot nos.1068 and 1069 , had fallen in the share of the plaintiff. The plaintiff and the defendant being in government service were residing in other places and their mother used to live in the said dwelling houses and they had contributed equally for maintenance of their mother.

8. The plaintiff also stated that he had an orange nursery in part of the Plot nos.1076 and 1077 and the rest portion was under paddy cultivation. As the aforesaid two buildings had become very old and were not comfortable for their mother, the plaintiff agreed to construct a new house in the northern portion of Plot no.1077 with the defendant as he said that he would not like to construct a house in the village but had expressed a desire to live with the mother till her death under the same roof. Accordingly, a new building measuring about 55 ft.X 60 ft. was constructed for which expenses were jointly incurred by them. After construction of the ground floor was completed, the defendant again requested the plaintiff to construct one more floor jointly so that the members of the families do not feel crammed for space. It was agreed that after death of the mother, new house in Plot no.1077 with other structures will remain the exclusive property of the plaintiff and the defendant will have no claim over the same.

9. Construction was started in the year 1985 and completed in the year 1988 and after such completion, they occupied one suit each in the first floor whenever they used to visit the village. A small flower garden, a courtyard and a vehicular road from the PWD road up to the new residential house were made in a part of Plot no. 1077. More than 50 numbers of fruit bearing orange trees came to be uprooted in the process as a result of which plaintiff suffered loss of income and to partly compensate the plaintiff, the defendant gave his Plot no.1074 to the plaintiff and accordingly, he started

damom cultivation through Sri Lall Bahadur Dahal in the said plot of land from the year 1989.

10. Their elder brother Jangbir Chettri tried to create rift between them and had also succeeded in gaining some control over their mother. In the months of October and November, 1995, the defendant requested the plaintiff to shift to the guest room in the ground floor of the new house on account of wedding of his son and accordingly, he shifted to the ground floor and the same continued to be in his exclusive possession.

11. However, on 21.10.1996, i.e., on the day of *Viajaya Dashmi* and *Tika*, the defendant, along with some of his men, had thrown out his belongings from the said room, cut down half-ripened paddy plants from Plot no.1067 and broken open the old dwelling house of the plaintiff in Plot no.1068 where plaintiff had stored paddy and other food grains and had taken forcible possession of the same. A meeting was convened by the defendant on 25.10.1996 with the help of Jangbir Chettri where they had obtained the signature of their mother in some documents. In view of the above, the plaintiff had lodged a complaint on 31.10.1996.

12. Emboldened by the order dated 30.05.1998 passed in Civil Suit No.28/1997, defendant dispossessed the plaintiff from the entire land of Plot no.1077 including the new house, Plot no.1076 and the old house in Plot no.1068. Attempt was also made to dispossess the plaintiff from other house in plot no.1069. However, the defendant had not succeeded in his attempt.

13. After mother of the parties had died in the month of March, 2001, the plaintiff requested the defendant to give back possession of the new house in Plot no.1077 by honoring his commitment, but the defendant refused to deliver possession and as such the suit came to be filed..

14. In the written statement, the defendant, apart from taking usual pleas such as the suit is barred by law of limitation, etc., stated that suit is

ssly under-valued as the value of property cannot be less then Rs.3,05,95,165/-. It is stated that after demise of his father, the land in Ipsing (area where the land is situated) was divided in two parts along the village road starting from 'Bar Pipal' trees to "Dhar Ghar", the house of the grandfather. The plaintiff being younger in age was given the first option to choose his share and he had opted to take up the land above the village road which was to the east of the village road and the land below was left for the defendant. It was mutually agreed that the inheritance will take place on the basis of such division only after the death of their mother. Though there was neither any formal partition nor any written document, the partition was made by the boundary of the road and not by distribution of specific plots of land and Plot nos.1076 and 1077 being below the village road i.e. west of the Road, did not fall in the share of the plaintiff and the same fell in the share of the defendant and accordingly he was in possession of the same. It is stated that the plaintiff concocted the story of cultivating the same through Adhiadars/Kutiadars.

15. It is pleaded that survey of 1978 was conducted in absence of the parties and Plot nos.1074, 1076 and 1077 were wrongly surveyed in favour of the plaintiff. He had nowhere admitted that the aforesaid plots fell in the share of plaintiff. It is denied that Parcha was issued in favour of defendant and plaintiff separately. It is stated that their father had decided that both of them will have one house each, built over Plot nos.1068 and 1069 , and while the defendant possessed the old house in Plot no.1968, the plaintiff demolished his old house and built a new house in the same place. It is denied that the new house in Plot no.1077 was built jointly and it is asserted that he had started construction in the year 1983, by initially constructing approach road, leveling ground etc. and completed the house having two floors by engaging 3 contractors incurring an expenditure of more than 3.5 crores. The plaintiff had not contributed any amount for the construction of

house. While denying the statements made by the plaintiff with regard to the two-storied building, defendant stated that being his younger brother he was allowed to stay in that house whenever he visited the village. While denying that he ever proposed to give up Plot no.1074 as compensation to the plaintiff, it is stated that in the said plot he had planted Chinese teak trees.

16. While denying that the plaintiff was dispossessed from the Plot nos. 1068, 1074, 1076 and 1077 after 30.05.1998, it is pleaded that the defendant is in possession of Plot nos. 1068, 1074, 1076 and 1077 as owner from 1984 and he also claims to be the owner by way of adverse possession from the time of partition if the above plots had been recorded in the name of the plaintiff. The mother of the parties desired that both plaintiff and defendant live in peace and harmony and accordingly, had left behind a sworn affidavit stating the factual aspects which belie the claims of the plaintiff.

17. It appears that on the death of the original plaintiff, i.e. Karna Bahadur Chettri, the appellant, her son, Rajendra Chettri, and daughters, namely, Mamta Chettri, Gitanjali Chettri, Maheshwari Chettri had filed an application under Order XXII Rule 3 read with Section 151 CPC for substitution and it is seen that by an order dated 20.04.2011 Rajendra Chettri alone was substituted. On an application filed by the present appellant under Order 1 Rule 10 read with Section 151 CPC, by an order dated 06.06.2012, she was impleaded as plaintiff. It is further seen that by a subsequent order dated 15.10.2012, Rajendra Chettri was transposed as Pro forma defendant no.2.

18. By an order dated 25.09.2014, the appellant was given an opportunity by the learned trial court to file additional pleading. Thereafter, the appellant filed additional pleading stating that she wants to continue with

suit filed by her deceased husband and verified the pleadings filed by her husband.

19. After the appellant had filed additional pleading on 29.09.2014, the defendant had filed another written statement which is more or less replica of the earlier written statement. Additionally, it is stated that after return of the plaint for presenting before the appropriate Court after rectification of valuation of the suit, the original plaintiff made changes in the plaint for which it cannot be taken to have been filed in the same suit. It is also stated that additional pleading filed is no pleading in the eye of law and the suit is liable to be dismissed as the present plaintiff filed no plaint.

20. During pendency of the appeal, Lall Bahadur Chettri, as respondent no. 1, had filed a petition under Section 151 CPC supported by his sworn affidavit for dismissing the appeal as infructuous. It is also stated in the said petition that the petition has been filed on behalf of respondent no. 2. The petition was registered as IA No. 02 of 2017. It is stated in the petition that Karna Bahadur Chettri had executed a Will dated 19.06.2010 whereby he had bequeathed the suit properties to his son, Rajendra Chettri, arrayed as respondent no. 2 in the appeal. It is averred that the appellant had filed Civil Misc. Case (Succession) No. 84 of 2015 in respect of properties mentioned in the Will. The aforesaid case was disposed on 20.04.2017 by granting Letters of Administration and therefore, the appellant lost her *locus standi* to continue with the appeal.

21. Reply affidavit was filed by the appellant. It is stated that against an order dated 10.09.2013 passed by the learned trial court rejecting the plaint, an appeal was filed before this Court, registered as RFA No. 01 of 2014. While disposing of RFA No. 01 of 2014 by an order dated 26.08.2014, this Court had observed that the appellant has *locus standi* and therefore, the petition is misconceived.

When the present appeal was taken up for consideration along with RFA No. 4 of 2016 and RFA No. 11 of 2017 on 26.02.2020, this Court had observed that hearing of the appeals may be commenced and at the time of consideration of RFA No. 5 of 2015, contention advanced in the petition under Section 151 CPC would be taken into consideration by this Court. As reflected in the order, learned counsel for the parties had also agreed to the course of action proposed by the Court and accordingly, hearing of RFA No. 05 of 2015 had commenced. The case was again listed for consideration on 03.03.2020 but the hearing of the cases could not be completed. Because of lockdown and prayer for adjournment, etc. the cases were subsequently released from part-heard. The appeals having again been listed on 19.10.2020 before this court, the same were taken up for consideration. The learned counsel appearing for the parties submitted that hearing of the cases may be proceeded with in terms of the order dated 26.02.2020. Though three appeals are listed together, it is to be stated that all the appeals relate to different properties but involving same parties except in RFA No. 4 of 2016.

23. Accordingly, Mr. T.B. Thapa, learned Senior Counsel for the appellant and Mr. N. Rai, learned Senior Counsel appearing for the substituted legal representatives of respondent no.1, namely, Mahesh Chettri and Naresh Chettri are heard. None has appeared for Rajendra Chettri .

24. IA No.4 of 2019 is an application by which the appellant prays for bringing on record the certified copy of the application for Letters of Administration with all the annexures. The same is taken on record and IA No.4 of 2019 is disposed of.

25. While arguing the appeal, both the counsel have addressed arguments on IA No. 02 of 2017. IA No. 02 of 2017 is taken up first.

Abiding by the averments made in the petition, Mr. Rai contends that in view of the judgment rendered in Civil Misc. Case (Succession) No. 84 of 2015, disputed plots of land which are subject matter of Title Suit No. 10 of 2014 having fallen in the share of Rajendra Chettri, the appellant, Smt. Devi Maya Chettri, has no *locus standi* to maintain the appeal. Accordingly, he submits that it is only Rajendra Chettri, to whom the suit property was bequeathed, who can maintain and continue to proceed with appeal.

27. Mr. Thapa submits that right, title and interest in respect of property cannot be determined in a petition for grant of Letters of Administration. Relying on the order of this Court dated 26.08.2014 passed in RFA No. 01 of 2014, he contends that a widow has a right and interest in the estate of the deceased and this Court had held that the appellant is possessed of necessary locus to pursue with the suit and therefore, there is no merit in the petition and accordingly, the same is liable to be dismissed.

28. Mr. Karna Bahadur Chettri had died on 22.11.2010. The Will was executed on 09.06.2010. The learned District Judge, East at Gangtok at paragraph 63 of the judgment dated 20.04.2017 passed in Civil Misc. Case (Succession) No. 84 of 2015 had recorded that she found no reason to disbelieve the authenticity of the Will. It is submitted at the Bar that the judgment dated 20.04.2017 passed in Civil Misc. Case (Succession) No. 84 of 2015 had not been put to challenge and has attained finality.

29. Paragraph 10 of the Will reads as follows:

That I have got the landed properties at Samdong Block in the East District of Sikkim as share to my ancestral property comprising Plot Nos. 1035, 1036, 1064, 1065, 1066, 1067, 1068, 1069, 1071, 1076 and 1077 recorded under Khatian No. 103.

In Plot No.1077, there is a building jointly constructed by me and my brother Shri Lall Bahadur Chettri with an understanding that after the death of our mother, the house constructed in Plot No. 1077 with other structures will remain my exclusive property and my brother Shri Lall Bahadur Chettri will not lay any claim in the said house. The said house was constructed for beneficial and comfortable living with the mother as my brother did not want to construct a house in the village and would like to live with mother till the mother's death. However, my brother Lall Bahadur Chettri forcefully took possession of Plot No. 1077 with two storied building, Plot No. 1068 with one kutchha house therein and Plot No. 1076 and illegally dispossessed me from the above plots of land. On such illegal dispossession I have filed a civil suit claiming for declaration, recovery of possession, compensation and for other consequential reliefs before the Court of District Judge, East at Sikkim, which is registered as Title Suit No. 12 of 2008 and pending disposal.

30. It is to be noted that Title Suit No. 12 of 2008, referred to in the above order, came to be subsequently registered as Title Suit No. 10 of 2014 in the Court of District Judge, Special Division-II at Gangtok.

31. The relevant portion of paragraph 13 of the Will reads as follows:

"13. Whereas, I hereby depose and bequeath that the above said properties are under to my wife, daughters and son which will take effect only after my death:-

……. …… …….. ……

(E) That I have got the landed properties at Samdong Block, East District of Sikkim which I have inherited and are my ancestral properties. I hereby bequeath all my share/interest on the said landed properties together with cottage type house constructed by me and all other structures/houses therein to my son Shri Rajendra Kumar Chettri. The details of the properties are given in paragraph ten (10) above.

In the order dated 26.08.2014 passed by this Court in RFA No. 01 of 2014, this Court had observed that there can be no manner of doubt that a widow has a right and interest in the estate of the deceased and the appellant was possessed of all necessary locus to pursue with the suit. However, the observations made have to be understood in the context in which the same were made. When the said order was passed, the application for grant of Letters of Administration in respect of the Will was not even filed. The position in law changed drastically with the grant of Letters of Administration in Civil Misc. Case (Succession) No. 84 of 2015 filed at the instance of the appellant. The appellant in the application for grant of Letters of Administration had stated that Schedule D property was given to Rajendra Chettri. Schedule D properties included the suit properties of Title Suit No. 10 of 2014 and presently of RFA No. 05 of 2015. Letters of Administration was granted in respect of suit properties along with some other properties. However, the learned District Judge had declined to grant Letters of Administration in respect of certain properties which were sought to be bequeathed by the testator but which were not recorded in his name. With the grant of Letters of Administration, the appellant ceases to have any right or interest in respect of suit properties. It is worthwhile to recapitulate that Rajendra Chettri, who was substituted as plaintiff, had transposed himself as defendant and was not contesting the suit subsequent to the impleadment of the appellant as plaintiff in the suit.

33. In view of the above discussion, I am of the considered opinion that the appellant presently has no *locus standi* to pursue the present appeal.

34. In view of the above determination, discussion on the merit of the appeal is not called for.

35. IA No. 02 of 2017 is allowed.

Accordingly, the appeal is dismissed as not maintainable at the instance of the present appellant. No cost.

37. LCRs be sent back.

Chief Justice

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