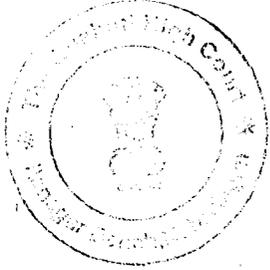


IN THE GAUHATI HIGH COURT

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

ITANAGAR PERMANENT BENCH

FAO No. 10 (AP) of 2012



Shri Obit Dai,
S/O. Late Lome Dai,
Village - Diking,
P.O. & P.S. - Pasighat, District - East Siang,
Arunachal Pradesh.

..... *Petitioner.*

- Versus -

Shri Ojing Dai,
S/O. - Late Lome Dai,
Village - Balek,
P.O. & P.S. - Pasighat, District - East Siang,
Arunachal Pradesh.

..... *Respondent.*

Advocates for the appellant : Mr. D Panging,
Mr. D Soki,
Mr. N Dai,
Mr. V Jamoh.

Advocates for the respondent : Mr. AK Singh,
Mr. K Mingu.

BEFORE

THE HON'BLE MR. JUSTICE M. R. PATHAK

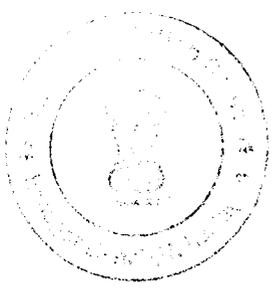
DATE OF JUDGMENT AND ORDER: 7TH OF JUNE, 2017

JUDGMENT AND ORDER (CAV)

Heard Mr. Dicky Panging, learned counsel for the appellant/plaintiff. Also heard Mr. Abhay Kumar Singh, learned counsel for the sole respondent/defendant.

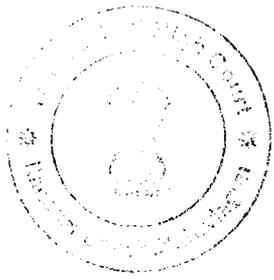
2. This appeal has been filed by the appellant against the judgment and order 03.10.2012 passed by learned Additional District Judge, Pasighat, East Siang District in PSG.ADSJ/Title Suit No.100/2012 dismissing the suit of the appellant/plaintiff, which the appellant stated that the same is in total violation of the procedure laid down by the Code of Civil Procedure, without framing any issue for determination and without providing any opportunity for rebutting the contentions raised by the sole respondent/defendant in the preliminary objection filed by him regarding the maintainability of the said title suit.

3. Brief facts of the case is that both the appellant and the respondent are own brothers, born out of the same parents; where appellant is the younger to the respondent. After the death of their father *Loma Dai*, their mother *Opet Dai* being the successor of her late husband, i.e. father of both the parties, inherited all his movable and immovable properties and she stayed with the respondent at Village Balek for some time. Since the month of June, 2006, said *Opet Dai*, started residing with the appellant and further, while she was with her elder son, the respondent herein, she was blamed for the death of his daughter. But in August 2006, the respondent came to the resident of the appellant and demanded local ornamental beads from said *Opet Dai*, his mother, which was refused by her. Subsequent to that their clan members came to the house of the appellant, approached his mother, *Opet Dai* and claimed her local ornamental beads in favour of the respondent. But, she refused the clan members' demand to hand over her beads to the respondent. In the end of September, 2006, the respondent in the house of the appellant informed him that a family meeting will be held on 01.10.2006, which was attended by both, by himself and his mother *Opet Dai*. In the said meeting, the respondent and the clan members demanded the ornamental beads from their mother along with the possession and ownership of



Gayam WRC (water rice cultivation) field as well as half of her *Sille Hydle Morang* Area in favour of the respondent, but she did not agree with such demand and in the said meeting she told them that her local ornamental beads would be passed over to that son who would take care of her at her old age and perform her last rites, as wished by her husband, father of the parties herein. In the said meeting, said *Opet Dai*, mother of both the parties as well as the appellant objected to any such decision, attempted and tried to be imposed upon them by their clan members present in the said meeting, as such, in the said meeting on 01.10.2006, no decision could be arrived at. As said *Opet Dai* later, fell sick, she was hospitalized on 20.11.2006 and she sold two strings of her own local ornamental beads, to meet her medical expenses. Said *Opet Dai*, mother of both the parties, subsequently developed paralysis and stayed with the appellant. It is stated that she expired on 25.05.2012 and the appellant performed her last rites as per *Adi* customs and traditions. Said *Opet Dai* on 31.10.2006 executed a Will before the Judicial Magistrate, Pasighat vide Registration No.383/31/10/2006 in order to resolve any future complications between her both the sons, the present appellant and the respondent with regard to her properties and by the said Will, the mother of both the parties divided her properties between them as being deemed fit and proper by her.

4. After the death of their mother, the clan members of both the parties held a meeting regarding possession and ownership of the local ornamental beads and immovable properties of the deceased mother of the appellant, which the appellant did not attend, since he was in the mourning due to death of his mother and he informed his clan members that said *Opet Dai*, mother of both the appellant and the respondent had already left a Will during her life time distributing her properties amongst his elder brother, the respondent and him. But, the clan members informed the appellant that a decision with regard to such properties of his mother had already been taken by them and that the same is already in force. But, the appellant could obtain any such decision from his elder brother, the respondent herein. Though the appellant sought for the said decision taken by the clan members, neither the clan members nor the respondent



furnished the said decision to him. Moreover, on 18.08.2012, the respondent issued a Notice informing all that no one shall purchase any property or land from the appellant. Being aggrieved with such action of the respondent and the attempt of the respondent along with the clan members in trying to grab his property, under his ownership and possession, the appellant on 26.9.2012 filed a Title Suit being TS No. 100 of 2012 before the Additional District Judge, Pasighat, East Siang District for declaration of title and ownership of the land and other properties of his share left by their deceased mother as per her Will executed on 31.10.2006.

5. On 26.09.2012 itself, the Trial Judge took up the said suit of the appellant for consideration and issued Notice to the respondent, directing the appellant to take steps on the respondent fixing the case on 03.10.2012.

6. On receipt of such notice of said TS No. 100/2012, the sole respondent/defendant on 03.10.2012 filed a preliminary objection before the learned Trial Judge stating that the suit of the appellant is not maintainable as there was no cause of action and that the appellant/plaintiff had filed the said suit with malafide intention to gain wrongfully by illegal means without any authentic document, which was not obtained as per the provisions of law as laid down, by suppressing material facts and for all these, the suit should be dismissed with compensatory cost under Section 35 A of the CPC.

7. In the said preliminary objection, the respondent stated that the suit of the appellant/plaintiff is hit by Section 213 of the Indian Succession Act, 1925 since the plaintiff had not obtained Probate under Section 276 with regard to the alleged Will dated 31.10.2006 left by their mother, on the basis of which the appellant/plaintiff is claiming declaration of title and ownership of the suit land. The respondent further contended that the said Will was not duly registered before the appropriate authority. The respondent in his said objection also contended that the claim of the appellant/plaintiff relying on the alleged Will is also not tenable under Section 91 of the Evidence Act since the same cannot be considered as a piece of evidence, till any such Probate is issued in that regard

and therefore, prayed before the Trial Judge to dismiss the said suit of the appellant with cost under Section 35A of the Code of Civil Procedure. While submitting said preliminary objection, the respondent further sought to reserve the right to file written statement, separately.

8. The learned Additional District Judge, Eastern Zone, Pasighat, East Siang District, Arunachal Pradesh after receipt of said preliminary objection dated 03.10.2012 of the respondent and after hearing the parties, by his order dated 03.10.2012 itself dismissed the Title Suit of the appellant/plaintiff observing that the said suit is not maintainable. The said Court further held that though the plaintiff's counsel submitted that cause of action in the case arose on 17.08.2006, 18.08.2006 and 30.09.2006 whereas, he found that said submission on behalf of the plaintiff differs from the cause of actions mentioned in the plaint itself. As the defendant respondent raised the issue that the suit is not maintainable since the said suit arose on the basis of a Will dated 31.10.2006 of their mother, *Opet Dai*, wife of Late Loma Dai, the testator of the Will being biological mother of both the plaintiff and defendant and since the said Will was not properly registered in the Office of the Registrar and that as the plaintiff without obtaining any probate or letter of administration from the competent the Court of law as required under Section 213 of the Indian Succession Act, 1925, therefore, the said Title Suit preferred by the appellant/plaintiff without obtaining such probate or letter of administration from the competent court should be set aside. The appellant also placed before the Court that by said impugned order 03.10.2012, learned Trial Judge also imposed a cost upon the plaintiff/appellant under Section 35A of the CPC directing the plaintiff to deposit the cost of the case within thirty days from the date of the said order. Being aggrieved with the said order dated 03.10.2012 plaintiff has preferred this appeal.

9. The contentions raised by the appellant herein is that the Trial Judge dismissed his Title Suit without giving any opportunity to him to refute the objections raised by the respondent/defendant. The appellant also contended that after receipt of such preliminary objection, no issue was framed by the learned Trial Judge to determine the issues involved in the suit and that there is no bar in

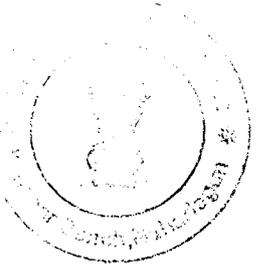
filing a suit without obtaining a Probate, with regard to right and title to property. The appellant further contended that Section 91 of the Evidence Act does not come into decide the right and title to the property involved in a suit, since it relates to exclusion of oral evidence by documentary evidence and further, the exemplary cost under Section 35A CPC is awarded only when the claims are false and vexatious, which is to the knowledge of the claimant but, in the present case, just on the plea of the defendant the Trial Court imposed such cost upon the plaintiff.

10. This Court on 18.10.2012 while issuing notice to the parties in this appeal, in the interim, by order dated 18.10.2012, suspended the operation of the impugned order dated 03.10.2012 after hearing the caveator/the sole respondent herein and called for the records.

11. From the records, it is seen that the sole respondent filed his preliminary objection to the suit in question that was preferred by the plaintiff/ appellant only on 03.10.2012, the date on which the learned Trial Judge while issuing notice to the defendant regarding the said suit, passed the order on 26.09.2012. It is stated that though the plaintiff filed application seeking time to file reply to the preliminary objections of the defendant but, the record reveals that no opportunity was given to the appellant to file his reply and that after receipt of the said preliminary objection of the defendant, the learned Trial Judge did not frame any issue regarding maintainability of the suit in question.

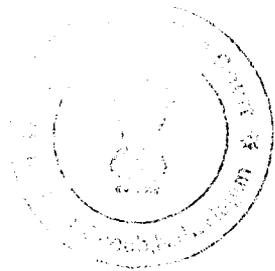
12. Order XIV of the CPC relates to settlement of issues and determination of suit on the issues of law or on the issues agreed upon and as per the provisions of Rule 1 of said Order XIV of CPC, a Trial Court is required to frame an issue with regard to only those pleadings which are asserted by one party and denied by the other. In the present case, though the claim of the plaintiff was objected by the sole defendant, by filing his preliminary objection, the learned Trial Judge did not frame any issue regarding the objections raised by the defendant and without giving any opportunity to the plaintiff to rebut the objections raised by the

defendant, dismissed the said Title Suit of the plaintiff on the same day i.e. the date on which the defendant filed his preliminary objection in the said suit.



13. Section 35A of the CPC relates to compensatory cost in respect of false or vexatious claims or defenses and the said Section clearly provides that if any suit or other proceeding, including an execution proceeding, but excluding an appeal or a revision, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party, by whom it has been put forward, and if, thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court if it so thinks fit may after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the parties by whom such claim or defence has been put forward of cost by way of compensation. From the reading of the preliminary objection, it can be seen that the sole defendant/respondent did not state that there was no such Will executed by his mother *Opot Dai* on 31.10.2006; but, he only raised the issue that the said Will was not duly registered before the Registrar of Registration Office and the suit was filed without obtaining Probate as required under the provisions of the Indian Succession Act, 1925 and the Will, on the basis of which the plaintiff is claiming right and title to the property, involved in the suit, cannot be considered for Evidence, as per the provisions of Section 91 of the Evidence Act. Moreover, it is also found that in the impugned order dated 03.10.2012, there is also no finding of the learned Trial Judge stating any reason for holding claim of the plaintiff as false or vexatious and apparently from the perusal of the order dated 03.10.2012, it can be seen that the said amount of compensatory cost of Rs. 3,000/- in respect of alleged false or vexatious claim was imposed upon the appellant only because of the counsel for the defendant prayed for it.

14. A Division Bench of this Court in the case of *Dr. Dwijendra Mohan Lahiri -Vs- Rajendra Nath*, reported in *AIR 1971 Assam and Nagaland 143* have held that –



"Issues are framed for a right decision of the case with the object to pin point the real and substantial points of defence between the parties specifically and unambiguously emerging out of the pleadings. Vague issues, suggested in a mechanical way should not be framed to keep the door open for astute casuistry as a suit proceeds at the different levels leading inevitably to the law's delay. The Court has to own its own responsibility in framing issues. A Court should decline to frame an issue as to maintainability of a suit in absence of specific averment in the written statement as to how and in what circumstances the same is not maintainable in law."

15. In catena of decisions it is settled that where a material fact stated in the plaint is denied or is not admitted in the written statement, the Court must frame an issue on that fact. In the case of *Nedunuri Kameswaramma -Vs- Sampati Subba Rai*, reported in *AIR 1963 SC 884*, the Hon'ble Supreme Court have held that –

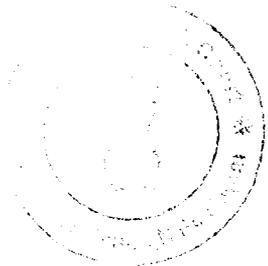
"If, though no issue is framed on the fact, the parties to the proceeding adduce evidence on the facts and discuss it before the Court decides the point, as if there was an issue framed on it, that decision will not be set aside in appeal on the ground merely that no issue was framed."

16. In the case of *Alka Gupta -Vs- Narender Kumar Gupta* reported in *(2010) 10 SCC 111*, where the matter relates to second suit of the plaintiff/appellant and where both the Trial Court as well as the High Court dismissed the suit on the ground of *res judicata*, the Hon'ble Apex Court have held that –

"Unless the defendant pleads the bar under the provisions of the Code and issue is framed focusing the parties on that bar to the suit, obviously the Court cannot examine or reject a suit on the ground of the bar pleaded by the defendant. The dismissal of a suit in the absence of any issue with regard to such bar is unsustainable."

17. A Three Judges Bench of the Hon'ble Supreme Court in the case of *Makhan Lal Bangal -Vs- Manas Bhunia*, a matter related to an election petition which is like a civil trial, have held that –

"The correct decision of civil lis largely depends on correct framing of issues, correctly determining the real points in controversy which needs to be decided. The scheme of Order XIV of the CPC dealing with settlement of issues shows that an issue arises when a material proposition of fact or law is affirmed by one party and denied by the other. Each material proposition is affirmed by one party and denied by other should form the subject of a distinct issue. An obligation is cast on the Court to read the plaint/petition and the written statements/counter, if any, and then determine with the assistance of the learned counsel for the parties, the material propositions of fact or of law on



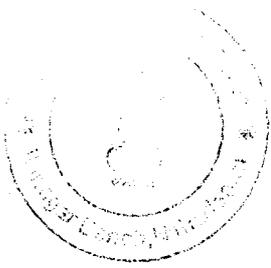
which the parties are at variance. The issues shall be framed and recorded on which the decision of the case shall depend. The parties and their counsel are bound to assist the Court in the process of framing issues. Duty of the counsel does not belittle the primary obligation cast on the Court. It is for the Presiding Judge to exert himself so as to frame sufficiently expressive issues. An omission to frame proper issues may be a ground for remanding the case for retrial subject to prejudice having been shown to have resulted by the omission. The petition may be disposed of at the first hearing if it appears that the parties are not at issue on any material question of law or of fact and the Court may at once pronounce the judgment. If the parties are at issue on some questions of law or of fact, the suit or petition shall be fixed for trial calling upon the parties to adduce evidence on issues of fact. The evidence shall be confined to issues and the pleadings. No evidence on controversies not covered by issues and the pleadings shall normally be admitted. For each party leads evidence in support of issues the burden of proving which lies on him. The object of an issue is to tie down the evidence and arguments and decision to a particular question so that there may be no doubt on what the dispute is. The judgment, then proceeding issue-wise would be able to tell precisely how the dispute was decided."

18. The Hon'ble Supreme Court in the case of *Binapani Kar Chowdhury - Vs- Satyabrata Basu*, reported in (2006) 10 SCC 442 discussing the decision rendered by the said Court in the case of *Hem Nolini Jukah -Vs- Isolyne Surojbashini Bose* reported in AIR 1962 SC 1471 have held that

"Where the right of either an executor or a legatee under a Will is an issue, such right can be established only when probate (when a executor has been appointed under the Will), or letters of administration (where no executor is appointed under a Will) have been granted by a competent Court. Section 213 of the Indian Succession Act 1925 does not come in the way of a suit or action being instituted or presented by the executor or the legatee claiming under a Will. Said Section 213, however, bars a decree or a final order being made in such suit or action which involves a claim as an executor or a legatee in the absence of a probate or letters of administration in regard to such Will."

19. In the case of *Commissioner, Jalandhar Division & others -Vs- Mohan Krishan Aberol & another* reported in (2004) 7 SCC 505, the Hon'ble Supreme Court have held that –

"Section 211 of the Indian Succession Act, 1925 shows that property vests in the executors by virtue of the Will and not by virtue of the probate. Will gives property to the executor; the grant of probate is only a method by which the law provides for establishing the Will. Said Section 211 provides that the estate of the deceased vests in the executor that the vesting is not of the beneficial interest in the property but only for the purpose of representation. The executor derives his title from the Will and not from the probate. The personal property of the testator including the right of action vests in the executor(s) on the death of



the testator. An executor get divested his interest as an executor from the death of the testator when he essence to a specific legacy. Section 213 of the said Act, 1925, acts as a bar to the establishment of right under the Will by an executor or a legatee unless probate or letters of administration have been obtained. This bar comes into play only when a right as an executor or a legatee under the Will is sought to be established. However, an unprobated Will can be admitted in evidence for collateral purpose in any other proceedings apart from probate proceedings. Therefore, on the demise of the testatrix, the said property vested in the executor."

20. In the case of *FGP Ltd. -Vs- Saleh Hoosein and Others* reported in (2009) 10 SCC 223, the Hon'ble Supreme Court have hold that –

"Under Section 211 of the said Indian Succession Act, 1925, the executor or the administrator, as the case may be, of a deceased person i his legal representative for all purposes and all the property of the deceased persons vests on him as such. Here the legal representative will have the same meaning as has been given in Section 2(11) of the CPC where the legal representatives means a person who in law represents the estate of the deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolve on the death of the party so suing or sued. Therefore, it is Section 211 of the Indian Succession Act, 1925 and not Section 213 of the said Act that deals with the vesting of the property. This vesting does not take place as a result of probate. On the executor's accepting his office, the property vests on him and the executor derives his title from the Will and becomes the representative of the deceased even without obtaining probate. The grant of probate does not give title to the executor, it just makes his title certain. Under Section 213 of the Indian Succession Act, 1925 the grant of probate is not a condition precedent to the filing of a suit in order to claim a right as an executor under the Will. The vesting of right is enough for the executor or administrator to represent the estate in a legal proceeding. Section 213 of the Indian Succession Act, 1925 operates in a different field which enjoin, that the rights under the Will by an executor or a legatee cannot be established unless probate or letters of administration is obtained and therefore, Section 211 and 213 of the Indian Succession Act, 1925 have different areas of operation. Even if the Will is not probated that does not prevent the vesting of the property of the deceased on the executor/administrator and consequently, any right of action to represent the estate of the executor can be initiated even before the grant of the probate."

21. With regard to the case in hand, the matter relates to right, title and interest of property of the appellant/plaintiff and that share of property, which he inherited after the death of their mother by virtue of a will executed by her during her lifetime. Though the defendant/respondent raise the preliminary objection regarding maintainability of the suit, stating that the plaintiff/ appellant did not

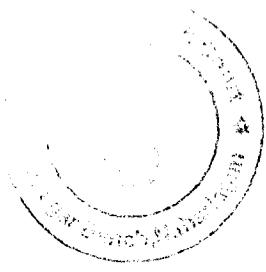


obtain any Probate with regard to the Will of their mother in claiming such right, title and interest of the property left by their mother, but from the impugned judgment, it can be seen that neither any issue was framed in that regard nor the trial proceeded with, where both the parties adduced evidence in that regard. Rather the learned Trial Court dismissed the suit of the plaintiff on the same day, when the defendant filed his preliminary objection, without giving any opportunity to the plaintiff/appellant to deny the objections raised by the defendant, that too without framing any issue.

22. In the present case, non-framing of issues involved in the suit even after filing of the preliminary objections by the respondent/defendant regarding maintainability of the suit and his decision dated 03.10.2012 in dismissing the said suit of the appellant/plaintiff by the learned Trial Judge on the same day of filing such preliminary objection is fatal, because of non-framing of issues involved in the suit, by which the appellant is certainly prejudiced.

23. From the above, it is seen that even in the absence of Probate, an executor or an administrator can file a suit and initiate a proceeding. Further, when the sole defendant/respondent raise the preliminary objection regarding the claim made by the plaintiff/appellant, without framing any issue towards settlement of dispute between the parties, without granting any opportunity to the appellant to rebut the objections raised by the defendant in violation of the provisions of the CPC, this Court is of the view that the learned Additional District Judge, Pasighat has illegally dismissed the suit of the plaintiff/ appellant by the impugned order dated 03.10.2012 that too by imposing compensatory cost under Section 35 A CPC, without stating any reason, just on the mere plea of the counsel for the defendant.

24. As such, the Court is of the opinion that the impugned order dated 03.10.2012 passed by learned Additional District Judge, Pasighat in PSG.ADSJ/Title Suit No. 100/2012, dismissing the said suit of the appellant/plaintiff is not tenable in law for the reasons discussed above and accordingly the same is hereby set aside and quashed directing the learned



Additional District Judge, Pasighat to hear the entire suit Title Suit No. 100 of 2012 of the appellant/plaintiff afresh, from the stage after filing of the preliminary objection by the sole respondent/defendant in the said suit and to dispose of the same in accordance with law. Learned Additional District Judge, Pasighat shall intimate both the parties regarding the next date of the said suit, by issuing fresh notice to them.

25. With the aforesaid observation and direction, this appeal stands allowed.

26. No order as to the cost.

27. The registry shall return the LCR to the Court of learned Additional District Judge, Eastern Zone, Pasighat, East Siang District, Arunachal Pradesh along with a copy of this order.

JUDGE

Annetta