

GAHC010057902023



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

Case No. : CRP(IO)/97/2023

SMTI. GOURI GOWALA AND 3 ORS
W/O LATE DHANPAL GOWALA, R/O ASEB ROAD, WARD NO. 6, NEAR OLD
POWER HOUSE, P.O.-TEZPUR, DIST-SONITPUR (ASSAM), PIN-784001

2: MANOJ GOWALA
S/O LATE DHANPAL GOWALA
R/O ASEB ROAD
WARD NO. 6
NEAR OLD POWER HOUSE
P.O.-TEZPUR
DIST-SONITPUR (ASSAM)
PIN-784001

3: SUBODH GOWALA
S/O LATE DHANPAL GOWALA
R/O ASEB ROAD
WARD NO. 6
NEAR OLD POWER HOUSE
P.O.-TEZPUR
DIST-SONITPUR (ASSAM)
PIN-784001

4: DEEPAK GOWALA
S/O LATE DHANPAL GOWALA
R/O ASEB ROAD
WARD NO. 6
NEAR OLD POWER HOUSE
P.O.-TEZPUR
DIST-SONITPUR (ASSAM)
PIN-78400

VERSUS

DAYANAND PRASAD
S/O SHRI RAMESHWAR PRASAD, R/O TEZPUR TOWN, MAIN ROAD, NEAR
GOPAL CYCLE STORE, P.O.-TEZPUR, DIST-SONITPUR (ASSAM), PIN-784001

Advocate for the Petitioner : MR. S SAHU, MS A ROY,MR. R B SAH

Advocate for the Respondent : MR. S BISWAS, MS D DEVI,MR. H BURAGOHAIN

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN
ORDER

07.11.2024

Heard Mr. S. Sahu, learned counsel for the petitioners and Mr. S. Biswas, learned counsel for the respondent.

2. In this petition, under Article 227 of the Constitution of India read with Section 151 of the C.P.C., the petitioners have challenged the correctness or otherwise of the order dated 03.02.2023, passed by the learned Munsiff No. 1, Tezpur, in Petition No. 3320/2023, arising out of Title Suit No. 143/2017.

3. It is to be noted here that vide impugned order dated 03.02.2023, the learned Munsiff No. 1, Tezpur has framed a preliminary issue i.e. ***whether the suit is barred by principle of res-judicata or not?*** and thereafter, fixed the matter for hearing on the point of preliminary issue on 16.03.2023.

4. Mr. Sahu, learned counsel for the petitioners submits that the petitioners, as plaintiffs, have instituted a suit, being Title Suit No. 143/2017, for declaration of decree dated 19.04.1999, passed in Title Suit No. 35/1996 as null

and void and not binding upon the petitioners, as the same was obtained by playing fraud upon the learned trial court and against the petitioners. In the said title suit, the respondent herein filed written statement and at the stage of step before preliminary hearing the respondent had filed an application under Order 14 Rule 2 sub-Clause 2 of C.P.C. for framing a preliminary issue to the effect that whether the suit is barred by principle of res-judicata or not. Thereafter, the petitioners have filed objection, but the learned trial court vide impugned order dated 03.02.2023, has allowed the petition and framed the preliminary issue and fixed the suit for hearing on that issue. Mr. Sahu further submits that the learned trial court had committed manifest illegality, in allowing the petition as the suit was filed for declaration of decree to be null and void and not binding upon the petitioners, which was obtained in Title Suit No. 35/1996, by playing fraud upon the learned trial court as well as the petitioners. Mr. Sahu also submits that the contention of the respondent in the Petition No. 321/2023 is that the suit is barred by the principle of res-judicata under Section 11 of the C.P.C. as the issue has already been decided in the Title Suit No. 35/1996 and according to Mr. Sahu the issue of res-judicata is a mixed question of law and fact and as such, the Title Suit No. 143/2017 cannot be decided by framing a preliminary issue. On such count, Mr. Sahu has submitted that the impugned order is illegal and arbitrary and therefore, it is contended to set it aside.

4.1. In support of his submission, Mr. Sahu has referred the following case laws :-

- (i) **B. Deshai and Others vs. Bipin Vadilal Mehta and Others**, reported in **2006 AIR SCW 3768**;
- (ii) **Vrenubala Nama and Others vs. Renubala Das**, reported in **2009 (3) GLT 753**; and

(iii) **Sultana Safiana Tohsin and Others vs. Manoj Jajodia and Others**, reported in **2006 (2) GLT 698.**

5. On the other hand, Mr. Biswas, learned counsel for the respondent vehemently opposed the petition and submits that to decide the issue of res-judicata, full trial is not necessary and the same can be ascertained by a bare perusal of the plaint of the suit, being Title Suit No. 143/2017 and the other suit, being Title Suit No. 35/1996. Mr. Biswas further submits that as the dispute herein can be decided by framing a preliminary issue and as the learned trial court has decided to frame preliminary issue and hear the matter, no jurisdictional error is committed by the learned trial court and therefore, impugned order dated 03.02.2023, calls for no interference of this court. As such, Mr. Biswas has contended to dismiss this petition. Mr. Biswas also submits that filing of the present petition and filing of the Title Suit No. 143/2017 is nothing but an attempt to frustrate the decree obtaining in the Title suit No. 35/1996 and that one Title Execution Case No. 49/1999 is pending, wherein the present petitioners had filed a petition under Section 47 of the C.P.C. and the same was also dismissed by the learned executing court.

5.1. In support of his submission, Mr. Biswas has referred the following case laws :-

(i) **Sathyanath and Another vs. Sarojamani**, reported in **(2022) 7 SCC 644** and

(ii) **Abdul Rahman vs. Prasonry Bai and Another**, reported in **(2003) 1 SCC 488.**

6. Having heard the submissions of learned counsel for both the parties, I have carefully gone through the petition as well as the documents placed on record and also perused the impugned order dated 03.02.2023, and also perused the case

laws referred by learned counsel for both the parties.

7. While dealing with the framing of preliminary issue in the case of **Sathyanath (Supra)**, Hon'ble Supreme Court in paragraph No. 21 has held as under:-

“21. The provisions of Order 14 Rule 2 are part of the procedural law, but the fact/remains that such procedural law had been enacted to ensure expeditious disposal of the lis and in the event of setting aside of findings on preliminary issue, the possibility of remand can be avoided, as was the language prior to the un-amended Order 14 Rule 2. If the issue is a mixed issue of law and fact, or issue of law depends upon the decision of fact, such issue cannot be tried as a preliminary issue. In other words, preliminary issues can be those where no evidence is required and on the basis of reading of the plaint or the applicable law, if the jurisdiction of the court or the bar to the suit is made out, the court may decide such issues with the sole objective for the expeditious decision. Thus, if the court lacks jurisdiction or there is a statutory bar, such issue is required to be decided in the first instance so that the process of civil court is not abused by the litigants, who may approach the civil court to delay the proceedings on false pretext.”

8. Again in the case of **Abdul Rahman (Supra)**, Hon'ble Supreme Court in paragraph No. 21 has held as under:-

“21. For the purpose of disposal of the suit on the admitted facts, particularly when the suit can be disposed of on preliminary issues, no particular procedure was required to be followed by the High Court. In terms of Order 14 Rule 1 of the Code of Civil Procedure, a civil court can dispose of a suit on preliminary issues. It is neither in doubt nor in

dispute that the issues of res judicata and/or constructive res judicata as also the maintainability of the suit can be adjudicated upon as preliminary issues. Such issues, in fact, when facts are admitted, ordinarily should be decided as preliminary issues.”

9. Thus, it appears that the issue of res-judicata, which is being raised in the Petition No. 3320/2023 by the respondent herein, under Order 14 Rule 2 of the C.P.C. can be decided on a preliminary issue in view of the ratio laid down by Hon’ble Supreme Court in the case **Abdul Rahman (Supra)**.

10. That being the position, this court finds sufficient force in the submission of Mr. Biswas, learned counsel for the respondent that the issue of res-judicata can be decided by perusing the plaint in both the suits, i.e. the Title Suit No. 35/1996 and the Title Suit No. 143/2017.

11. I have also considered the submission of Mr. Sahu, learned counsel for the petitioners and also gone through the decisions referred by him. But, this court is unable to agree with the submission of Mr. Sahu, in view of the ratio laid down by Hon’ble Supreme Court in the case **Abdul Rahman (Supra)**, which was much prior to the decision of **B. Deshai (Supra)** and therefore, the detail discussion of the same is found to be not required here in this case.

12. In the result, I find no merit in this petition and therefore, the same stands **dismissed**.

13. Accordingly, the impugned order dated 03.02.2023, passed by the learned Munsiff No. 1, Tezpur, in Petition No. 3320/2023, arising out of Title Suit No. 143/2017, stands upheld. Consequently, the learned trial court shall proceed to hear and dispose of the matter in accordance with law.

14. Interim order passed earlier, if any, stands vacated.

JUDGE

Comparing Assistant