

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Revisional Jurisdiction)

DATED: 08.04.2019

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

C.R.P. No. 01 of 2018

Petitioner : Shri Nar Bahadur Subba

versus

Respondents : Shri Dhan Bahadur Rai and Another

**An application under Article 227
of the Constitution of India**

Appearance:

Ms. Gita Bista, Advocate (Legal Aid Counsel) with Ms. Anusha Basnet, Advocate for the Petitioner.

Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri, Advocate (Legal Aid Counsel) and Ms. Malati Sharma, Advocate, for the Respondents.

ORDER

Meenakshi Madan Rai, J

1. The Petitioner, the Plaintiff before the learned trial Court, (hereinafter "Petitioner"), filed an application under Order VII Rule 11(a) read with Section 151 of the Code of Civil Procedure, 1908 (for short "CPC, 1908"), before the said Court praying that the Counter Claim of the Respondents No. 1 and 2, the Defendants No. 1 and 2 before the learned trial Court (hereinafter "Respondents No. 1 and 2"), be rejected as it did

Shri Nar Bahadur Subba vs. Shri Dhan Bahadur Rai & Anr.

not disclose a cause of action. The learned trial Court, on hearing submissions on both sides, passed the impugned Order dated 12.05.2017 rejecting the prayer of the Petitioner, who is consequently before this Court praying that the impugned Order be set aside.

2. The facts of the case may briefly be traversed for clarity on the issue.

3. The Petitioner filed a suit for declaration of title, eviction, recovery of possession and other consequential reliefs against the Respondents No. 1 and 2. The Petitioner's case *inter alia* is that, he is the absolute owner of the landed property at Sirwani Block, East Sikkim being Plot No.143, 145, 146 and 147 as per the Survey Operations of 1950-52 and re-numbered as Plot No.220, 225, 226 and 228 respectively, as per the Survey Operations of 1979-80. The Respondent No. 2 is the Petitioner's blood sister and the Respondent No. 1 is his brother-in-law, having married the Respondent No. 2 in the year 1957-58. They were residing on a plot of land gifted to her by her father. The Petitioner's parents having passed away early in his life, his paternal uncle raised him till the year 1971-72. The same year i.e. 1971-72, the Respondent No. 2 sold out the plot of land gifted to her, to the Forest Department, Government of Sikkim and received compensation. Both Respondents then returned to the house of the Petitioner on Plot No.220. The Petitioner got married in

Shri Nar Bahadur Subba vs. Shri Dhan Bahadur Rai & Anr.

1998 and in 2003, shifted with his family to a house constructed by him on Plot No.225 and 226. The Respondents continued to remain on Plot No.220. Before shifting house from Plot No.220, an Agreement "*Bandobast Kagaz*" Annexure P-3 was drawn between the Petitioner and the Respondents in the presence of witnesses by which it was agreed that the Respondent No. 1 would construct a house for the Petitioner on the Petitioner's land. The Respondent No. 1 failed to do so. On such failure, the Petitioner perforce had to sell a piece of land from Plot No.225 to one Phigu Bhutia and utilize the money for constructing his house. Vide the same "*Bandobast Kagaz*" Annexure P-3 the Petitioner had also agreed to gift a "piece" of land from Plot No.220 to the Respondent No. 1. Taking advantage of this document, the Respondent No. 1 transferred the entire Plot No.220 in his name which the Petitioner came to learn of only in January, 2013 when the Respondents No. 1 and 2 started constructing an RCC building over Plot No.220. The transfer allegedly had been effected in the year 2001 itself. The Petitioner therefore prayed for the reliefs reflected in Paragraph 19 of the Plaint.

4. The Respondents No. 1 and 2 filed their Written Statement denying and disputing the averments made in the plaint along with a Counter Claim avering that Plot No.225 was given to the Respondent No. 2 as "*daijo*" (dowry), vide "*Daijo ko Kagaz*" Annexure P-9, dated 24.01.1998 by the Petitioner

Shri Nar Bahadur Subba vs. Shri Dhan Bahadur Rai & Anr.

in lieu of Plot No.282, which had earlier been given to her by her father as "*daijo*" (dowry) but was destroyed by a landslide in the year 1986. After the death of their father, on agreement with the Petitioner and Respondent No. 2, the plot was taken away by the Public Works Department, Government of Sikkim. The Respondents further claim that the Petitioner is required to hand over possession of Plot No.225 or in the event of the land having been sold by him, consideration money received for the said land.

5. Ms. Gita Bista forwarding her arguments for the Petitioner contended that the question of handing over Plot No.225 in lieu of Plot No.282 does not arise. That the document Annexure P-9 allegedly prepared on 24.01.1998 between the Petitioner and the Respondents pertains to Plot No.220 and not Plot No.225. That Section 123 of the Transfer of Property Act requires that where a gift of immovable property is made, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses and delivered which is absent in the said document. That, further the Petitioner has been injuncted from selling land from Plot No.225 on the objection of the Respondents and their sons with the caveat that the land should not be sold out till the Petitioner's son attains the age of thirty years. Although the Petitioner had sold more than twelve pieces of land from Plot No.225 and

Shri Nar Bahadur Subba vs. Shri Dhan Bahadur Rai & Anr.

226 prior to the instant suit, no objection till then had been raised. It was further contended that by allowing the Counter Claim without there being any cause of action, the Petitioner has been deprived of his right to property guaranteed under Article 300A of the Constitution. Hence, the impugned Order be set aside. To buttress her submissions learned Counsel relied on *I.T.C. Ltd., vs. Shri Krishna Moktan and others*¹.

6. Learned Senior Advocate for the Respondents No. 1 and 2 contended that the "*Daijo ko Kagaz*" dated 24.01.1998 (Annexure P-9) delineates the boundaries of the property which is in fact plot No.225 and was given to the Respondent No. 2 as "*daijo*" (dowry) in lieu of land given to her by her late father. That nothing prevents him from filing the Counter Claim in the nature of a cross-suit since the Petitioner is required to hand over the property to the Respondent No. 2. To support his contentions, learned Counsel relied on *Jag Mohan Chawla and Another vs. Dera Radha Swami Satsang and Others*² and *Mayar (H.K.) Ltd. & Ors. Vs. Owners & Parties, Vessel M.V. Fortune Express & Ors.*³.

7. I have heard the contentions of learned Counsel at length and I have also perused the impugned order.

8. Firstly, it must be pointed out that, whether a gift of immovable property is to be effected by a registered

¹ AIR 1992 Sikkim 1

² (1996) 4 Supreme Court Cases 699

³ AIR 2006 Supreme Court 1828

Shri Nar Bahadur Subba vs. Shri Dhan Bahadur Rai & Anr.

instrument and whether an injunction was granted by the learned trial Court from selling land from Plot No.225, raised by learned Counsel for the Petitioner in the instant petition, are to be tested on merits. The prayers of the Petitioner at "b" in the instant petition extracted hereinbelow also clearly reveals as follows;

".....
b. after hearing the parties and upon perusal of the records to kindly set aside the order dated 12.05.2017."

Consequently, this Court is only concerned with the limited issue as to whether the Counter Claim ought to have been rejected by the learned trial Court. In this context, we may pertinently refer to Order VII Rule 11 of the CPC, 1908 which deals with rejection of plaint and reads as follows;

"11. Rejection of plaint. – The plaint shall be rejected in the following cases:-

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9:

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]

Shri Nar Bahadur Subba vs. Shri Dhan Bahadur Rai & Anr.

The relevant provision relied on by learned Counsel for the Petitioner is Order VII Rule 11(a) of the CPC, 1908. The language of Rule 11 of the CPC, 1908 is clear and unequivocal once the Court finds that the case falls under one or more of the categories specified therein, it has no power to entertain the suit and the plaint has to be rejected.

9. Counter Claim is elucidated in Order VIII Rule 6A of the CPC, 1908 which reads as follows;

"6A. Counter-claim by defendant.- (1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

A Counter Claim has to be treated as a plaint and is governed by Rules applicable to plaints. The provision extracted hereinabove clearly lays down that the Counter Claim shall have the same effect as a cross suit to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the Counter Claim. Thus, a Counter

Shri Nar Bahadur Subba vs. Shri Dhan Bahadur Rai & Anr.

Claim is substantially a cross-action not merely a defence to the Plaintiff's claim however it must be of such a nature that the Court would have jurisdiction to entertain it as a separate action. There is no challenge to the jurisdiction in the instant petition.

10. In *Mohan Lal and others vs. Bhawani Shanker and another*⁴ it was held that the rights granted to the Defendants to set up Counter Claim are not only limited to the claim put forth by the Plaintiff in a suit itself and even the cause of action need not be the same, there is nothing in Order VIII Rule 6 or Rule 6A of the CPC, 1908 restricting the nature of relief which the Defendants might seek in the Counter Claim. A Counter Claim is thus, on pain of repetition, to be treated as a plaint as is clearly elucidated in this provision and is governed by the Rules applicable to plaints. The essence of a Counter Claim is that the Defendant should have an independent cause of action in the nature of a cross-action and not merely a defence to the Plaintiff's claim. The restriction however is that the cause of action must have arisen before the Defendant delivers his defence or before the time limited for delivering his defence has expired. Further, in *Datta Bandu Sadale and others vs. Sridhar Payagonda Patil and others*⁵, it was held that there is no requirement that the Counter Claim must be of the same nature as the claim of the Plaintiff or that it must be arising

⁴ AIR 2002 Rajasthan 144

⁵ AIR 1992 Bombay 422

out of the same transaction. I am in respectful agreement with the observations in the two ratio *supra*.

11. Merely because the Respondents No. 1 and 2 have made a claim for Plot No.225 the question of the Petitioner being deprived of his right to property as guaranteed under Article 300A of the Constitution does not arise. The parties are at liberty to furnish their respective documents as evidence and documents are to be tested in terms of the Indian Evidence Act, 1872 as proof of the ownership or otherwise of either of the parties. It is only thereafter that the Court will reach a finding.

12. It would indeed be relevant to discuss what cause of action is. In ***The Church of Christ Charitable Trust & Educational Charitable Society, Represented by its Chairman vs. M/s Ponniamman Educational Trust, Represented by its Chairperson/Managing Trustee***⁶, it was held *inter alia* as follows;

“8.....The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words “cause of action”. A cause of action must include some act done by the defendant since in the absence of such act no cause of action could possibly accrue.

9. In *A.B.C. Laminart Pvt. Ltd. and another vs. A.P. Agencies, Salem*, (1989) 2 SCC 163, this Court explained the meaning of “cause of action” as follows:

“12. A cause of action means every fact, which if traversed, it would be necessary for the CRP No. 7 of 2016 5 Shri Rinzing Wangyal Bhutia & Another vs. Shri Wangchuk Bhutia & Others plaintiff to prove in

⁶(2012) SCCR 700

Shri Nar Bahadur Subba vs. Shri Dhan Bahadur Rai & Anr.

order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

On the anvil of the aforestated decision and in view of the facts set forth in the Counter Claim, the question of the pleadings being devoid of cause of action is uncalled for.

13. In *P.V. Guru Raj Reddy & Another vs. P. Neeradha Reddy and others*⁷ it was held that the rejection of a plaint under Order VII Rule 11 of the CPC, 1908 is a drastic power conferred in the Court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII Rule 11, therefore, are stringent and have been consistently held to be so by the Hon'ble Apex Court. It is only if the averments in the plaint *ex facie* do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims have to be adjudicated.

14. In view of the foregoing discussions and the provisions of law extracted hereinabove, I am of the considered opinion

⁷ AIR 2015 Supreme Court 2485

Shri Nar Bahadur Subba vs. Shri Dhan Bahadur Rai & Anr.

that the Respondents No. 1 and 2 have not erred by filing a Counter Claim with the averments made therein. They are well within their rights as laid down in Order VIII Rule 6A of the CPC, 1908. The finding of the learned trial Court in the impugned order warrants no interference.

15. No observations have been made on the merits of the case which shall be decided at the time of trial, needless to add uninfluenced by the observations made herein.

16. Accordingly the Revision Petition is rejected and dismissed.

17. Copy of this order be sent to the learned trial Court and records be remitted forthwith.

**(Meenakshi Madan Rai)
Judge**

08.04.2019

Approved for reporting: **Yes**
Internet: **Yes**

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