IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM:NAGALAND:MEGHALAYA:MANIPUR:
TRIPURA:MIZORAM & ARUNACHAL PRADESH)
SHILLONG BENCH

1. RFA No.(SH) 6 of 2008

Smti Jyoti Vaswani
W/o Shri Pishu Vaswani,
GS Raod, Police Bazar, Shillong.

: Appellant

-versus-

1.Smti Reshma Vaswani,
W/o Shri Harish Vaswani,
Hotel Broadway, GS Road, Police Bazar,
Shillong-793001,
East Khasi Hills District, Meghalaya.

2. Shri Harish Vaswani,
S/o Shri KC Vaswani,
Broadway Hotel, GS Road, Police Bazar,
Shillong 793001,
East Khasi Hills District, Meghalaya.

: Respondents

3. Smt Rukmani Bai,
W/o (L) L Thadani,
C/o Bhaswandas Stores, Police Bazar,
GS Road, Shillong-1, East Khasi Hills,
Shillong.

4. Shri Kishan Chand Thadani,
S/o (L) Chuaimal Thadani,
Bhagwandas Departmental Store Police Bazar,
GS Road, Shillong-1, East Khasi Hills,
Shillong.

5. Deputy Commissioner (R)
District East Khasi Hills,
Shillong.

6. Chief Executive Officer,
Shillong Municipal Board,
Jail Road, Shillong. : Proforma respondents

CR(P) No.(SH)8 of 2009

Smti Jyoti Vaswani
W/o Shri P Vaswani,
R/o Laitumkhrah, Shillong.
: Petitioner

Versus

1. Smti Reshma Vaswani,
W/o Shri Haish Vaswani,
R/o Hotel Broadway,
GS Road, Police Bazar,
East Khasi Hills, Shillong.

2. The Meghalaya Board of Revenue
Shillong.
: Respondents

B E F O R E
THE HON'BLE MR JUSTICE T VAIPHEI

For the appellant : Mr ODV Ladia,
Mr B Laitmon,
Advocates
For the respondents : Mr B Bhattacharjee,
Mr S Changkija,
Advocates

Date of Hearing : 21.09.2011

Date of Judgment and order : 16-12-2011

JUDGMENT AND ORDER

Both the appeal and revision, which are inter-connected and arising out of the dispute between the same parties over the same disputed plot, were heard together, and are now being disposed of by this common judgment. The appeal is directed against the order dated 3-3-2004 passed by the learned Assistant District Judge, Shillong in T.S. No. 4(H) of 2001 rejecting the plaint under Order 7, Rule 11 of the Code of Civil Procedure as being barred by the doctrine of *estoppel*, while the revision is directed against the order dated 31-3-2009 passed by the Board of Revenue refusing to admit her appeal against the order dated 1-10-2008 of the Additional Deputy Commisioner, Shillong rejecting her prayer for issuing separate patta to her in respect of the same disputed plot *i.e.* Plot No. 43 marked as Plot A in the map attached to the family settlement dated 23-6-1984.

2. To simplify the case, I will first decide RFA No. 6(SH) of 2009 and thereafter dispose of, as far as possible, the connected CR(P) No. 8(SH) of 2009 on the basis of my decision thereon. In the appeal, the case of the appellant, as pleaded in the plaint, is that she the cousin of one Ashok Bhagwandas, s/o late Bhagwandas, and after her marriage with Pishu Vaswani, the latter also became acquainted with the said Ashok Bhagwandas, his brothers and sisters. Out of love and affection for the appellant, the

said Ashok Bhagwandas, for himself and on behalf of his brothers and sisters, duly conveyed, by way of gift, a plot of land measuring approximately 2,450.25 square feet situate by the side of G.S. Road, Police Bazar, Shillong vide the Gift Deed dated 29-9-1988 which was registered on 29-3-1989 at Mumbai. Having accepted the gift, the donor delivered possession of the said plot in favour of the appellant. At the time of execution of the Gift Deed, the donors were not aware of any case filed by the respondent No. 1 (defendant 1) against any of them pending before any Court. After registration of the Gift Deed, the name of the appellant stood mutated in the revenue records vide the letter dated 3-1-1991 of the Deputy Commissioner, Shillong. However, it turned out that a gift deed was also executed by one Parbatibai, w/o late Odarmal Thadani, the principal of the respondent No. 2 (Shri Harish Vaswani, now deceased) in favour of respondent 1 in respect of the plot of land measuring about 2450 sq. feet lying by the side of a stream and at the back side of the plot of land delineated, demarcated and shown as Plot No. 'D' in the map forming a part of the memorandum of family arrangement entered into between Shri Kishan Chand Thadani, Smt. Rukimini Bai, Shri Ashok Bhagwandas (Thadani) on the one hand and Smt. Parbatibai on the other on 23-6-1984, which was witnessed by Shri Atmaram Murdhanani, Proprietor of Mohini Store and Shri Kishan Chand Vaswani, Proprietor of Broadway, Shillong, who is the father-in-law of the respondent No. 1.

3. It was further pleaded by the appellant that in terms of the oral family arrangement followed by a memorandum along with the map attached thereto voluntarily entered into among the parties concerned, The disputed plot was allotted

for the exclusive ownership and possession of the said Ashok Bhagwandas, his brothers and sisters while plot 'B' was allotted to Shri Kishan Chand Thadani, plot 'C' to Smt. Rukminibai and plot 'D' to Smt. Purbatbai, now deceased. The said arrangement had already been acted upon by the parties then and there, though it was mentioned in Clause 7 of the memorandum that the 'Patta of the entire plot of the land will stand in the names of 4(four) parties signing the Memorandum of oral settlement …. and other taxes will be shared and borne equally till separate Pattas are issued as and when allowed by the authorities'. It was contended by the appellant that the disputed plot was not the land gifted by Smt. Parbatibai, the principal of defendant No. 2, to respondent 1 and, as such, she could not claim the ownership and possession of the disputed plot or any part thereof inasmuch as she could, at best, stepped into the shoes of the said Parbatibai in respect of plot 'D' only. Though the property was perfectly divided among the parties in terms of the family arrangement, due to fragmentation law, no separate Patta could be issued at that point of time and Patta No. 63 remained in the joint names of Shri Kishan Chand Thadani and three others: the respondent No. 1 could not obviously claim any right to the property more than that of her predecessors-in-interest, namely, the late Parbatibai. However, on the strength of the said Gift Deed dated 15-1-1988 executed by her late husband (defendant 2) and on the strength of Power of Attorney executed in his favour by the late Parbatibai, respondent 1 in collusion with the said Kishan Chand Thadani occupied the disputed plot of the said Ashok Bhagwandas when the disputed plot and plot 'D' were vacant lands except for the one or two tin sheds standing thereon: the said Ashok Bhagwandas, his brothers and sisters were then living in Mumbai and

other places while the said Parbatibai, from whom the respondent 1 alleged to have received the gift was also absent from Shillong. Taking advantage of their absence and of the fact that the patta was standing in the joint names of Shri Kishan Chand Thadani and three others, she, in collusion with the said Kishan Chand Thadani, occupied the disputed plot allotted to the said Ashok Bhagwandas although factually she is entitled to take possession of plot 'D' as shown in the sketch map attached to the memorandum of family arrangement dated 23-6-1984. Mutation of the disputed plot was also allowed by the Deputy Commissioner (R) Shillong on 23-7-1984 vide Mutation Case No. 28 of 1984.

4. It is also the pleaded case of the appellant-plaintiff that the respondent No. 1 thereafter constructed a building on the disputed plot and then instituted Title Suit No. 6(H) of 1988 in the Court of Assistant District Judge, Shillong against the said Ashok Bhagwandas and others on the plea that the latter, her predecessor-in-interest, threatened to dispossess her if she did not quit and voluntarily vacate the disputed plot. The suit was a subject matter of Civil Revision No. 408 of 1988 before this Court which was hurriedly settled out of Court at the instance of respondent 1 and her late husband by wilful misrepresentation and concealment of facts to the appellant (the plaintiff in the instant suit) and her husband when she had no knowledge that the land covered by Patta No. 63, Plot No. 43 had been divided by family arrangement dated 23-6-1984 by which the land was perfectly divided and the specific portions of the heirs thereto spelt out after the death of the original owner, the late Smt. Nadiabai. Consequently, the learned Assistant District Judge decreed the suit by consent on 15-

5-1989. According to the appellant, the compromise decree including the sketch map filed therewith was nothing but a fraudulent decree, which is inoperative and inexecutable. It was also contended that such a decree without registration was invalid and inoperative: no deed of exchange was entered between the owners of the disputed plot and plot 'D'.

5. The appellant thereupon instituted Title Suit No. 10(H) of 1991 for declaring that she was the owner of the disputed plot as shown in the map attached to the Memorandum of family arrangement dated 23-6-1984 and for declaring that the compromise decree dated 15-5-1989 passed by the learned Assistant District Judge, Shillong in Title Suit No. 6(H) of 1988 was null and void. The appellant also filed Misc. Case No. 32(H) of 1991 for interim injunction to restrain the respondent 1 from further construction on the disputed land. Due to the delaying tactics adopted by the respondent 1, the injunction application was frustrated with the result that she managed to complete the building constructed by her and rented out the rooms thereon to different tenants. Ultimately, the respondent 1 and her husband proposed a compromise on certain terms and conditions, which were accepted by her. She accordingly filed an application on 22-3-2000 before the learned Assistant District Judge, Shillong for withdrawal of the suit in the above terms and conditions. She had insisted on inserting those terms and conditions on the assurance made by the respondents No. 1 and 2 that they would abide by the agreed terms even without incorporating the same in the agreement. The trial court by the order dated 22-3-2000 accordingly disposed of the suit as withdrawn. She also withdrew the objection filed by

her in Partition Case No. 1 of 2000 pending before the Revenue Court of the Deputy Commissioner, Shillong against the prayer of respondent 1 for issuing separate patta in her name. After she had fulfilled the promise made by her in the said oral agreement, she also expected the respondents to keep their side of the bargain, but the latter refused to honour their words. As the appellant was compelled to withdraw the suit by means of such fraud practiced by the respondents, she was constrained to institute the instant suit for declaration with consequential reliefs.

6. The suit was contested by the respondents by filing their written statement. A preliminary objection on the very maintainability of the suit was also raised by them. As the suit was dismissed on the basis of this objection under Order VII, Rule11 CPC, I may confine myself to the pleadings of the respondents on this issue. It is the case of the respondents that the suit was not maintainable on the ground that with respect to the same subject-matter between the same parties, there had been a consent order and decree passed by the learned Assistant District Judge, Shillong in title Suit No. 6(H) of 1988 on 15-5-1989: this consent decree also created an *estoppel* between the parties. Even after such consent decree was passed by the learned Assistant District Judge, Shillong, which is the competent court of jurisdiction, the appellant again instituted Title Suit No. 10(H) of 1991 before the same Court concerning the issue directly and substantially involved in T.S. No. 6(H) of 1988. When the respondents in their written statement raised objection against the maintainability of the suit on the ground of *res judicata* and *estoppel*, the appellant prayed for withdrawal and abandonment of the suit without seeking leave of the Court for instituting a fresh suit.

The learned Assistant District Judge by his order dated 22-3-2000 dismissed the suit on withdrawal. On the pleadings of the parties, the trial court framed as many as 11 issues in the suit, but as noted earlier, on the application filed by the respondents under Order VII, Rule 11, CPC, it proceeded to take up the following Issue No. 1, Issue No. 2, Issue No. 5 and Issue 6 as preliminary issues:-

1. Whether the suit is maintainable in its present form?
2. Whether there is any cause of action for filing the present suit?
5. Whether the suit is hit by *res judicata* and principle of *estoppel*?
6. Whether the plaint is liable o be rejected under the provisions of Order VII, Rule 11 CPC?

7. Though the trial court dismissed the suit on other grounds as well, the legality of its rejection under Order VII, Rule 11 CPC on the ground of *estoppel* by conduct is at this stage the crucial issue. The relevant paragraphs are found at page 11 and 12 of the original order, which are as under:

> "In the instant suit, no doubt, the parties are the same, so also the cause of action was also the same, the subject matter and the relief as prayed for was also the same. The plaintiff in the earlier Title Suit No. 10(H) 1991 on her own accord withdrawing (*sic*) her case against the defendant as the parties had amicably settled the matter and that she has abandoned her claims against the defendant. Going through the petition No. 123/2000 dt. 22-3-2000 in the said T.S. No. 10(H) of 1991 no prayer was made by her to grant her also the liberty to file a fresh suit nor any statement to that effect in the said application. The petition was allowed by the Court and the suit was dismissed by Order dated 22-3-2000.
>
> It may be mentioned that withdrawal of a suit comes within the provisions of Order 23, Rule 1 of CPC. Unless specific prayer is made praying for liberty to file a fresh suit, a fresh suit on the same subject-matter between the same parties is barred under the said provision of CPC."

8. Unfolding his submissions, Mr. O.D.V. Ladia, the learned counsel for the appellant, maintains that the trial court has completely overlooked the fact that the issue raised by the respondent, namely, whether the suit is barred by estoppel by conduct, is a mixed question of fact and law, which cannot be decided as a preliminary issue: it ought to have proceeded with the suit by holding a full-fledged trial to decide the controversies involved in the suit. This alone, according to the learned counsel, is enough to set aside the impugned judgment. He heavily relies on the decision of the Apex court in ***Major S.S. Khanna v. Brig. F.J. Dillion, AIR 1964 SC 497, Ramesh Sankla v. Vikram Cements, AIR 2009 SC 713, Daljit Singh v. Joginder Singh, AIR 1985 P & H 184 and Bettiah Estate v. Bhagawati Singh, AIR 1993 All 2*** in support of his contention. He also contends that once the issues are already settled and trial got commenced, the trial court can no longer take recourse to Order 7, Rule 11 CPC and must proceed with and conclude the trial after allowing both the parties to adduce their evidence. He further submits that the decree passed in Title Suit No. 6(H) of 1988 was merely a creature of agreement, and as such a fresh suit to set aside such decree obtained by means of fraud can always be instituted: neither estoppel nor res judicata apply in such a case. To buttress his contention, he refers to the decisions of the Apex Court in ***Ruby Sales and Services v. State of Maharashtra & ors., (1984) 1 SCC 531 and Union Carbide Corporation v. Union of India, AIR 1992 SC 248 and Shri Ram and another v. Ist Additional District Judge, AIR 2001 SC 1250***. It is his contention that even though the earlier suit was withdrawn without leave of court, filing a fresh suit in respect of the same subject-matter but with a fresh cause of action is not barred: the instant suit is based on a decree obtained in the earlier suit by fraud,

which constitutes a new cause of action. Reliance is placed by him on the following decisions:- ***Mahadkar Agency v. Padmakar Shetty, AIR 2003 Bom 136; Valabh Das v. Dr. Madanlal & ors., AIR 1970 SC 987; N.R. Swamy v. B. Francis Jagan, AIR 2001 SC 2469, Kurji J. Kotecha v. Ambalal Kanjibai Patel, AIR 1972 Guj 63; M/s Thakuruddim Ramjash v. Sourendra Mukherjee, AIR 1982 Cal 133; Smt. Nirmalav v. Hari Singh, AIR 2001 HP 1 and Bank of Rajasthan v. Hajarimal Surana & ors., (2005) 10 SCC 238***. He, therefore, strenuously urges this Court to set aside the impugned judgment and remand the suit for normal trial in accordance with law. Per contra, Mr. B. Bhattacharjee, the learned counsel for the respondent, supports the impugned judgment and submits that the same does not suffer from any infirmity warranting the interference of this court.

9. Before proceeding further, it may not be out of place to reproduce the reliefs claimed in Title Suit No. 4(H) of 2001, which are in the following terms:

> "In view of the facts and circumstances as stated above, the Plaintiff prays for a decree against the Defendants in the suit for declaration:-
>
> (a) that the plaintiff is legal and rightful owner of a plot of land measuring 2450.25 sq. ft. more or less in area delineated and demarcated in a plot No. 'A' as shown in the map attached with Memorandum of family arrangement dated 23-06-1984 entered into between the predecessor-in-interest of the Plaintiff and Defendant No. 1 and also the Pro forma Defendant No. 3 and 4;
>
> (b) that the decree purported to be by consent of the parties based on some wrong documents and dates etc., detrimental to the interest of the Plaintiff and others concerned as obtained on 15-05-1989 in T.S. No. 6(H) of 1988 is a fraudulent one and not legally tenable and executable and also the subsequent order dated 22-03-2000 as obtained out of T.S. No. 10(H) of 1991 of the same Court of Asstt. District Judge at Shillong also purported to be by the consent of the parties based on false promises that amount to breach of trust, duping the plaintiff and her husband once again

and putting undue pressure in the name of family peace and good name that too in an unauthorised way and any subsequent action based on the impugned decree and order dated 15-05-1989 and 22-03-2000 respectively are also null and void;

(c) that the possession of Defendant No. 1 in respect of the portion of the land shown in Plot No. 'D' in the changed map attached with and forming a part of the decree dated 15-05-1989 is wrongful and not supported by valid documents in the eye of law as this map has materially changed the alignments of the plot shown in the original map annexed with the Memorandum of family arrangement without the knowledge and against the interest of other co-owners is invalid and not tenable in law all along;

(d) that the plaintiff is entitled to recovery of possession of land under the plot No. 'D' in the new map attached with decree dated 15-05-1989 from the defendant No. 1 or anybody claiming through her

(e) perpetual injunction restraining the Defendants, their agents, workmen from undertaking their extension or alteration works in the disputed building and also starting further any new business venture from the said disputed building;

(f) mandatory injunction directing the Defendant No. 1 and/or her Tenants in the building viz., M/s Woolcraft and M/s Alland's Wines to deposit their rent into the Civil Court as provided under Section 88 of C.P.C.

(g) that the gift deed dated 15-1-1988 executed by Shri Harish Vaswani on the strength of General Power of Attorney dated 27-3-1987 said to be executed in his favour by Smt. Parbatibai (now deceased) is illegal and not operative and bound to revert to its original owner and/or her successor on the ground as stated in the body of the petition;

(h) that the Plaintiff is entitled for mesne profit so far derived by the Defendant No. 1 out of the suit land and building standing thereon from the date of filing of the first suit by the Defendant No. 1;

(i) any other relief or reliefs the Plaintiff is found according to law, equity and natural justice; and

(j) full cost of the suit."

10. It will also be instructive to refer to the reliefs claimed in Title Suit No. 10(H) of 1991, which are as under:

"In view of the facts and circumstances, the Plaintiff prays for a decree against the Defendant in the suit for declaration:-

(i) That the Plaintiff is the legal and rightful owner of the plot of land measuring 2,450.25 sq. ft. more or less in area delineated and demarcated in plot No. A as shown in the map attached with the Memorandum of Family Arrangement dated 23rd June, 1984 entered

into between the predecessors-in-interest of the Plaintiff and the Defendant and also the Pro forma Defendants of this suit.
(ii) That the decree purported to be by consent of the parties based on some wrong documents and data etc., detrimental to the interest of the Plaintiff and others concerned is a fraudulent one and not legally tenable and executable and any subsequent action based on the impugned decree is also null and void.
(iii) That the possession of the Defendant in respect of the portion of the land shown in plot No. D in the changed map attached with and forming a part of the decree is wrongful and not supported by any valid document in the eye of law as this map has materially changed the alignment of the plots shown in the original map annexed with the Memorandum of Family Arrangement without the knowledge and against the interest of other co-owners is invalid and not tenable in law.
(iv) Recovery of possession of the land under Plot No. D in the new Map attached with the decree from the Defendant or anybody claiming through her.
(v) Perpetual injunction restraining the Defendant, her agent, workmen from proceeding with the illegal works of construction on the suit land and also from use and occupation either by herself or anybody else.
(vi) Mandatory injunction directing the Defendant, her agent, etc., to demolish the illegally constructed building in the plot of land of the Plaintiff and to remove the materials of the building demolished from the suit land within a period to be fixed therefor.
(vii) Cost of the suit.

Any other relief or reliefs the Plaintiff is found entitled according to law, equity and natural justice."

As already noticed earlier, Title Suit No. 10(H) of 1991 was withdrawn by the appellant without the permission of the trial court vide the order dated 22-3-2000, which is in the following terms:

"22-3-2000. Both parties are present with their respective counsel. The Plaintiff files petition 123/2000 stating that she withdraws the suit abandoning all claims against the defendant.

As such on withdrawal of the suit, case stands dismissed and disposed off.

Sd/- B. Giri,
Assistant District Judge,
Shillong."

11. In the preliminary objection raised by the respondent, she specifically raised the issue that as the appellant had abandoned Title Suit No. 10(H) of 1991 without the permission of the trial court, she was precluded from bringing a fresh suit in respect of the same subject-matter. Order 23, Rule 1 CPC deals with withdrawal of suit or abandonment of part of a claim, the relevant portions whereof are reproduced below:

"Rule 1. Withdrawal of suit or abandonment of part of claim—

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order 32 extend, neither the suit nor any part of the claim shall be abandoned without leave of the court.

(2) * Omitted *****

(3) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect,

or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,

It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with a liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1),

or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule(3), he shall be liable for such costs as the court may award and shall be precluded from

instituting any fresh suit in respect of such subject-matter or such part of the claim."

12. A plain reading of Rule (1)(3) and Rule 1(4) of Order 23 CPC in juxtaposition will indicate in no uncertain terms that where a plaintiff withdraws from a suit without obtaining the permission of the court, he is precluded from instituting a fresh suit in respect of the same subject-matter, and against the same defendant. The rule is mandatory. In ***Helim Ullah v. Hakim Ali, AIR 1935 Cal 157***, the plaintiff withdrew his suit with the consent of the defendant but without the leave of the court to bring a fresh suit on the same cause of action on the plea that the matter would be referred to arbitration. The arbitration having proved abortive, it was held that he could not institute a fresh suit on the same cause of action. The term "subject-matter" means series of acts or transactions alleged to exist giving rise to the relief claimed. The "subject-matter" in sub-rule (4) means the cause of action. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject-matter of the second suit is the same as in the first. Mere identity of some of the issues in the two suits does not bring about an identity of the subject-matter in the two suits. However, a suit on a different cause of action is not barred although the suit may relate to the same property: though the subject-matter of the suits may be identical, the subject-matter of the subsequent suit will not be barred unless the cause of action in both the suits are one and the same. To sum up, where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter. As already

noticed, the expression “subject-matter” has a reference to a right in the property. The expression includes the cause of action and the relief claimed. Even if part of the claim abandoned in the first suit is found to be the genesis of the cause of action claimed in the second suit, the second suit is not maintainable if liberty to file another suit was not granted in the first suit.

13. The question which now falls for consideration is, whether the cause of action and the relief claimed in the TS No. 10(H) of 1991 and the cause of action and the relief claimed in the subsequent suit, namely, TS No. 4(H) of 2001 are substantially identical? In the plaint of TS No. 10(H) of 1991, the appellant had asserted that the cause of action for the suit “arose on and from 18th April, 1988, the date of encroachment on plot No. A, 15.9.1988, the date on which the suit bearing No. T.S. 6(H)1988 was mischievously filed and on and from 15..6.1989 on which the decree out of that case was obtained by way of fraud as described herein above and also on and from each date of unauthorised occupation of the land and on other dates within the jurisdiction of this Court and as such the Court has jurisdiction to entertain it”. In the subsequent suit i.e. TS No. 4(H) of 2001, the appellant pleaded in the plaint that “**the cause of action in the present suit arose on and from 15.09.1999 on which date the Defendant No. 1 and her husband Shri Harish Vaswani/Defendant No. 2 came with a proposal to the Plaintiff at her residence as contained in paragraph No. 12 and on and from 22.3.2000 on which date Title Suit No. 10(H) of 1991 was allowed to be withdrawn fraudulently once again at the proposal of the Defendant No. 1 and 2 and accepted by the Plaintiff and also on and from each**

date of unauthorised occupation of the Plaintitff's land by the Defendant No. 1 and on other dates within the jurisdiction of the Court and as such the Court has jurisdiction to entertain this suit. And as the decree dated 15.05.1989 and the order dated 22.03.2000 purported to be by the consent of the Parties was obtained fraudulently in playing fraud, breach of trust over the Plaintiff and/or also over the Court, as such that decree and order allowing withdrawal do not estopped the Plaintiff from filing the present suit as contemplated under the principle of estoppel". I have earlier extensively reproduced the relief claimed in both the first suit and the instant suit. There were eight reliefs claimed in the earlier suit whereas ten reliefs are claimed in the second suit. Except for relief (b) claimed in the second suit, the remaining relief claimed in both the suits are identical. It is, however, the contention of Mr. ODV Ladia, the learned counsel for the appellant that the appellant, by challenging the legality of, or by claiming additional relief for setting aside, the order dated 22-3-2000 on the ground that this order had been obtained by fraud, has furnished a fresh cause of action, and, as such, the second suit is not barred.

14. It is true that if the second suit is based on a fresh cause of action, Order 23, Rule 1(4) will not operate as a bar against her for instituting such a suit. However, if the cause of action claimed in the second suit is founded on the basis of the part of the claim abandoned in the first suit, in the absence of obtaining leave to file a fresh suit, the second suit will not be maintainable. According to the appellant, the first suit had been withdrawn by her on the basis of the settlement arrived at between her and

the respondent in which it had been agreed that the latter would allow her to use a path measuring 4' to 5' wide from the back side for movement of men and materials for her, etc., but at the time of withdrawal of the suit, those terms and conditions were not incorporated: she has thus been cheated by the respondent once again. This is how the second suit came to be filed by her with a fresh cause of action. As already indicated, the second suit is based not only on this cause of action, but also on the basis of the cause of action of the first suit. In my opinion, the cause of action of the second suit and that of the first suit are intricately linked and the first suit is, therefore, found to be the genesis of cause of action claimed in the second suit. Even if the second suit succeeds, no right in respect of the suit property can accrue to the appellant until and unless she succeeds in the first suit, which, however, as already noted, had already been withdrawn by her without the permission of the trial court and is, therefore, not maintainable being barred by Order 23, Rule 1(4) CPC. In other words, the plea regarding fraud cannot materially improve the case of the appellant for sidestepping the embargo imposed by Order 23, Rule 1(4), CPC. Clever drafting cannot create an illusion of a cause of action. The trial court has the duty to examine the party searchingly and nip such clever drafting in the bud at the first hearing or the moment it comes to its notice. In the view that I have taken, the learned Assistant District did not commit any illegality in holding that the instant suit is not maintainable being barred by Order 23, Rule 1(4) of the Code.

15. The last question which falls for consideration is whether a plaint can be rejected under Order VII, Rule 11 CPC even after settlement of issues or at the

starting of the trial? A plain reading of Order VII, Rule CPC does not bar rejection of a plaint at any stage of the proceeding if the suit is barred by law. In other words, the starting of the trial or settlement of issues is no bar to such an action: Order VII, Rule 11 does not place any restriction in this behalf.—see ***Unniraman v. Padmanabhan, AIR 1988 Ker 257***. The term "law referred to in Order VII, Rule 11 does not refer to an enacted law alone but also takes within its sweep established legal principles or doctrines which can bar a suit such as res judicata, estoppel, waiver or acquiescence. Irrespective of any objection taken by he defendant, it is the duty of the trial court to see if the plaint really discloses any cause of action or if the plaint is barred by law. For this reason, it is the plaint only, which is to be seen for a decision under Order VII, Rule 11. Order VII, Rule 11 applies to those cases only where the statement made by the plaintiff in the plaint without any doubt or dispute shows that the suit is barred by any law in force. In the instant case, it is self-evident from the plaint that the earlier suit filed by her had been withdrawn by her without leave of Court. Therefore, the suit is barred by Order 23, Rule 1(4) CPC. As the suit is so barred, the trial court correctly rejected the plaint under Order VII, Rule 11 CPC. The impugned order, therefore, does not warrant the interference of this Court.

15. As for ***C.R.(P) No. 8(SH) of 2009***, the revision is directed against the order dated 31-3-2009 passed by the Meghalaya Board of Revenue, dismissing the appeal filed by the petitioner, who is also the appellant in the connected first appeal, against the order dated 1-10-2008 passed by the learned Additional Deputy Commissioner, East Khasi Hills, Shillong in Case No. L.14/3/2008 refusing to issue Patta/Lease for

the disputed land in her favour. There is no dispute that the suit land in the connected RFA is one and the same with the disputed land in this revision petition. Once Title Suit No. 4(H) of 2001 instituted by the petitioner for declaration of her title to the same suit land has been found to be barred by Order 23, Rule 1(4) of the Code in the connected judgment, her application for issue of Patta/Lease agreement in respect of the same disputed land must meet the same fate. It may be noted that both the Revenue Courts had decided that as the subject-matter of the prayer before them was *sub-judice*, they should not interfere at that stage. With the disposal of the RFA in the connected judgment ending with the dismissal of the suit, there is no question of issuing patta/lease agreement in respect of the same plot of land in favour of the petitioner. Consequently, the impugned orders of both the Revenue Courts need not be interfered with by this Court.

16. Both the appeal and the revision petition are, therefore, dismissed. However, on the facts and in the circumstances of the case, I direct the parties to bear their respective costs.

JUDGE

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