

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR,
TRIPURA, MIZORAM AND ARUNACHAL PRADESH)

SHILLONG BENCH

Civil Revision Petition No. 19(SH) of 2012

1. Md Wajid
s/o (L) Abdul Wadoor
r/o Holding No. 13 JB, Jhalupara
Shillong Cantonment,
East Khasi Hills District,
Shillong.

2. Shri Samir Ahmed
r/o Holding No. 13 JB, Jhalupara
Shillong Cantonment
East Khasi Hills District,
Shillong.

::: Petitioners

-vs-

1. Shri SK Md. Sadique
s/o (L) Md. Abdul Samad,
R/o Holding No. 13, JB, Jhalupara
Shillong Cantonment
East Khasi Hills District,
Shillong.

2. Md. Mustaqueen
s/o Md Azim,
R/o Holding No. 13 JB, Jhalupara,
Shillong Cantonment
East Khasi Hills District
Shillong.

3. The Headman,
Jhalupara Village
Shillong

::: Respondents

4. Smti Rabia Khatoon
r/o Holding No. 13 JB, Jhalupara
Shillong Cantonment,
East Khasi Hills,
Shillong.

::: Proforma Respondent

BEFORE
THE HON'BLE MR JUSTICE T VAIPHEI

Advocate for the Petitioners

: Mr S Sen,
Mr E Nongbri, Advs

Advocate for the Respondents

: Mr SS Das, Adv

Date of hearing : 31.08.2012

Date of judgment and order : 12-10-2012

JUDGMENT AND ORDER

This revision under Article 227 of the Constitution is directed against the order dated 7-6-2012 passed by the learned Assistant District Judge, Shillong in Title Suit No. 3(H) of 2007 under Section of the Code of Civil Procedure ("CPC") staying the suit on the ground that the matter in issue therein is directly and substantially in issue in the previously instituted suit, namely, Title Suit No. 12 (H) of 2007, which is pending before another civil court of competent of jurisdiction and of vacating the interim injunction passed in Misc. Case No. 4 (H) of 2007 arising out of that suit.

2. Title Suit No. 12(H) of 2007 was instituted by the petitioners/plaintiffs ("the plaintiffs" for short) before the learned Munsiff/Shillong for declaration of their right, title and interest in the suit land situated at Holding No. 13 JB located at Jhalupara Cantonment, Shillong. According to the petitioners/plaintiffs ("the plaintiffs"), they together with the defendant No. 1/the respondent No. 1 herein (Shri S.K. Md. Sadique), have been jointly holding the suit land under lease from the Cantonment Board, Shillong since 1932, and the lease was renewed on 1-2-1995 in their joint names. They have always been occupying the suit land peacefully and without any disturbance from any quarter. The plaintiff No. 1 and 3 authorized the plaintiff No. 2 (son of the late Abdul Wadood) to deal with the suit land against the defendant Nos. 1 and 2 when the plaintiff No. 2 and the defendant

No. 1 received a caveat from the defendant No. 2 (respondent 2 herein) stating therein that the defendant No. 1 had transferred by way of the Gift Deed dated 5-10-2006 the share of the defendant No. 1 in the suit land. The plaintiff No. 1 and No. 3 has authorized the plaintiff No. 2 to defend the suit land from the illegal acts of the defendant No. 2, who could not acquire the share of the defendant No. 1 in the suit land without their consent.

3. According to the plaintiffs, in the year 1996, the late Abdul Wadood, the father of the plaintiff No. 2, had instituted Title Suit No. 6(H) of 1996 together with Misc. Case No. 8(H) of 1996 before the learned Munsiff/Shillong and obtained on 26-4-1996 an ad-interim injunction to restrain the defendant No. 1 from disposing of his share to any third party and not to block the approach road leading to the compound of the joint lease holders. On the basis of the said gift deed, the defendant No. 2 and his associates forcibly entered the compound of the plaintiffs with a view to evict them from the suit land. However, on the protest made by the plaintiffs and on the intervention of the public, they had to leave the suit land. An FIR to this effect was lodged against the defendants and their associates. As the defendants are determined to dispossess the plaintiffs of the suit land, they instituted this suit claiming the following reliefs:

- (i) To pass a decree declaring that the defendant No. 1 has no right and title over the suit property, and has no authority to capture the land by force illegally and with back door policy.**
- (ii) Decree declaring the right, title, interest and peaceful possession of the suit premises.**
- (iii) Decree declaring the Defendants not to disturb the peaceful possession and occupation of the plaintiffs over the suit property and also to maintain status quo.**

(iv) **Cost of the suit and any other or further relief/reliefs as your honour may deem fit and proper.**

4. The plaintiffs thereafter filed Misc. Case No. 16(H) of 2007 before the same Court for issuing temporary injunction against the defendants. The trial court by the order dated 29-3-2007 allowed the application and restrained the defendants from disposing of by way of sale/mortgage the suit land or otherwise from constructing house/building, shed, etc. thereon until further order. The trial court, however, by the order dated 30-4-2007, vacated the ad-interim injunction and required the opposite parties to show cause. Interestingly, Title Suit No. 3(H) of 2007 was instituted by the petitioners before the learned Assistant District Judge, Shillong apparently after the interim injunction order had been vacated by the learned Munsiff in the connected Misc. Case No. 16(H) of 2007 by transposing the plaintiff No. 1 in Title Suit No. 12(H) of 2007 as the pro-forma defendant No. 4 (the pro forma respondent No. 4 herein) for granting a number of reliefs.

5. The case of the plaintiffs in this suit is that they are joint lessees along with the pro-forma respondent No. 4 herein of the same suit land, and by registered Gift Deed dated 16-11-1972, the late S.K. Md. Alijan donated all his leasehold rights to the suit land upon late Abdul Wadoor, the father of the plaintiff No. 1, the defendant No. 1 S.K. Md. Sadique), pro forma defendant No. 4 (Rabia Khatoon) and the late S.K. Abdul Aziz (father of the plaintiff No. 2 and the petitioner No. 2 in this revision petition). Following the Gift Deed, the donees took possession of different portions of the suit land with the existing structures thereon and have been living separately since then: mutation was also done in their joint names as lessees. After the death

of the said Abdul Wadoor and S.K. Abdul Aziz, their respective sons, namely, the plaintiff Nos. 1 and 2 took over possession of their respective portions in the suit land but in an unequal share. The share of the plaintiff No. 1 formed a small portion, which is much less than $\frac{1}{4}$ shares without any proper entrance from Jhalupara Road as their family members have to enter their house by the back side, and no vehicle can be brought inside the compound although the defendant No. 1 has been enjoying all the privileges associated with the lease to the exclusion of the plaintiffs, who is also entitled to equal enjoyment of the leasehold right to the extent of $\frac{1}{4}$ th equal share. This put both the plaintiff to great disadvantages, and their request to the defendant No. 1 to give them their due shares and ingress and egress to Jhalupara Road did not prove useful. Sometime in the year 1996, the defendant No. 2 had started construction of shop rooms covering the frontage of the suit land for letting out to tenants, which, if permitted, would completely block the frontage thereby blocking the entry of the portion of the plaintiffs from the main Jhalupara Road and give him the advantage of enjoyment of the frontage to the exclusion of the plaintiffs and other shareholders against their right to equal enjoyment of the leasehold rights jointly. The protest made by the plaintiff against the proposed construction proved futile, and the defendant No. 2 went ahead with his design along the roadside.

6. The father of the plaintiff No. 1 (the late Adul Wadoor) thereafter instituted Title Suit No. 6(H) of 1996 before the learned Munsiff, Shillong for declaration and permanent injunction for protecting his interest, but the suit was subsequently dismissed in default. On 20-3-2007, the defendant No. 1 executed the Gift Deed

dated 17-12-2006 donating a portion of the suit land measuring 250 square feet to the plaintiff No. 1 and handed over possession of the same to him as witnessed by the plaintiff No. 2 and pro forma defendant No. 4. Recently, the defendant No. 2 who is a stranger to the suit land with the help of miscreants and in collusion with defendant No. 1 forcibly trespassed into a portion of the leasehold, tried to occupy the same and construct a boundary wall/fencing by breaking the boundary wall of the plaintiffs and threatened the plaintiffs and their family members with dire consequences. This led the plaintiffs and the pro forma defendant No. 4 to lodge an FIR on 27-3-2007 and instituted Title Suit No. 12(H) of 2007 along with Misc. Case No. 16(H) of 2007 before the learned Munsiff/Shillong against the defendants to protect and safeguard their interest over the suit land. In the meantime, the defendant No. 2 had filed the complaint dated 22-3-2007 before the Headman, Jhalupara Village Council, which recorded the statements of the plaintiff and the defendant Nos. 1 and 2 and the wife of the defendant No. 1 and without any lawful authority gave a finding that the defendant No. 2 was the lawful and true purchaser of the suit land and directed him to occupy the same.

7. According to the plaintiffs, they for the first time came to know the existence of the Gift Deed dated 5-8-2006 when they received the caveat. The plaintiffs, therefore, question the validity of the Gift Deed dated 5-8-2006 as no approval of the Cantonment Board was ever obtained nor was the consent of the co-sharers obtained, and the defendant No. 2 cannot therefore, claim any title to any portion of the suit land. The Headman, Jhalupara Village Council has no jurisdiction to decide that the defendant No. 2 was the lawful

purchaser. The defendant No. 2 on the strength of the invalid Gift Deed took the help of some miscreants and the defendant No. 1 and started to interfere with the peaceful possession of the suit land by the plaintiffs by trying to construct structure thereon. Title Suit No. 3(H) of 2007 was thus instituted before the learned Assistant District Judge, Shillong for the following reliefs:

“24. The Plaintiff prays for a decree:

- (i) Declaring that the Plaintiffs are entitled to equal enjoyment of 1/4th of all the leasehold right in Holding No. 13 JB, Shillong Cantonment, Shillong together with Defendant no. 1 and pro forma Defendant No. 4 as granted under the Deed of Gift dated 16-11-72 and lease granted by the Government of India vide Deed of Lease dated 19-03-32 and renewed again with effect from 01-04-62.**
- (ii) With a further declaration that the Plaintiffs as occupants of a portion in the Holding No. 13 JB are entitled to ingress and egress to and from Jhalupara Road.**
- (iii) For a Declaration that the Gift Deed dated 05-8-06 is an invalid and void document and no right, title or interest has been created in favour of Defendant No. 2 on the strength of the said Gift Deed.**
- (iv) Declaring that the Headman/Jhalupara Village Council had no authority under law to exercise their jurisdiction and interfere into the matter and their findings dated 22-3-07 is without any legal sanction and is not binding on any parties and requires to be set aside and quashed.**
- (v) For a declaration that the Defendant No. 2 has no right, title or interest over any portion of the land in Holding No. 13 JB and is a trespasser for the same.**
- (vi) For perpetual injunction restraining the Defendant No. 1, his agents, contractors, labourers, employees from raising any construction or altering the existing structure and converting the same into shop rooms without providing sufficient land for construction of approach road and without prior consent in writing of all the Plaintiffs and other Donees so that the Defendant may not get any additional advance (advantage?) depriving the Plaintiff and other Donees from equal enjoyment of the property and further restraining the Defendant No. 1 from inducting Defendant No. 2 or anybody through or under him into Holding No. 13 JB.**

- (vii) For a permanent injunction restraining Defendant No. 2, his legal; heirs, assigns, executors, administrators, workers, labourers or any one claiming through or under him from entering into the suit land and interfering with the peaceful occupation, possession of the suit land by the Plaintiffs and to carry out any construction over the suit land.**
- (viii) Full cost of the suit.**
- (ix) Any other relief/relieves to which the plaintiffs are found entitled to under law.”**

8. The case of the plaintiffs in the first suit, namely, Title Suit No. 12(H) of 2007 instituted before the learned Munsiff/Shillong was founded on their assertion of their right, title and interest over the land of Holding No. 13 JB as such claim was denied and disputed by the defendants. Though one of the reliefs claimed did not specifically mention the term “permanent injunction”, the tone and tenor of the pleadings unmistakably shows that the relief so claimed is essentially a decree for permanent injunction to restrain the defendants from disturbing their peaceful possession of the suit land. Coming now to the second suit instituted by the plaintiffs before the learned Assistant District Judge, Shillong, namely, Title Suit No. 3(H) of 2007, it is seen that the facts pleaded and the reliefs claimed are more elaborate and comprehensive than the ones claimed in Title Suit No. 12(H) of 2007. The grievances of the plaintiffs in the second suit are projected to be many. However, a close look at the pleadings in both the suits will reveal that the disputes in both the suits pertain to title over the same suit land and the validity of the Gift Deed dated 5-10-2006 executed by the defendant No. 1 in favour of the defendant No. 2 and the attempt made by the defendant No. 2 to dispossess the plaintiffs of the suit land i.e. part of the Holding No. 13 JB. As against three substantial reliefs claimed in Title Suit No. 12(H) of 2007 adumbrated

above, as many as seven substantial reliefs are claimed in Title Suit No. 3(H) of 2007 with additional pleadings.

9. According to Mr. S. Sen, the learned counsel for the petitioners/plaintiffs, the two suits are as different as chalk and cheese inasmuch as the subject-matters in both the suits are not the same: the decision rendered in the former suit, on the facts of this case, will not operate as *res judicata* in the subsequent suit, which is the test laid down by various decisions for judging as to whether the matters in issue in the previous suit are directly and substantially in issue in the latter suit. The contention of the learned counsel is that the learned Assistant District Judge has completely overlooked this well-settled legal position and submits that the claim in the latter suit is far more comprehensive and, as such, the entire controversy in the latter suit cannot be finally determined in the former suit. To fortify his various contentions, the learned counsel for the petitioners, relies on the following decisions: **(i) *National Institute of Mental Health & Neuro Sciences v. O. Parameshwara*, (2005) 2 SCC 256;** **(ii) *Sujan Bai v. Moti Ram*, AIR 1980 Bom 188** and **(iii) *Shaw Wallace & Co. v. Bholanath Mandanlal Sherawala and ors.*, AIR 1975 Cal 411.** Mr. Sen, the learned counsel for the respondents, however, submits that the instant revision under Article 227 of the Constitution is not maintainable on the ground that an order staying suit under Section 10 is revisable under Section 115 CPC and Article 227 of the Constitution cannot be invoked when there is an alternative statutory provision under Section 115 CPC. He draws support from the decision of the Apex Court in ***Mohd. Yunus v. Mohd. Mustaqim & ors*, (1984) 1 SCR 211** and the decisions of this Court in ***Jogendra Chandra Shill v. Anukul Chandra Shill and ors*, 2004 (3)**

GLT 696, Ram Gopal Agarwal v. Bhimsen Sethi, 1998 (1) GLT 323 to buttress his contention in this behalf. On merit, he contends that the petitioners, after having failed to obtain interim injunction in the previous suit filed by them before the learned Munsiff, they are now instituting a fresh suit which is directly and substantially in issue in the previous suit by camouflaging it as a distinct and different suit by adding additional facts, parties and reliefs in the latter suit to circumvent the provision of Section 10 CPC. He maintains that the instant petition is not maintainable and is otherwise devoid of merit, and the same is liable to be dismissed.

10. In so far as the maintainability of the instant petition under Article 227 of the Constitution is concerned, it must be noted that the proviso to Section 115(1) CPC provides that the High Court shall not vary or reverse any order made, or any order deciding an issue in the course of a suit or other proceeding except where the order, if it had been decided in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. A plain reading of Section 115 as it now stands makes it amply clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to the suit or proceeding. If the answer is 'yes', then the revision is maintainable. But, on the contrary, if the answer is 'no', then the revision is not maintainable. Examining the objection raised by the learned counsel for the respondents against the backdrop of the aforesaid legal principles, the impugned order staying Title Suit No. 3(H) of 2007 pending before the learned Assistant District Judge, Shillong, in my judgment, cannot, by any stretch of imagination, be taken to have finally decided the suit or

proceedings in question. Further proceedings in Title Suit No. 3(H) of 2007 were merely postponed by the learned Assistant District Judge, Shillong; the suit has not been disposed of finally. In that view of the matter, it is not difficult to hold that revision under Section 115 CPC does not lie against the impugned order of stay of suit under Section 10 CPC. Resultantly, the revision petition filed by the petitioners under Article 227 of the Constitution lies and is, therefore, maintainable. The contentions to the contrary advanced by the learned counsel for the respondents in this behalf are, therefore, rejected.

11. Coming now to the merit of the case, it may at the outset be appropriate to refer to Section 10 CPC, which is in the following terms:

“10. Stay of Suit.— No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any court beyond the limits of India established or continued by the Central Government having like jurisdiction, or before the Supreme Court.

Explanation.— The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action.”

A plain reading of Section 10 CPC thus makes clear that where the subject matter of the two suits is one and the same and the parties are also the same, under such circumstances, if there are two suits between the parties, it is the subsequent suit which has to be stayed and not the previous ones. The legal position is lucidly explained by Bombay High Court in ***J.H. Iron Mart v. Tulsiram, AIR 1953 Bom 117*** in the following manner:

“What the section requires is that the matter in issue in the two suits should be directly and substantially

the same, and proper effect must be given to the language used by the Legislature in S. 10 that the identity required is a substantial identity. It is true, as the authorities have laid down, that there must be an identity of the subject-matter, it is equally true that the field of controversy between the parties in the two suits must also be the same, but the identity contemplated and the field of controversy contemplated should not be identical and the same in every particular, but the identity and the field of controversy must be substantially the same."

12. Paragraph 5 and a portion of paragraph 6 of the report may as well be reproduced for better understanding of the controversy at hand:

"(5) Now, what is the position in the case before us. The Plaintiffs in the Calcutta suit rely on one version of the contract. The respondents as the plaintiffs in the Bombay suit rely on a different version of the same contract, and the real subject matter of the suit and the field of controversy between the parties is, what is the contract which was entered into between the parties and what are the terms of the contract. Whatever reliefs the Plaintiffs may seek in the Calcutta suit and whatever may be the reliefs which the respondents may seek in the Bombay suit, these reliefs are incidental to the decision which the Court must come to as to what was the contract between the parties. Therefore, if the Calcutta High court in the previously instituted suit were to decide that the contract was either as the appellants pleaded or as the respondents pleaded, that decision must operate as res judicata.

(Underlined for emphasis)

"(6) What we meant was that effectively and substantially the decision of the Calcutta suit must put an end to the Bombay suit, and we made it clear what we meant was that the decision in the Calcutta suit must operate as res judicata in the Bombay suit. Applying that test here, in our opinion, the test is satisfied because if once the Calcutta High Court has held what the contract was between the parties and what the terms of the contract were, the Bombay suit would effectively be to put an end to because that decision would bind the parties and all that will be required to be done would be to give the necessary reliefs to the respondents in the Bombay suit if they have succeeded and those reliefs will flow from the decision of the Calcutta High Court and will be consequential upon the decision of the Calcutta suit.

Therefore, in our opinion, the learned Judge below, with respect to him, was in error when he took the view that this was not a case to which S. 10 applied."

13. Coming now to the case at hand, the common thread running through the two suits instituted by the same plaintiffs is essentially a dispute about the ownership of the suit land located inside Holding No. 13 JB and of the competence of the defendant No. 1 to transfer the suit land to the defendant No. 2. In both the suits, the plaintiffs by means of the two suits are also trying to restrain the defendant No. 2 and his associates from disturbing their peaceful occupation and possession of the suit land. For example, if once the learned Munsiff in the previously instituted suit has decided that the defendant No. 1 has no right to transfer the suit land upon the defendant No. 2 and issued permanent injunction to restrain the defendant No. 2 and his men from disturbing the plaintiffs' peaceful occupation and possession of the suit land, the question of granting of the multiple reliefs claimed by the plaintiffs would be incidental to that decision. In my opinion, the decision rendered by the learned Munsiff in the previously instituted suit would effectively and substantially put an end to the latter suit instituted before the learned Assistant District Judge, Shillong. In other words, the decision by the learned Munsiff/Shillong in Title Suit No. 12(H) of 2007 will bind the parties and all that will be required to be done would be to give necessary reliefs to the plaintiffs in the latter suit if they have succeeded in accordance therewith: the reliefs claimed in the latter suit will naturally flow from the decision of the learned Munsiff/Shillong and will be consequential upon the decision thereof. For example, one of the reliefs claimed in the latter suit, namely, a declaration that the Gift Deed dated 5-8-06 is an invalid,

etc. or, that matter, a declaration that the Headman/Jhalu(para Village Council has no authority under law to exercise their jurisdiction and the findings dated 22-03-2007 is without legal sanction, will naturally flow from the decision rendered by the learned Munsiff in the previously instituted suit. In the view that I have taken, the impugned order does not suffer from any improper exercise of jurisdiction to warrant the interference of this Court under Article 227 of the Constitution.

14. That apart, what disturbs me most is the conduct of the plaintiffs in instituting another suit involving the same subject-matter before another Court: the latter suit is not instituted by the defendants but by the same plaintiffs. If, for some reason or defective pleadings, the previous suit was found to be defective and not comprehensive enough to cover all their grievances and incorporate all the reliefs to be claimed by them also, instead of instituting another suit, they should have suitably amended the plaint to incorporate the same by invoking Order VI, Rule 17 CPC. It must be remembered that the object of Section 10 CPC, on the one hand, is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue and, on the other hand, to avoid recording of conflicting findings on issues which are directly and substantially in issue in a previously instituted suit. Thus, the object underlying Section 10 CPC is to protect a person from multiplicity of judicial proceedings. Keeping in view the conduct of the plaintiffs and also of the surrounding circumstances, the inference is irresistible and the conclusion inevitable that the plaintiffs, after their interim injunction order was vacated by the learned Munsiff/Shillong in the

previously instituted suit, were trying to invent another device to somehow obtain another interim injunction denied to them in a previously instituted suit by instituting another suit before a court of concurrent jurisdiction over the same matters in issue: they can thus be accused of forum hunting and abuse of process of Court. Therefore, the learned Assistant District Judge has correctly exercised her jurisdiction in staying the latter suit instituted before her.

15. It is next contended by the learned counsel for the plaintiffs that the learned Assistant District Judge has also exceeded her jurisdiction by vacating the interim injunction order dated 14-5-2007 passed in the connected Misc. Case No. 4(H) of 2007 while staying the suit. It is his contention that such order is most illegal and unwarranted when no prayer to this effect was made by the defendants/respondents. The law is now well-settled that where in a suit further proceedings are stayed for some reason or the other, in such cases in order to carry on the process of the suit, certain steps are to be taken in aid of proceedings to keep them alive. Therefore, a stay order under this Section does not take away the power of the court in the stayed suit to make interlocutory orders, such as orders for appointment of receiver or an injunction, or an attachment before judgment. Such power to issue temporary injunction must, *proprio vigore*, necessarily carry with it the power to continue or vacate the interim injunction order already issued in appropriate cases. In the instant case, on overall view of the facts and circumstances of the case, the plaintiffs cannot be said to have established a strong prima facie case for continuing the interim injunction granted to them earlier. In that view of the matter, the learned Assistant District Judge cannot be faulted

with in any manner in vacating the interim injunction granted to the plaintiffs by her on 14-5-2007.

16. The offshoot of the foregoing discussion is that there is no merit in this revision petition, which is hereby dismissed. However, since the learned counsel for the plaintiffs has raised an important question of law, I refrain from imposing cost upon the plaintiffs for an abuse of process of Court. Transmit the L.C. record forthwith.

JUDGE

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