

GAHC010009182013



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

Case No. : CRP/307/2013

ARUN CHANDRA RAJBONGSHI and 2 ORS
S/O LT. BOKOMA RAJBONSHI

2: SEWJI PRASAD GOUR
S/O SRI KANAIYALAL GOUR

3: MANDAN LAL GUPTA
S/O LT. GIRIDHARI PRASAD GUPTA
ALL ARE RESIDE OF A.T. ROAD
TOKOBARI
GUWAHAT

VERSUS

KUKIL SINGH and 13 ORS

2: PARESH SINGH

3: BHARAT SINGH
NO.1 TO 3 ARE SON NARAYAN SINGH
ALL ARE R/O A.T. ROAD
TOKOBARI
P.O. and P.S. PANBAZAR
GHY-1
DIST- KAMRUP
ASSAM

4: BHUBANESWAR DAS
S/O LT. NAVEN CHANDRA DAS
R/O A.T. ROAD
ROKOBARI
P.O. and P.S. PANBAZAR

GHY-1
DIST- KAMRUP
ASSAM

5:SAWARMAL BHARGAV
S/O DANSUKH MAHARAJ

6:SUVKARAN BHARGAV
S/O LT. SHIW SHIV BHAGWAN BHARGAV

7:RAJU SHARMA
S/O BINDESWAR SHARMA

8:SUKKHDEO SHARMA
S/O LT. JADISH SHARMA

9:BABUL SINGH
S/O LT. HARDEO SINGH

10:MAHAVIR BHARGAV
S/O LT. SHIW BHAGAWAN BHARGAV

11:SATYADEO SINGH
S/O SHRI HARIHAR SINGH

12:DINU BHARGAV
S/O LT. MAHESH BHAHESH BHARGAV

13:CHANDA DEVI MANDAL
W/O SHRI PULSKAR MANDAL

14:PRATAP NARAYAN THAKUR
S/O LT. RETI NATH THAKUR
NO.5 TO 15 ARE R/O A.T. ROAD
TOKOBARI
ATHGAON
GHY. DIST- KAMRUP METRO
ASSA

Advocate for the Petitioner : MR.K RAJBONGSHI

Advocate for the Respondent :

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 26-09-2023

Heard Mr. J. Das, learned counsel for the petitioners as well as Mr. A. Sarma, learned counsel for the respondent nos.1, 2 and 3.

2. At the outset the learned counsel for the petitioners has prayed for an adjournment. It being a matter of the year 2013, the prayer for adjournment is refused as the legality of the order is the only issue to be examined.

3. This revision under Article 227 of the Constitution of India is directed against the order dated 08.01.2013 passed by the learned Addl. District Judge No.2, Kamrup Metro, Guwahati in TS no.76/1988. By the said order the learned trial Court had taken up for adjudication the preliminary issue raised by the petitioner as to whether the counter-claim of defendant nos.16, 17 and 18 was maintainable or not. The said preliminary issue was decided in the affirmative by holding that the counter-claim of the defendant nos.16, 17 and 18 was not barred by *res-judicata* and was maintainable.

4. The said suit was filed under section 92 CPC for appointment of new trustees by removing the defendants as trustees and for accounts of trust. In the said suit, the plaintiffs had prayed for (i) the removal of defendants from the office of trustees, (ii) appointing new trustees and vesting (*sic.*) the trust property in them, (iii) directing accounts to be taken from the defendants of the income of the trust property and payment of the balance to the new trustees, (iv) any other reliefs to which the plaintiffs may be entitled to, (v) cost of the

suit.

5. The suit property is a plot of land measuring 2K-19L covered by Dag no.1223 of KP Patta no.620 (old)/ 410 (new) of Gauhati Town with two pucca buildings, 5 C.I. sheet houses under holdings No.4A, 4B, 4C and 4D of Ward No.6 of Gauhati Municipal. In the last town resettlement operation, the said land measuring 2K-19L is covered by new Dag no.447 and new KP Patta No.676 of Gauhati Sahar, Block No.2 with the Municipal holdings renumbered as Holding Nos.5, 6, 7, 8 and 9 of Ward No.19 of Guwahati Municipal Corporation, which is situated in Tokobari, Guwahati.

6. It appears from the records that the written statement was filed by the defendant nos.1 and 2 and the defendant nos.16, 17 and 18 had filed their written statement as well as their counter-claim. Against the said counter-claim, a written statement was filed by the plaintiffs.

7. In the counter-claim, the defendant nos.16, 17 and 18 had prayed for dismissal of the suit with compensatory cost and for a decree of cancelling the deed of trust dated 05.09.1970 and for declaration of the right, title and interest of the defendant nos.16, 17 and 18 over the land as well as for permanent injunction.

8. In the written statement filed against the counter-claim, amongst others, a plea was taken to the effect that the TS no.82/2006 filed by the defendant nos.16, 17 and 18 was dismissed by the Court of Munsiff No.1,

Kamrup (Metro), Guwahati under Order IX Rule 8 CPC and therefore, it was contended that the defendant nos.16, 17 and 18 were precluded from bringing a fresh suit in respect of the same cause of action and that the counter-claim has been filed by suppressing the fact of dismissal of the previous suit.

9. In the said proceedings, by filing petition no.257 of 2012 dated 10.08.2012, prayer was made for framing of a preliminary issue as to whether the counter-claim of the defendants was maintainable in the eye of law. As per the contents of the revision petition, the no-objection was filed to the said application by the defendant nos.16, 17 and 18.

10. By the impugned order, the learned trial Court on examining the witnesses available on record had examined the certified copy of the plaint of TS 319/2004 (old) corresponding to TS no.82/2006 (new), the written statement filed in the said suit as well as the order dated 10.05.2010 passed in the said suit and had expressed an opinion that the subject matter in the TS 82/2006 and the counter-claim of defendant nos.16, 17 and 18 both are same and the reliefs sought for are also substantially same. Moreover, it is also seen that the TS 82/2006 was dismissed by the learned Munsiff by order dated 10.05.2010 for evidence not being adduced in support of the plaintiff's side and accordingly the order was passed in view of the provision of Order IX rule 8 CPC. It may be mentioned that as per the contents of the impugned order the defendant nos.16, 17, 18 are not contesting the said application.

11. The learned trial Court took note of the provision of section 11 CPC and made the following observations:

"Now before deciding the question as to whether the order dated 19.05.09 passed by learned Munsiff passed in T.S. No.82 of 2006 will operate as a resjudicata for filing the present counter claim or not, I would like to refer the provision of section 11 of C.P.C. Section 11 of C.P.C. reads as follows:-

"11. Res judicata - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Thus, it is clear that to operate any judgment, or order of Court in a formerly instituted suit as res-judicata in a subsequent suit, the following conditions must be fulfilled:-

- 1) The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit either actually or constructively.*
- 2) The former suit must have been between the same parties or between parties under whom they or any of them claimed.*
- 3) The parties in the subsequent suit must have litigated under the same title in the former suit.*
- 4) The court which decided the former suit must have been competent to try the subsequent suit or the suit in which issue has been subsequently raised.*
- 5) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided in the former suit.*

Thus, after going through the order dated 19.05.09 passed by learned Munsiff in T.S. No.82/06, it is seen that the issues in the suit were not finally heard and decided by the learned Munsiff. To bar a second suit on the ground of resjudicata, the issues raised in the subsequent suit must be heard and finally decided in the formerly instituted suit. Here the order dated 19.05.2009 was passed by learned Munsiff in T.S. No.82/06 under Order 9 Rule 8 C.P.C. Hence, the issues in the said suit were not finally heard and decided by the learned Munsiff which are also raised in the present counter claim. It was held in the case law, Gujarat Electricity Board -Vs-Saurashtra Chemicals; reported in AJK 2004 Guj 82, that dismissal of a suit under Order 9 Rule 8 of C.P.C. cannot operate as a resjudicata to bring a subsequent suit on the same

matter.”

12. From the above it appears that the learned trial Court proceeded in the matter by considering the provisions of section 11 CPC and formed an opinion that the previous suit i.e. TS 82 of 2006 was not finally heard and decided by the learned Munsiff. However, the learned trial Court failed to take into consideration the provision of Order IX Rule 9 CPC which is quoted herein below:

Order IX, Rule 9 of the Code states that, if the plaintiff elucidates a "sufficient cause" that prevented him from appearing before the court, then the court may set aside the order passed by it under Order IX, Rule 8 of the Code.

13. It is further observed from the impugned order that the categorical finding of the learned trial Court was the subject matter in the previous as well as the present suit where same reliefs were sought for and that the suit and counter-claim were filed between the same parties.

14. It would be relevant to state that as per the provision of sub-rule 2 of Rule 6-A of Order VIII CPC provides that the counter-claim shall have the same effect as the cross suit so as to enable the Court to pronounce the final judgment in the same suit both on the original claim and the counter-claim. Therefore, although the nomenclature of the claim made by a defendant in a suit is referred to as a counter-claim but it has the same effect of being a cross-suit and that as per the provision of sub-rule 4 of Rule 6A of CPC, it is provided that the counter-claim shall be treated as a plaint and governed by the rules applicable to the plaints.

15. In order to arrive at the decisions, the learned trial Court had placed reliance on the case of *Gujarat Electricity Board Vs. Saurashtra Chemicals*, reported in *AJK 2004 Guj 82*. The said citation is available at *AIR 2004 Gujarat 83*. As per the facts of the said judgment, the suit of the respondents in the said case was decreed by holding that the respondents as plaintiffs was entitled to recover the amount of money mentioned therein from the defendants with interest. In the appeal preferred against the said decree contention was raised that there was a previously instituted suit and therefore, it was contented that the present suit was barred in view of provision of Order II, Rule 2 CPC as well as Order IX, Rule 9 CPC. It would suffice to mention that the second suit was held by the Gujarat High Court to be not maintainable in view of provisions of Order II Rule 2 and Order IX Rule 9 CPC and accordingly, the decree passed in the subsequent suit was set aside and quashed.

16. In light of the said finding as recorded in the case of *Gujarat Electricity Board (supra)*, we are unable to appreciate the finding of the learned trial Court that the dismissal of the suit under Order IX Rule 8 CPC would not operate as a *res-judicata* to bring subsequent suit in the said matter.

17. Therefore, the legal premise on the basis of which the impugned order dated 08.01.2013 is structured is found to be in erroneous appreciation of the judgment cited i.e. *Gujarat Electricity Board (supra)* and in view of the provisions of Order IX, Rule 9 CPC. Hence, the Court is inclined to hold that the impugned order dated 08.01.2013 passed by the learned Additional District Judge No.2, Kamrup (Metro), Guwahati is not sustainable on facts and in law and therefore, the said order is hereby set aside and quashed.

18. The petition no.257/2012 dated 10.08.2012 is restored to the file of the said learned Court and the matter is remanded back to the Court of learned Additional District Judge No.2, Kamrup (Metro), Guwahati for a fresh adjudication of petition no.257/2012, dated 10.08.2012 by taking this order into consideration.

19. Nothing contained in the order shall be construed to be an observation on the merit of the suit, which has not been gone into.

20. Moreover, before parting with the records, the Court is inclined to observe that as per the mandate of Order VIII, Rule 6A CPC, the written statement can be treated separately from the counter claim, but may be tried together.

21. This application stands allowed to the extent as indicated above, leaving the parties to bear their own cost.

22. At this stage, the learned counsel for the applicant has submitted that an IA being IA(C) 3615/2022 has been filed in connection with this revision petition for impleadment. However, the said application is not on board. A photocopy of the said application has been produced by the learned counsel for the applicant. In the said petition, it is projected that some of the applicants therein claim to have entered into the concerned trust as trustees and therefore the prayer is to implead the applicants as petitioner nos.2, 3, 4 and 5 by striking out the names of the petitioner nos.2 and 3.

23. In light of the prayer made in the suit, the Court is of the considered opinion that if the said IA is allowed, it would run and operate contrary to the prayer made in the plaint. Although the said application is not on board, but on considering the photocopy of the said application which was produced by the learned counsel for the applicants, the said application stands closed with liberty to the applicants to renew the prayer before the learned trial Court, if so advised. Accordingly, the Registry shall treat the said IA(C) 3615/2022 as closed. Let a copy of the IA(C) 3615/2022 produced by the learned counsel for the applicants/ petitioners be returned.

24. Let the LCR be sent back.

25. Both sides who are represented by their learned counsel, shall appear before the Court of learned Additional District Judge No.2, Kamrup (M), Guwahati on 09.10.2023 by producing a certified copy of the order and await further instructions from the said learned Court.

JUDGE

Comparing Assistant