THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Revisional Jurisdiction)

DATED : 3rd October, 2020

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

CRP No.02 of 2017

Petitioner : Bishnu Maya Rai

versus

Respondents : Dr. Rameshwar Prasad and Others

Revision Petition under Section 115 read with Section 151 of the Code of Civil Procedure, 1908

Appearance

Mr. N. Rai, Senior Advocate with Ms. Susmita Gurung, Advocate for the Petitioner.

Mr. Sudhir Prasad and Mr. Kazi Sangay Thupden, Advocates for the Respondent No.1.

Mr. B. Sharma, Senior Advocate with Mr. Sajal Sharma, Advocate for the Respondents No.2 and 3.

Mr. Santosh Kumar Chettri, Government Advocate for the State-Respondents No.4 to 7.

Mr. K.T. Bhutia, Senior Advocate with Ms. Sunita Chettri, Advocate for the Respondent No.8.

None for Respondent No.9.

O R D E R

Meenakshi Madan Rai, J.

1. The learned Civil Judge, East Sikkim at Gangtok, by the impugned Order, dated 28.07.2016, in Title Suit No.12 of 2014 *(Dr. Rameshwar Prasad and Others vs. The Chief Secretary and Others)* was considering the two preliminary issues framed, *viz.*

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(i) Whether the Suit is barred by res judicata?

(ii) Whether the present Suit is barred by the provisions of Order II Rule 2 of the CPC in

view of Title Suit No.02 of 2010 having been finally decided?

The Court concluded that the Suit of the Respondents No.1, 2 and 3 herein was neither barred by *res judicata* nor Order II Rule 2 of the Code of Civil Procedure, 1908 (for short, "CPC") for reasons enumerated in the impugned order. Aggrieved thereof the Petitioner assails the Order.

2.(i) It is the Petitioner's case that the Respondents No.1, 2 and 3 as Plaintiffs had filed Title Suit No.15 of 2008 (later renumbered as Title Suit No.02 of 2010) seeking Declaration, Cancellation/quashing of documents, Injunction and Consequential reliefs *inter alia* against the Petitioner herein, who was the Defendant No.4 in the said Title Suit. The Title Suit was dismissed by the Court of the learned District Judge, Special Division II, East Sikkim, at Gangtok vide its Judgment dated 30.03.2011 and an Appeal was preferred before this Court. By its Judgment dated 30.06.2011, in Regular First Appeal No.02 of 2011, the Judgment of the learned trial Court was upheld by this Court. Dissatisfied thereof, the Respondents No.1, 2 and 3 filed a Special Leave Petition before the Hon'ble Supreme Court being Special Leave to Appeal (Civil) No.24765/2011 which was dismissed in *limine* vide its Order dated 06.02.2012.

(ii) After the dismissal of the previous Suit, the Respondents No.1, 2 and 3 again filed a Suit for Declaration, Cancellation of documents, Injunction and other reliefs *inter alia* against the Petitioner, i.e. Title Suit No.15 of 2012 which was later renumbered as Title Suit No.12 of 2014. Consequent thereto the Petitioner herein filed an application requesting the learned trial

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Court to frame preliminary issues on the question of maintainability of the present Suit, accordingly the two preliminary issues *supra* were framed vide Order dated 24.06.2013 and subsequently the impugned Order pronounced.

(iii) Before this Court, learned Senior Counsel for the Petitioner submitted that the Title Suit No.12 of 2014 that has been filed before the learned trial Court by the Respondents No.1, 2 and 3, is in fact old wine in new bottles as it raises the same issues that have already been decided in the Title Suit No.02 of 2010 and upheld right up to the Hon'ble Supreme Court of India. That, the Respondents No.1, 2 and 3 have attempted to confuse the learned trial Court with regard to the issues involved by enumerating several Schedules in the Plaint as properties in dispute but have failed to pinpoint as to what exactly is the issue in dispute. This is in view of the fact that they are well aware that the matter was fully and finally adjudicated upon previously and no further issues persist. That, the landed property detailed in Schedule "A" of the previous Suit i.e. Title Suit No.02 of 2010 being Plot No.882 is the same as reflected in Schedule "C" in the new Suit i.e. Title Suit No.12 of 2014. That, this plot number is not even relevant as the plot of land allotted to the Petitioner was from Plot No.881 and it has conclusively been found that the said plot of land belongs to the Government, who had the option of allotting it according to the prevailing rules and regulations. That, any construction made by the Petitioner over and above the allotted site has been duly regularized by the Respondent No.5, while one such construction measuring an area of 222 square feet of land is pending regularization, however this construction too falls within Plot No.881 which as already

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decided indubitably belongs to the Government. That, the learned trial Court vide its impugned Order, while dismissing the preliminary objections raised by the Petitioner failed to appreciate that the parties and the subject matter in the previous Suit and the present Suit are identical. That, settled issues cannot be re-agitated by the Respondents No.1, 2 and 3 being barred by the provisions of Section 11 of the CPC. That, the Respondents No.1, 2 and 3 are not entitled to the reliefs claimed by them for the foregoing reasons and the impugned Order deserves to be set aside and quashed. No specific arguments were put forth by learned Senior Counsel with regard to Order II Rule 2 of the CPC.

3. Learned Counsel for the Respondent No.1 submitted that the instant matter does not pertain to Plot No.881 as sought to be made out by learned Senior Counsel for the Petitioner but in fact relates to Plot No.882 on which plot the Petitioner has now encroached. That, this is evident from the fact that as per the Allotment Order, dated 25.01.2008, an area measuring 520 square feet was allotted to her from Plot No.881, a Government plot. That, the issue at hand concerns Schedule "C" of the Plaint filed by the Plaintiffs (Respondents No.1, 2 and 3 herein) before the learned trial Court in Title Suit No.12 of 2014. That, a perusal of the Inspection Report shows that the Petitioner is also in occupation of a portion of Plot No.882 when her allotment admittedly was only from Plot No.881, measuring 520 square feet. In fact, the Inspection Report indicates that she is now in occupation of 1102.00 square feet and the excess land which is shown in the said record is encroached upon from Plot No.882 which belongs to the Respondents No.1, 2 and 3, hence, the necessity for filing Title Suit

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No.12 of 2014. That, the question of the Suit being barred by *res judicata* or the provisions of Order II Rule 2 of the CPC as rightly concluded by the learned trial Court does not arise since the claim of the Respondents No.1, 2 and 3 in the Title Suit No.12 of 2014 pertains to encroachment of Plot No.882 which is their ancestral property and not Government land. That, the cause of action herein is different from that of the previous Title Suit.

4. Learned Senior Counsel for the Respondents No.2 and 3 endorsed and relied upon the submissions made by the Respondent No.1 and submitted that the encroachment made by the Petitioner on Plot No.882 which belongs to the Respondents No.1, 2 and 3 is to be adjudicated upon and that the instant matter is not concerned with Plot No.881.

5. The State-Respondents No.4 to 7 had no submissions to make except to contend that the documents on record would indicate their stand. That, Plot No.881 has been found to be Government land from where the Petitioner had been allotted the land.

6. Learned Senior Counsel appearing for Respondent No.8 submitted that the Inspection Report, dated 08.01.2013, is indicative of the fact that the Respondents No.1, 2 and 3 are now laying claim to Plots No.882 and 883 whereas initially their claim was confined to Plot No.881. That, the learned trial Court has only relied on the Inspection Report of the State-Respondents No.6 and 7 which cannot be taken at face value, therefore, the Respondents No.1, 2 and 3 herein have no case.

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7. Due consideration has been given by me to the rival contentions advanced by learned Counsel for the parties. I have

also carefully perused all documents placed before me including the impugned Order.

8. The learned trial Court, by the impugned Order, considered the two preliminary issues already extracted *supra* and on considering the submissions of learned Counsel for the parties as well as the documents furnished, observed *inter alia* that the Respondents No.1, 2 and 3 herein, although pitted against the same parties, the dispute did not concern the same plot of land i.e. Plot No. 881 and therefore concluded that the Suit was not barred either by *res judicata* or by Order II Rule 2 of the CPC as the subject matter in the instant Suit was different from the previous Suit.

9.(i) Having perused the pleadings and the documents placed before me, it appears that the parties in Title Suit No.15 of 2008 (renumbered as Title Suit No.02 of 2010) and Title Suit No.15 of 2012 (renumbered as Title Suit No.12 of 2014) were identical with the exception of the District Collector, East, who has been impleaded as Defendant No.4 in the fresh Suit i.e. Title Suit No.12 of 2014. It is evident that vide Allotment Order No.GOS/UD&HD/ 7(272)97-98/2173, dated 29.10.1999, an area measuring 40 feet x 30 feet was allotted to the Petitioner herein, by the Defendant No.2 (Respondent No.5 herein) at the Flour Mill Area, Tadong, East Sikkim. This allotment is not the subject matter of dispute and any further discussions on its fate is truncated here.

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(ii) Vide letter bearing No.38/77/3077/UD&HD, dated 25.01.2008, a site measuring 26 feet x 20 feet, equivalent to 520 square feet, was allotted to the Petitioner herein by the Respondent No.5 herein, from Plot No.881 at "Old Gangtok Bazaar" now "M.G. Marg," as described in Schedule "D" to the Plaint in the Title Suit

No.12 of 2014 and Schedule "B" to the Plaint in the old Suit (i.e. Title Suit No.02 of 2010). A dispute arose between the parties i.e. the Petitioner and the Respondents No.1, 2 and 3 regarding the ownership of the land from where the allotment was made, leading to the filing of Title Suit No.02 of 2010**.** The learned trial Court came to the finding that Plot No.881 belonged to the Government. The High Court upheld the Judgment while the Hon'ble Supreme Court dismissed the Special Leave Petition filed by the Respondents No.1, 2 and 3 herein. It is also not in dispute that Plot No.881 measures a total area of 9801 square feet from where the allotment was made to the Petitioner. However, the records of the Defendant No.2 in the Title Suit No.12 of 2014 (Respondent No.5 herein) reveal that on an inspection conducted by the representatives of the Respondents No.6 and 7 herein, the Petitioner was found to be in possession of 1102 square feet of land whereas the total area allotted to her was 829 square feet. It is on this count that conflicting claims are being raised by the opposing parties.

(iii) It is relevant to clarify here that after the initial allotment of 520 square feet was made to the Petitioner, an additional area of 190 square feet was allotted to her vide order of the Respondent No.5 herein, bearing number 38(77)/ 1043/UD&HD, dated 25.04.2011 thereby adding the allotment to a total area of 710 square feet. Later 119 square feet of unauthorized horizontal construction was also regularized by the Respondent No.5 herein, vide letter No.38(77)/UD&HD/1978, dated 30.05.2011, thus, the overall area allotted to the Petitioner measured 829 square feet. These facts are admitted by the Petitioner and can also be gleaned from the documents furnished before this Court. According to the

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Petitioner, a staircase on a piece of land measuring 222 square feet has been constructed by her, also in excess of the land allotted to her, which is pending regularization by the Government, and this admitted unauthorized construction, as per the Petitioner, falls on Plot No.881 ("*Sarkar*"). The Respondents No.1, 2 and 3, for their part, contend that it is not merely 222 square feet of land that she has encroached upon as the Inspection Report clearly indicates that she is in possession of 1102 square feet of land and the encroachment is not confined to Plot No.881 as attempted to be made out by the Petitioner but is from Plot No.882 which belongs to the Respondents No.1, 2 and 3.

10. On due consideration of the rival stands it thus emerges that the dispute in the fresh Title Suit (i.e. Title Suit No.12 of 2014) pertains to the alleged encroachment made by the Petitioner allegedly on Plot No.882 and is not confined to her admitted encroachment on Plot No.881, although I have to remark here that nebulous drafting on the part of the Plaintiffs (Respondents No.1, 2 and 3 herein) in the Title Suit No.12 of 2014 has confounded the matter. In view of the above flagged circumstances, as correctly held by the learned trial Court, it is clear that neither the Suit is barred by *res judicata* nor is it barred by Order II Rule 2 of the CPC.

11. Section 11 of the CPC *inter alia* provides that 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

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finally decided by such Court. Order II Rule 2 of the CPC provides that every Suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action but a Plaintiff may relinquish any portion of his claim in order to bring the Suit within the jurisdiction of any Suit. Where the Plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

12. It is pertinent to recapitulate here that the learned trial Court in its Judgment in Title Suit No.02 of 2010, has observed *inter alia* that Plot No.882 was not relevant for that case. It is evident that the entire Suit of the parties in Title Suit No.02 of 2010 pivoted around the ownership of Plot No.881 which ultimately was found to be recorded in the name of "*Sarkar*" (Government). Neither was the ownership of Plot No.882 adjudicated upon nor can it be said that the Respondents No.1, 2 and 3 herein had, at any point of time, relinquished their claims over any other plot of land which was not the subject matter of the old Suit (i.e. Title Suit No.02 of 2010). As already noticed no specific arguments were placed before this Court with regard to Order II Rule 2 of the CPC by the Petitioner besides the averments also raises no claim of the Respondents No.1, 2 and 3 having relinquished any portion of their claim in order to bring the Suit within the jurisdiction of any Court. No averment or argument has been advanced with regard to the Respondents No.1, 2 and 3 having omitted to sue in respect of any portion of their claim or their intentional relinquishment of any portion of their claim. The objective of Order II Rule 2 of the CPC is based on the principle that the Defendants should not be twice

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vexed for one and the same cause, thereby restraining the Plaintiffs from dividing their claims and the remedies thereof. For the Rule to be invoked two conditions must be satisfied *viz.* the previous Suit and the fresh Suit must arise out of the same cause of action and they must also be between the same parties. However, the Rule does not preclude a second Suit based on a distinct and separate cause of action. Merely because the parties to the fresh litigation are the ones who were involved in a previous litigation it cannot be concluded that the matter is *res judicata* nor does it mean that the Respondents No.1, 2 and 3 had relinquished any of their claims to any other landed property. The requirements of the provisions of Law *supra* have to be fulfilled in order for it to apply to the Title Suit No.12 of 2014 which is not so in the instant case, as already discussed.

13. All parties to the Suit are required to go into trial and establish their divergent claims considering that a new plot of land is in dispute and the *lis* cannot be adjudicated upon fully and finally without examining witnesses and documents which the parties may seek to rely upon during the course of trial to establish their opposing claims.

14. Hence, I find that, no reason whatsoever warrants any interference in the impugned Order of the learned trial Court. The Revision Petition thus stands dismissed and disposed of. Pending applications, if any, also stand disposed of.

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15. Considering that the Title Suit pertains to the year "2012," the learned trial Court shall make all efforts to dispose of this matter within six months and no later, from the date of appearance of the parties before it.

16. The learned trial Court shall proceed in the matter as per Law and conclude it accordingly, unencumbered and unprejudiced by the observations in this Order, which are, in no manner, to be construed as findings on the merits of the Suit.

17. Copy of this Order be forwarded to the learned trial Court forthwith, for information and compliance, along with its records.

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(Meenakshi Madan Rai)
Judge
03.10.2020

ml Approved for reporting : **Yes**