

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

ITANAGAR PERMANENT BENCH NAHARLAGUN

CRP.22(AP)2017

Shri Kago Bungu alias Budhi Bungu
Son of Shri Budhi Nibo alias Kago
Nibo.
Village Siro
P.O. Ziro
District Lower Subansiri, (AP)
Contact No. 8730030049.

.... Revision Petitioner

-Versus-

Hibu Che Tulu clan, Hong village,
Represented by Shri Hibu Tallang
Son of late Hibu Sunka
Village Hong
P.O. Ziro
District Lower Subansiri,
Arunachal Pradesh.

..... Respondent

Advocates:

For the petitioners: Mr. Subu Koyang

For the respondents: Mr. K. Tama
Mr. K. Lasa
Mr. H. Jeram
Mr. T. Koyang
Mr. G. Kamduk

:::BEFORE:::

HON'BLE MR. JUSTICE AJIT BORTHAKUR

Date of hearing : 27.02.2018

Date of Judgment: 27.02.2018

JUDGMENT & ORDER (ORAL)

Heard Mr. S. Koyang, learned counsel appearing for the petitioner and Mr. K. Tama, learned counsel appearing for the respondent.

2. By this petition filed under Section 115 of the Code of Civil Procedure, 1908, the petitioner seeks to set aside and quash the impugned order, dated 02.06.2017, passed by the learned Civil Judge, Senior Division, Lower Subansiri District, Ziro, in Title Suit No. 43/2014.

3. The petitioner's case, in a nutshell, is that a Title Suit was instituted against one Shri Hibu Nado, a member of Hibu Che Tulu clan for a decree for declaration of title, possession and interest over the suit land in his favour vide T.S. No. 18/2014, which is pending in the court of learned Civil Judge, Senior Division, Lower Subansiri District, Ziro. The Secretary of the said clan lodged a complaint on 16.04.2012 with the Deputy Commissioner, Lower Subansiri District, Ziro (revenue court) for cancellation of land possession certificate (for short 'LPC') of the revision petitioner, which is pending trial. The secretary of the said clan has also instituted a T.S against the revision petitioner in the court of learned Civil Judge, Senior Division, Lower Subansiri District, Ziro seeking cancellation of the LPC of the revision petitioner which is pending trial vide T.S. No. 43/2014. The petitioner has contended that the learned Civil Judge, Senior Division, Ziro ought to have stayed the proceeding which was instituted subsequent to the T.S. No. 43/2014 invoking Section 10 of the Code of Civil Procedure, but declined to stay it. The petitioner has further contended that the parties to the said Title Suit did not even file the original documents as required under Order XIII of the Code of Civil Procedure and the trial has been going on the basis of photocopy of the documents which is secondary evidence. On the other hand, the petitioner has contended that the suit land is not identifiable as there is no schedule of the suit land described in the plaint and as such, title, possession and interest of unidentifiable suit land cannot be determined by the Court. According to the petitioner, although the issues are required to be filed after pleadings are

completed, the issues have been framed before filing of the written statements by the proforma defendants, in contravention of the laid down procedure for trial of a Civil Suit. Hence, it is prayed to set aside and quash the impugned order, dated 02.06.2017, passed in T.S. No. 43/14 and for a direction to the learned Court below to follow the prescribed procedure under Order XIII of the Code of Civil Procedure.

4. The respondent contested the above contentions of the petitioner by filing an affidavit-in-opposition averring that the LPC in the name of the petitioner was obtained fraudulently by forging the signatures of one Shri Hibu Taming (adjacent owner) and by representing the fact that other boundaries, are waste lands and therefore, he has filed a complaint case against the petitioner and his brother before the Court of learned Chief Judicial Magistrate, Ziro vide C.R. Case No. 01/2016 which is under investigation by the Police. According to the respondent, by filing T.S. No. 09/2012 which is renumbered as T.S. No. 18/2014, the petitioner has not prayed for a decree for interest and possession over the suit land. The respondent has averred that he filed T.S. No. 43/2014 in the Court of learned Civil Judge, Senior Division, Ziro praying for declaration of the two LPCs issued in favour of the petitioner and his brother namely, Kago Gambo as void and for cancellation of the same, that is on **different sets of facts** not similar to the cause of action for which T.S. 18/2014 is instituted. The respondent has averred that it is the judicial convention, practice and procedure that there can be proforma defendants in a suit, who are named as a matter of formality, who typically has no direct responsibility for the harm alleged by the plaintiff and as such, the proforma defendant No. 1, the Deputy Commissioner, Ziro and proforma defendant No. 2, the DLSO from whose office the petitioner and his brother obtained the LPCs by forging the signature of one of the boundary owners namely, Shri Hibu Taming and by misrepresenting the fact that certain boundaries of the land covered by the LPCs are waste land or is without any owner. The respondent has admitted that on 02.06.2017, documentation and framing of issues were done before filing of the written statement by the proforma defendants, who are only formal parties not required to file a written statement. It is contended that the petitioner has misconceived of the law pertaining to admissibility of secondary evidence of documents, in terms of Section 65 (e) of the Evidence Act. According to the respondent, the causes of action involved in T.S. Nos 18/2014 & 43/2014 are distinctly different and therefore, the learned

court below has rejected the prayer to frame issue No. 8 of the petitioner/defendant No. 1. On the other hand, the respondent has stated that the relief claimed by him for a decree, declaring the LPCs as void, cannot be passed by the Revenue Officer as the Arunachal Pradesh (Land Settlement and Record) Act, 2000 does not provide any provision. Hence, it is prayed to dismiss the petition with cost.

5. The impugned order, dated 02.06.2017, passed in T.S. No. 43/2014 by the learned court below is extracted herein below-

“ 02.06.2017

ORDER

Plaintiff Is Represented By The Ld. Counsel Shri K. Tama. The defendant is represented by the Ld. Counsel Shri S. Koyang.

The Ld. Counsel for the defendant submits that the draft issues should be framed after filing of written statement of the defendant No. 3 and 4 and on draft issues submitted by the plaintiff. He submits that this case is hit by Sec-10 CPC as the Title Suit No. 18/14 is pending trial in this court for declaration of the title of the disputed land where the defendant No. 1 and 2 has obtained the LPC which is disputed question in TS-43/14.

The Ld. Counsel for the plaintiff submits that he has two issues in instant case to determine the case. He also submits that the defendant No. 3 and 4 are only proforma defendant.

Heard both the Ld. Counsels.

After hearing the submissions of both the counsels, I am of the opinion that the case is to be proceed further and this case can be determined without the appearance of the defendant No. 3 and 4 in my view.

In order to determine the point raised U/S-10 of CPC, I have carefully gone through the issues framed in TS-18/14. On going through the issues, I do not find any issues to cancel the LPC or whether the LPC was obtained by forging the signature of Shri Hibu Taming.

Therefore, I am of the view that the TS-43/14 and TS-18/14 are two different issues completely founded on different aspects. The TS-43/14 is for declaration of the LPC No. as LMZLPZLPCZ/177/2011 and LMZLPCZ/232/2011 as null and void and mandatory injunction for cancellation of the said LPC in the disputed land of Ts-18/14. The TS-18/14 is for declaration of the title favour of the plaintiff and the defendant is protecting the suit to defend the case in TS-18/14.

In the view above, the provision of Sec-10 CPC do not apply to TS-43/14 for simple reasons of pending of the case TS-18/14. Both the suits are for determination is on different issues.

Accordingly, the following issues are drafted as under-

- i) Whether the present suit is maintainable in its present form or not?**
- ii) Whether the defendant No. 1 and 2 obtained the LPC No. LMZLPZLPCZ/177/2011 and LMZLPCZ/232/2011 by prudently for forging the signature of Shri Hibu Taming or not?**

iii) **Whether the land measuring 2400 sq mtr of plaintiff is included in the said LPC of the defendant No. 1 measuring 2175 sq mtr or not?**

iv) **Whether the plaintiff has any other relief or not?**

The Ld. Counsel for the defendant submits to include the issue No. 8 submitted by him in this case.

I have carefully gone through the issues submitted by the Ld. Counsel for the defendant.

In my view, the issue No. 8 of the defendant is not relevant to decide this suit but it is an issue relating to the TS-18/14. The making of draft issue No. 8 submitted by the defendant as issue will rather attract the Sec-10 of CPC in my considered view.

Next date is fixed on 30th June, 2017 for filing of witnesses and submission of the deposition in affidavit of the plaintiff witnesses."

6. On perusal of the above impugned Order, it appears that the learned Court below held the opinion that Section 10 of the Code of Civil Procedure is not applicable to the T.S. No. 43/2014, inasmuch as the T.S. No. 18/14, is based on different set of facts and issues. The learned Court below also held the opinion that the draft issue No. 8, submitted by the petitioner/defendant, which relates to the issue as to whether some part of the suit land was purchased by the defendant No. 1 from Shri Punyo Tama and the remaining part of the suit land was inherited from his father, being not in issue in the T.S. No. 43/14, is not relevant and further, that as the said suit can be adjudicated in the absence of the proforma defendants No. 3 and 4, four issues were framed, based on the pleadings.

7. Section 10 of the Code of Civil Procedure provides that the court should stay the subsequent suit in which matter in issue is directly and substantially in issue in a previously instituted suit between the same parties or between the parties under whom they or anyone of them claimed litigating under the same title so as to prevent the court of concurrent jurisdiction from simultaneously trying two parallel suits and to prevent inconsistent finding in the matters in issue. Therefore, initiation of civil and criminal proceedings in regard to the same cause of action and facts cannot be a ground for stay of the civil suit.

8. Perusal of the records of T.S. No. 43/2014 reveals that it has been instituted by Hibu Che Tulu Clan, represented by Shri Hibu Tallang/ the respondent herein against the petitioner/defendant No.1 and his brother Shri Kago Gambo, the defendant No. 2 praying for a decree of declaration that

the two LPCs issued by the proforma defendant No. 3 in their favour were void/illegal and accordingly, to cancel the said two LPCs. On the other hand, by filing T.S.No. 09/2012 (renumbered as T.S. No. 18/2014), the petitioner/plaintiff has prayed for a decree declaring his title over the suit land against one Shri Hibu Nado, the defendant, who is not a party in the T.S. No. 43/2014. Thus, the subject matters in dispute in the said two suits are apparently not identical and parties litigating are also not same and therefore, Section 10 of the Code of Civil Procedure is not applicable to either of the said two suits.

9. So far the question of non-production of the original documents by the respondent/plaintiff is concerned at or before settlement of the issues as required under Order XIII of the Code of Civil Procedure and to determine admissibility of the documents are concerned, it is noticed that the petitioner/ defendant did not raise this question before the learned trial Court below. Here, it may be mentioned that Order XIII, Rule 1 of the Code of Civil Procedure requires the parties to produce all the original documents, copies of which have been given along with the plaint or the written statement, but when the secondary evidence has been admitted in evidence, without any objection, their admissibility cannot be questioned at a later stage. The record shows that the respondent/plaintiff has filed photocopy of the documents along with the plaint. It needs to be mentioned here that a document is no public document within the meaning of Section 74 of the Evidence Act, unless it is prepared by a public servant in the discharge of his official duty. In other words, to be public documents, it should be record of the act of a public officer or Court and other than those documents are 'private document' within the meaning of Section 75 of the Evidence Act. In the instant case, the respondent/plaintiff has sought for declaration and cancellation of the two LPCs issued by the proforma defendant No. 1, The Deputy Commissioner, Ziro, which are 'public documents' within the meaning Section 74 of the Evidence Act, the uncertified Xerox copy of which are produced along with the plaint and further, the petitioner/defendant in their written statement has not denied those documents. Therefore, option is still open even after settlement of the issues, to the respondent/plaintiff to call for the relevant original documents/records under the provisions of Order 11, Rules 14 and 16 of the Code of Civil Procedure.

10. Coming to the point of settlement of issues before written statements were filed by the proforma defendants No. 3 and 4, it needs to be mentioned that it is the duty of the Court, after reading the plaint and the written statements, if any, and after examination under Order X, Rule 2 of the Code of Civil Procedure and further, hearing the parties, to settle the issues for adjudication so as to arrive at a just decision in the suit. It is seen from the record that the main defendants No. 1 and No. 2 have filed their written statements. The proforma defendants No. 3 and 4, who are formal parties, have not contested the suit by filing written statements and consideration of the draft issues and thus, based on the pleadings of the plaintiff and the defendants No. 1 and 2, and hearing the learned counsel of both sides, the learned trial Court rightly framed the issues. The Court may before passing a decree even amend the issues or frame additional issues on such terms as it thinks fit for determining the matters in controversy under Order XIV, Rule 5 of the Code of Civil Procedure.

11. With regard to the non-joinder of necessary party as defendant in the suit, it is noticed that the plaintiff has joined the defendants against whom relief has been sought. It is the settled position that it is not necessary to join person as defendant against whom no relief is claimed by the plaintiff and in absence of whom the suit can effectively be adjudicated. Therefore, it cannot be said that non-joinder of the proforma defendant No. 3, as main defendant in the suit holds no ground as non-joinder of necessary party. The joinder or non-joinder of parties in a suit is always a question of facts to be considered by the learned trial Court.

12. Considered thus, this revisional Court does not find any justifiable reason in law to interfere in the impugned Order of the learned Court below and resultantly, the revision petition stands **dismissed**. No Cost.

Send back the LCRS along with a copy of this order.

JUDGE

