

(2023) 08 SIK CK 0027
In the Sikkim High Court
Case No : Writ Petition (C) No. 15 Of 2023

Shova Gurung

APPELLANT

Vs

Siddharth Raj Gurung & Ors.

RESPONDENT

Date of Decision : 07-08-2023

Acts Referred:

Evidence Act, 1872 — Section 138
Constitution Of India, 1950 — Article 227

Citation : (2023) 08 SIK CK 0027

Hon'ble Judges : Bhaskar Raj Pradhan, J

Bench : Single Bench

Advocate : B. Sharma, B.N. Sharma, Safal Sharma, Shreya Sharma, K. D. Bhutia, Subaksha Pradhan, Alex Basnet, Shakil Raj Karki

Final Decision : Dismissed

Judgement

Bhaskar Raj Pradhan, J

1. The plaintiff has filed Title Suit No. 02 of 2018 against Siddharth Raj Gurung-her nephew, Secretary, UD&HD, District Collector and Sub-Divisional Magistrate as defendants in the same order. It seeks a decree of confirming her possession of the suit premises; a declaration that defendant no.1 has no connection with Schedule 'B' premise and the premises shown in A to F of Annexure-7 and a decree restraining the defendant no.1 from entering and interfering with the possession of the plaintiff over Schedule 'B' premise.

2. The plaint reflects that most of her grievances are against the defendant no.1. The plaintiff did not assert that defendant nos. 2 to 4 were adverse parties. In fact reading paragraph 33 (A) of the plaint, three things are certain i.e. –

(i) that defendant nos.2 to 4 are performa defendants;

(ii) no prayers were sought for against the proforma defendants; and

(iii) that defendant nos. 2 to 4 had initiated proceedings to set right the record

however, the file remained pending because of pendency of the suit.

3. During the trial the plaintiff preferred an application seeking a direction upon the defendant no.1 to cross examine the witnesses of defendant nos. 3 and 4 first to be followed by cross-examination by the plaintiff. In the application it was pleaded that the defendants were contesting parties and as such cross-examination of the witness of defendant nos.3 and 4 has to be done by the defendant no.1 first as they were sailing in the same boat. It was also pointed out that witness Shri. D.B. Rasaily cited by defendant nos.3 and 4 earlier was cited as witness by defendant no.1 and when he was cited by defendant nos. 3 and 4 later, defendant no.1 dropped his name thus proving that there was collusion between the defendants.

4. The learned Trial Judge, Jorethang Sub-Division, South Sikkim vide impugned order dated 18.04.2023 rejected the application dated 23.03.2023 filed by the plaintiff on the reasons stated therein.

5. Section 138 of the Indian Evidence Act, 1872 provides:

"138. Order of examination.- witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witnesses testified on his examination-in-chief.

Direction of re-examination.-the re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

6. Section 138 makes it absolutely clear that the cross examination is done by an adverse party and not by anyone else.

7. The plaintiff while preferring the application before the learned Trial Judge nor in his pleadings while approaching this court under Article 227 of the Constitution of India has asserted anything with regard to the written statement filed by the defendant nos. 2 to 4. It has been stated at the bar that written statements have been filed separately by defendant no.1 and defendant no.2 and jointly by defendant nos. 3 and 4. The written statements have not been filed by the plaintiff in the present proceedings.

8. The pleadings in the plaint as stated above however does not support the plaintiff's case in the application that defendant nos. 3 and 4 are sailing in the same boat. It is the specific case in the plaint that defendant no. 3 and 4 are only proforma defendants and no prayers are sought for against them. In fact the plaint unequivocally pleads that the defendant nos. 2 to 4 have already initiated proceedings to set the record right vide letter dated 28.06.2017 which

remained pending due to the pendency of the suit.

9. Thus no ground has been made out by the plaintiff to exercise the power under Article 227 of the Constitution of India to interfere with the impugned order.

10. It is for the trial court in consideration of the facts and circumstances of the case to ensure justice is done and in that view of the matter decide on the sequence of examination of the witnesses and cross-examination thereof. Keeping in mind the provision of the law, if on a reading of the plaint and the written statements the trial court is of the view that the stand taken by any of the defendant nos.2, 3 and 4 is also adverse to the stand taken by the plaintiff it is open for the trial court to sequence the cross-examination of witnesses to ensure no party before it is prejudiced.

11. The writ petition is dismissed with no orders as to costs.