

IN THE COURT OF THE ADDITIONAL DISTRICT JUDGE
AIZAWL JUDICIAL DISTRICT : AIZAWL

P R E S E N T

Mrs. Helen Dawngliani
Addl.District & Sessions Judge

RFA No.12/2013
In Civil Suit No.19/2006

Smt. Darzami

W/o Ngura (L)

R/o Chanmari, Aizawl

..... Appellant

Versus

Sh.Lalrintluanga

S/o Rualkhuma(L)

R/o Champhai Vengthlang, Champhai

..... Respondent

Date of Hearing 28.2.2014 & 25.3.2014

Date of Judgment 28.3.2014

A P P E A R A N C E

For the Appellant Mr. Nelson Sailo Sr. Advocate
Ms.Dinari T.Azyu
Mr. Victor L Ralte

Ms. Vanhmingliani Advocates

For the Respondent

.....

Mr. W.Sam Joseph Advocate

J U D G M E N T & O R D E R

1. This appeal has been filed u/s 17(3) of the Mizoram Civil Courts Act, 2005 read with Order XLI CPC against the Judgment & Order dt.8.11.2012 passed by the Ld. Civil Judge-I, Aizawl District, Aizawl in Civil Suit No.19 of 2006.

2. Brief facts of the case :-

A. The appellant/plaintiff filed a suit against the respondent/defendant which was registered as Civil Suit No.19.2006. As per the plaint which was written in the form of an application, the appellant/plaintiff asserted that in the year 1997 the respondent took to her to one M Zakhuma who was willing to sell his land for a sum of Rs. 1 lac. After negotiation, the seller was willing to sell his land for a sum of Rs.80,000/-. After the deal was made, defendant stated to her that he also require a small plot for obtaining LSC and stated that since he did not have ready money the plaintiff shall pay the entire amount and that he will repay Rs.40,000 /-with interest @ Rs.400/-for every Rs.10000 and that since he urgently needed the LSC he will do all the office work regarding mutation etc. Accordingly, she purchased the land by sending the defendant to hand over the consideration to the seller. In good faith she left everything to the defendant. To the shock and surprise of the appellant 4 LSC's two in the name of the appellant and one each in the name of the respondent and his wife were issued whereas as per the verbal agreement she only agreed to slice

out a small portion of her land which was near the stream(Kawrkam) solely for the purpose of obtaining loan. But when the LSC's were issued, the appellant found that the best portion of the land which is the hilltop was in the name of the name of the defendant. When the daughter of the appellant approached the respondent the respondent made clear that he will neither give them money or the LSC. Having no other option, the appellant/plaintiff filed a complaint before the Subordinate District Council Court for a direction to the respondent/defendant to return the LSC's which he conveniently settled in his name besides his wife and the price for which, he failed to pay as was agreed upon. The said complaint which was written in the form of an application was treated as a plaint and registered as Civil Suit No.19/2006.

B. The respondent/defendant in his written statement, inter alia, has stated that he received Rs.40,000/- from the appellant/plaintiff for the price of the land belonging to Upa KM Zakhuma which was purchased on 8.1.1996. Accordingly, he paid Rs.80,000/- to Pu.KM Zakhuma for the price of the land. The said Rs.80,000/- include Rs.40,000/- which he received from the appellant/plaintiff. The land so purchased was divided into two parts but in the names of three persons. One part was in the name of the appellant as Darzami I and Darzami II. The other portion was in his name and the name of his wife. The respondent/defendant denied that he requested the appellant to slice out a portion of the said land in order to enable his wife to obtain a loan. He also denied that agreed to pay the appellant/plaintiff a sum of Rs.40000/- with interest @Rs.400/- per Rs.10,000/-. The respondent/defendant contended that in the month of March, 1996 in response to the demand made by the appellant/plaintiff, he supplied six truck trips of firewood at the cost of Rs.48,000/- to her daughter, out of which he received

only Rs.8000/- from the appellant/plaintiff leaving a balance of Rs.40000/-. The respondent/defendant also stated that the appellant/plaintiff constructed a road within the land of his wife. The respondent pray to dismiss the suit with a further paryer to pay him Rs.40,000/- as cost of the firewood and compensation for the damage sustained due to construction of road within the land of his wife.

3. On the basis of the pleadings the Ld. Trial court framed the following issues :-

- (i) Whether the suit is maintainable in its present form and style?
- (ii) Whether there is any cause of action in favour of the plaintiff and against the defendant ?
- (iii) Whether the suit is maintainable for non payment of requisite court fees?
- (iv) Whether the suit is barred by the principles of acquiescence, estoppels and delay?
- (v) Whether the suit is maintainable for non enclosure of documents ?
- (vi) Whether the plaintiff purchased land including the said land from Shri KM Zakhuma for a consideration of Rs.80,000/- and/or whether the said defendant contributed a sum of Rs.40,000/-
- (vii) Whether the plaintiff and the defendant agreed that a portion of the purchased land adjoining the drain shall be sliced out in favour of the defendant for a consideration of Rs.40,000/- with an interest @ Rs.400/- per Rs.10,000/- and whether the plaintiff entrusted the defendant to take necessary action for obtaining patta for the land?
- (viii) Whether the defendant violated his agreement with the plaintiff by getting two portions of the land settled in the name of his wife and himself i.e LSC No.AZL.677 of 1997 dated 27.5.1996 in favour of RTC Laltanpuui and LSC No.AZL.47 of 1997 dated 21.2.1997 in favour of R.Lalrintluanga and whether the defendant filed to make payment for the price of the land of the plaintiff. If so the plaintiff is entitled to the relief claimed if so, whether their agreement is liable

to be declared void and whether the plaintiff is liable to be declared as owner of the said land covered by two LSC's.

(ix) Whether the plaintiff is liable to pay Rs.40,000/- to the defendant?

(x) Whether the plaintiff is entitled to the reliefs claimed if so to what extent ?

4. Decision of the Ld. Trial Court :-

Issues no.1-6 were decided in favour of the appellant/plaintiff. Issue No.6 was decided against the appellant/plaintiff and it was held that the plaintiff did not purchase land from KM Zakhuma and that the defendant also did not contribute a sum of Rs.40,000/- only. Issues No. 7 & 8 were also decided against the appellant/plaintiff in view of the decision against Issue No.6. In respect of issue no.9, the claim of the defendant was rejected and it was held that the plaintiff is not liable to pay Rs.40,000/- to the defendant. Issue No.10 was also decided against the plaintiff.

5. Heard the Ld. Counsels and perused the record.

Mr.Nelson Sailo, Ld. Senior Advocate assisted by Mrs. Dinari T.Azyu, advocate appearing for the appellant/plaintiff while challenging the Judgment & Order dt.____ submitted that the impugned Judgment & Order is perverse, erroneous and contrary to the materials available on record. In this connection the Ld. Senior Counsel submitted that the respondent/defendant stated in his written statement that he received a sum of Rs.40,000/- from the appellant as price of the land, thereafter on 8.1.1996 he paid a total amount of Rs.80,000/- to Mr.KM Zakhuma for purchase of his land and that Rs.80,000/- was inclusive of Rs.40,000/- which he received from the appellant. On the other hand, the defendant deposed before the court that he purchased the land in question from Pu.KM Zakhuma for a sum of Rs.80,000/- which he paid from his own pocket. Thereafter, on the request of the plaintiff, he sold half the land to her for a sum of Rs.45,000 which he received in full from her. Similarly, DW No.3 deposed that the appellant/plaintiff

came to the house of the respondent/defendant and paid Rs.45,000/-. According to the Ld. Counsel in the midsts of serious contradictions between the pleadings and evidence of the respondent/defendant, the Ld. Trial Court ought not to have dismissed the suit. The Ld. Counsel further argued that all the witnesses appearing for the defendant are either related to him or his frequent guest. As such they are interested witnesses and their statements are not credible. The next submission of the Ld. Counsel is that the Ld. Trial court was bias, arbitrary and whimsical in not considering the clear evidence that in the year 2006 attempt was made within the family circle to settle the dispute of the parties by going to the disputed site at the instance of the respondent/defendant. That time the respondent/defendant proposed to settle the matter by offering a sum of Rs.40,000/- as price of the land without interest and that the appellant/plaintiff must hand over the LSC to him. However, no settlement could be reached as the proposal was not acceptable to the appellant/plaintiff. The Ld. Counsel argued that such vital evidence could not have been missed by the Ld. Trial Court had it appreciated the evidence in its proper perspective. The third argument raised by the Ld. Senior Counsel is that the alleged receipt of Rs.80,000/- nowhere indicates that it was the respondent/defendant's money. On the contrary it corroborates the stand of the appellant/plaintiff that she sent the defendant to Pu.KM Zakhuma with a sum of Rs.80,000/- as price of the land. Turning to the evidence of DW No.3/Thangluaia, the Ld.Counsel argued that the statement of the said witness have been clearly discredited in his cross examination. The Ld. Counsel elaborated by submitting that the said DW No.3 stated in his examination-in-chief that although he was invited by the respondent/defendant, he did not accompany him at the time of purchase of the land. But in his cross examination he stated that he was present when the alleged sale was transacted, however, subsequently he stated that he did not know the exact agreement and transaction between the appellant/plaintiff and the respondent/defendant. The Ld. Counsel

argued that in view of such inconsistencies in the evidence adduced by the defendant, the suit ought not to have been dismissed. Comparing the evidence adduced by the parties, the Ld. Senior Counsel submitted that the evidence adduced by the appellant/plaintiff is not only consistent but also harmonious. The Ld. Trial Court has clearly failed to appreciate the evidence in its correct perspective and as such the impugned Judgment & Order is liable to be set aside and quashed. In support of his submission the Ld. Counsel has placed reliance in the case of Teshy Shelly versus Tayum Ete decided by the honb'le Gauhati High Court in RFA No.1(AP) of 2004 vide Judgment & Order dt.22.3.2006.

On the other hand, Mr.W.Sam Joseph, the Id. Counsel for the respondent/defendant submitted that the appellant has not produced any document to show which portion of the land was purchased by her. In the absence of any document to prove her case it is difficult to believe the appellant's case and that the same is not probable. The Ld. Counsel further submitted that since the Village Council pass have been converted into settlement certificates the Revenue Department of the State government and wife of the defendant are necessary parties without which the case cannot be properly adjudicated. In this regard the Ld. Counsel argued that they have raised this point in the written statement at paragraph No.3. Accordingly, the issue whether the suit is liable to be dismissed for non-joinder of necessary party has to be added and this can be done as per Order XIV Rule 5 CPC if the same is necessary for determining the matters in controversy between the parties. The Ld. Counsel further submitted that the fact that the Revenue authorities issued one LSC each in the name of the respondent/defendant and his wife proves that the claim of the appellant/plaintiff has no basis. According to the Ld. Counsel if the appellant had an agreement with the defendant as alleged she should have approached the Revenue authorities for cancellation of the LSC's but the appellant/plaintiff did not do so. The next submission of the Ld. Counsel is that the settlement certificates in

question were issued in the year 1996/1997. But the appellant/plaintiff approached the court only in the year 2006 and as such her action is clearly hit by the doctrine of estoppels by acquiescence. Mr.W.Sam Joseph by referring to the cross examination of PW/Lalmangaihi submitted that it is proved that the respondent had supplied firewood to the school run by the appellant and that the appellant owe the respondent a sum of Rs.40,000/- as cost of firewood. The Ld. Counsel argued that the oral evidence and the documents on record clearly proves that the land in question was purchased by the respondent from Mr.KM Zakhuma and after his purchased, he sold half of the said land to the appellant for a sum of Rs.45,000/-. As such the appellant has no right to stake claim on the two settlement certificates in the name of the respondent and his wife. As the appellant collected the LSC no.47 of 1997 from the Revenue Department in the absence of the respondent and as the repeated requests of the respondent to return the said LSC failed, the respondent had to inform the Police. The said LSC No.AZL.47/1997 which is in the name of the defendant and in the custody of the Court has to be returned to the respondent. The Ld. Counsel contended that the inconsistencies highlighted by the appellant are not substantial inconsistencies which affects the very crux of the case. The Ld. Counsel strenuously argued that from the evidence and materials on record, the preponderance of probability clearly leans in favour of the respondent/defendant. The Id.Counsel therefore pray to dismiss the appeal with cost. The Ld. Counsel has placed reliance on the following cases:-

1. Sitaram Motilal Kalal versus Santanu Prasad Jaishanker Bhatt AIR 1966 SC 1697
2. Budhi Mahal Versus Gangadhar 46 cut LT 287

6. DISCUSSION, DECISION AND REASONS THEREOF :-

The main ground of challenge in this appeal is that the Ld.Trial Court committed serious error in dismissing the suit inspite of glaring inconsistency in the pleadings and evidence adduced by the respondent/defendant.

For better appreciation the statement made by the respondent/defendant in his written statement is reproduced :-

"13. With reference to the statement made in para 3(3) of the plaint, the defendant has denied that he received Rs.80,000/- from the plaintiff for payment made to Upa M.Zakhuma for the price of the said land and that on that day the plaintiff was not sick. He has reiterated that he never threatened the plaintiff.

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15. That the defendant states that he received Rs.40,000/- from the plaintiff for payment made to Pu.K.M Zakhuma on 8.1.1996 for the price of the land. He further states that he made payment of Rs.80,000/-(including he received Rs.40,000/- from the plaintiff) to Pu.K.M Zakhuma for the whole land. He also states that the land, which he bought from Pu.K.M Zakhuma was divided into two parts, one part was owned by Pi.Darzami and another part was owned by the defendant. The defendant had divided his part of land and LSC was made in the Revenue Department in his name and in his wife's name".

At this stage the statement of the respondent/defendant in his examination-in-chief may also be reproduced :

"1. Luangmual-a Pu.KM Zakhuma ram hi dt.8.1.1996 khan Rs.80,000/-(Cheng singriat) in ka lei a, hetia ka lei hian ram neitu Pu.KM Zakhuma hneah hian pawisa baa awm miah lovin keima pawisa ka hlan fel vek a. Hetih lai hian he ram hi VC Pass a ni. Hetianga VC Pass a nih lai hian plaintiff Darzami hneah hian ama'n In hmunah a it avangin lei then atan min dil a, tichuan a ram chanve chu Rs.45000/-(Cheng singli sangnga) in ka hnen atangin a lei chhawng veleh a ni. Pawisa pawh hi a zavaiin min pe nghal vek bawk. Hetianga kan inlei sak lai hian ramri pawh mumal takin kan then nghal vek a ni." (On 8.1.1996 I purchased a plot of land located

at Luangmual from Pu.KM Zakhuma for a sum of Rs.80,000/- and on the said date, I paid the full consideration to the land owner Pu.KM Zakhuma from my own money. At that time the land was under a VC Pass. While the said land was still under VC Pass, the plaintiff Darzami approached me and offered to buy half of the said land. Accordingly, I sold half of the said land to Pi.Darzami for a sum of Rs.45000/-. She paid the full consideration to me. On and at the time of the said purchase we clearly demarcated our respective boundary/area.)

His said statement was not falsified during cross examination but he stated – *“I received a sum of Rs.5000/- from the plaintiff with regard to the purchase of the landed property”*

On his re-examination, the respondent/defendant further stated –

“ The deal regarding purchase of land at the first instance was purely between myself and Pu.KM Zakhuma and during this time the plaintiff has no personal knowledge about the purchase of land by me from KM Zakhuma at all.

The land which the plaintiff had purchased was my land.

After I purchased the land from Mr.KM Zakhuma at a sum of Rs.80000/-, the plaintiff purchased half of the land at a sum of Rs.45000/- from me”.

7. Pleadings as per Order VI Rule 1 CPC is plaint or written statement. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. Variance between pleadings and proof is impermissible. In the case of **Kishore versus Chaltibai** AIR 1959 SC 504 the honb'le Apex Court has held that defendant also cannot set up a case which is different from one pleaded in the written statement. Accordingly, Court cannot look into evidence with respect to the fact not pleaded.

8. However, it is also a settled position of law that pleadings should receive a liberal construction and no pedantic approach should be adopted to defeat justice on technicalities. Strict rule of pleading is inapplicable where the point of difference is not wholly inconsistent with a case pleaded and no prejudice is caused to the party.

8. In the case at hand, upon examination of the written statement and the evidence of record, it can be well understood that the plea and evidence are clearly inconsistent. As per the pleadings, the respondent/defendant purchased the plot of land from Mr.KM Zakhuma for a sum of Rs.80,000/- including a sum of Rs.40,000/- given to him by the appellant/plaintiff for the said land. On the contrary, in the evidence of the defendant in particular and the evidence of the other defendant witnesses in general, they have deposed that the defendant purchased the land for Rs.80,000/- from Mr.KM Zakhuma which he paid from his own money. Later, on being approached by the appellant/plaintiff he sold half of the said land to her for a sum of Rs.45,000/- which according to the defendant he received in full. Therefore with such clear contradictions between the pleadings and the evidence there is no reason for the appellant/plaintiff to know the case of the defendant.

9. Evidence can be given only on a plea properly raised and not in contradiction of the plea. It is well settled that oral evidence cannot substitute pleadings and where a party failed to set up a case in his pleadings, he is debarred from leading evidence in its support at the stage of trial. Variance between pleadings and proof is not permissible. It is trite to say that a party is expected and is bound to prove the case as alleged by him and as covered by the issues framed.

10. On a reading of the issues framed by the Ld. Trial Court, it is noticed that with regard to the plea raised by the

respondent/defendant Issue no.VI i.e Whether the plaintiff purchased land including the said land from Shri KM Zakhuma for a consideration of Rs.80,000/- and/or whether the said defendant contributed a sum of Rs.40,000/-? was framed. But contrary to the said issue the respondent/defendant lead evidence to the effect that he purchased the land for Rs.80,000/- from his own money and later sold half of it to the appellant/plaintiff for a sum of Rs.45,000/-. This evidence is clearly beyond the issue framed and inconsistent with the pleaded case of the defendant. It can neither be interpreted as an elaboration of any of the issues framed. Further the said inconsistency has also prejudiced the appellant/plaintiff because as per the written statement she contributed Rs.40000/- for purchase of the landed property in question from Mr.KM Zakhuma. But from the evidence of the defendant she bought a portion of the land from the defendant. Accordingly, due to the said inconsistency it is not clear from whom the appellant/plaintiff bought the land which is the very crux of the dispute. Such evidence is a clear departure from the plea. As such, it cannot but be said that the inconsistency has caused prejudice to the appellant/plaintiff.

11. The honb'le Apex Court in the case of **Vinod Kumar versus Surjit Kaur** reported in **AIR 1987 SC 2179** while dismissing the appeal filed by the defendant has held –

In the written statement, the appellant has averted as follows:-

"The demised premises were taken by the answering respondent from the petitioner for the purposes of his residence and for running his clinic therein The answering re- spondent is having his residence and clinic in the premises in dispute and is using the same for the said purposes, as such."

However, when the appellant entered the witness box, he gave up the case set out in the written statement and pro- pounded a different case that the hall had been taken on lease only for non-residential purposes. The perceptible manner in which the appellant had shifted his defence has escaped the notice and consideration of the Statutory Au- thorities. Both the Authorities have failed to bear in mind that the

pleadings of the parties from(form) the foundation of their case and it is not open to them to give up the case set out in the pleadings and propound a new and different case.”

11. Considering the nature of inconsistency between the pleadings and evidence of the defendant in the instant case, I am of the view that the variance is not minor inconsistency. As such, in the absence of any pleadings, the evidence adduced by the defendant/respondent cannot be looked into. On the other hand, the appellant/plaintiff led evidence which is consistent with her pleadings and there was nothing from her evidence which could have taken the defendant by surprise. It appears that this aspect of the matter was overlooked by the Id.trial court who proceeded to discuss the oral evidence alone without keeping in mind the pleaded case of the respective parties.

12. It has been argued by the Ld. Counsel for the respondent/defendant that the Government of Mizoram, Land Revenue & Settlement Department who issued the settlement certificates is necessary party and that though at para 3 of their written statement they have raised the plea that the suit is liable to be dismissed for non-joinder/misjoinder of parties, no issue was framed. According to the Ld. Counsel cancellation of the settlement certificates of the respondent/defendant and his wife cannot be done without impleading the Revenue Department and the wife of the respondent as party to the suit for which the issue “*Whether the suit is bad for non-joinder of necessary parties*” is to be added.

13. _ Order XLI Rule 23&23 A CPC remand of cases by the appellate Court. A reading of the said provision of law as well as interpretataions given by the various honb’le high Courts and the honb’le Apex Court shows that the power to remand under Order XLI Rule 23 and 23A CPC has to be exercised sparingly since public policy is that a litigation should be concluded finally as far as possible.

15. The prayer of the appellant/plaintiff, amongst others, is cancellation of LSC No.AZL.677/1996 issued in the name of the defendant's wife and LSC No.AZL.47/1997 issued in the name of the respondent/defendant and for declaring the plaintiff/appellant as the rightful owner.

16. Necessary party is one without whom no order can be made effectively. The test for determining the effectiveness of a decree is whether the decree can be executed within the presence of the party in question as regards the property sought to be decreed in favour of the plaintiff.

In the instant case, the wife of the defendant has not been made a party to the suit. Relief sought for in the plaint affected her right because cancellation of a settlement certificate in her name was sought for. It is therefore necessary that she should be part of the proceeding in order to have her say. Further no effective decree could have been passed in her absence since the settlement certificate in question is in her name.

17. For the reasons indicated in the foregoing paragraphs, the impugned Judgment & Order dt.8.11.2012 is set aside and quashed. The matter is remanded back to the Ld. Trial Court who shall implead wife of the defendant as defendant No.2. The Ld. Trial Court shall proceed from the stage of filing written statement by the newly impleaded defendant and afford opportunity to lead evidence and/or cross examine any of the witnesses already examined. The Ld. Trial Court upon receipt of this judgment & order alongwith the case record shall issue notice to the newly impleaded defendant. Parties will appear before the Ld. Trial court on 22.4.2014.

19. Before parting it may be added that the decisions relied on by the Ld. Counsels are not discussed since the manner of disposal does not involve the subject matter of the said decisions which are on preponderance of probability and admission of documents.

20. Send back the case record of the Ld. Trial Court to the Court of Civil Judge-IV, Aizawl ie Mr.Vincent Lalrokima. It is expected that the Ld.Trial Court shall make an endeavor for expeditious disposal.

20. With the above Order, the appeal stands disposed off.

(HELEN DAWNGLIANI)
Addl.District & Sessions Judge
Aizawl Judicial District : Aizawl

6. POINT(S) FOR DETERMINATION :-

- (i) Whether the impugned judgment & order is liable to be set aside and quashed for perversity ?
- (ii) Whether the evidence adduced by the respondent/defendant is admissible in view of its inconsistency with the pleadings ?
- (iii)

The honb'le Apex Court in the case of **Ram Sarup Gupta versus Bishun Narain** reported in **AIR 1987 SC 1242** has held that once

it is found that inspite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.

Presuming for a while that the inconsistency is not fatal, doubt arises as to why the respondent/defendant could wait for long 10 years to get his settlement certificate from the appellant/plaintiff. The land was purchased in the year 1996, Settlement certificates were issued in the early part of the year 1997 but the respondent/defendant approached the Police only in the year 2006 to get his settlement certificate from the appellant/plaintiff. It is rather strange that a man who stand to loose his landed property, which according to him, was purchased from his hard earned money could wait for nearly 10 years even to merely take possession of the settlement certificate not to speak of acting upon the said land.