

# THE HIGH COURT OF SIKKIM: GANGTOK

(Civil Appellate Jurisdiction)

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**SINGLE BENCH: HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**

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## **R. F. A. No. 01 of 2021**

Ms. Dinku Khati,  
D/o Late Tek Bahadur Khati,  
R/o Utpal Nagar, Road No.4,  
Siliguri – 734003, P.O: Anchal,  
P. S: Pradhan Nagar, West Bengal  
at present C/o. Ms. Shanti Ramudamu,  
Near Tathangchen School,  
Upper Tathangchen, Gangtok,  
East Sikkim.

..... **Appellant**

### **Versus**

1. Smt. Kamal Kumari Subba,  
W/o Ashok Kumar Subba,  
R/o 31 A National Highway,  
Sisa Golai, Gangtok – 737101,  
P.O. Gangtok & P.S. Sadar,  
East Sikkim.
2. Shri Ashok Kumar Subba (Tsong),  
S/o Late Budh Bir Subba,  
R/o 31 A National Highway,  
Sisa Golai, Gangtok – 737101,  
P.O. Gangtok & P.S. Sadar,  
East Sikkim.

..... **Respondents**

**An appeal under Order XLI, Rules 1 and 2 of the Code of Civil Procedure, 1908.**

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### **Appearance:**

Mr. B. K. Gupta, Legal Aid Counsel for the Appellant.

Mr. Vivek Anand Basnett, Advocate for Respondent No.1

Ms. Sashi Rai, Advocate for Respondent No. 2.

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**Date of hearing** : **16.11.2021**  
**Date of judgment** : **20.12.2021**

## **J U D G M E N T**

### **Bhaskar Raj Pradhan, J.**

1. The present appeal has been filed by the appellant (plaintiff) assailing the impugned judgment dated 23.10.2020 passed in Money Suit No. 09/2016 and the decree thereon thereby awarding her Rs.4,30,000/- only to the plaintiff although she had claimed a sum of Rs.10,75,000/- towards the plaintiff's professional fees.

2. The plaint was filed in the year 2016 by the plaintiff against the two respondents who were defendant nos.1 and 2 respectively. The defendants were husband and wife. The plaintiff was hired by them as their lawyer.

3. According to the plaintiff the defendant no.1 had hired her services by signing the vakalatnama in her favour to conduct cases before the Debts Recovery Tribunal, Guwahati (*for short* DRT), the Gauhati High Court at Guwahati and the Debts Appellate Recovery Tribunal, Kolkata (*for short* DRAT). The defendant no.2 had been given the power of attorney by defendant no.1 to engage counsel to conduct the cases before the forums. The plaintiff asserted that, pursuant thereto, she appeared and conducted cases before the forums. However, despite conducting those cases on behalf of the defendants, no fees were paid to the plaintiff by the defendant no.1. The plaintiff made several requests but to no avail in spite of assurances. The

plaintiff continued appearing before the DRAT and even settled the matter out of Court with the bank on their request. When the plaintiff learnt that the defendant no.1 had instructed another counsel, she issued a legal notice dated 02.06.2014 demanding a sum of Rs.7,60,000/- upon the defendant no.1. In paragraph 20 of the plaint, the plaintiff asserted about the various dates she appeared before the forums, the professional services she rendered and the fees raised by her totalling to Rs.7,60,000/-.

**4.** In paragraph 21 the plaintiff asserted that besides the aforesaid amount she had also rendered other professional services which were not included in the legal notice totalling to Rs.3,15,000/-. It was thus her case that the plaintiff was entitled to a total of Rs.10,75,000/- as her professional fees and accordingly prayed for the relief.

**5.** The defendant no.1 filed her written statement. She stated that she had authorized and empowered the defendant no.2 to engage counsel to conduct the cases before the forums. As per her knowledge the case was being conducted by a learned senior counsel and the plaintiff was working as his junior and assisting him. The defendant no.1 also stated that the plaintiff was accompanying the defendant no. 2 wherever and whenever he used to move around and as such she was misled by the defendant no.2 regarding the matter before the Gauhati High Court. With regard to the specific averment about the plaintiff's appearances before the forums and the professional services

rendered as detailed in paragraph 20 and 21 of the plaint, the defendant no.1 made a vague denial putting the plaintiff to strict proof thereof. The defendant no.1 also alleged that the plaintiff was in collusion with defendant no.2 to extract money from the defendant no.1.

**6.** The defendant no.2 while objecting to the suit, substantially admitted the relevant assertions made by the plaintiff with regard to her engagement as a lawyer and the professional services rendered. He admitted that it was after the assurance of the defendants that the plaintiff started conducting cases before the forums. While replying to paragraph 20 of the plaint the defendant no.2 stated that Rs. 5000/- per day as legal fees besides accommodation had been agreed with the plaintiff. However, due to financial problems the defendant no.2 could not pay the travel charges, as well as make payment for her accommodation and legal fees. The defendant no.2 categorically admitted that he had carefully gone through the table at paragraph 20 of the plaint and confirmed that the plaintiff had in fact appeared and rendered her legal services as mentioned therein. With reference to the contents of paragraph 21 of the plaint, the defendant no.2 reiterated the same statement as he did in reply to paragraph 20 and admitted the claim.

**7.** The learned Trial Court framed three issues i.e., whether the defendant no. 1 is liable to pay a sum of Rs.10,75,000/- to

the plaintiff as a legal fees?; whether the suit was barred by limitation and what was the relief the plaintiff was entitled to.

**8.** The parties examined only themselves. The evidence on affidavits of the parties substantially reiterated the averments in their respective pleadings. During cross-examination the plaintiff clarified that although the power of attorney did not authorise the defendant no.2 to appoint her to represent defendant no.1 before the Gauhati High Court, she was subsequently appointed and also filed a vakalatnama. During cross-examination by the defendant no.2, the plaintiff admitted that she updated the defendant no.1 directly about the development of the case and further both the defendants used to accompany her on the dates of the case.

**9.** The defendant no.1 asserted that she had instituted the suit against the United Bank of India. She asserted that she had liquidated the loan amount to the bank by the sale of her property at Sisa Golai to one Bharat Basnett and the defendant no.2 is a witness to the transaction. She stated that she had not appointed the plaintiff to represent her but the defendant no.2 had by deceptively obtaining the power of attorney acted on her behalf.

**10.** During the cross-examination by the plaintiff, the defendant no.1 admitted that she was a party before the forums; that she was introduced to the plaintiff by the defendant no.2 in the year 2009 as an advocate; that she had not paid any legal

fees to the plaintiff; that she had filed a case in the DRT in the year 2012 and she had accompanied the defendant no.2 and the plaintiff to file the case; that the power of attorney was a registered power of attorney and that she used to accompany the senior counsel and Mr. B. C. Sharma to Guwahati for hearings; that she had signed vakalatnama (Exhibit-3); that defendant no.2 had not signed any vakalatnama for conducting the cases before the forums; that she had not filed any objection against the plaintiff for appearance before the DRT; that she had no idea that the plaintiff was appearing before the DRT for her case; and that she had received the legal notice from the plaintiff but she had not replied to the same nor paid the plaintiff for her professional charges.

**11.** The defendant no.2 asserted that although the 5½ storied building situated at Sisa Golai is in the name of defendant no.1, however, the same was purchased by him. He stated that the plaintiff had been introduced to his family in the year 2009 after which she had continuously helped him and his family including defendant no.1 in providing legal assistance. He asserted that although it was his decision to engage the plaintiff to conduct the cases in connection with his RCC building before the forums, the defendant no.1 had agreed and aware as well. He asserted that the defendant no.1 had already received Rs.1,61,00,000/- from the buyer for the sale of his property and as such it was the defendant no.2 who was liable to pay the plaintiff.

**12.** The defendant no.2 stated that the defendant no.1 had executed the power of attorney on 28.05.2012 to act on her behalf and accordingly he had engaged the plaintiff. Although he had the power of attorney, the vakalatnama was not signed by him as the defendant no.1 used to be present during the proceedings. Although the plaintiff had conducted the case before the forums but her legal fees could not be settled as the defendant no.1 had taken the entire amount.

**13.** The defendant no.2, in cross-examination, admitted that the plaintiff was present for every hearing before the forums. However, in some of the order sheets her name as well as the names of other counsel were not reflected; that the defendant no.1 had signed the vakalatnama in his presence engaging the plaintiff as counsel; that on 05.02.2013, 20.03.2013, 23.04.2013, 31.05.2013, 05.06.2013 and 30.07.2013 the plaintiff had appeared before the DRT but her appearance is not reflected in the order sheets; that the mentioning of the appearance of a learned counsel in the order sheets is in fact that of the plaintiff; that on 14.06.2013, 17.06.2013 and 21.06.2013 the plaintiff was present along with other counsel before DRT; that on 15.07.2013 the defendant no.1 along with learned senior counsel had boarded a flight to Guwahati and that the final argument before the DRT was conducted by the learned senior counsel along with the plaintiff; that the entire chamber work like drafting and research work used to be done by the

plaintiff; that the plaintiff had helped in arriving at the final settlement with the bank. He stated that since the entire amount from sale transaction pertaining to his house situated as Sisa Golai had been taken by defendant no.1 she is, as such liable to pay the fees of the plaintiff.

**14.** The judgment and decree passed by the learned Trial Court dated 29.10.2018 was set aside by this Court on 30.11.2019 and the matter remitted for disposal by pronouncing opinion on all issue according to law since it had non-suited the plaintiff solely on the ground of limitation. Thereafter, the learned Trial Court had passed the impugned judgment and decree by which out of the total amount claimed, an amount of Rs.4,30,000/- was decreed in favour of the plaintiff with a direction that defendant no.1 and 2 shall make the payments jointly and equally. The plaintiff is aggrieved by the non-grant of the remaining legal fees.

**15.** The learned Trial Court noted that the defendants had admitted that the plaintiff was engaged by them for rendering legal assistance and appearing before the forums. The learned Trial Court examined the claim of the plaintiff for her appearances as well as other professional services rendered as detailed in paragraph 20 and 21 of the plaint. The learned Trial Court disallowed various claims as there was no order sheets/documentary proof to evidence the plaintiff's appearance on 08.05.2012, 15.05.2012, 20.03.2013, 31.05.2013, 05.06.2013, 17.06.2013 and 30.07.2013. Further, the learned

Trial Court also disallowed various claims of the plaintiff for her other professional charges on various other grounds. Consequently, the plaintiff was granted an amount of Rs.4,30,000/- as her legal fees and her travel allowance.

**16.** It is fundamental that an allegation of collusion must be specifically averred with details and proved. Although it is apparent that the defendant no.2 admitted to the claim made by the plaintiff, the evidence led by the defendant no.1 does not clearly establish the collusion.

**17.** Mr. B. K. Gupta, learned counsel for the plaintiff took this Court through the pleadings as well as the evidence and submitted that the learned Trial Court should have granted the entire relief and not only a part of the claim. Mr. Vivek Anand Basnett, learned counsel for the defendant no.1 submitted that the plaintiff was not entitled to the reliefs prayed for. Ms. Sashi Rai, learned counsel for the defendant no.2 submitted that the direction of the learned Trial Court upon the defendant no.2 to pay half the decretal amount was not correct.

**18.** Despite the admission by the defendant no.2 the learned Trial Court, in its wisdom, chose to frame a specific issue as to whether the defendant no.1 is liable to pay a sum of Rs.10,75,000/- to the plaintiff as legal fees. Evidently the learned Trial Court took into consideration the entirety of the pleadings to frame the issue. Having done so, the learned Trial Court also examined specifically each of the claim made in paragraph 20

and 21 and chose to allow only those claims for which the plaintiff had proof. Considering the nature of the pleadings and the evidence this Court is of the firm opinion that the reasoning for disallowing some of the claims cannot be faulted although the defendant no.2 admitted it. When the plaintiff did not seek any relief against the defendant no.2 in spite of the assertion that she had been instructed to appear by both the defendants it was quite convenient for the defendant no.2 to admit to the entire claim of the plaintiff. The learned Trial Court correctly sought for proof for each of the claim and having not found it, disallowed part of it which according to her did not have proof.

**19.** It was the plaintiff's case that she had made several requests for payment of her legal fees but the defendant no.1 in spite of giving assurances did not pay her and assured that she would pay within a short period with a request to the plaintiff to continue representing her through defendant no.2. The defendant no.1 did not deny it specifically but put the plaintiff to strict proof. The defendant no.2 however, admitted the assertion of the plaintiff. He further pleaded that the defendants had decided that on settlement of the case, the legal fees would be paid. However, during the pendency of the case, the defendant no.1, without the consent of the defendant no.2, engaged another counsel resulting in the differences between the plaintiff and the defendant no.1. The learned Trial Court examined the issue of limitation and held that the claim made by the plaintiff in

paragraph 20 and 21 of the plaint is well within limitation. The defendants have not assailed this part of the impugned judgment.

**20.** The order sheets of the plaintiff's appearances before the DRT, the Gauhati High Court, DRAT were exhibited as Exhibit-P-1, P-2 and P-10 all collectively.

### **Debts Recovery Tribunal**

**21.** Exhibit-3 is the vakalatnama filed by the plaintiff before the DRT. It reflects the plaintiff's name as one of the advocates. Order dated 05.06.2012 (Exhibit-P-1 collectively) of the DRT reflects that the plaintiff had filed a vakalatnama dated 04.06.2012 along with the petition with a prayer for allowing the new set of counsel to represent the applicant. The order records that although the vakalatnama was taken on record the plaintiff was asked to obtain a no objection certificate from the previous counsel and submit it on the next date. The order dated 23.07.2012 records that the plaintiff had submitted the no objection certificate in compliance to the order dated 05.06.2012. The order dated 17.09.2012 and 18.03.2013 specifically records the plaintiff's appearances. Thereafter, the subsequent orders dated 05.02.2013, 20.03.2013 and 31.05.2013 passed by the Registrar do not reflect the appearance of the plaintiff before the Registrar but however reflects the appearance of a learned counsel for the plaintiff. Unless the contrary is proved the

marking of the presence of a learned counsel for the plaintiff before the Registrar on those days all subsequent to the filing of the vakalatnama dated 04.06.2012 would also reflect plaintiff's presence. Although the plaintiff claimed that she had appeared before the DRT on 14.05.2013 and accordingly, sought for her professional fees for Rs.25,000/- for that date the records reveal that she had appeared on 14.06.2013 for which she has not charged. Consequently, the plaintiff is also entitled to her professional fees over and above what has been granted by the learned Trial Court for her appearances and professional services on 20.03.2013, 23.04.2013, 31.05.2013, 14.06.2013, 30.07.2013 and 05.06.2013 which totals to Rs.1,50,000/-.

### **The Gauhati High Court**

**22.** In Exhibit-P-2 collectively which are orders of the Gauhati High Court in the writ petition filed by the defendant no.1, the name of the plaintiff appears as Advocate on Record for the petitioner/plaintiff. The claims made by the plaintiff for her professional services dated 30.06.2014, 01.10.2013, 06.10.2013-08.10.2013, 22.11.2013, 26.11.2013, 17.12.2013, 16.06.2014, 16.07.2014 and 18.07.2014 have been rightly rejected by the learned Trial Court as there is no proof.

**23.** Although the plaintiff has claimed for appearance on 03.09.2012 the order of the Gauhati High Court reflects that she had appeared on 03.09.2013 instead. As the plaintiff has not

charged for her appearance on 03.09.2013, this Court is of the opinion that her claim for Rs.25,000/- must be granted.

**24.** The plaintiff's claim for her appearances on 11.12.2013 and 12.12.2013 for Rs.20,000/- must be granted as the order dated 12.12.2013 passed by the Gauhati High Court does reflect her appearance.

**25.** The learned Trial Court has disallowed the plaintiff's claim for appearance before the Gauhati High Court on 26.11.2013. However, the order dated 09.09.2013 records that the matter was scheduled to be listed on 26.11.2013. Therefore, it may not be correct to disallow the plaintiff's claim for an amount of Rs.25,000/- for her appearance on 26.11.2013.

**26.** The learned Trial Court has disallowed the claim of the plaintiff for preparation of contempt petition and filing it before the Gauhati High Court on 17.12.2013 for an amount of Rs.25,000/- on the ground that there is no documentary proof. The learned Trial Court has also disallowed her further claim of Rs.20,000/- dated 06.01.2014 for filing of the contempt petition and FIR before the Gauhati High Court on the ground that it was not correct as the order of the Gauhati High Court reflected that it listed the contempt case along with the writ petition after the Bihu vacation. The order dated 06.01.2014 however, reflects that in fact a contempt case had been filed by the defendant no.1 and it was directed to be listed along with the writ petition after the

Bihu vacation. The plaintiff is thus entitled for her professional fees for the above dates totalling to Rs.45,000/-.

**27.** Consequently, the plaintiff is further entitled to an additional amount of Rs.1,15,000/- towards her professional services rendered before the Gauhati High Court.

### **Debts Recovery Appellate Tribunal**

**28.** Exhibit-4 is the vakalatnama filed before the DRAT which also reflects the name of the plaintiff as one of the advocates. The orders dated 30.06.2014, 16.07.2014 and 18.07.2014 of the DRAT reflects the plaintiff's absence. The order dated 18.07.2014 also reflects that Mr. Vivek Anand Basnett, learned counsel for the defendant no.1 had earlier filed an application for cancellation of the appointment of the plaintiff as the advocate for defendant no.1. It also reflects that the plaintiff who was then the advocate for the defendant no.1 had filed an application for rejection of Mr. Vivek Anand Basnett's application. The orders dated 13.03.2014, 27.03.2014 and 09.06.2014 do not record the appearance of the plaintiff. Exhibit-11, however, is a letter dated 04.03.2014 issued by the plaintiff to the United Bank of India stating that she had filed an appeal on 04.03.2014 before the DRAT and it would be mentioned on 05.03.2014 before the Chairperson for fixing a date of hearing. Thus, the plaintiff has been able to prove her appearance on 04.03.2014 and 05.03.2014 before the DRAT. The plaintiff is thus entitled to an

amount of Rs.23,334/-. The plaintiff's claim for appearance on 29.04.2014 for an amount of Rs.20,000/- should also be granted as the order records that both the parties were represented. The plaintiff's claim for her professional fees on 07.03.2014, 13.03.2014, 14.03.2014, 15.03.2014, 18.03.2014 and 27.03.2014 were rightly rejected. Consequently, the plaintiff is entitled to a further amount of Rs.43,334/- for her professional services rendered before the DRAT.

**29.** The learned Trial Court also came to a finding that although the plaintiff had claimed her legal fees only against the defendant no.1 but the evidence on record show that defendant no.2 was equally liable. Thus, the learned Trial Court directed that the defendant no. 1 and 2 each to pay half the decretal amount to the plaintiff within six months from the date of the judgment. Although no appeal has been filed by the defendant no.2 directing him to share the burden of the decree with the defendant no.1, Ms. Sashi Rai, learned counsel for the defendant no.2 submit that the defendant no.2 is aggrieved by the judgment to that extent as the plaintiff had not even sought the relief against the defendant no.2.

**30.** In ***Bachhaj Nahar vs. Nilima Mandal***<sup>1</sup> the Supreme Court held as under:

*“23. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief*

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<sup>1</sup> (2008) 17 SCC 491

*is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppels, acquiescence, non-joinder of causes of action or parties, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs. In a suit for recovery the possession of property 'A', court cannot grant possession of property 'B'. In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc."*

**31.** Thus, it is clear that defendant no.2 could not have been directed to pay half the decretal amount since neither the plaintiff had prayed for the relief nor was there an issue framed for the defendant no.2 to contest and defend. Accordingly, the direction of the learned Trial Court to the defendant no.2 to pay half the decretal amount is set aside.

**32.** The impugned judgment is liable to be modified to the above extent and the plaintiff is entitled to be paid a further amount of Rs.3,08,334/- for her professional services by the defendant no.1 which had been rejected by the learned Trial Court.

**33.** The appeal is partly allowed. The impugned judgment is modified to the above extent. The impugned decree is also modified and it is directed that the defendant no.1 shall pay an amount of Rs.7,38,334/- only to the plaintiff as her professional fees within a period of three months from the date of the judgment. Decree to be drawn accordingly.

- 34.** The parties shall bear their respective costs.
- 35.** A copy of this Judgment may be transmitted to the learned Trial Court, for information, along with its records.

**( Bhaskar Raj Pradhan )**  
**Judge**

Approved for reporting  
Internet

: **Yes/No**  
: **Yes/No**

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