

**RCA No. 20 OF 2009**

**Order Below Exh.-128**

1. The Ld. Advocate for the appellant has submitted that there was a talk between the parties for the compromise and for that both the parties have given their proposal of compromise at Exh. 117 & 121. The appellant has sold suit property for the expenses incurred by him to defend the case filed against husband of the respondent who was behind bar for the offence punishable U/s. 302 of C.P.C. Therefore, appellant is entitled to get set off the said expenses and the suit property. The appellant has sold 14 acre and 15 guntha land for the said expenses and therefore is entitled to get set off the said land. He has also submitted that right and liability are two side of the one point and the person has to discharge both the liability and right. He has also referred the cross-examination of Jagdishbhai Shantilal and others to drawn the attention with the fact with regard to sale of suit property for the expenses incurred by the appellant to defend the case of the husband of the respondent. He has also referred the provision of Order 41 Rule, 27 of C.P.C. and submitted that his case falls within purview of Order 27, Rule 1(b) of C.P.C. It is specifically provided in the said rule that for substantial cause the party permitted to adduce and produce additional evidence even at the Appellate Court. He has also relied on two judgments which will be discussed at the relevant time.
2. The Ld. Advocate for the respondent has strongly resisted the arguments advanced by the Ld. Advocate for the appellant and has further submitted that even before the Ld. Trial Court the

appellant was ready to give 11 acres land but thereafter, he has resile from his statement and now he wants to give only 2 acres of land by way of compromise which cannot be accepted to the respondent. Therefore, when there is no scope for the compromise between the parties, no permission can be granted to produce additional evidence for the compromise. He has also submitted that even when the appellant has not filed any counter claim before the Ld. Trial Court and has also not asked for the set off in the written statement then at the appellate stage the appellant cannot be permitted to produce additional evidence to get set off. He also referred the deposition of Mangalbai Hirabhai and has submitted even in the cross-examination, it is not on record that the appellant failed to prove that he has sold the suit property for the expenses incurred by him to defend the case of the husband of the appellant. He has also submitted that even in the cross-examination, it is not on record that he has sold only one land bearing survey No. 53. Therefore, there is no substance in the application of the appellant and the case of the appellant does not fall within purview of Order 41, Rule, 27 of C.P.C. and therefore, prayed to dismiss the application of the appellant.

3. First of all, it is important to note that present application has been submitted by the appellant to bring the record that the respondent has sold some property out of the suit property for the expenses incurred by him to defend the case of the husband of the appellant and that too for the compromise between the parties at the appellate stage. Here, it is true that both the parties at the appellate stage also tried for the compromise and for that both the parties has given their proposals. But ultimately, the respondent has not accepted the proposal of the

appellant and has submitted that he is not ready for the compromise as per the terms of the appellant and therefore, initiated for the final hearing of the appeal. Thereafter, present application has been submitted. Therefore, when the respondent is not ready and willing for the compromise then no question arise to adduce or produce any further additional evidence for the compromise. \

4. It is also important to note that finally the prayer of the appellant in the present application is to get set off on that land which has been sold by him for the expenses incurred by him to defend the case of the husband of the appellant. I have gone through the record of the Ld. Trial Court and particularly the written statement filed by the appellant i.e. original respondent and I found that the appellant has not asked for any set off of even he has not filed any counter suit before Ld. Trial Court. The provision of counter claim / counter suit is provided in Order 8, Rule 6A of C.P.C. It provides that :

**Order 8 Rule 6(A) Counter-claim by defendant :**

- (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

- (2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.
- (3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.
- (4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

As per above provision, the counter claim has to be submitted by the defendant before or after filing of the suit to before the defendant has delivered his defence or before the time limitation to deliver his defence has been expired. Here, as stated above, the appellant / defendant has not submitted any counter claim before Ld. Trial Court and therefore, at appellate stage the appellant is not entitle to ask in any counter claim or set off. Even the Ld. Advocate for the appellant has not shown to this Court that at the appellate stage also the appellant can file the counter claim or ask for any set off. Therefore, when there is no provision in law, the appellant is not entitle to get or ask for any set off.

5. The Ld. Advocate for the appellant has relied in the case of M. Laxmi and Co. Vs. Anant R. Deshpande reoprtd in 1973(1) SCC 37. In the said judgment, the Hon'ble Supreme Court of India has

held that “Subsequent events and additional material-The High Court ordinarily do not consider subsequent events in revision petition, but the court can look to subsequent events when the relief claimed originally has by reason of subsequent change of circumstances become inappropriate or where it is necessary to take notice of changed circumstances-If the court finds that the judgment of the court carried into fact because of change of circumstances the court can take notice of the same, to shorten the litigation and to reserve rights of both the parties and to subserve the ends of justice.”

Even, the Ld. Advocate for the appellant has also submitted that his case falls within purview of Order 41, Rule, 27 (1)(b) if any subsequent event is arisen then additional evidence can be permitted to produce. Here, the appellant has proposed for the compromise with the respondent and respondent has also submitted his proposal for the compromise. But the compromise could not be arrived at because of the terms and condition given by the appellant was not accepted to the respondent. Therefore, when the respondent do not want to accept the proposal of the appellant and he is not ready for the compromise then there is no question of production of any evidence for the compromise. Moreover, the event and circumstances which the appellant is tried to bring on record was already there. Even at the Ld Trial Court has no new facts or evidence is come on record. Moreover, the allegation of the appellant that he has sold some land out of the suit property to incurred expenses to defend the case of the husband of the respondent was also raised and pleaded before the Ld. Trial Court and appellant has also examined witness in that reference before Ld. Trial Court. Therefore, there is no change in the circumstance and therefore, this judgment is not helpful to the appellant.

6. He has also relied in the case of K. Venkataramiah Vs. A. Seetharama Reddy reported in 1963 AIR(SC) 1526. The said judgment is with regard to assigning the reason for allowing of dismissing the application to produce the additional evidence at the appellate stage. Therefore, when I am specifically assigning detailed reason then this judgment is not helpful to the appellant. Therefore, there is no substance in the application of the appellant and it deserves to be dismissed and therefore, I pass the following order.

**ORDER**

The application filed by the appellant vide Exh.-128 is hereby dismissed.

No order as to costs.

Pronounced and signed in the open court today on 7<sup>th</sup> May in the year of 2018.

**Place: Bharuch**  
**Date: 07/05/2018**

**(Hemantkumar Arvindray Dave)**  
**Additional District Judge**  
**Bharuch**  
**Code GJ00385**