
(2012) 07 CAL CK 0021

Calcutta High Court

Case No: F.A. No. 18 of 2007

R. Rebeiro @ Rubin
Reberio

APPELLANT

Vs

Monoj Lal Seal

RESPONDENT

Date of Decision: July 6, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 101, Order 21 Rule 21, Order 21 Rule 99, Order 7 Rule 3
- Specific Relief Act, 1963 - Section 34
- West Bengal Court Fees Act, 1970 - Section 10

Citation: (2013) 2 CHN 695

Hon'ble Judges: Tapan Kumar Dutt, J; Mrinal Kanti Chaudhuri, J

Bench: Division Bench

Advocate: Prasun Ranjan Gupta and Biswabrata Basu Mallick, for the Appellant; Mrinal Kanti Chatterjee and Sonali Mukhopadhyay, for the Respondent

Final Decision: Disposed Off

Judgement

Tapan Kumar Dutt, J.

This Court has heard the learned Advocates for the respective parties. The facts of the case, briefly, are as follows:

The plaintiff/appellant filed a suit against the defendants/respondents being Title Suit No. 474 of 1987 which was placed before the learned 9th Bench, City Civil Court at Calcutta.

2. The plaintiff/appellant prayed for a decree for declaration that the ex parte decree passed on 9.3.1986 in Ejectment Suit No. 1003 of 1985 was obtained by fraud by the defendant No. 1/respondent and the said ex parte decree should be declared as null and void.

3. The suit was contested by the defendant No. 1/respondent by filing a written statement denying the material allegations made in the plaint. It appears that the suit was filed on 13th March, 1987.
7. It is the plaintiffs case that on 25th April, 1987 the plaintiff was dispossessed from the property which was the subject-matter of the said Ejectment Suit No. 1003 of 1985 and, accordingly, on 26th April, 1996, the plaintiff filed an application for amendment of the plaint praying decree for recovery of possession in respect of the property which was the subject matter of the said Ejectment Suit No. 1003/1985.
5. It appears that the said amendment application was allowed by the learned Trial Court. The defendant No. 1 also filed an additional written statement. It appears from the arguments and/or submissions made by the learned Advocates for the respective parties that a portion of the first floor of Premises No. 102, Collin Street, Calcutta is in dispute.
6. The plaintiff/appellant is claiming tenancy under the landlords (Seals) in respect of such portion, and the landlords (Seals) are claiming to have obtained a decree against some other persons in respect of such portion and, according to the landlords (Seals), the plaintiff/appellant has no right and/or interest in respect of such portion which happens to be the subject-matter of Ejectment Suit No. 1003 of 1985.
7. However, the said suit came up for hearing and the learned Trial Court by the impugned judgment and decree dated 29th June, 2002 dismissed the said suit.
8. It will appear from the impugned judgment that the learned Trial Court framed the following nine issues:
- i) Has the plaintiff any cause of action for the suit?
 - ii) Is the suit maintainable in its present form?
 - iii) Is the suit bad for defect of parties?
 - iv) Is the suit hit by section 34 of the Specific Relief act?
 - v) Is the plaintiff a tenant under the defendants in respect of the suit premises, as contended by him?
 - vi) Has the plaintiff his alleged interest in and possession of the suit premises?
 - vii) Is the plaintiff entitled to obtain a decree for declarations as prayed for?
 - viii) What relief if any, is the plaintiff entitled to?
 - ix) Is the suit barred under the principles of res judicata?

9. But, the learned Trial Court decided the issue Nos. (i) to (iv) and then held that the other issues, that is, issue Nos. (v) to (ix) are left untouched in view of the findings made in respect of issue Nos. (i) to (iv).

10. The learned Trial Court found that the plaintiff/appellant has not put in sufficient Court fees after the amendment of the plaint, that is, after the inclusion of the prayer for recovery of possession. The learned Trial Court also found that the property in respect of which the plaintiff/appellant has prayed for recovery of possession has not been described properly in the plaint and it remains vague. The learned Trial Court further found that in view of the provisions of Order 21, Rules 99 and 101 CPC the suit is not maintainable. The learned Trial Court also came to the conclusion that the suit is barred by the law of limitation. Since the learned Trial Court refrained from deciding the issue Nos. (v) to (ix), it is not necessary for this Court to discuss the other merits or otherwise of the case at this stage.

11. The learned Advocate appearing on behalf of the plaintiff/appellant submitted that in view of section 10 of the West Bengal Court Fees Act, 1970, the learned Trial Court should have given an opportunity to the plaintiff/appellant to put in the deficit court fees but the suit could not have been dismissed on such ground.

12. Reading section 10 of 1970, it appears to this Court that there is substance in such submission. It may be recorded here that the learned Advocate appearing on behalf of the Seals, that is, the respondent Nos. 1 and 2 did not make any submission in reply to the submission made by the learned Advocate for the plaintiff/appellant in this regard.

13. The learned Advocate appearing on behalf of the plaintiff/appellant submitted by referring to Order 7, Rule 3 CPC that reading the plaint as a whole it would appear that the description given in the plaint was sufficient to identify the property in respect of which the prayer for recovery of possession was made. In paragraph 31(a), the plaintiff has mentioned that decree be passed for recovery of possession of the portion in respect of which the ex parte decree in Ejectment Suit No. 1003 of 1985 was passed.

14. He has also referred to prayer (b)(ii) of the plaint wherein a description of the property has been given. It may be noted here that no separate schedule in this regard has been mentioned in the plaint excepting the one that has already been given in the plaint when the plaint was initially filed.

15. The said learned Advocate submitted that reading the plaint as a whole indicates that the plaintiff wanted recovery of possession of the property which was the subject-matter of the said Ejectment Suit No. 1003 of 1985 and therefore there cannot be any confusion in this regard.

16. The said learned Advocate further submitted that in the additional written statement the defendants (Seals) did not raise any objection in this regard. It is true that it would have been better and proper if the plaintiff/appellant had described the property in respect

of which recovery of possession has been sought for separately in a separate schedule at the end of the plaint but by mere omission to do so the plaint should not be rejected and/or the suit should not be held to be not maintainable without giving an opportunity to the plaintiff/appellant to incorporate a separate schedule in this regard by way of amendment of the plaint.

17. It cannot be said from the facts and circumstances of the present case that one cannot get any idea whatsoever as to the description of the property and/or identity of the property in respect of which recovery of possession has been sought for by the plaintiff/appellant. But, as already noted above, it would have been proper for the plaintiff to describe such property in a separate schedule in the plaint.

18. The learned Trial Court has held that the plaintiff/appellant could not have filed the present suit by ignoring the provisions of Order 21, Rule 101 CPC.

19. The learned Advocate for the plaintiff/appellant submitted that since a prayer has been made for declaration of the decree passed in Ejectment Suit No. 1003 of 1985 as null and void, it being vitiated by fraud, the plaintiff/appellant was compelled to file the present suit.

20. In prayer b(ii), the plaintiff/appellant has made a prayer for recovery of possession of the property from which he has been dispossessed and such property happens to be the subject-matter of Ejectment Suit No. 1003 of 1985.

21. Before proceeding with the matter any further, it would be proper if the provisions of Order 21, Rules 99 and 101 CPC are adverted to.

22. The said two provisions of law are quoted below:

Order 21 Rule 99: Dispossession by decree-holder or purchaser.--Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

Order 21 Rule 101: Question to be determined.--All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application, and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

23. There is no dispute that the plaintiff/appellant was not a party in the said Ejectment Suit No. 1003 of 1985 and, thus, not the judgment-debtor in the decree passed in the said suit. There is also no dispute that the plaintiff/appellant has been dispossessed from the very same property, which was the subject-matter of the said Ejectment Suit No. 1003 of 1985. There is also no dispute that the plaintiff/appellant has sought for recovery of possession of the very same property which was the subject-matter of the said Ejectment Suit No. 1003 of 1985.

24. Now, the question is whether or not the plaintiff/appellant can file an independent suit without taking recourse to Order 21 Rules 99 and 101 CPC. Even to decide the question whether the decree obtained by the landlords (Seals) in the said Ejectment Suit No. 1003 of 1985 was fraudulent or not, it would become necessary for the plaintiff/appellant to establish his right, title and/or interest in respect of the suit property which was the subject-matter of the said Ejectment Suit No. 1003 of 1985. Thus, the basic question, which has to be considered is as to whether or not the plaintiff/appellant has any right, title and/or interest in respect of the suit property involved in Ejectment Suit No. 1003 of 1985. Rule 99 of Order 21 CPC provides that when any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property, he may make an application to the Court complaining of such dispossession. The plaintiff/appellant was not a party, as already noted above, in Ejectment Suit No. 1003 of 1985 and thus not the judgment-debtor in the decree passed in the said suit. Thus, the plaintiff/appellant qualifies to make an application in terms of Order 21 Rule 99 CPC, and Rule 101 of Order 21 CPC provides, inter alia, that all questions arising between the parties to a proceeding on an application under Rule 99 shall be determined by the Court dealing with the application and not by a separate suit.

25. Thus, in this case the plaintiff/appellant should have filed an application under the relevant provisions of Order 21 CPC before the learned Court concerned and the plaintiff/appellant was barred under the law to file a separate suit in this regard. The question whether the decree passed in the said Ejectment Suit No. 1003 of 1985 was vitiated by fraud or not should have been decided by the Court concerned under the provisions of Order 21 CPC while deciding the question as to whether or not the plaintiff/appellant had any right, title and/or interest in respect of the subject-matter of dispute.

26. The other portion of the prayer made in the plaint, that is, the prayer for recovery of possession comes squarely under the relevant provisions of Order 21 CPC.

27. Thus being the position, this Court is of the view that the learned Trial Court was right in coming to the conclusion that the relevant provisions of Order 21 CPC created a bar for the plaintiff/appellant to file a separate suit.

28. With regard to the question of limitation, it appears that the plaintiff/appellant was dispossessed on 25th April, 1987 and the application for amendment of the plaint for

inclusion of the prayer for recovery of possession was made on 26th April, 1996, that is after about nine years from the date of dispossession.

29. Since this Court is of the view that the suit is barred under the provisions of Order 21 Rule 99 read with Rule 101 CPC, this Court is not inclined to go into the question as to whether the suit was barred by limitation or not. Since under the law the plaintiff/appellant was not right in filing the suit itself, this Court is of the view that it is not necessary to go into the question whether such suit is barred by the law of limitation or not. Even though the learned Advocate for the plaintiff/appellant has submitted that the suit is not barred by limitation and the learned Advocate for the Seals (respondent Nos. 1 and 2) has submitted that the suit is barred by limitation, this Court finds that the suit was not maintainable in view of the provisions of Order 21 Rules 99 and 101 CPC.

30. In the event, in future the plaintiff/appellant files any application under Order 21 Rule 99 read with Rule 101 CPC and/or any other relevant provisions of law under Order 21 CPC the Court concerned may have to consider such question of limitation in accordance with law.

31. As already noted above, the learned Trial Court did not decide the issue Nos. (v) to (ix). It thus stands that the said suit filed by the plaintiff/appellant, being Title Suit No. 474 of 1987, stands dismissed on the ground that it is barred under the provisions of Order 21, Rule 99 read with Rule 101 CPC.

32. In such circumstances, even though this Court does not agree with all the findings made by the learned Trial Court, as indicated above, but this Court agrees with the conclusion arrived at by the learned Trial Court that the suit should be dismissed as not maintainable.

33. It is made clear that this Court has not gone into the question as to whether or not the plaintiff/appellant has any right, title and/or interest in the property in dispute in the said Ejectment Suit No. 1003 of 1985 and such question is left open to be decided in accordance with law before the appropriate Court if and when occasion arises.

34. The appeal stands disposed of by holding that the conclusion arrived at by the learned Trial Court that the suit is not maintainable is affirmed.

35. There will be, however, no order as to costs.

36. Let the Lower Court records be sent back to the learned Court concerned immediately. Urgent certified xerox copy of this judgment, if applied for, shall be given to the parties as expeditiously as possible on compliance of all necessary formalities.

Dr. Mrinal Kanti Chaudhuri, J.

I agree.