

(2014) 08 CAL CK 0081**Calcutta High Court****Case No:** G.A. 1197 of 2014 and CS No. 120 of 2011

Prahlad Rai Dhanania

APPELLANT

Vs

Narayani Devi Dhanania

RESPONDENT

Date of Decision: Aug. 5, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 4 Rule 1, Order 7 Rule 11, Order 7 Rule 11(a), Order 7 Rule 11(d), Order 7 Rule 14
- Hindu Succession Act, 1956 - Section 22

Citation: (2015) 1 CHN 628 : (2015) 2 WBLR 183**Hon'ble Judges:** Soumen Sen, J**Bench:** Single Bench**Advocate:** Molay Ghosh, Sr. Advocate and Ashis Chakraborty, Advocate for the Appellant; Anindya Mitra, P.S. Sengupta, Sr. Advs., Sabyasachi Chowdhury and Srenik Singhvi, Advocate for the Respondent**Final Decision:** Dismissed**Judgement**

Soumen Sen, J.

This application has been filed at the instance of the defendant No. 10 for rejection of the plaint on the ground that the plaint does not disclose any cause of action against the defendant No. 10. It is stated that the suit is also barred by the laws of limitation.

2. The plaintiff has instituted the suit (CS No. 120 of 2011), inter alia, for a declaration that the deed of conveyance dated 11th March 2011 executed by the other co-sharers of his branch is not binding on him. The plaintiff has also prayed for a direction upon the defendant Nos. 1 to 9 to execute and register a conveyance in respect of their undivided 9/44th share i.e. approximately 20.45% share in Premises NO. 46, Shakespeare Sarani, Kolkata 700 017, hereinafter referred to as "the suit premises". In the plaint it is stated that one Ramjidass Dhanania along with

his three brothers, namely Dinanath Dhania (since deceased), Harkishan Das Dhanania (since deceased) and Shankarlal Dhanania (since deceased) during their lifetime remained the joint owners of the said premises, each having undivided 1/4th share in the suit premises.

3. In or about 2002, Ramjidass Dhanania claimed partition of the suit premises. The plaintiff and the defendant Nos. 1 to 9 in the instant suit are the legal heirs of Ramjidass Dhanania. During the pendency of the partition suit, on 26th April 2003, Ramjidass Dhanania died intestate. Thereafter, all rights, title and interest of the undivided 1/4th share of the said deceased in the suit premises devolved upon the plaintiff and the defendant Nos. 1 to 9 and the proforma defendant each acquiring undivided 1/44th share in the said premises. In the partition suit a preliminary decree was passed on 20th January 2005 by reason whereof the plaintiff and the defendant Nos. 1 to 9 and the proforma defendant each became the owner of 1/44th share in the suit premises. The partition suit is still pending.

4. Ramjidass Dhanania during his lifetime together with his three brothers executed a power of attorney in favour of one Gouri Shankar Lohia who wrongfully exceeded his authority for entering into a purported development agreement in respect of the suit premises on 13th October 1982 with the defendant No. 10. On or about 10th October 1985, the defendant No. 10 filed a suit for specific performance of the said agreement dated 13th October 1982.

5. During the pendency of the partition suit, on 25th November 2003, the defendant Nos. 1 to 9 had entered into a Terms of Settlement with the defendant No. 10 being the plaintiff in CS No. 619 of 1995 on the basis whereof a compromise decree was passed on 29th July 2004. The compromise decree dated 29th July 2004 provided for sale by the defendant Nos. 1 to 9 of their undivided 9/44th share in the said premises to the defendant No. 10. The plaintiff being aggrieved by the said compromise decree preferred an appeal. The Hon'ble Division Bench by an order dated 2nd November 2006 disposed of the said appeal being APD No. 545 of 2004 by observing that the terms of settlement shall not of its own create or extinguish any right. Right has to be created and extinguished in the manner laid down in the terms of settlement by proper deed of conveyance duly stamped and registered.

6. The plaintiff further states that although on 29th July 2004 the defendant Nos. 1 to 9 have agreed to sell their undivided 9/44th share in the premises to the defendant No. 10, when the plaintiff approached the defendant Nos. 1 to 9 to purchase their undivided 9/44th share in the said premises being Schedule-C property by exercising his right of preemption, the said defendants represented that they were no longer willing to sell their share in the said premises to the defendant No. 10 and the said compromise decree for all intents and purposes have been given a go-bye. The plaintiff believed the said representation to be true and acted accordingly. That the defendants were not willing to give effect to the compromise decree would be further evident from the offer submitted by the defendant Nos. 1

to 9 in the partition suit to purchase the entirety of the said premises at Rs. 60 crore.

7. On 18th February 2011, the defendant Nos. 1 to 9 prayed for appointment of a Commissioner of Partition as a Receiver to take charge of the premises to free the premises from its illegal occupants so that the said premises could be sold at the best market price.

8. During the period from December 2006, the plaintiff was all along informed by the defendant Nos. 1 to 9 that none of the parties to the said consent decree dated 29th July 2004 has sought to execute or register any conveyance. However, the plaintiff was surprised to receive a letter dated 4th April 2011 from the advocate on record of the defendant Nos. 1 to 9 wherefrom it appeared that a deed or deeds of conveyance in respect of the suit premises have been executed in favour of the defendant No. 10. The plaintiff states that such act on the part of the said defendants is contrary to the representation all throughout made by the said defendants to the plaintiff which the plaintiff believed to be true. The plaintiff alleges that the defendant Nos. 1 to 9 wrongfully, illegally fraudulently and with an intent to deceive the plaintiff not to exercise his right of preemption represented that the agreement or proposal for transfer of their respective shares and/or interests in the suit premises has been abandoned or given a go-bye or otherwise acted in such a manner fitted to deceive the plaintiff. The plaintiff has given particulars of such fraud in paragraph 23 of the plaint.

9. The plaintiff states that the plaintiff is entitled to exercise his right of preemption and purchase the said undivided 9/44th share i.e. approximately 20.45% share of the defendant Nos. 1 to 9 in the suit premises. The defendant Nos. 1 to 9, however, are invading or seeking to invade such right of preemption of the plaintiff in respect of the undivided 9/44th share i.e. approximately 20.45% share of the defendant Nos. 1 to 9 in the suit premises. The plaintiff states that the said deed of conveyance dated 11th March 2011 is void and/or voidable and accordingly seeks declaration that the said deed of conveyance be adjudged void and ordered to be delivered up and cancelled.

10. The applicant/defendant No. 10 has entered appearance and filed his written statement. Thereafter, this application has been filed for rejection of the plaint. As stated earlier, the ground for rejection is that the plaint does not disclose any cause of action and is barred by the laws of limitation.

11. Mr. Anindya Kumar Mitra, learned senior counsel appearing on behalf of the applicant/defendant No. 19 submits that although the plaint purports to be based on an alleged right of preemption, the averments made in the plaint do not disclose any cause of action or ground for accrual of any right of preemption as purported to have been claimed by the plaintiff. The plaint also does not contain any averment to show that the suit has been filed within the prescribed of limitation. The plaint does not state when the alleged cause of action arose nor would it appear from the

averments made in the plaint. The suit accordingly is barred by the laws of limitation. Mr. Mitra further submits that in view of paragraph 24 of the plaint where the plaintiff asserted right of preemption and alleged that the defendant Nos. 1 to 9 are invading and/or threatening to invade such right of preemption, it was incumbent upon the plaintiff to state when such right to claim preemption accrued in favour of the plaintiff. Mr. Mitra, referring to the terms of settlement filed in the specific performance suit, submits that it will appear from the terms of settlement that the other co-sharers in respect of the said property including the present defendants had agreed to transfer their share in favour of the defendant No. 10 for a consideration which itself constitutes a notice of transfer and the right of preemption, if any, arose on 29th July 2004 when the consent decree was passed. It is submitted that although the plaintiff has alleged that he had approached the defendant Nos. 1 to 9 to purchase their 9/44th share in the premises, the plaint is silent on the date when the alleged approach was made. Mr. Mitra refers to Clause 10 of the Terms of Settlement to show that the consenting defendants which inter alia include the defendant Nos. 1 to 9 have already made over possession of the vacant portion of the suit premises which have been in their respective occupations or in occupation of their nominees as co-owners as recorded by Ms. Indrani Chatterjee, Advocate/Receiver appointed in the suit in her report dated 22nd November 1985.

12. The learned Senior Counsel has referred to Section 22 of the Hindu Succession Act and submitted that the preferential right to acquire property, that is to say, right of preemption is exercisable when anyone of the heirs specified in class I of the schedule proposes to transfer his or her interest in the property or business. Since the terms of settlement could be taken as the intention of such heirs to transfer their interest in the property the cause of action if any arose on 29th July, 2004. The suit, however, was instituted only in 2011 on a purported plea that conveyance was executed by the defendants on 11th March, 2011. The execution and registration of the sale deed in 2011 is immaterial and would not give a cause of action to the plaintiff to institute the suit, in 2011 and is barred by limitation in view of Article 97 of the Limitation Act 1963 which states to enforce right of preemption whether the right is founded on law or general issues or special contract the date relevant is when the purchaser takes under the sale sought to be impeached, physical possession of the whole or a part of the property sold, or, where the subject-matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered. In view of Clause 10 of the terms of settlement forming part of the consent decree it is submitted that right of preemption if any arose on and from 29th July, 2004 and the suit for preemption has to be filed within period of one year from that date. It is submitted that the essential and main relief in the plaint is the enforcement of a right of preemption and the declaration that the title deed executed on 11 March, 2011, as null and void is only consequential. If no decree could be passed on a claim founded on preemption then

the other reliefs automatically would fail. With regard to the scope of Order 7 Rule 11 of the Code of Civil Procedure, it is submitted that in order to find out if the plaint discloses a cause of action or is barred by limitation reliance can be placed on documents referred to in the plaint but not annexed or disclosed. In this regard referred has been made to the decision of the Hon'ble Supreme Court (Church Of Christ Charitable Trust And Educational Charitable Society Vs. Ponniamman Education Trust) reported in 2012(8) SCC 706. Mr. Mitra has also referred to Order 4 Rule 1 and Order 7 Rule 6 of the CPC and submitted that the plaintiff has failed to comply with the mandatory requirements mentioned therein and on that ground also the plaint is required to be rejected.

13. Per contra Mr. Ghosh the learned Senior Counsel, Mr. Ashish Chakraborty submits that the cause of action in the suit is the execution of the purport deed of convenience dated 11 March, 2011. It is submitted that in terms of Article 97 of the Limitation Act, 1963, the period of limitation starts when the instrument of sale is registered. In the partition suit, the other defendants had agreed to purchase the property at Rs. 60 crores on January 11, 2011 which explains the averments made in the plaint that the plaintiff was induced to believe that the said defendants would not execute the deed of conveyance and the said terms of settlement has been given a go bye. The learned Counsel disputes that the purchaser has taken physical possession of the whole or part of the property sold. The learned Counsel has referred to a judgment dated 21st December, 2012, passed in EC 128 of 2011, CS 619 of 1985 and the tabular statement filed in EC No. 128 of 2011 to show that the purchaser is not in possession of the suit property as late as in 2012. The learned Senior Counsel refers to a decision in Batul Begum and Mansur Ali Khan & Ors. reported in 1928 Indian Appeals 248 and submitted that the physical possession under Article 97 of the Limitation Act would amend a personal and immediate possession. It is submitted that the possession contemplated under the said Article is the actual physical possession. In view of the fact that the purchaser was never put to possession or in physical possession of the property in question the right to sue accrues when the date of conveyance was registered. It is submitted that the purchaser on the date of institution of suit admitted was not in possession.

14. Mr. Mitra learned Senior Counsel on behalf of the applicant, however, objected to the production of the judgment and the tabular statement alluded to above. The learned Senior Counsel has referred to a decision in Ghadadhar Majhi Vs. Jurali Mondal & Ors. reported in 1985(2) CHN 282 and submitted that in the said decision it has been held that Section 22 of the Hindu Succession Act not only applies concluded transfers as well as contemplated transfers. It is submitted that since the defendants in the suit were contemplating transfer of their shares in the property as early as on 29th July, 2004, the right or preemption would become enforceable with a period of one year from that date.

15. On a plain reading of a plaint it cannot be said that the plaint does not disclose a cause of action. The plaintiff has challenged the conveyance and asserted his right of preemption. On a true and meaningful reading of the plaint it shows that the plaintiff claims preemption consequent upon the registration of the sale deed in favour of the applicant by the other defendants in the suit. Whether the plaintiff would succeed on such a cause of action is too early to predict and shall stand to trial. In so far as the plea of limitation is concerned unless the suit is expressly barred by the laws of limitation the plaintiff shall not be non-suited. It is settled law that for determining whether the plaint is liable to be rejected under Clause (a) of Rule 11 of Order 7, averments in the plaint alone are material and relevant and nothing else. For determining whether there is a cause of action for institution of a suit the question can only be determined on the basis of materials (other than the plaint) on record.

16. In that case, Order 7 Rule 11(a) has no application. This distinction of non-existence of cause of action and nondisclosure cause of action has been discussed in State of Orissa Vs. Klockner and Company and Others, In (1988) QBD 128, Lord Esher M.R., defined "cause of action" to mean "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

Fry L.J., agreed and said:-

"Everything which, if not proved, gives the defendant an immediate right to judgment must be part of the cause of action."

To put it in a concise form, the words "cause of action" means the whole bundle of material facts which are necessary for the plaintiff to prove, in order to entitle him to the reliefs claimed in the suit Order 7 Rule 11 required the plaintiff to incorporate in the plaint the facts constituting the cause of action. The plaintiff is requested to plead all material facts upon which his right to relief is based and from which court can arrive at a conclusion in his favour. Such "cause of action" generally means a situation or state of facts that entitles a party to maintain an action in court, the material facts imperative for claimant to allege and prove, constitute cause of action that helps plaintiff to obtain decree. The phrase "does not disclose cause of action" as used in Order 7 Rule 11(a) has to be narrowly construed. This power of rejection of plaint ought to be used only when court is absolutely sure that plaintiff does not have an arguable case at all. The expression "cause of Action" as used in this rule does not mean a claim which is still enforceable under the law of limitation. Where, therefore, a suit is barred by time it cannot be said that the plaint does not disclose a cause of action, and that it cannot be dealt with under clause (a). The Court may, however, proceed under clause (d).

17. Mr. Mitra, the learned Senior Counsel has referred to the various documents in the application for rejection of the plaint and would submit that the Court at this stage is not preclude to find out if the suit is otherwise barred by limitation. The Church of Christ (supra) cited in support of the said submissions does not come to the aid of the applicant. In Church of Christ (supra), it was found that document on which the cause of action based was not produced. The suit was for specific performance to sale an immovable property. The buyer entered into an agreement of sale with the appellant-owner which never culminated in sale and such agreement was terminated. The alleged agreement was entered into by the defendant No. 2 on the basis of a power of attorney. It was found that the power of attorney only authorises certain specified acts but not any act authorising entering into an agreement of sale or to execute sale deed or admit execution before the Registrar. Order 7 Rule 14 of CPC mandates the plaintiff to produce the documents on which the cause of action is based. This document, however, was not disclosed. In such facts and circumstances it was held that when the document which forms the basis of the claim in the suit is not produced the plaint can be rejected for nondisclosure of cause of action.

18. In Gadadhar Majhi (supra) it was held that the section not only applies to concluded transfers but also contemplated transfers. The contemplating transferors should serve notice on his others Class I co-sharers, before actually effecting transfer failing which the intending preemptor may have his remedy by way of a suit in a competent Civil Court. In the instant case, the transfer was concluded with the execution of deed of conveyance on 11th of March, 2011.

19. Order 7 Rule 11(d) of CPC has limited application. It must be shown the suit is barred under any law and such conclusion must be drawn from averments made in the plaint. No amount of evidence can be looked into. If the law by which the defendant claims exclusion of jurisdiction or rejection of the plaint on the ground of limitation such fact should be manifest from a reading of the plaint and does not call for any investigation into any fact at all. In order to find out whether the suit is barred by limitation under Article 97 of the limitation Act, 1963, the same has to be manifest from a reading of the plaint and no amount of evidence can be looked into. The argument based on limitation itself calls for an evidence to be taken for the purpose of determining if the suit is barred by limitation. There is a serious dispute with regard to the possession of the suit properties being taken by the purchaser at the time of institution of the suit. More over a reading of the order of the Appellate Court shows that the right to challenge any deed would accrue with the registration of the sale deed. The plea limitation is a mixed question of law and fact. It cannot be said that the suit is expressly barred by limitation. More over Article 97 of the Limitation gives a right to claim preemption when the instrument of sale is registered. Under the old law when the entire property sold is, at the date of sale, capable of actual possession, the suit could be brought within one year of the time when the vendee takes possession of the entire property. But in view of the changes

made in the new Article (Article 97) where the purchaser takes possession of ever a part of the property, limitation starts running from the date of such possession. The second part of the third column of Article 97 covers cases where the subject-matter of the sale, which means the whole of the property sold, does not admit of physical possession of the whole or part of the property. Although the law insists on physical possession as it amounts to a notice to all the would be preempts that a change has occurred to the enjoyment and possession of the land in question, these cases which are covered by the second part of the third column, the terminus a quo is the date when the instrument of sale is registered in Article 97 there is a significant change from Article 10 of the 1908 Act. The half part of the third column of the Article will be attracted even if the vendee took delivery of the possession of the part of the property purchased and the starting point of limitation would commence from the date of such taking part possession of the property purchased. Which of the conditions under Article 97 would be application in the given facts and circumstances of the case cannot be decided in this application. Moreover there is a specific averment in the plaint that the defendant Nos. 1 to 9 represented that they are not willing to go ahead with the sale of their shares. In fact, there is a hiatus for almost eight years with regard to the execution of sale deed. Such an issue requires an investigation.

20. Accordingly, this application fails. However, there shall be no Order as to costs.