

(2016) 10 CAL CK 0005
CALCUTTA HIGH COURT
Case No: C.O. No. 4591 of 2015.

Bishad Kumar Jana - Petitioner
@HASH Smt. Anjali Jana and
Others - Opposite Parties

APPELLANT

Vs

RESPONDENT

Date of Decision: Oct. 4, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11
- Constitution of India, 1950 - Article 227
- Limitation Act, 1963 - Article 113

Citation: (2016) 4 ICC 828 : (2017) 2 WBLR 604

Hon'ble Judges: Siddhartha Chattopadhyay, J.

Bench: Single Bench

Advocate: Mr. Bhaskar Ghosh, Ld. Sr. Advocate and Mr. Samir Kumar Mondal, Advocate, for the Petitioners; Mr. Anirban Bose, Ld. Bar-at-law, Mr. S. Senapati, Advocate, for the Opposite Parties Nos. 1, 2 and 4 to 6; Mr. Somnath Ghoshal, Advocate, for the Opposite Part

Final Decision: Disposed Off

Judgement

Siddhartha Chattopadhyay, J. - Challenging the legality and validity of the order dated 23.09.2015 passed by the Id. Civil Judge, (Junior Division), Kakdwip, South 24 Parganas, the defendant/petitioner has filed this application under Article 227 of the Constitution of India on the ground that the learned Court below failed to appreciate the position of law and particularly failed to take into account the limitation point in its proper perspectives.

2. According to him, the learned Trial Court failed to appreciate that he has obtained a decree in 1976 and the said decree has not been challenged before any Court of law. He further contended that the said decree has attained its finality and therefore

no cause of action arises in the plaint filed by the present opposite party/plaintiff.

3. As against this, learned Counsel appearing on behalf of the opposite party has contended that plaint discloses a specific cause of action and has also clearly mentioned about the date of knowledge. He further specified by saying that he came to know about the decree passed in T.S. 521 of 1976 after getting an information from the B.L.L.R.O. concerned. Within shortest possible time, he has filed this case bearing T.S. 226/2013 and from that view point the suit is not barred by limitation. He has also contended that he had filed the suit T.S. 226 of 2013 and prayed for setting aside the decree passed in T.S. 521 of 1976 as the said decree was obtained by practising fraud. He categorically submitted that no notice was served upon them when the suit of T.S. 521 of 1976 was initiated. He has categorically submitted that a wrong address has been shown in the plaint and the said summon was not actually served upon him, because at the relevant point of time he had been residing at Medinipur.

Suppressing all these facts, the present petitioner had got the decree in T.S. 521 of 1976. He further stated that there is plea of fraud in his case and so it does not come within the purview of limitation. In fine, he has prayed for dismissal of the said application.

4. Since, the question of law is involved in this revisional application, so this Court does not feel it necessary to narrate the whole factual aspects of the parties.

5. Now this Court is called upon to answer regarding the application under Order 7, Rule 11 on merit, of course considering the factual aspects of this case. At the time of hearing, learned Counsel appearing on behalf of the petitioner has contended that in the plaint the plaintiff has disclosed that he derived his knowledge from the notice issued by B.L.L.R.O. is absolutely false on the ground that after giving notice upon both parties the said T.S. 521 of 1976 was disposed of in favour of the present petitioner. According to him, for that reason the suit is completely barred by limitation.

6. After hearing rival submission of the respective parties it seems to me that following considerations are essential for disposal of an application under Order 7, Rule 11 of Code of Civil Procedure i.e.

(1) Whether the meaningful reading discloses a specific cause of action or not,

(2) Whether by way of a clever drafting an important parts of cause of action has been concealed under an artful advocacy,

(3) Whether the said cause of action is barred by any law.

Point No. 1

7. On perusal of the plaint, I find that the main grievance of the present opposite party/plaintiff was such that the decree was obtained in T.S. 521 of 1976 by

practising fraud because no summon was issued upon their predecessors. He has also submitted that at the relevant point of time one of the predecessors had been residing at Medinipur and naturally question of serving summon to him does not arise. So the plea of fraud has been taken in the plaint. In the plaint it has been specifically averred that he derived knowledge after getting a notice from the B.L.L.R.O. that a decree in T.S. 521 of 1976 was there against him. Therefore, this Court feels that the meaningful reading of the plaint discloses that there is specific cause of action.

Point No. 2

8. After going through the plaint itself there is no indication of clever drafting and at the same time nothing has been concealed under an artful advocacy.

Point No. 3

9. This Court would like to refer the relevant part of plaint itself. It is the specific case of the plaintiff that fraud has been practised not only upon them but also upon the trial Court. By keeping the Court in dark, the present petitioner/defendant (plaintiff of T.S. 521 of 1976) has obtained a decree.

Whether the present petitioner has practised fraud or not that can be ascertained only after taking evidence since it is a mixed question of fact and law. Therefore, it seems to me, apparently that there is no legal bar. The learned Counsel appearing on behalf of the petitioner has referred to a decision reported in 2003 (1) CLJ 603. I have gone through the said decision and it seems to me that factual aspects of that case is substantially different. In that case decree was challenged in appellate forum and by the said appellate court the decree was affirmed. Thereafter, again on the self-same cause of action plaint was filed. Here there was no appeal preferred in connection with the decree passed in T.S. 521 of 1976. Therefore, the said decision does not help the present petitioner at all. Learned Counsel appearing on behalf of the opposite party has cited a decision reported in 2014 (1) CHN Cal 56, wherein a Co-ordinate Bench of this Court held that the plaint is to be looked into to see whether on perusal of the same it appears to be barred by law of limitation or not. While fraud is alleged then such fraud could be proved only by evidence and not by mere averments in plaint.

This finding of the Co-ordinate Bench has got a support from the decision reported in (2006) 5 SCC 658, wherein Hon"ble Apex Court held that suit should not be dismissed as barred by limitation without proper pleadings, framing of issue of limitation and taking of evidence. Hon"ble Apex Court further held that a question of limitation is a mixed question of fact and law. In this instant case, evidence has not yet been taken, therefore, it is too early to say that the suit is barred by limitation. Hon"ble Apex Court in a decision reported in (1996) 7 SCC 767 contended that Article 113 is not applicable where the limitation period starts running from the date of knowledge of the fraud and the knowledge includes derivative or

constructive knowledge.

According to the plaintiff/opposite party, he came to know about the decree after getting the letter from B.L.L.R.O. concerned.

Therefore, the limitation period will be reckoned from the date of such knowledge from the date of receipt of the letter issued by the B.L.L.R.O. concerned. Before coming to the conclusion in regard to under Order 7, Rule 11 of Code of Civil Procedure the first question to be answered is :- (i) Do these disputes involve any question (whether legal or factual) on which the existence or extent of a legal right of the plaintiffs depends? If it does then the next question is whether the raising of such disputes is barred by any law. If the aforesaid questions the answers are affirmative, then the plaint must be rejected as a whole. But in this instance case, answers of all the above points are negative and naturally Order 7, Rule 11 has been quite rightly rejected by the learned Trial Court. I have no hesitation to put a seal of approval in the order impugned. However, I make it clear that I have not gone into merit of the case in any way. The observation made above is only for the purpose of disposal of this revisional application. The impugned order dated 23.09.2015 is hereby affirmed. The revisional application is dismissed.

10. Let a copy of this judgment be sent to the learned Court below for his information and taking necessary action in accordance with law.

11. Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.