

(2016) 02 CAL CK 0115
CALCUTTA HIGH COURT
Case No: CO 4290 of 2015

Purnendro Mullick and
Others

APPELLANT

Vs

Tapendro Mullick and
Others

RESPONDENT

Date of Decision: Feb. 24, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 10 Rule 10, Order 7 Rule 11, Order 7 Rule 11(a), Order 7 Rule 11(d), Section 151
- Constitution of India, 1950 - Article 227

Citation: (2016) 2 ICC 290 : (2016) 5 WBLR 118

Hon'ble Judges: Subrata Talukdar, J.

Bench: Single Bench

Advocate: Joy Saha, Aniruddha Mitra, Bhaskar Mukherjee and Debjani Ghosh, for the Appellant; P.C. Pal Choudhury and D.N. Mukherjee, for the Respondent

Final Decision: Dismissed

Judgement

Subrata Talukdar, J.

1. The short question which this Court is required to answer in this civil application under Article 227 of the Constitution of India is the legal correctness of the order impugned No. 17 dated 18th November, 2015 in Title Suit No. 420 of 2015 passed by the Ld. 7th Bench, City Civil Court at Calcutta thereby rejecting the application filed on behalf of the defendants under Order 7 Rule 11 read with Section 151 of the Code of Civil Procedure (for short CPC).

2. The present petitioners in this application are the defendants in the suit.

3. The opposite party No. 1 (for short OP1) and the proforma opposite party No. 2 in this application are respectively the plaintiff No. 1 and plaintiff No. 2 in the suit.

4. The plaintiff No. 1/OP1 instituted the suit for declaration and injunction in respect of the Trust Estate (hereinafter referred to for short as either the Trust or the Trust Estate) of Jitendro Mullick (since deceased), being the common predecessor-in-interest of both the plaintiff No. 1 and the defendants. The suit has been instituted on the ground that by the Deeds of Appointment dated 27th September, 2010 and 18th September, 2012 the defendants, acting as Trustees, are taking steps to alienate and dispose of the Trust properties by sale, transfer etc.

5. Therefore, the plaintiffs have prayed for a declaration that the Deeds of Appointment dated 27th September, 2010 and 18th September, 2012 are bad and liable to be cancelled. The plaintiffs have further prayed for reliefs in the nature of permanent injunction restraining the defendant Nos. 2 and 3 from acting as Trustees and also restraining the defendant Nos. 1, 2 and 3 from alienating, transferring and disposing of the Trust properties, including its tenants/lessees without the consent of the plaintiff No. 1. Permanent injunction has also been prayed for to restrain the defendant Nos. 1 and 2 from operating the bank accounts of the Trust Estate.

6. The defendants/present petitioners contested the suit and filed an application under Order 7 Rule 11 read with Section 151 CPC for rejection of the plaint. The solitary contention of the defendants in the application for rejection of plaint centres around the interpretation of Clauses 14 and 15 of the Deed of Trust dated 16th of August, 1949.

7. Clauses 14 and 15 of the said Deed of Trust read as follows:--

"14) If any one of the said Trustees shall die become legally disabled become incapacitated refuse to act as a Trustee or resign from the Trusteeship during the life time of the Settler, the Settler shall have power to appoint a new Trustee in his place and stead. If any one of the said Trustees shall die become legally disabled become incapacitated refuse to act as a Trustee or resign from the Trusteeship after the death of the Settler. The surviving Trustees or Trustee shall have power to appoint a new Trustee in his place and stead.

15) If there be any disagreement between the Trustees under these present then the opinion of the Settler during his life time shall always prevail and after his demise the opinion of the majority and if there be no majority then the opinion of the senior Trustee shall prevail."

8. The defendants have pleaded at paragraphs 6 to 11 of the application for rejection of the plaint as follows:--

"6. A close scrutiny of Clause 14 of the above Deed of Trust will make it clear that after the death of the settlor, in case of any of the three remaining Trustees die or become legally disable or become incapacitated or refuse to act as Trustee or resign from Trusteeship, the surviving Trustee or Trustees shall have the power to appoint a new Trustee in his place and stead. Clause 14 of the trust deed does not make any provision

for appointment of any Trustee in place and stead of the settlor.

7. Hence, it is submitted that the purported resolution dated 21st February, 1993 was not at all any document of appointment in accordance with the Deed of Trust dated 16th August, 1949. The plaintiff No. 1 cannot claim himself as a Trustee on the basis of the said purported resolution dated 21st February, 1993.

8. In the circumstances stated hereinabove, it is submitted that the plaintiff No. 1 not being a Trustee, cannot represent the Jitendro Mullick Trust Estate. The above suit filed by the plaintiff No. 1 claiming himself as a Trustee to the Jitendro Mullick Trust Estate is not maintainable.

9. The plaint does not disclose any cause of action against the plaintiff No. 1 and the suit is barred by law.

10. The present suit is a frivolous and harassive suit. The Hon"ble Supreme Court has time and again deprecated filing of a frivolous suit and observed that the frivolous suit should be rejected in an application under Order 7 Rule 11 of the Code of Civil Procedure.

11. It is submitted that the plaint in the above suit should be rejected as it is hit by the Order 7 Rule 11 (a) and Order 7 Rule 11 (d) of the Code of Civil Procedure."

9. In the affidavit-in-opposition to the application for rejection of plaint the plaintiffs have, inter alia, given the history of the Trust Estate and the litigation surrounding the Trust Estate. It has been, inter alia, stated in the said affidavit-in-opposition that the plaintiff No. 1 was appointed as Trustee in February, 1993. Therefore, the appointment of the plaintiff No. 1 as the Trustee in February, 1993 cannot be questioned now by the defendants at such distance of time in their application under Order 7 Rule 11 CPC.

10. With reference to the interpretation of Clauses 14 and 15 of the Deed of Trust it is the stand of the plaintiffs that the Settlor of the Trust Estate can also act as a Trustee. Since there is no confusion that both the Settlor and Trustee are distinct entities, the plaintiff No. 1 was appointed in place of the deceased Trustee, who, coincidentally, was also the Settlor of the Trust Estate.

11. The plaintiffs also sought the leave of the Ld. Trial Court to file a supplementary affidavit to the affidavit-in-opposition to the application under Order 7 Rule 11 CPC. The supplementary affidavit was objected to on behalf of the defendants by filing written objection.

12. By the order impugned dated 18th November, 2015 the Ld. Trial Court, inter alia, found on a perusal of the application under Order 7 Rule 11 read with Section 151 CPC as well as the other pleadings filed on behalf of the parties that the suit is perfectly maintainable and therefore rejected the prayer of the defendants.

13. Sri Joy Saha, Ld. Senior Counsel appearing for the present petitioners-defendants submits at the very outset that the order impugned is neither a reasoned nor a speaking order. Sri Saha reiterates the interpretation of Clauses 14 and 15 of the Trust Deed advanced on behalf of the defendants in their application under Order 7 Rule 11 read with Section 151 CPC.

14. Sri Saha submits that the Ld. Trial Court was required to dwell on the interpretation offered by the defendants which touches on the locus of the plaintiff No. 1 to maintain the suit. According to Ld. Counsel for the petitioners the appointment of the plaintiff No. 1 in place of the Settlor cannot be said to be covered by the first part of Clause 14 of the Deed of Trust. Second, the latter part of Clause 14 of the Trust Deed will apply to the Trustees being the successors-in-interest, excluding the plaintiff No. 1, who claims appointment from the Settlor.

15. Sri Saha raises a strong challenge to the maintainability of the suit on the ground of limitation. Particularly, Sri Saha refers to the challenge thrown to the Deed of Appointment dated 27th September, 2010 and the fact that the suit was filed in March, 2015. At the end of five years, Sri Saha argues, the suit must be held to be hopelessly barred by limitation.

16. The additional argument advanced by Sri Saha is that the Ld. Trial Court could not have looked into any other document or allowed the plaintiffs to file a supplementary affidavit while deciding the application under Order 7 Rule 11 read with Section 151 CPC. By doing so, Sri Saha submits, the Ld. Trial Court violated a fundamental principle of law that an application for rejection of plaint can only be decided on the basis of the averments made in the plaint itself.

17. Sri Saha also questions the order of the Ld. Trial Court on the ground of being conspicuously silent on the interpretation of Clause 14 of the Trust Deed. In support of his submissions Sri Saha relies upon the following decisions:--

" , 2007 (5) SCC 614 (at paras 25, 27-29, 31, 39-40) in the matter of Hardesh Ores (P) Ltd. v. Hede & Company.

, 2005 (5) SCC 548 (at paras 10-18) in the matter of N.V. Srinivasa Murthy & Ors. v. Mariyamma (Dead) by Proposed Lrs. & Ors.

2012 (8) SCC 706 (at paras 16-19, 21-25, 29-30) in the matter of Church of Christ Charitable Trust and Educational Charitable Society v. Pooniamman Educational Trust.

, 2004 (3) SCC 137 (at paras 10-13, 17, 20-21) in the matter of Sopan Sukhdeo Sable & Ors. v. Assistant Charity commissioner & Ors."

18. Per contra, Sri P.C. Pal Choudhury, Ld. Counsel appearing for the present OPs-plaintiffs reiterates the interpretation of Clause 14 as adopted by the plaintiffs in their

affidavit-in-opposition to the application for rejection of plaint. Sri Pal Choudhury reiterates the stand of the plaintiff No. 1 that he was appointed as the Trustee in a meeting of which notice was served on all the Trustees including, the present petitioner No. 1. Furthermore, the appointment of the plaintiff No. 1 as the Trustee was affirmed by a majority of two out of three Trustees.

19. Sri Pal Choudhury further submits that the appointment, which was made in the year 1993, was circulated to the other Trustees who did not object to such appointment, thereby acknowledging the same since 1993. According to Ld. Counsel for the OPs-plaintiffs, the nature of the objection raised by the defendants/present petitioners requires to be determined at the trial on evidence, including documentary evidence.

20. Having heard the parties and considering the materials on record this Court is of the considered view that the objection with regard to the status of the plaintiff No. 1 qua the interpretation of Clauses 14 and 15 of the Deed of Trust dated 16th August, 1949 (supra) is an issue which can be decided at the trial itself. To the further mind of this Court the issue raised by the present petitioners/defendants for rejecting the plaint is not of a nature which can demonstrate that the plaint does not disclose any cause of action or is barred by any law.

21. This Court is of the further view that the bar of limitation argued by the present petitioners/defendants has been sought to be rebutted by the plaintiffs in their affidavit-in-opposition. It is trite law that limitation itself is an issue which can be decided at the trial. Useful reference in this regard may be made to the judgments reported in , 2001 (2) SCC 472 in the matter of Ragu Thilak D. John v. S. Rayappan & Ors. at Para 6 and in , 2011 (1) CHN (Cal) 515 in the matter of Namita Roy & Ors. v. Bengal Greenfield Housing Development Co. Ltd. at Paras 30, 31 and 32.

22. Next, considering the argument of Sri Saha that the order impugned of the Ld. Trial Court is a non-speaking or unreasoned order, this Court must be mindful of the fact that the application for rejection of plaint must be decided on the touchstone of the pleadings made in the plaint itself. Therefore, this Court while choosing not to take notice of the discussion by the Ld. Trial Court on the basis of the supplementary pleadings allowed to be filed by the parties and, confining itself to the pleadings in the plaint read with the challenge under Order 7 Rule 11 read with Section 151 CPC, notices that the plea of the defendants that the plaint is barred under Order 7 Rule 11 (a) and Order 7 Rule 11 (d) cannot be sustained in law.

23. It appears to the mind of this Court that neither the plaint fails to disclose any cause of action nor the plaint is barred by any law. Useful reference in this regard may be made to the judgment reported in 2008 (1) WBLR (Cal) 953 in the matter of Sk. Rafiuddin Ahmed v. Hazi Abdur Rahim & Ors. at Paras 25, 27 & 34 and , 2005 (7) SCC 510 in the matter of Popat and Kotecha Property v. State Bank of India Staff Association at Paras 7, 8, 9, 10 and 25.

24. Next, this Court, in discharge of its supervisory duties under Article 227 of the Constitution of India, is required to notice whether the Ld. Trial Court correctly grasped the essence of the provisions under Order 7 Rule 11 CPC. Shorn of its lingual inadequacies, if any, this Court is of the view that the Ld. Trial Court correctly applied the principles of Order 7 Rule 11 CPC to the facts of the present case and rejected the application for rejection of plaint.

25. With regard to the above discussion this court is required to notice the judgment reported in , 2004 (3) SCC 137 in the matter of Sopan Sukhdeo Sable v. Assistant Charity Commissioner & Ors. at Paras 11, 12 and 21, which read as follows:--

"11. In I.T.C. Ltd. v. Debts Recovery Appellate Tribunal and Ors. (, 1998 (2) SCC 70) it was held that the basic question to be decided while dealing with an application filed under Order VII Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order VII Rule 11 of the Code.

12. The trial Court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order VII Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order X of the Code. (See T. Arivandandam v. T.V. Satyapal and Anr. (, 1977 (4) SCC 467).

21. According to Mr. Mohta appearing for the appellants, as noted above, the reliefs are separable and merely because some of the reliefs cannot be granted by the Civil Court it would entail an automatic rejection of the old plaint. In fact he submitted that some of the reliefs would be given up by the plaintiffs in the suit itself. It is true as contended by Mr. Savant learned counsel appearing for the respondent-trust by ingenious drafting a cause of action in the nature of red herrings cannot be brought into judicial arena. But a reading of the reliefs shows that some of them can only be considered by the Civil Court."

26. In the backdrop of the above discussion any direction remanding the matter to the Ld. Trial Court will only delay the hearing of the suit, since it is held in this judgment that the application for rejection of plaint was correctly decided in law.

27. CO 4290 of 2015 stands accordingly dismissed.

28. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.