
(2018) 10 CAL CK 0042

Calcutta High Court

Case No: Company Order No.3001 Of 2018

Edward Keventer
Private Limited
@APPELLANT@Hash
Atanu Banerjee and
Others

APPELLANT

Vs

RESPONDENT

Date of Decision: Oct. 9, 2018

Acts Referred:

- Indian Contract Act, 1872 - Section 230
- Transfer of Property Act, 1882 - Section 44
- Code of Civil Procedure, 1908 - Order 2 Rule 1, Order 2 Rule 2, Order 1 Rule 10(2), Order 4 Rule 1(3), Order 6 Rule 17, Order 7 Rule 6, Order 7 Rule 11(d), Order 14 Rule 2

Citation: (2018) 10 CAL CK 0042

Hon'ble Judges: Sabyasachi Bhattacharyya, J

Bench: Single Bench

Advocate: Abhrajit Mitra, Arindam Banerjee, Satadeep Bhattacharya, Biswajit Kumar, Raja Baliyal, Amal Kanti Das, Debayan Sinha, Anyesha Das

Final Decision: Dismissed

Judgement

Sabyasachi Bhattacharyya, J.

1. The instant revisional application arises out of a suit, instituted initially for partition, for declaration that the plaintiffs had fifty per cent share in the

suit property and for consequential reliefs.

2. Subsequently the plaintiffs sought an amendment, inter alia seeking to introduce a declaration that the defendant nos. 1 and 2 had no right, title or

interest to transfer the entire premises no. 20, Gopal Chandra Mukherjee Road, Kolkata - 2, exceeding their 50% of share, in favour of the defendant

no. 6 who had not acquired any interest more than 50% in the said property by virtue of the said deed of conveyance dated 09.11.1992, and for

incorporating the corresponding facts. The said amendment was allowed by a different portion of the order than that impugned herein.

3. On the other hand, the present petitioner, being defendant no. 6 in the suit, had filed an application under Order VII Rule 11, read with Order I Rule

10(2), of the Code of Civil Procedure, seeking a rejection of the plaint as far as the said defendant was concerned and/or expunction of itself from the

suit. The said application was rejected on contest. The present revision has been preferred by the defendant no. 6 against such portion of the

impugned order, whereby its prayer for rejection of plaint was refused.

4. The suit was originally filed for the following reliefs: -

a) "A decree be passed in preliminary form for partition of the suit properties by metes and bounds declaring the 50% share of the plaintiffs in

respect of schedule A and B properties and also 40% share of consideration money for rs.8,500/- out of schedule C property mentioned in the schedules of the plaint;

b) A final decree for partition of the entire suit properties by metes and bounds to be

passed in favour of the plaintiffs in terms of the preliminary

decree with delivery of possession therein by the help of partition commissioner to be appointed by the Id. court;

c) A decree for partition and declaration that the plaintiffs are the owners of the undivided 50% share of the premises no. 20, Gopal Chandra

Mukherjee Road [schedule a(iv)] of the plaint and the deed of conveyance between the defendant nos. 1 and 2 with the defendant no. 6 is not binding

upon the plaintiffs;

d) Receiver;

- e) Inventory and account, decree be passed;
- f) Temporary injunction;
- g) Permanent injunction;
- h) Order and/or decree be passed under order 2 rule 2 of the c.p. code;
- i) Cost of the suit;
- j) Any other relief or reliefs the plaintiffs are entitled in law and in equity.

5. Learned senior counsel appearing for the petitioner argues that the adjudication of the suit, at least as regards the defendant no. 6/petitioner itself,

depends on the decision on relief c), as claimed in the plaint. Since admittedly the registered deed, executed in favour of the present petitioner, was of

November 9, 1992 and the suit was filed only in the year 1999, the relief c), challenging the deed of conveyance between the defendant nos. 1 and 2

with the present petitioner, was palpably barred by limitation. It is further argued that, by virtue of Order VII Rule 6 of the Code of Civil Procedure,

the plaintiffs were duty-bound to disclose the ground upon which exemption from the law of limitation was claimed. As the plaint did not disclose any

such ground, the Trial Court ought to have rejected the plaint outright, at least as against the defendant no. 6/petitioner.

6. It is further argued that, by virtue of Order IV Rule 1(3) of the Code of Civil Procedure, the plaint shall not be deemed to be duly instituted unless it

complies with the requirement of Sub-Rules (1) and (2). Since Sub-Rule (2) mandates compliance with Order VI and Order VII of the Code, non-

compliance with Order VII Rule 6 ought to have been visited by a rejection of the plaint.

7. It is submitted by learned senior counsel for the petitioner that in the aforesaid circumstances, the plaint ought to have been rejected as against the

present petitioner, or at least the name of the petitioner ought to have been struck out from the plaint.

8. In support of his arguments, learned senior counsel for the petitioner cites the following judgments:

i. (2012) 8 SCC 706 [Church of Christ Charitable Trust and Educational Charitable Society represented by its Chairman vs. Ponniamman Educational

Trust represented by its Chairperson/Managing Trustee]. By placing particular reliance on paragraph nos. 9 and 22 of the said judgment of the

Supreme Court, it is submitted that failure to mention the date of a particular document, on which the suit hinges, might give rise to a presumption that

the date, if disclosed, would have attracted the bar of limitation. The plaintiff has to conform to Order VII Rule 6 and specifically plead the ground upon

which exemption from limitation is claimed. In order to get over the bar of limitation, all the required details ought to be disclosed. Non-disclosure

entails rejection of the plaintiff.

ii. (2000) 7 SCC 702 [Dilboo (Smt)(Dead) By LRS and others vs. Dhanraji (Smt)(Dead) and others]. Placing reliance on paragraph no. 20 of the said

judgment, learned senior counsel argues that it is always for the party who files the suit to show that the suit is within time. In cases where the suit is

filed beyond the limitation period, the plaintiff would have to aver and prove that the suit was within such period from the starting point of limitation. In

the absence of any averment or proof to show that the suit is within time, it is the plaintiff who would fail. Whenever a document is registered, the

date of registration becomes the date of deemed knowledge. In other cases, where a fact could be discovered by due diligence, then deemed

knowledge would be attributed to the plaintiff because a party cannot be allowed to extend the period of limitation by merely claiming that he had no

knowledge.

iii. (1994) 2 Cal LT 82 [Nandalal N. Verma & Co. Ltd. vs. Alliance Mills (Leasee) Pvt. Ltd.], wherein a Division Bench of this Court held, inter alia,

that if the right to sue against a particular defendant was specifically barred by law (Section 230 of the Indian Contract Act in that case), the name of

the said defendant was liable to be struck off from the plaintiff and the plaintiff could only proceed against the other defendants.

iv. (2004) 3 SCC 137 [Sopan Sukhdeo Sable and others vs. Assistant Charity Commissioner and others]. In the said case, the Supreme Court held,

while considering the effect of Order II Rules 1 and 2 of the Code of Civil Procedure, that some of the reliefs claimed in the said suit were barred by

law. That being so, the Supreme Court restricted the adjudication of the suit to the other, maintainable, questions only. For the rest of the reliefs, the

plaintiffs were permitted to relinquish and/or give up their claim.

9. Learned counsel for the plaintiffs/opposite party nos. 1 to 3, while controverting the arguments of the petitioner, submits that by the other portion of

the impugned order, an application of the plaintiffs under Order VI Rule 17 of the Code of Civil Procedure was allowed, thereby inter alia permitting

introduction of an averment to the effect that the transfer by the defendant nos. 1 and 2 in favour of defendant no. 6 was effected by misrepresenting

themselves to be the absolute owners of the suit property, whereas, in reality, the defendant nos. 1 and 2 had only fifty per cent share in the property.

As such, it was stated that the aforesaid transfer, insofar as the same exceeded the share of the vendors, was null and void. Hence, it is submitted that

even without a specific challenge to the deed of conveyance between the defendant nos. 1 and 2 and the defendant no. 6, it could be held that, by

virtue of such transfer, only the share of the defendant nos. 1 and 2, and not the entire property, passed on to the petitioner.

10. In such view of the matter, it is submitted, irrespective of the period of limitation for challenging the deed of conveyance itself, the court below

could come to a conclusion that the said deed, even if existent, would at best convey only the share of the defendant nos. 1 and 2 and not the entire

suit property, and could pass consequential decree of partition.

11. It is next submitted on behalf of the opposite party nos. 1 to 3 that there were allegations of fraud in various paragraphs of the plaint, which would

make the question of limitation academic, since fraud vitiates all.

12. It is further argued by learned counsel for the opposite party nos. 1 to 3 that Order IV Rule 1(3) of the Code of Civil Procedure, as argued by

learned senior counsel for the petitioner, is not applicable to the present case at all, since the suit was filed in the year 1999, whereas the said provision

was introduced to the Code of Civil Procedure with effect from July 1, 2002. As such, it is submitted, non-compliance with the Rules contained in

Orders VI and VII of the Code would not entail that the plaint shall not be deemed to be duly instituted.

13. It is submitted that Order VII Rule 6 of the Code does not debar the present suit in any manner, in view of sufficient explanation having been

given in the plaint for the alleged delay. Hence, it is argued, on a plain and meaningful reading of the plaint, as mandated by law, there was no ground

for rejection of the plaint.

14. Learned counsel for the opposite party nos. 1 to 3 cites the following judgments:

i. AIR 2015 SC 3357 [Vaish Aggarwal Panchayat vs. Inder Kumar and others]. In the said decision, the Supreme Court refused to reject the plaint

since the question involved therein related to res judicata, which involved a mixed question of law and fact and required not only examination of the

plaint but also other evidence.

ii. (2006) 5 SCC 638 [Ramesh B. Desai and others vs. Bipin Vadilal Mehta and others], wherein the Supreme Court held that limitation was a mixed

question of fact and law and as such, could not give rise to a preliminary issue as contemplated in Order XIV Rule 2 or Order VII Rule 11(d) of the

Code of Civil Procedure.

iii. (2007) 14 SCC 183 [C. Natrajan vs. Ashim Bai and another], for the same proposition that the question, as to whether the suit is barred by

limitation or not, would depend upon facts and circumstances of each case. In the said reported decision, the Supreme Court refused to reject the

plaint under Order VII Rule 11(d) of the Code of Civil Procedure.

iv. (2017) 3 WBLR (Cal) 379 [Halonix Limited vs. Khaitan Electricals Limited], wherein a Division Bench of this Court held that the question of

limitation could be decided only by a full-fledged trial and the plaint could not be rejected under Order VII Rule 11(d) of the Code of Civil Procedure.

15. Lastly, relying on Section 44 of the Transfer of Property Act, 1882, it is argued on behalf of the opposite party nos. 1 to 3 that where one of two or

more co-owners of immovable property transfers his share of such property, the transferee acquires, in respect of such share, the transferor's

right to joint possession or other common or part enjoyment of the property and to enforce a partition of the same, but subject to the conditions and

liabilities affecting, at the date of the transfer, the share so transferred. As such, learned counsel for the opposite party nos. 1 to 3 argues that the

defendant no. 6/petitioner acquired only the share of the defendant nos. 1 and 2 by virtue of the transfer of 1992 and could not claim more.

16. In this context, for a proper adjudication, the following provisions are required to be set out:

“Section 44 of the Transfer of Property Act, 1882:

44. Transfer by one co-owner. “Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share

of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer,

the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to

the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred. Where the transferee of a share of a dwelling-

house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other

common or part enjoyment of the house.”

“Order IV Rule 1 of the Code of Civil Procedure, 1908:

1. Suit to be commenced by plaint. (1) Every suit shall be instituted by presenting a plaint in duplicate to the Court or such officer as it appoints in

this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

(3) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub-rules (1) and (2).

“Order VII Rule 6 of the Code of Civil Procedure, 1908:

6. Grounds of exemption from limitation law. " Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the

plaint shall show the ground upon which exemption from such law is claimed:

Provided that the Court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is

not inconsistent with the grounds set out in the plaint.

17. A perusal of the plaint, in the present case, reveals that the amended relief (c) therein claims that the defendant nos. 1 and 2 had no title to

transfer the entire premises no. 20, Gopal Chandra Mukherjee Road exceeding their share therein and, as such, by virtue of the said deed the

defendant no. 6 acquired only fifty per cent of the said property, which belonged to the said defendants. Such relief is inseparably connected with the

other reliefs of partition and ancillary reliefs, since the other reliefs are dependent on relief (c).

18. Unlike Sopan Sukhdeo (supra), cited by the petitioner, the adjudication claimed in relief (c) is inseverable from the rest of the reliefs and could not

be held to be unrelated with the other issues. As such, there could not arise in the present case, as in the said reported judgment, the question of

restricting the reliefs to partition and consequential relief by expunging relief (c). Either all the reliefs had to be retained on board, or the plaint had to

be rejected as a whole.

19. It is seen on a plain and meaningful reading of the plaint, that certain allegations of fraud have been levelled in respect of the sale deed executed

by the defendant nos. 1 and 2 in favour of the defendant no. 6. It has been alleged, for example, in paragraph no. 7 of the plaint that the said

defendants fraudulently and illegally represented themselves as the only owners of the properties-in-suit and that accordingly they were using and

enjoying the suit properties and usufructs, completely denying and ignoring the due shares of the plaintiffs.

20. It has further been alleged in paragraph no. 12 of the plaint that the defendant nos. 1 and 2 had illegally sold, transferred and parted with the

possession of the joint properties of the plaintiffs and defendant nos. 1 and 2 on November 9, 1992, by a fictitious deed of conveyance, in respect of

one hundred per cent share in the premises at 20, Gopal Mukherjee Road, P.S.:Cossipore, District: North 24 Parganas, Calcutta-700002, to the

defendant no. 6.

21. Such allegations of fraud, in the absence of any specific date of knowledge of such fraud, leaves a doubt as to the starting point of limitation.

However, the said allegations could be deemed to substantially cater to the requirements of the proviso to Order VII Rule 6 of the Code of Civil

Procedure by furnishing grounds to claim exemption from the law of limitation.

22. Furthermore, an amendment was introduced, thereby incorporating a relief as to declaration that the defendant nos. 1 and 2 had no right, title or

interest to transfer the entire premises no. 20, Gopal Chandra Mukherjee Road, exceeding their 50% share in favour of defendant no. 6, who did not

acquire any interest more than 50% in the said property by such deed of conveyance dated November 09, 1992; the plaintiffs thereby opened up a

scope for the trial court to declare the 50% share of the respective parties by ignoring the said deed.

23. This apart, even if such an amendment were not introduced, the court, while adjudicating the shares of the parties, could incidentally look into the

effect of the deed dated November 09, 1992 and its effect, insofar as how much share in the suit property it conveyed in favour of the defendant no.

6/petitioner. Hence, the argument as to limitation would remain arguable at best and could not be decided on the face of the plaint, justifying rejection

of the plaint at the outset.

24. In such view of the matter, it would be premature at this juncture to hold that the relief claimed against the present petitioner was palpably-barred

by limitation. The rigour of the proviso to Order VII Rule 6 of the Code of Civil Procedure is not applicable to the present suit by virtue of Order IV

Rule 1 (3), since the said sub-rule itself came into force with effect from July 1, 2002, while the present suit was instituted in the year 1999.

25. As such, the other judgments cited by the petitioner, as to the plaint being partially rejected, fade into irrelevance. Additionally, it might be noted,

the judgment of Dilboo and others (supra) was rendered in a case where the suit itself was disposed of, and as such, is not applicable to a situation of

rejection of plaint.

26. Hence, it would be premature to reject the plaint, as against the defendant no. 6/petitioner or as a whole, and/or to strike out the name of the

defendant no. 6/petitioner from the plaint, and such an adjudication would be best left for the trial of the suit, on evidence.

27. Accordingly, C.O. No. 3001 of 2018 is dismissed on contest against the plaintiffs/opposite party nos. 1 to 3.

28. There will be no order as to costs.

29. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.