

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Raja Basu Chowdhury

FAT 647 of 2017
with
IA No.: CAN 2 of 2018 (Old No.: CAN 9920 of 2018)

Putul Bhattacharjee & Others
- versus -
Sudarshan Bhattacharjee & Others

For the Appellants : *Mr. Partha Pratim Roy,*
Ms. Jeenia Rudra,
Mr. Debasish Mukhopadhyay,
Mr. Thaneswar Kumai.

For the Respondents : *Mr. Indranath Mukherjee,*
Mr. Subir Banerjee,
Ms. Ruxmini Basu Roy,
Mr. Sandip Bandyopadhyay.

Hearing is concluded on : *1st July, 2022.*

Judgment On : **13th July, 2022.**

Raja Basu Chowdhury, J.

1. This appeal is directed against the judgment and decree dated 30th October, 2017 passed by the learned Civil Judge (Senior Division) at Siliguri in Partition Suit No. 147 of 2010 (*Smt. Putul Bhattacharjee & Ors. Vs. Sri*

Sudarshan Bhattacharjee & Ors.) whereby the learned court was, *inter alia*, pleased to reject the plaint by allowing an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (in short, the Code) filed by the respondent no. 1 herein, who is also the defendant no. 1 in the suit.

2. Assailing the judgment and decree, as aforesaid, the instant appeal has been filed by the appellants, who are the legal heirs of the original plaintiff no.1.

3. The original plaintiff no. 1 along with the plaintiff no. 2 had filed the suit, *inter alia*, claiming partition of the suit property. It is the appellants' case that one Jnanesh Chandra Bhattacharjee (in short, Jnanesh), since deceased was the absolute owner and was in possession of all that landed property measuring 6 cottahs 8 chittacks more or less, situate at Subash Pally, Ward No. 20 under Siliguri Municipal Corporation. Jnanesh died intestate on 27th December, 1968 leaving behind, his widow Prativa Devi and six sons namely Sudarshan, Santosh, Susanta, Sukumar, Subash and Subrata as his legal heirs and successors. Prativa Devi having died intestate, six sons of Jnanesh jointly inherited the suit property in equal share and as such the plaintiffs and the defendants are co-owners of the suit property, each having one-sixth share therein.

4. The appellants further claim that the respondent no. 1 being the eldest son of Jnanesh used to and continues to look after the suit property and all original documents and papers relating to the suit property were in the custody of the respondent no.1.

5. The appellant's further claim that Santosh Bhattacharjee, the plaintiff no.2 in the suit had gifted his undivided one-sixth share in the suit property unto and in favour of the original plaintiff by a registered instrument executed in the year 2011. Subsequently the original plaintiff having died intestate on 12th April, 2013, the appellants have been substituted in his place and stead and are jointly entitled to two-sixth undivided share in the suit property.

6. The appellants claim that the original plaintiff's effort to effect partition amicably was turned down and hence the suit was filed praying for partition of the suit property by metes and bounds consequent upon declaration of share of the parties.

7. The respondent no. 1, who is also the defendant no.1 in the suit, has been contesting the suit by filing written statement. The order-sheet reflects that the suit was transferred to the peremptory list and the plaintiffs' first witness PW1 has been examined and documents have been marked as Exhibits (subject to objection). In course of cross examination of the plaintiffs' first witness, the respondent no. 1 filed an application under Order 7 Rule 11 read with Section 151 of the Code. At the instance of the respondent no. 1 the suit was taken out from the peremptory board. The said application was contested by the appellants. By a judgment and decree dated 30th October, 2017 the application under Order 7 Rule 11 of the Code was allowed and it was ordered that the suit is not maintainable and the plaint is rejected.

8. Mr. Partha Pratim Roy, learned advocate appearing for the appellants submit that the learned Judge erred in law in rejecting the plaint by taking into consideration facts and events which did not form part of the plaint. The decision to reject the plaint was not based on averments made in the plaint but was based on pleadings and documents filed by the respondent no.1 in his application under Order 7 Rule 11, which were disclosed for the first time in such application.

9. According to Mr. Roy, the learned Judge ought not to have relied on copies of the two documents being copies of registered deeds of sale dated 2nd July, 1965 and 25th September, 1965 purportedly executed by Jnanesh, while deciding an application under Order 7 Rule 11 of the Code.

10. Mr. Roy submits that the learned Judge has caused miscarriage of justice by rejecting the plaint relying upon the aforesaid documents which were introduced by the respondent no. 1 for the first time in his application under Order 7 Rule 11 of the Code. The authenticity of the aforesaid documents are in doubt, originals of such documents have not been disclosed, the same at best can be a defence in the trial, such defence of the respondent no.1 cannot form the basis for allowing the application under Order 7 Rule 11 of the Code. In support of such contention reliance has been placed upon the case of *Srihari Hanumandas Totala Vs. Hemant Vithal Kamat and Ors.*, reported in AIR 2021 SC 3802.

11. *Per contra*, Mr. Indranath Mukherjee, learned advocate representing the respondent no.1 submits that the learned Judge has in fact dismissed the suit on merit. According to him, this is not a case of rejection of plaint.

He submits that this Hon'ble Court ought not to go by the nomenclature of the application filed but should take into consideration the substance of the averments. He says that the suit itself has been rightly dismissed on merit due to absence of cause of action. He then places the application under Order 7 Rule 11 of the Code. In paragraph 3 of the said application, the respondent no. 1 has pleaded that on 10th December, 2016, the respondent no. 1 had received a notice issued by the Revenue Officer, BL & LRO, Siliguri directing the respondent no. 1 to appear before the concerned authority on 27th December, 2017 in connection with the landed property of Jnanesh, the recorded khatian holder of such landed property. The respondent no. 1 has further stated in such application that in January, 2017 he had come to learn from one office staff, that Jnanesh in the year 1965 had sold out a portion of his landed property to one Rekha Rani Dey and by making searches, the respondent no.1 has been able to identify two title deeds executed by Jnanesh in the year 1965. By placing reliance on the aforesaid two documents, the respondent no. 1 claims that the property forming subject matter of the suit had already been sold by Jnanesh long back and that the aforesaid property now belongs to the State of West Bengal. The very corpus of the suit is non-existent and as such there is no infirmity in the judgment impugned. Proceeding on such premise, the respondent no.1 had sought for dismissal of the suit. He submits that the learned court was justified in rejecting the plaint as nothing survived in the suit since the property stood vested in the State. It would thus be an idle formality to proceed with the suit.

12. Mr. Mukherjee further submits that in the event, this Hon'ble Court is of the view that the judgment impugned cannot be sustained, the trial court be directed to decide the above question, whether Jnanesh had transferred his interest in the suit property in the year 1965, as a preliminary issue in the suit. According to Mr. Mukherjee the aforesaid issue goes to the root of the matter and needs to be decided at the first instance.

13. We have perused the copy of the plaint, the application under Order 7 Rule 11 of the Code and the judgment impugned in the present appeal. We have taken note of the submissions made by the parties.

14. We find from the records that this is a partition suit filed by the legal heirs of Jnanesh. The property forming subject matter of the suit was originally owned by Jnanesh. We find from the order sheet that the suit had been on peremptory hearing board when the plaintiffs' first witness was in the witness box and was being cross-examined by the respondent no 1. At the instance of the respondent no.1 the suit was removed from the peremptory hearing board on 1st June, 2017 and subsequently the application under Order 7 Rule 11 of the Code was taken up for consideration by the learned Judge and ultimately by a judgment and decree dated 30th October, 2017 the learned Judge has allowed the application under Order 7 Rule 11 of the Code and had rejected the plaint.

15. We are thus not impressed by the submissions made on behalf of the respondent no. 1 that the order of dismissal is not limited to rejection of the plaint but is a decision on merit of the suit. It is the respondent's case

before the learned trial court, as would appear from the averments made in the application under Order 7 Rule 11 of the Code, that the suit is barred by law as subsequent to the execution of the registered instruments dated 2nd July, 1965 and 25th September, 1965 neither the plaintiffs nor the defendants can be considered as owners in the suit property by way of inheritance. In other words, the respondent no.1 has attempted to make out a case that on the strength of the said registered instruments, the plaintiffs stands non-suited. We must indicate that while deciding an application under Order 7 Rule 11 of the Code, what is relevant for consideration, is the plaint and the documents annexed thereto. The issues on merits of the matter which may arise between the parties would not be within the realm of the court at this stage.

16. Since the application is for rejection of the plaint the court is bound to take the statements pleaded in the plaint at face value and ought not to be persuaded by the documents relied by the respondent no.1, which may impinge upon the plaintiffs' claim. We have meticulously perused the statements made in the plaint. We do not find any recording that Jnanesh at any point of time has sold or transferred the suit property in favour of any third party. We find that the learned Judge has been impressed with the defence taken by the respondent no.1 in the application under Order 7 Rule 11 of the Code and has rejected the plaint.

17. We are afraid, the procedure adopted by the learned Judge, placing reliance on the defence of the respondent no.1, howsoever strong the same might be, could not have rejected the plaint, by invoking the provisions of

Order 7 Rule 11 of the Code. Such procedure as adopted is not sustainable in law. It is well settled that in order to reject a plaint only the averments made in a plaint and the documents relied thereon can be taken into consideration. The defence of the respondent no.1 cannot be considered while dealing with an application under Order 7 Rule 11 of the Code. The judgment reported in the case of *Srihari Hanumandas Totala Vs. Hemant Vithal Kamat and Others* (Supra) supports the above view.

18. We also do not find any reason to direct the learned trial court to decide whether the suit is barred by law or not as a preliminary issue, since we did not find any such issue being raised by the respondent no.1. We may add that pleadings form the basis for framing an issue. An issue may be of law or of fact or a mixed question of law and fact. However, unless the foundation for raising an issue is made in the pleadings, especially when the same relates to an issue of fact, no such issue can be framed. The written statement filed by the respondent no. 1 does not reflect the aforesaid stand and as such no issue, far less a preliminary issue, can be framed for such purpose. On the contrary we find that the respondent no.1 has made a counter claim and has sought for a declaration that he is the absolute owner of the suit property. In any event, it is for the learned Judge to decide such questions and we do not wish to foreclose the same at this stage.

19. We find the aforesaid judgment and decree dated 30th October, 2017 passed by the learned Civil Judge, Senior Division at Siliguri in Partition Title Suit No. 147 of 2010 cannot be sustained. The same is, accordingly, set aside. The plaint is restored to the file along with interim order/orders, if

any. The trial court shall proceed with the trial from the stage the suit had been shifted out of peremptory board at the instance of the respondent no.1.

20. Since the matter has been pending for more than a decade, we request the learned trial court to dispose of the suit as early as possible preferably within a period of six months, without granting unnecessary adjournments to the parties.

21. The appeal and the connected application are disposed of.

22. There shall, however, be no order as to costs.

23. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Raja Basu Chowdhury, J.)

(Tapabrata Chakraborty, J.)