

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Supratim Bhattacharya

FMA 765 of 2017

IA No. CAN 1 of 2017

(Old No. 3327 of 2017)

Smt. Laily Ghosal

-vs-

Sri Debnarayan Dey & Ors.

For the Appellant : Mr. Bhaskar Ghosh
Mr. Gautam Lahiri
Mr. Partha Sarathi Basu

For the State : Mr. Ritoban Sarkar
Mr. Debanjan Ghosh
Ms. Chitrani Roy Chowdhury
Mr. Abhidipta Tarafder

Heard On : 23.03.2023

Judgement Delivered On : 22.06.2023

Supratim Bhattacharya, J.:-

- 1.** The instant appeal has been preferred by the appellant/ defendant No.2 namely Laily Ghoshal being aggrieved by and dissatisfied with the Judgement and Decree dated 7th of March 2017 passed by the Ld. Additional District Judge 1st Court Alipore, South 24 Parganas in Title Appeal No. 23 of 2017.
- 2.** Through the aforesaid judgement and decree the Ld. Additional District Judge 1st Court, Alipore has reversed the Judgement and decree dated 13th of January 2017 passed by the Ld. Civil Judge Sr. Divn. 7th Court Alipore, South 24 Parganas, in Title Suit No. 17 of 2015.
- 3.** The Civil Judge Sr. Divn, 7th Court Alipore, South 24 Parganas vide order dated 13.01.2017 has dismissed the Title Suit No. 17 of 2015 on contest as being not maintainable under the provision of Order II rule 2 of the Code of Civil Procedure.
- 4.** Against the Judgement and decree passed on 13.01.2017 by the Ld. Civil Judge Sr. Divn. in Title Suit No. 17 of 2015, Title Appeal No. 23 of 2017 was preferred and ultimately the Ld. Additional District Judge 1st Court Alipore, South 24 Parganas allowed the appeal on contest without any order as to cost, by setting aside the Judgement and decree passed in the Title Suit No. 17 of 2015. Through the impugned Judgement the Ld. Additional District Judge 1st Court, Alipore directed the Ld. Trial Judge

to proceed with the suit from the hearing of the injunction application afresh and after deciding the injunction application has further directed to proceed with the suit after allowing the defendants therein to file respective written statements if not filed earlier. It has been further directed that after framing issues if not framed earlier to dispose of the suit that is Title Suit No. 17 of 2015 in accordance with law. The Ld. Additional District Judge has further directed to maintain *status quo* in respect of nature and character of the suit property as the respondents vide order No. 4 dated 13.01.2017 were directed to maintain *status quo* in respect of nature and character of the suit property by the Ld. Trial Judge.

- 5.** The fact of the instant lis is that Dolly Bose the respondent No.3/defendant is /was the owner of the suit property being premises No.311 Becharam Chatterjee Road, P.S. Parnashree, District South 24 Parganas.

According to the plaintiffs/respondents No.1 and 2 namely Debranjana Dey and Alo Dey were delivered vacant possession of the aforesaid property in the year 1978 on the basis of an understanding with Dolly Bose. The said understanding was that there will be an absolute sale of the said property to the plaintiffs according to market price which was settled at Rs. 75,000/-. It is the contention of the plaintiffs/respondents No.1 and 2 that they have paid Rs. 18,000/- in instalments to the respondent/defendant. The respondents No.1 and 2

have also alleged that the respondent No.3/ defendant along with her men and agents on 15.3.2013 had tried to forcibly evict the respondents No.1 and 2. On the basis of the aforesaid contentions the respondent Nos. 1 and 2 earlier filed a Title Suit being TS No. 7322 of 2013 praying for declaration that the plaintiffs are in settled possession of the suit property till date since 1978 and have also prayed for permanent injunction restraining the defendant from disturbing the peaceful possession and enjoyment by the plaintiffs. The petition under *Order XXXIX Rules 1 and 2* was rejected ex parte on 02.05.2013.

In the Title Suit 7322 of 2013 the defendant filed written statement after disposal of the injunction petition and stated that the said property has been sold during the month of April 2013.

The plaintiffs/respondents No.1 and 2 thereafter filed another suit being TS No. 17 of 2015 before the self same court. In this title suit filed later in addition to Dolly Bose, who was the defendant in the earlier suit, one Laily Ghoshal has been added as defendant No.2 being the purchaser of the suit property. The prayers made in the second suit that is Title Suit No. 17 of 2015 are a declaration that the deed of conveyance dated 16.04.2013 is illegal, null and void ab-initio and not binding upon the plaintiffs along with a prayer for a decree for specific performance of the contract in respect of the suit property and a decree for permanent injunction restraining the defendants from selling,

transferring, alienating and creating third party's interest in respect of the suit property.

In the Title Suit No. 17 of 2015 the Ld. Civil Judge Sr. Divn. framed a preliminary issue which is as follows:

“ Is the suit maintainable in its present form in view of the provision of Order II Rule 2 CPC ?”.

The preliminary issue was considered and ultimately the Ld. Judge came to the finding that the suit fails and ordered that the suit is dismissed on contest.

Against this order of dismissal of the Title Suit No. 17 of 2015, being not maintainable under the provision of Order II Rule 2 of CPC the appellants preferred an appeal being Title Appeal No. 23 of 2017.

Ld. Additional District Judge Alipore, 1st Court heard out the said Title Appeal and allowed the appeal on contest, by setting aside the order dated 13.01.2017 passed in the Title Suit No. 17 of 2015.

Against the Judgement and Order passed in the said Title Appeal the appellants have preferred the instant appeal.

- 6.** The moot point for consideration in the instant appeal is as to whether the finding of the Appellate Court, that the Title Suit being No. TS 17 of 2015 has arisen out of the separate cause of action from that of the

cause of action which has given rise to the Title Suit No. 7322 of 2013, is in accordance with law.

7. The Ld. Counsel appearing on behalf of the appellant during his exhaustive argument has submitted that both the title suits being Title Suit No. 7322 of 2013 and Title Suit No 17 of 2015 have arisen out of the same cause of action. He has submitted that the respondents No. 1 and 2 have all their reliefs incorporated in the Title Suit No. 7322 of 2013, which reliefs the plaintiffs respondents have. He has further submitted that the reliefs belonging to the plaintiffs/respondents which they have sought for were already present prior to the filing of the first Title Suit being TS 7322 of 2013. He has further submitted that the respondents no. 1 and 2/ plaintiffs had not sought for any permission as regards to leaving a part of the relief which the plaintiffs had already accrued as has been alleged by them.

The Ld. Counsel has stressed upon the point that both the title suits have arisen out of the same cause of action that is the alleged understanding alleged to have taken place during the year 1978. He has further submitted that Order II rule 2 of the Code of Civil Procedure has been incorporated in the said code on the principle that the defendants should not be twice vexed for one and the same cause. He has further submitted that Order II rule 2 of the Code of Civil Procedure has been given effect to stop multiplicity of proceedings arising out of the same cause of action. The Ld. Counsel has further submitted that the

respondents no. 1 and 2/ plaintiffs have relied upon the fact that on the basis of an understanding/ oral agreement for sale the respondents No. 1 and 2/ plaintiffs have paid Rs. 18,000/- in four instalments on four different dates during the year 1978 and since the year 1978 till the year 2012, that is for more than 34 years the respondents no. 1 and 2/ plaintiffs sat tight over the said issue and have never prayed for giving effect to the verbal agreement for sale which has been alleged to have taken place long ago, allegedly during the year 1978. He has further submitted that it is very hard to believe that a person will sit tight for more than 30 years after paying several instalments, said to be part of the total consideration arising out of an agreement. The Ld. Counsel has further submitted that the respondents no. 1 and 2/ plaintiffs in spite of having the reliefs already accrued in favour of them had left behind some reliefs and that too without taking the leave of the Court cannot be encouraged. Banking upon the aforesaid facts and circumstances the Ld. Counsel has prayed for allowing the instant appeal by setting aside the judgement and decree passed in the Title Appeal No. 23 of 2017.

- 8.** The Ld. Counsel appearing on behalf of the respondent no. 1 and 2/ plaintiffs has submitted that the first Title Suit being T. S. 7322 of 2013 was filed praying for injunction restraining the defendants from evicting the plaintiffs while the second Title Suit being T.S. 17 of 2015 stands upon a different footing, wherein the reliefs sought are a declaration to the effect that the deed of sale between the defendant No. 1 and 2 in the

title suit of 2015 be cancelled and the respondents no. 1 and 2 have also sought for specific performance of the contract. The Ld. Counsel has stressed upon the point that the reliefs sought for in the first title suit and in the second are totally different and the reliefs sought for have arisen out of different cause of action.

Ld. Counsel has further submitted that the reliefs sought for in the TS 17 of 2015 praying for cancellation of the deed has arisen out of the cause of action which has arisen in the year 2014 when the plaintiffs came to know from the locality that the defendants have colluded with each other and have executed a deed of sale behind the back of the plaintiffs. The Ld. Counsel has further submitted that when the reliefs sought for in the two suits are different and have arisen out of different cause of action then the provisions of Order II rule 2 of the Code of Civil Procedure cannot be given effect to. Banking upon the aforementioned submissions the Ld. Counsel has prayed for rejecting the instant appeal.

9. First of all let the Order II Rule 2 of the Code of Civil Procedure be laid down, which is as follows :

“2. Suit to include the whole claim.—

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

10. From the said aforementioned rule it reveals that the bar of subsequent suit as envisaged under Order II rule 2 comes into operation if the following conditions are fulfilled:

- i) Where the cause of action on which the previous suit was filed forms the foundation of the subsequent suit;
- ii) When the plaintiff could have claimed the relief in the earlier suit, sought in the subsequent suit, and
- iii) Both the suits are between the same parties.

11. From the above mentioned rules it is evident that where the cause of action for seeking a particular relief is not available to a plaintiff at the time of filing the earlier suit, the bar under Order II, rule 2 is not applicable.

- 12.** In the instant lis the suit property involved in both the title suits that is the first Title Suit No. 7322 of 2013 and the second Title Suit No. 17 of 2015 is same.
- 13.** In the first title suit prayers sought for are declaration as to possession, permanent injunction and any other reliefs, while in the second title suit the prayers sought for are decree of declaration that the deed of conveyance dated 16.4.2013 is illegal, null and void ab-initio and not binding upon the plaintiffs and a decree for specific performance of the contract in respect of the suit property.
- 14.** In the second suit the deed of conveyance dated 16.04.2013 has been prayed for to be not binding upon the plaintiffs. The plaintiffs have relied upon the fact that they were not aware of the deed of conveyance dated 16.4.2013.
- 15.** From the pleadings of both the title suits it is evident that the defendant has disclosed in the written statement filed in the first title suit that is Title Suit No. 7322 of 2013, as regards to the deed of conveyance.
- 16.** The plaintiffs could have applied for leave to amend the pleadings as subsequent events can be taken into consideration which has been laid down by the Judgement of the Hon'ble Apex Court in between *Vineet Kumar vs. Mangal Sain Wadhera* reported in (1984) 3 SCC 352.
- 17.** The law is well settled that though the rights of the parties are normally to be decided on the date of the suit, the Court can, in the

interest of justice require it to take notice of subsequent events and grant appropriate reliefs as has been laid down in the suit between *Bhanu Prakash Vs. Munnalal*.

- 18.** The liberal principles which guide the exercise of discretion in allowing amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be readily granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted on the opposite party under the pretence of amendment that one distinct cause of action should not be substituted for another and that the subject matter of the suit should not be changed by amendment. In the suit between *Suraj Prakash Bhasin Vs. Smt. Raj Rani Bhasin and others* which has been reported in (1981) 3 SCC 652 the principle has been laid.
- 19.** From the aforementioned authorities it is evident that through amendment the subsequent events could have been brought into record but in the instant case the plaintiffs have chosen not to take that path instead have filed a subsequent suit.
- 20.** Under the provisions of Order II rule 2 both the suits should be between the self same parties but in the instant case in the second suit that is in the Title Suit No. 17 of 2015 another defendant has been added, in addition to the defendant who was in the first suit, who has purchased the suit property through the deed of conveyance in respect of which relief has been sought for.

21. The plaintiffs have relied upon an oral understanding said to have taken place during the year 1978 on the basis of which they are claiming possession of the suit property and are now praying for specific performance of the contract. No document has either been produced or said to be in possession of the plaintiffs in respect of the said oral understanding .

22. The plaintiffs have also not mentioned as regards to any written receipt issued by the defendant in respect of their payment of Rs. 18,000/- paid in instalments on several dates and no document has been placed in this regard.

23. Taking into consideration the aforementioned discussion, the Ld. Trial Judge is directed to have the two suits that is Title Suit No. 7322 of 2013 and Title Suit No. 17 of 2015 consolidated and tried.

24. Considering the aforesaid facts and circumstances the Ld. Trial Judge is directed to frame two issues, in addition to the issues already framed or to be framed, which are as follows:

- I) Whether the oral understanding said to be of the year 1978 is tenable in law ?
- II) Whether the suit is barred by limitation?

Let the said two suits being Title Suit No. 7322 of 2013 and Title Suit No. 17 of 2015 be consolidated and heard out within a period of 6 (six) months from the date of receipt of this order.

FMA 765 of 2017 with IA No. CAN 1 of 2017 (Old No. 3327 of 2017) stand disposed of.

Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.

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

(Supratim Bhattacharya, J.)