

11.12.2023
Court No. 19
Item no.01
CP

C.O. No. 2452 of 2022

Smt. Mousumi Mukhopadhyay @
Mousumi Mukherjee

Vs.

Sri Nikhilesh Mukhopadhyay & Ors.

Mr. Ayan Banerjee
Mr. Soumo Chaudhury

.....for the petitioner.

Affidavit of service is taken on record.

None appears on behalf of the opposite parties.

It appears that the learned advocate appearing on behalf of the opposite parties in the court below was sought to be served, but the service has returned with the endorsement 'door locked'. The constituted attorney of the opposite parties who had represented the opposite parties in the suit, was served with a copy of the application. A notice of mentioning dated December 4, 2023 and a notice dated December 8, 2023, after the matter was mentioned, were sent to the said constituted attorney. The postal receipts indicate that the constituted attorney has been served. The court is satisfied with the service.

The postal receipts, the copies of the notices and the affidavit of service are kept with the records.

The petitioner is aggrieved by the order dated May 11, 2022, passed by the learned Civil Judge

(Senior Division), 6th Court, Alipore in Title Suit No. 51 of 2014.

By the order impugned, an application under Order 7 Rule 11 of the Code of Civil Procedure filed by the petitioner/defendant, was rejected. The learned court was of the view that the issues raised by the defendant in the application for rejection of the plaint touched the merits of the suit, which would be decided at the trial.

Mr. Banerjee, learned advocate appearing on behalf of the petitioner, submits that without a prayer for recovery of possession, the suit could not proceed and the plaint should be rejected. According to him, the plaint indicates that his client was in possession of the property in question. Thus, if the co-owners file a suit for partition, there should be a prayer for recovery of possession. Declaration of the shares was also sought for, without claiming recovery of possession.

Upon perusal of the plaint, this court finds that the facts relating to the filing of the suit and cause of action are as follows:-

- a) The suit has been filed for partition and accounts.
- b) The subject matter of the suit is, all that piece and parcel of a three storeyed building constructed upon a land measuring about 1

cottah, 3 chittaks, situated at Premises No. 18A, Satya Doctor Road, P.S. Watgunge, Kolkata – 700023.

- c) The original owner was one Sri Sikharesh Mukhopadhyay, the elder brother of the father of the plaintiffs. Sikharesh Mukhopadhyay died testate, leaving behind a will dated May 25, 1953. The will was duly probated and the suit property devolved upon Sunilesh Mukhopadhyay, the father of the plaintiffs.
- d) Sunilesh Mukhopadhyay died on April 2, 1999, leaving behind him his widow, Smriti Mukhopadhyay (since deceased) and three sons, namely Nikhilesh, Saibalesh and Salilesh Mukhopadhyay, who inherited the property equally, each having one-fourth share therein.
- e) The defendant was a tenant in respect of a portion of the property. Subsequently, the plaintiffs came to know that the defendant was claiming to have acquired absolute ownership of the property from their deceased mother. The certified copy of the said deed was obtained. The plaintiffs did not authorize their mother to sell the property and, at best, she could have sold

out only one-fourth portion of the undivided property.

- f) The plaintiffs filed Title Suit No. 29 of 2007, before the learned Civil Judge (Senior Division), at Alipore against the defendant and their mother. The mother died and the defendant contested the suit. The suit was decreed on contest and by judgment and decree passed in the said suit, it was declared that the share of the plaintiffs in the said suit had not been affected by the sale. The fact that the plaintiffs and the mother had acquired one-fourth share each, was held in the suit. There were several tenants in the suit property from whom the defendant was wrongly realizing the rental amounts without disclosing the income to the plaintiffs. The plaintiffs' /co-sharers filed the suit for partition and accounts. They jointly claimed undivided three-fourth share.
- g) The accounts of the rent received had not disclosed to the plaintiffs, who were co-sharers in respect of the property in question.
- h) That the defendant was requested to partition the suit property after the title of

the plaintiffs and the defendant was declared by the court, but the defendant failed to do so. Hence, the suit was filed for a decree of declaration of three-fourth share of the property. For final decree upon partition by metes and bounds through a partition commissioner. Further prayer was for a preliminary decree in respect of accounts of the rental income from the suit property since July, 2000 and a final decree for the said amount to be payable to the plaintiffs.

Having considered the contentions of the petitioner, this court finds that this is a suit for partition and accounts. The learned court below rightly held that the plaint should not be rejected on the ground that recovery of possession had not been prayed for. Such issue goes to the merit of this suit. In a partition suit, when the preliminary decree is passed, the shares are declared. Partition by metes and bounds is thereafter undertaken by a partition commissioner. Allotment of the respective shares of the parties as per the report of the partition commissioner is done.

Reference is made to the decision in **G. Nagaraj and Anr. vs, B.P. Mruthunjayanna and**

Ors. decided in **Civil Appeal No.- 2737 of 2023.**

The Hon'ble Apex Court held as follows:-

“6. The law is well settled. For dealing with an application under Rule 11 of Order VII of CPC, only the averments made in the plaint and the documents produced along with the plaint are required to be seen. The defence of the defendants cannot be even looked into. When the ground pleaded for rejection of the plaint is the absence of cause of action, the Court has to examine the plaint and see whether any cause of action has been disclosed in the plaint.

7. A perusal of the judgments of the Trial Court and the High Court will show that the Courts have gone into the question of correctness of the averments made in the plaint by pointing out inconsistent statements made in the plaint. The Courts have referred to the earlier suits filed by the appellants and have come to the conclusion that the plaint does not disclose cause of action.

8. The learned counsel appearing for the second and third respondents vehemently submitted that on a plain reading of the plaint, it is crystal clear that cause of action is not disclosed. Therefore, we have perused the plaint. After having perused the plaint and in particular paragraphs 16 and 17, we find that the cause of action for filing the suit has been pleaded in some detail. It is pleaded how the first appellant acquired title to the property. The facts constituting alleged cause of action have been also incorporated in paragraph 17.

9. We are of the view that merely because there were some inconsistent averments in the plaint, that was not sufficient to come to a conclusion that the cause of action was not disclosed in the plaint. The question was whether the plaint discloses cause of action. As observed earlier, the plaint does disclose cause of action. Whether the appellants will ultimately succeed or not is another matter.”

In the decision of ***Jageshwari Devi and ors. vs. Shatrughan Ram*** reported in **(2007) 15 SCC 52**, the Hon’ble Apex Court held as follows:-

“3. We have heard learned counsel for the parties. We have perused the order of the trial court and of the High Court. We have also perused the plaint filed by the respondent herein. The main ground on which rejection of the plaint was sought was that the plaint does not disclose a cause of action which is a ground specified under Order 7 Rule 11(a) CPC. The trial court on consideration of the averments in the plaint held, and in our view rightly, that it could not be held that the plaint does not disclose a cause of action. It is relevant to state that there is a difference between the non-disclosure of a cause of action and defective cause of action: while the former comes within the scope of Order 7 Rule 11, the latter is to be decided during trial of the suit. The contention raised on behalf of the appellant that the cause of action disclosed is vague and incomplete, is not a ground for rejection of the plaint, under Order 7 Rule 11 CPC no exception can be taken to the order.”

The plaint discloses a cause of action. None of the reliefs claimed is time barred. The suit is not barred by law.

Under such circumstances, there is no scope to interfere with the order of the learned court below. The suit shall proceed on its own merits.

Accordingly, the revisional application is dismissed.

However, there shall be no order as to costs.

All the parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)