

IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

**S.A. 135 of 2022
CAN 1 of 2017
CAN 2 of 2017
CAN 3 of 2018**

PARTHA PRATIM CHOUDHURY
VS.

RATHINDRA NATH SAHA @ KHOKAN SAHA & ORS.

For the Appellant : Mr. Gopal Chandra Ghosh, Adv.
Mr. Prasanta Banerjee, Adv.

For the Respondent No. 1 : Mr. Kaushik Chatterjee, Adv.

For the Respondent Nos. 3,4 & 5 : Mr. Tapas Mukherjee, Adv.
Mr. Atanu Biswas, Adv.
Mr. Bikram Basak, Adv.
Ms. Soumita Shaw, Adv.
Mr. Aftab Hossain, Adv.

Hearing concluded on : 17th July, 2023

Judgement on : 24th July, 2023

Siddhartha Roy Chowdhury, J.:

1. Challenge in this appeal is to the judgement and decree passed by learned Civil Judge, Senior Division, Kalna in Title Appeal No. 11 of 2011, affirming thereby the judgement and decree passed by learned Civil Judge, Junior Division, Kalna, in Title Suit No. 153 of 1993, dismissing the suit for declaration and permanent injunction filed by the plaintiff/appellant.
2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.

3. To appreciate the appeal in its proper perspective it is expedient to narrate the facts of the case in brief. The appellant (hereinafter referred to as 'plaintiff') filed the suit for declaration of title and permanent injunction. It is adverted that one Rabindra Nath Gupta was the owner of the suit plot, after the demise of Rabindra Nath Gupta his legal heirs and successors stepped into his shoes and transferred the property (having an area of 9 decimal out of 11 decimal) in favour of the plaintiff by a registered deed of sale. The remaining area of 2 decimal on the north-east corner is owned and possessed by Khokan Saha @ Rathindra Nath Saha. There is a tile shed room on the south-eastern side of the suit plot which is owned and used by plaintiff and his family members as drawing room. The said room is connected to municipal road and accessible to public. The defendants want to use it as club room. The defendants made attempts to take possession of the property by force. The defendants have no right title interest over the suit property. Plaintiff was contemplating construction of a boundary wall encompassing the property purchased but the defendants threatened the plaintiff to dispossess him from the said tile shed room on 28th May, 1993. Hence by filing the suit the plaintiff prayed for decree for declaration of right title interest in respect of suit property, permanent injunction and other relief available under the law.
4. The defendants Rathindra Nath Saha, Kamal Modak, Ganesh Das, Samir Saha and Kalpana Saha contested the suit by filing written statement denying all material allegations. It is the specific case of the defendants that suit property having area of 11 decimal of land, was owned by Rabindra Nath Gupta, he was survived by his sons Bishnu

Pada Gupta, Dilip Gupta, Bimal Gupta, Kumar Gupta, Dipti Gupta and Nirmal Kumar Gupta; who transferred 2 decimal of land to Sripati Ruidas @ Sripati Das with a definite demarcation. Sripati Das while possessing the property by constructing house, sold and transferred the same to Kalpana Saha. Remaining 9 decimal of land was owned by the Guptas. Rabindra Nath Gupta was the absolute owner of the aforesaid property. 3 decimal of land to the north-western side of the property, owned by Kalpana Saha, was lying as waste land and in the year 1974 Nabaratna club took possession of the said 3 decimal of land and constructed a club room and a podium or platform was constructed to the west of the club room where they have been performing Kali Puja for more than 25 years. The club members used to play indoor games in the club room. There is a passage and a gate leading to the club room from the municipal road. The club members planted one sapling of Krishnachura 25 years ago which is still standing over there and has become a big tree, which is also possessed by club members. The club has acquired title by way of adverse possession in respect of said 3 decimal of land. The defendants prayed for dismissal of the suit. Learned Trial Court after considering the evidence on record adduced by the parties was pleased to dismiss the suit. Challenging the order of dismissal, the plaintiff preferred an appeal being Title Appeal No. 11 of 2011.

5. Learned First Appellate Court did not find any reason to differ with the view expressed by learned Trial Court. Consequently the appeal was not accepted. Hence the second appeal which was admitted to address the following substantial question of law :-

Whether learned Court below was justified in dismissing the appeal without disposing of the application under Order 6 Rule 17 of the Code of Civil Procedure filed by the plaintiff/appellant whereby the plaintiff/appellant prayed for an additional relief for recovery of possession of the suit premises from the trespassers to overcome the bar of maintainability of the suit due to Section 34 of the Specific Relief Act.

6. Assailing the impugned judgement Mr. Gopal Chandra Ghosh, learned Counsel for the appellant submits that an application was filed before the learned Appellate Court under Order 6 Rule 17 of the Code of Civil Procedure on 3rd July, 2014. At the time of filing of the suit, by Nirupama Chowdhury, the predecessor-in-interest of the present plaintiffs/appellants, C.S. record of rights had no indication about the existence of latrine over the suit property, erected by Kalna Municipality. But learned Trial Court after going through the R.S.R.O.R. observed that Kalna Municipality should have been impleaded as party. Hence by filing application the plaintiff prayed for leave to implead (i) Kalna Municipality represented by its Chairman. (ii) Bishnu Pada Gupta, Dilip Gupta, Nirmal Gupta sons of Late Rabindra Nath Gupta as defendants. The plaintiff further intended to incorporate certain averments in the prayer portion of the pleading in the following manner : “(e) That a decree for recovery of Khas possession of the suit property be given to the plaintiff as the plaintiff has been dispossessed from the suit property during pendency of the suit”.
7. Learned First Appellate Court by order dated 12th May, 2015 decided to dispose of the application along with appeal and on 10th June, 2015

was fixed for hearing of appeal. The appeal was disposed of, keeping the said petition under Order 6 Rule 17 of the Code of Civil Procedure pending. Mr. Ghosh strenuously argued that an interlocutory application generally ought to have been decided at the earliest point of time. In exceptional cases based on the facts and circumstances an interlocutory application should be considered at the stage of final disposal of the case for reasons to be recorded.

8. In this case suit was dismissed being bad for non-joinder of necessary parties and for want of prayer for recovery of possession and petition filed to cure the defects before the learned Appellate Court, remains unattended, causing serious prejudice to the plaintiffs. To buttress his point Mr. Ghosh places his reliance upon the unreported judgement of Hon'ble Karnataka High Court pronounced in the case of **SMT. KEMPAWA @ CHAMPAVATI W/O ... VS. SHRI BASAPPA LAGAMAPPA (SINCE DECEASED BY HIS LRS)** wherein it is held :-

“42. An Interlocutory Application is filed seeking consideration before the final disposal of a case. The Courts should therefore consider such Interlocutory Applications at the earliest point of time. It is only as a matter of exception and based on the facts and circumstances of the case that an Interlocutory application could be considered at the stage of final disposal of the case for reasons to be recorded. In the instant case the Learned Single Judge has failed to take note of the existence of the Interlocutory application. It is only after the Judgment, was pronounced that, the order on the Interlocutory application was passed separately. This would imply that not only at the stage of final arguments but also while pronouncing the Judgment, the Learned Single Judge has not considered the same.

43. The procedure adopted by the Learned Single Judge in rejecting the Interlocutory application as having become infructuous due to the final disposal of the case is not only erroneous but is opposed to the basic principles of Jurisprudence. We would reiterate that all Applications filed during M.F.A.No.25018/2011 the pendency of a case would necessarily have to be considered at the earliest point of time. The procedure adopted by the Learned Single Judge in finally hearing the matter without considering the pending application is not only erroneous but a procedural irregularity. The Courts are duty bound to consider all Interlocutory Applications before the consideration of the final case on merits. Exceptionally the same may be considered at the stage of final hearing for reasons to be recorded. The failure to consider the application before passing an order on merits is erroneous. The procedure adopted by the Learned Single Judge is erroneous and opposed to law."

The sum and substance of all the above decisions is that, before or in exceptional cases at the time of disposal of main matter, all the pending Interlocutory Applications are required to be disposed of."

9. According to Mr. Ghosh only on this ground the appeal deserves an order of remand with a direction upon the learned First Appellate Court to dispose of the application under Order 6 Rule 17 of the Code of Civil Procedure and decide the appeal afresh.
10. It is contended by Mr. Ghosh an application under Order 41 Rule 27 of the Code of Civil Procedure has also been filed by the plaintiff and annexing photocopy of deed, letter of Kalna Municipality along with site inspection report, information of plot issued by Land & Land Reforms Department, Kalna, Burdwan, it is contended, *inter alia*, Sripati Ruidas

@ Sripati Das acquired 2 decimal of land by the dint of Bando Basto Patra from the then Zamindar. So the averment that Kalpana Saha purchased the aforesaid 2 decimal of land from Sripati herein is incorrect. Rathindra Nath Saha practiced fraud upon the Court. It is further contended that Kalna Municipality is not required to be impleaded as party in view of the statement made by the Chairman that there is no latrine over the plot of land in question. Bishnu Pada Gupta, Dilip Gupta and Nirmal Gupta are not at all the sons of Rabindra Nath Gupta. The petition under Order 6 Rule 17 of the Code of Civil Procedure was submitted on the basis of information given by the respondent no. 1 and others. He had no opportunity to go through the deed of conveyance of 1974 standing in the name of Kalpana Saha and the statement of Municipality came only on 8th August, 2022. Those documents would show that fraud was practiced upon the Court by the respondents. During the pendency of the second appeal the respondents blocked the passage/land of the appellants by constructing wall and by encroaching the electric pillar. An illegal construction was also made over the suit property by respondent no. 1 along with his relative Atanu Biswas and other associates.

11. Refuting such contention of Mr. Kaushik Chatterjee, learned Counsel representing the respondent no. 1 and Mr. Tapas Mukherjee, learned Counsel representing the respondent nos. 3,4 and 5 submit that the suit property is not exclusively possessed by the plaintiff. The club has been possessing the suit property since 1974. Drawing my attention to the testimony of the witnesses particularly D.W. 1 it is adverted that in his affidavit under Order 18 Rule 4 of the Code of Civil Procedure,

precisely in paragraph 10 and 11, D.W. 1 stated that a club room was constructed over 3 decimal of waste land and a platform was also constructed towards the west of the said club room. Every year Kali Puja is celebrated on that erected platform by the Nabaratna Club for Nandi Bagan Barowari Samity. The club members used to play indoor games in the club room. The said room subsequently got dismantled due to wear and tear. There was no cross-examination on the aforesaid statements. It is further submitted that during cross-examination D.W. 1 stated that “The said club had a room and platform for Puja. But at present the room of club is not existing. The platform is only in existence. There is no permission of the municipality in respect of the room of the club.”

12. Learned Counsel representing the respondent no. 1 and respondent nos. 3,4 and 5 submitted that the club is possessing 3 decimal of land over the suit plot and this fact has been established by way of cross-examination of D.W. 1. Therefore, the club is necessary party, for proper adjudication of the suit. But the plaintiff did not make any attempt to implead the Nabaratna Club through its members. It is further submitted that though the application under Order 6 Rule 17 of the Code of Civil Procedure was not disposed of. But subsequently by filing the petition under Order 41 Rule 27 of the Civil Procedure Code, the plaintiff stated that Chairman, Kalna Municipality, clearly stated that the municipal authority is not in possession of the property in suit. The letter of Chairman of Kalna Municipality is therefore, sufficient to hold that Kalna Municipality is not necessary party.

13. True it is the plaintiff prayed for amendment of the cause title by incorporating the name of Bishnu Pada Gupta, Dilip Gupta and Nirmal Gupta, are sons of Rabindra Nath Gupta but no attempt was made to implead Nabaratna Club, through its members. The property is possessed by the club not the Guptas and without impleading the club, the prayer for recovery of possession will not serve any purpose. Therefore, there is no reason to set aside the impugned judgement and send it back to learned Appellate Court for disposal of the application under Order 6 Rule 17 of the Code of Civil Procedure and to dispose of the appeal thereafter by writing a judgement afresh.
14. It is submitted by Mr. Mukherjee that in view of Section 103 of the Code of Civil Procedure, this Court can decide any issue on fact in the second appeal, which may be disposed of on merit.
15. True it is Rathindra Nath Saha while adducing evidence as D.W. 1 during cross-examination stated that the club is possessing the suit property in respect of 3 decimal of land out of 9 decimal, claimed to have been purchased by appellant. In the plaint also there is averment that the club was trying to possess the property and was claiming the room, used by the plaintiff and his family members as their drawing room, to be a club room. Therefore the plaintiff ought to have impleaded Nabaratna Club as one of the defendants claiming title over the property, purchased by the plaintiff. Therefore, the Club was a necessary party.
16. Though a suit in general cannot be dismissed for mis-joinder or non-joinder of parties, proviso to Rule 9 of Order I says otherwise :-

“9. Mis-joinder and non-joinder.

No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

Provided that nothing in this rule shall apply to non-joinder of a necessary party.”

17. In this regard, we can use with profit the judgement pronounced Hon’ble Apex Court in **KANAKARATHANAMMAL VS. V.S. LOGANATHA MUDALIAR & ORS.** reported in **AIR 1965 SC 271**, wherein it is held :-

*“15.It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two, brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under s. 12 of the Act. That, in fact, is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. **It is true that under O. 1 r. 9 of the Code of Civil Procedure no suit shall be defeated by reason of the misjoinder or non-joinder of parties; but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal.** Even in such cases, the Court can under O. 1 r. 10, sub-rule 2 direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother,, the present suit filed by the appellant partakes of the character of a suit for partition, and in such a suit clearly the appellant alone would not be entitled to claim*

*any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. **If the appellant persisted in proceeding with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake.** In Naba Kumar Hazra & Anr. v. Radheshyam Mahish & Ors.(1) the Privy Council had to deal with a similar situation, In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties and in the end, it was urged on his behalf that the said co-mortgagors should be allowed to be impleaded before the Privy Council. In support of this plea, reliance was placed on the provisions of O. 1 r. 9 of the Code. In rejecting the said prayer, Sir George Loundes, who spoke for the Board observed that "they are unable to hold that the said Rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in India."*

18. The amendment sought for before the learned First Appellate Court under Order 6 Rule 17 of the Code of Civil Procedure has lost its relevance in view of the averment made in the application under Order 41 Rule 27 of the Code of Civil Procedure to admit certain documents as additional evidence. In the said application the plaintiff stated that Kalna Municipality is not required to be impleaded. The Guptas whom the plaintiff intends to implead as defendants are his vendors. They have transferred the property and their presence is not required for proper adjudication of the suit. True it is the plaintiff wanted to

incorporate a prayer in the plaint for recovery of possession. But without impleading the club as party defendant, the plaintiff cannot maintain the suit, for the simple reason that the testimony of D.W. 1 discloses the possession of the club over 3 decimal of land. In the application under Order 41 Rule 27 the plaintiff stated that during pendency of the second appeal the plaintiff was dispossessed by respondent no. 1 and his relative Atanu Biswas and other associates but such averment does not wipe out the testimony of D.W. 1 as to the possession of the club.

19. Mr. Gopal Chandra Ghosh, learned Counsel though submits that club is represented by Rathindra Nath Saha who as D.W. 1 has admitted to be one of the members of the club. Therefore, the club which is not registered one, need not be impleaded in the suit.
20. However, such submission of Mr. Ghosh fails to inspire any confidence in the Court, simply because the club is an association of some members. So registration of club is not at all necessary to sue or to be sued. Nabaratna Club has not been impleaded as defendant. The plaintiff ought to have arrayed Nabaratna Club as one of the defendants represented by its members and Rathindra Nath Saha could have represented the club. But the plaint is not presented impleading the club as party/defendant, though there is an averment expressing the apprehension of some kind of overtact on the part of the club.
21. Therefore, in my humble opinion this is not a fit case to invoke the provision of Order 41 Rule 23 A of the Code of Civil Procedure on the ground that learned First Appellate Court did not dispose of the

interlocutory application under Order 6 Rule 17 of the Civil Procedure Code for the reason, I have given hereinbefore.

22. The suit as framed is bad for non-joinder of necessary parties. The additional evidence sought to be given will be of no help to the plaintiff/appellant. Such additional evidence shall not cure the defect caused by non-joinder of necessary parties. The application under Order 41 Rule 27 of the Code Civil Procedure stands dismissed.
23. In my humble opinion the appeal does not merit in consideration. Hence I am not inclined to accept it. Consequently, the appeal stands dismissed however without cost. The connected applications are also disposed of. Impugned judgement passed by learned First Appellate Court stands affirmed.
24. Let a copy of this judgement along with lower Court record be sent down to the learned Trial Court for information.
25. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)