

Ct.
No.
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C.O. 1593 of 2019
Rabindra Nath Manna & Ors.
Vs.
Phanindar Nath Manna

Mr. Ram Prakash Banerjee
Mr. Ambu Bindu Chakraborty **...For the Petitioners**

Mr. Gopal Chandra Ghosh
Mr. Raj Krishna Mondal **...For the Opposite Party**

This application has been preferred against impugned order dated 15th January, 2019 passed by the learned Civil Judge (Junior Division), 1st Court, Arambagh, in Title Suit No. 113 of 2016. By the impugned order the learned Court below rejected defendant's application under Order 7, Rule 11 of the Code of Civil Procedure, wherein the defendants/Petitioners herein has sought for rejection of the plaint and by the same order allowed plaintiff's application, wherein plaintiff has sought for amendment of plaint.

The plaintiff / opposite party herein filed aforesaid suit, being Title Suit No. 113 of 2016 for specific performance of contract for sale against the petitioner. In the plaint it is alleged that the defendants/petitioners entered into an agreement for sale on 6th August, 1996 in respect of a landed property.

According to the plaint case the plaintiff has advanced Rs. 15,000/- as part payment of consideration out of Rs. 50,000/- with the stipulation therein that the defendants/petitioners will show relevant documents and

papers to the Advocate of the plaintiff within a specified period and after satisfaction of the plaintiff's Advocate regarding title of suit lands, the plaintiff shall pay the balance amount of consideration within specific time and the defendants shall execute and register the Deed of Conveyance in favour of the plaintiff.

It is further stated that the defendant surveyed the suit lands situated in different Dags by the Surveyor. The defendants prepared a document of amicable settlement on 28th July, 2012 by way of *Apos Bantannama* which was signed by both the plaintiff and defendants. Plaintiff's further allegation is defendants neither complained with the terms and conditions as to supply of documents of title of the suit land nor complained with terms for sale in favour of the plaintiff. Petitioners further contention is that previously the opposite party filed another Title Suit, being Title Suit No. 125 of 2012 against them for declaration and injunction on the self-same cause of action but the said suit was ultimately dismissed with the observation that the plaintiff ought to have instituted suit for specific performance of contract and having failed to do so plaintiff's said suit is barred under Section 34 of the Specific Relief Act.

Thereafter, the plaintiff filed the present suit, being Title Suit No. 1132 of 2016 alleging that the cause of action

arose on 6th August, 1996 being the date of agreement for sale and on 28th July, 2012 being the date of *Apos Bantannama* as also on 20th May, 2016 being the date of dismissal of earlier suit and by way of impugned amendment application plaintiff also sought to incorporate another date as cause of action for execution which is on 30th June, 2016 when the defendant No. 1 for self and also for defendant Nos. 2 and 3 denied to deliver the documents concerning title to the property to be sold to the plaintiff.

The petitioners herein as defendant appeared in the said suit and filed written statement controverting the allegations made in the plaint and they have also filed application under Order VII, Rule 11 of the Code seeking rejection of plaint. In the said application, the defendant contended that the present suit is barred by *res judicata* in view of the disposal of the earlier suit, being Title Suit No. 125 of 2012 between the same parties and regarding the same property which has been dismissed by a competent Court of law. The suit is also barred by limitation and also on the ground that the suit has not been properly valued. They have also submitted that the suit is not maintainable, since the agreement for sale dated 6th August, 1996 was made on insufficient stamp paper and the said agreement is liable to be impounded. In support of limitation it has been

contended that the *Apos Bantannama* was executed on 28th July, 2012 and the suit was filed much later beyond the period of limitation.

The plaintiff /opposite party filed written objection against the petition seeking rejection of the plaint and the plaintiff also filed application for amendment of plaint under Order VI, Rule 17 of the Code. By way of amendment plaintiff wants to incorporate one more date as date of cause of action and also wants to amend the valuation of suit and also wants to incorporate prayer for an alternative decree of return of earnest money.

After considering both the applications the learned Court below passed the impugned order by which he allowed plaintiff's prayer for amendment filed under Order VI, Rule 17 and rejected the defendants' application under Order VII, Rule 11 of the Code.

Mr. Ram Prakash Banerjee, learned Counsel appearing on behalf of the petitioners submits that the Court below without considering the submissions of the petitioners herein has straight way allowed the application for amendment of the plaint and he has rejected the defendant's application under Order VII, Rule 11 of the Code. Accordingly, he has prayed for setting aside the order impugned.

Mr. Gopal Chandra Ghosh, learned Counsel appearing on behalf of the opposite party raised objection contending that the proposed amendment is formal in nature and it is very much required for adjudication of the controversy between the parties and as such learned Court below has not committed any mistake in allowing the said application. He further submits that the petitioners have prayed for rejection of the plaint on the ground of *res judicata* and for deficit Court fees and also on the ground that the suit is barred by limitation. He further submits whether the suit is barred by limitation or not that cannot be adjudicated without taking evidence and he also submits even if there is any deficit of Court fees in filing the suit, the Court can very well direct plaintiff to pay the deficit Court fees and if after passing such direction, plaintiff fails to pay the deficit Court fees, then only the question of rejection of plaint will arise. But here such situation has not arisen. Moreover, whether the suit is barred by *res judicata* or not, cannot be the subject matter for deciding the question of rejection of plaint under Order VII, Rule 11 of the Code.

I have considered the submissions made by both the parties. On perusal of the schedule of amendment it appears that the proposed amendment if allowed will not constitutionally or fundamentally change the nature and

character of the suit. Moreover, if the proposed amendment is allowed, it will not cause such prejudice to the other side which cannot be compensated by cost. On the contrary it appears that for effective and conclusive adjudication of real dispute i.e. as to whether plaintiff is entitled to get a decree of specific performance or not, proposed amendment is necessary and as such I find nothing perverse or illegality in allowing the said prayer for amendment of the plaint by the court below.

So far as the prayer for rejection of the plaint is concerned, the Court below is of clear view that the grounds of *res judicata* and that suit is barred by limitation as raised by the defendant in support of rejection of plaint, involves mixed question of fact and law and as such the plaint cannot be rejected in its threshold without taking evidence.

It is settled law that for deciding the question as to whether the suit is barred by law of limitation or not only averments made in the plaint are relevant. In the plaint plaintiff has disclosed various dates towards cause of action of the suit. Plaintiff pleaded after execution of deed of settlement he filed a suit where defendants did not appear but as per averment of plaint they continuously threatened plaintiff to dispossess from suit property. Now the cause of action as allegedly arose on different dates, as per averment

of plaint whether will ultimately save the plaintiff from the point of limitation or not can be decided at the time of final adjudication and as such ultimate finding of Trial Court is neither perverse nor illegal.

Accordingly the point as to whether suit is barred by law or not shall be kept open for final adjudication of the suit. The order impugned in my considered view does not call for any interference.

The revisional application, being C.O. 1593 of 2019 is accordingly dismissed.

However, this order will not preclude the defendants/petitioners to prefer application before the Court below challenging maintainability of the suit.

In the event of filing such application before the Court below by the defendants within a period of 8 (eight) weeks from date, the Court below will frame a preliminary issue on the point of maintainability and will dispose of such application preferably within a period of 6 (six) weeks thereafter upon giving opportunity to both the parties to contest.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)