

14.05.2024
Item No.7
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IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
Appellate Side

CO/149/2023

ABDUS SATTAR SARKAR
VS
SMT. KALPANA ROY & ORS.

Mr. Ajoy Kumar Singhanian,
Mr. Nabankur Paul,
Ms. Madhurima Roy,
..for the petitioner.

Mr. Narendra Nath Das,
Mr. Jagesh Ch. Roy,
..for opposite party no.1.

Mr. Gobind Roy,
Ms. Binapani Singha,
. . for opposite party nos.2,6 & 10.

In a suit for recovery of possession the first defendant had filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (in short CPC) alleging *inter alia* that the suit is barred by limitation for which the provision of Order VII Rule 11(d) of CPC is attracted and the suit being barred by law, the plaint is to be rejected and the suit be dismissed. The defendant no.1, being the applicant herein has also tried to make out a case that the plaint does not disclose a cause of action thereby attracting the provision of Order VII Rule 11(a) of CPC.

Being aggrieved by the rejection of the application under Order VII Rule 11 of CPC by the Trial Judge vide an order dated 5th October, 2021, the first defendant in the suit has filed an application under Section 115A of CPC before the Court of the Learned Additional District Judge at Mekhliganj. The revisional application was dismissed by an order dated 17th July, 2023. In this application under Article 227 of the Constitution of India, the first defendant in the suit has challenged the orders dated 5th October, 2021 which has been upheld by the order dated 17th July, 2023.

The applicant says that in the plaint, the plaintiffs have alleged that the applicant (first defendant) has been inducted into the suit property as a licensee without any licence fee and such licence has been subsequently revoked thereby giving rise to the plaintiffs' cause to file the suit. The applicant says that the plaint does not disclose the vital dates as to when the applicant was inducted into the suit property and when the so called licence was revoked. In absence of such statement, there is no specific time provided in the plaint wherefrom the plaintiffs' cause of action to file the suit arose.

In a suit for recovery of possession, in view of the provision of Section 6 of the Specific Relief Act, 1963, the applicant contends that the suit is

required to be instituted within six months from being dispossessed. If no specific date is provided, this six months period cannot be ascertained and as such, the plaint does not disclose any cause of action and at the same time the suit is barred by limitation. The applicant though has not pleaded in the petition but urges a further point that the suit is not otherwise maintainable in view of the provision of Section 34 of the Special Relief Act, 1963 as the plaintiffs have only asked for recovery of khas possession and mandatory injunction without seeking the relief for declaration of ownership of the suit property.

The opposite parties on the other hand submits that the plaint clearly discloses a cause of action as also when the right to sue accrued in favour of the plaintiff for the first time. Thus, the suit is neither barred in law or for non-disclosure of any cause of action. The Trial Court and the Revisional Court has, therefore, rightly rejected the application of the petitioner.

The Hon'ble Supreme Court in ***Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) Dead Through Legal Representatives And Others*** reported in (2020) 7 SCC 366 after taking note of most of the previous judgments operating in the field has elucidated the duty cast on the Court while

dealing with an application under Order VII Rule 11 of CPC when such an application is made under Order VII Rule 11(a) i.e. where the plaint discloses no cause of action and Order VII Rule 11(d) when the suit is said to be barred by limitation.

The suit on a plain reading of the plaint is for recovery of possession of an immovable property or any interest therein based on title acquired through succession. The suit, therefore, appears to be one governed by Article 65 of the Limitation Act, 1963.

The plaintiff has pleaded that the plaintiff, the defendant no.2 and the proforma defendant nos. 3 to 5 and proforma defendant nos.7 to 17 have become owners of the suit property after the death of their father Gour Mohan Ray Potwari. The proforma defendant no.6 being one of the sons of Gour Mohan Ray Potwari was according to the plaintiff adopted by her uncle and aunt, namely, Chamatkar Ray Potwari and Binodini Ray Potwari. Both of them has passed away. Binodini Ray Potwari has died in the year 1983/1984 and Chamatkar Ray Potwari predeceased her. The proforma defendant no.6 has, therefore, been correctly left out of the ownership of the property of his biological father Gour Mohan Ray Potwari. The plaintiff, the defendant no.2 and the forforma defendant nos.3 to 5 at the request of the defendant no.1 for the reasons stated in the plaint

allowed the defendant no.1 to reside in the suit land with his wife as licensee without license fee on the condition that as and when the plaintiff or the proforma defendants will require the land then the defendant no.1 will give and deliver up vacant possession of the suit land without any delay. On 16th August, 2016 the plaintiff asked the defendant no.1 to give and deliver up vacant possession of the suit property. The defendant no.1 after repeated assurances failed to do so and ultimately on 1st November, 2016 denied the plaintiff to give and deliver up vacant possession of the suit land. Although, license of an immovable property is granted under Section 52 of the Indian Easements Act, 1882 but the provisions of the said Act is not applicable in the State of West Bengal. Only principles analogous thereto applies even on the basis thereof the suit as framed will be for possession of immovable property or interest therein based on title with specific dates as to demand for possession and denied thereof.

After hearing the parties and considering the materials on record, I find that there is no scope for interfering with the order impugned being dated 5th October, 2021 passed by the learned Civil Judge (Junior Division) at Mekhliganj, Coochbehar for the following reasons :

1. It is well settled provision of law that while deciding an application under Order VII Rule 11 of CPC the Court can only look into the plaint and the documents annexed with the plaint.
2. The Court has to take the statement in the plaint to be true and correct.
3. The defence of defendant cannot be looked into at that stage.
4. Only in a water tight case where the plaint is *ex facie* barred by limitation, the Court can reject the plaint as rejection of the plaint will amount to non-suiting the plaintiff.
5. Limitation is a mix question of law and fact and a suit if the Court has a doubt the issue should be relegated to trial.
6. Only in a case where without requiring for going into any further enquiry, the Court finds that the claim is barred by limitation, the suit can be dismissed on the ground of limitation by applying the provision of Order VII Rule 11(d) of CPC.
7. On the other hand, if there is any scope of enquiry, the Court should reject the application under Order VII Rule 11 of CPC

based on limitation and relegate the issue to trial.

The non-disclosure of cause of action urged by the applicant in this case also requires the consideration of the defence of the applicant being the first defendant in the suit. The defence in view of the settled position of law cannot be looked into at the stage of Order VII Rule 11. The bar under Section 34 of the Specific Relief Act, 1963 has not been pleaded in the application under Order VII Rule 11 of CPC. In absence of pleading, this point cannot be urged while an application under Order XXVII is being heard. In any event whether the plaintiffs were required to seek a declaration or can maintain the suit by seeking only recovery of possession and injunction require an enquiry for which the parties are required to lay evidence even in a limited score.

On a meaningful reading of the plaint, it cannot, therefore, be said that the suit is not maintainable in view of the provision of Section 34 of the Specific Relief Act, 1963.

The plaintiffs have not alleged in the plaint to have been dispossessed. The plaintiffs have run a case of voluntary induction as a licensee without any licence fee. The plaintiffs are required to prove this allegation to obtain a decree, at the same time

the argument of the defendant that the provision of Section 6 of the Specific Relief Act, 1963 comes into operation for which the suit is not maintainable cannot also be accepted at this stage.

The first defendant has already filed his written statement which is annexed to this application. The Trial Court should make the suit ready and frame the issues expeditiously and will be free to decide upon whether the point of limitation can be decided as a preliminary issue after evidence to that effect is adduced by the parties.

The application being C.O.149 of 2023, in view of the aforesaid, is disposed of.

(ARINDAM MUKHERJEE, J.)