
(2004) 09 CAL CK 0040
In the Calcutta High Court
Case No : C.O. No. 583 of 2003

Aparna Ghosh and Another

APPELLANT

Vs

Sarupchand Roychowdhary and Others

RESPONDENT

Date of Decision : 15-09-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 17, 5
Registration Act, 1908 — Section 61
West Bengal Land Reforms Act, 1955 — Section 5, 8

Citation : (2005) 1 CALLT 112 : (2005) 1 CHN 140

Hon'ble Judges : Bhaskar Bhattacharya, J

Bench : Single Bench

Advocate : Biswajit Basu, Hasanuz Zaman and Susenjit Banik, for the Appellant; S.P. Roy Chowdhury, Debasis Roy and S. Sen, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattachaiya, J.—This revisional application under Article 227 of the Constitution of India is at the instance of a pre-emptee in proceedings u/s 8 of the West Bengal Land Reforms Act (hereinafter referred to as the Act) and is directed against Order No. 146 dated 10th February, 2003 passed by the learned Civil Judge, Junior Division, 2nd Court, Katwa in Misc. Case No. 39 of 1993 thereby allowing an application for amendment of the application for pre-emption.

2. The opposite party No. 1 filed the aforesaid application u/s 8 of the Act for pre-emption on the ground of adjoining ownership. Subsequently, the pre-emptor filed an application for amendment of the original application for pre-emption for incorporating the ground of co-sharership of the holding in accordance with the then law but on objection raised by the present petitioner, the learned Trial Judge rejected such application for amendment. It appears from the record that the pre-emptor did not challenge such order by moving any higher forum.

3. Subsequently, after amendment of the Act by incorporation of the word "plot" in place of the word "holding" in Section 8 of the Act, the opposite party No. 1 filed another application for amendment of the original application thereby alleging that in view of amendment of the aforesaid provision, he was entitled to get pre-emption also on the ground of co-sharership of the plot concerned.

4. The aforesaid second application for amendment of the pre-emption was opposed by the present petitioner contending that in the past similar prayer having been refused, the pre-emptor was not entitled to agitate the aforesaid ground by way of further amendment. It was further contended that no amendment should be allowed at such a belated stage. It was also submitted that by lapse of time, a valuable right had accrued in favour of the petitioner and as such, the opposite party No. 1 was not entitled to take any additional ground for enforcing the right of pre-emption.

5. By the order impugned herein, the learned Trial Judge has allowed such application holding that by the proposed amendment, the nature of the suit would not be changed and that such amendment was necessary for effective adjudication of the disputes involved in the suit, in view of amendment of West Bengal Land Reforms Act in the year 2000.

6. Being dissatisfied, the pre-emptee has come up with the present application under Article 227 of the Constitution of India.

7. Mr. Basu, the learned Advocate appearing on behalf of the petitioner has advanced threefold submission in support of this application.

8. First, Mr. Basu has contended that previously, the opposite party No. 1 having prayed for amendment of original application for pre-emption by incorporating ground of co-sharership and the same having been rejected, the said order has attained finality and as such, the second application on the self- same ground is barred by the principle of res judicata.

9. Secondly, Mr. Basu contends that an application for pre-emption on the ground of co-sharership can be filed only within three years from date of transaction if no notice u/s 5(5) of the Act is served upon a co-sharer. According to Mr. Basu, in this case the transaction had taken place on 6th November, 1989 and the registration was completed on 10th November, 1989 as it appears from the certified copy given to his client; but the original application for pre-emption was filed on 8th September, 1993 more than three years from the date of transaction. Mr. Basu, thus, contends that when original application for pre-emption was filed beyond the period of limitation, by way of amendment, the opposite party No. 1 cannot incorporate any ground of co-sharership. In support of such contention Mr. Basu relies upon a decision of the Supreme Court in the case of Muni Lal Vs. The Oriental Fire and General Insurance Company Ltd. and another, .

10. Thirdly, Mr. Basu contends that the hearing of the suit has already been commenced and at that stage, the opposite party No. 1 cannot come up with a

fresh ground for the purpose of reopening of the entire matter. Therefore, according to Mr. Basu, the learned Trial Judge acted illegally and with material irregularity in allowing such belated application.

11. The aforesaid contentions of Mr. Basu are disputed by Mr. Roy Chowdhury, the teamed Advocate appearing on behalf of the opposite party No. 1. Mr. Roy Chowdhury contends that previous application for amendment that was sought for was on a different ground, inasmuch as, by the said amendment the opposite party No. 1 wanted to incorporate the ground of "co- sharership of the holding" but during the pendency of the application, the main provision for pre-emption having been amended with retrospective effect from 1969, his client should be permitted to avail of the amended provision of the Act.

12. Mr. Roy Chowdhury next contends that whether the original application for pre-emption was barred by limitation or not cannot be decided at the time of consideration of an application for amendment. Mr. Roy Chowdhury by referring to the certified copy of the deed in question draws attention of the Court to the fact that although certified copy was given on 10th November, 1989 but it was specifically mentioned that such certified copy had been given from the untranscribed document. Mr. Roy Chowdhury contends that it necessarily indicates that registration was not completed by that time.

13. Mr. Roy Chowdhury lastly contends that in the original application for pre-emption, his client has specifically averred that no notice in terms of Section 5(5) of the Act was served upon his client. According to him, if no notice in terms of that section is served upon a co-sharer, then it amounts to fraud and once fraud is established, it vitiates everything and limitation cannot start running for impugning such a void transaction so long the fraud is not detected by the pre-emptor. According to Mr. Roy Chowdhury, his client in this case is entitled to get the benefit of Section 17 of the Limitation Act.

14. In reply to the aforesaid contention put forward by Mr. Roy Chowdhury, Mr. Basu repeats his earlier submissions and in addition to that asserts that provisions contained in Sections 4 to 24 of the Limitation Act do not apply to an application for pre-emption and thus, Mr. Roy Chowdhury's client cannot get the benefit of Section 17 of the Limitation Act. In support of such contention, Mr. Basu relies upon a recent decision of the Supreme Court in the case of Gopal Sardar v. Karuna Sardar, reported in 2004(2) CHN (SC; Supp) 164.

15. After hearing the learned counsel for the parties and after going through the materials on record, I am of the view that in the facts of the present case the learned Trial Judge rightly allowed the application for amendment.

16. When the earlier application for amendment of pre-emption application was filed, the opposite party No. 1 wanted to take additional plea in accordance with the then law that he was a co-sharer of the holding but such application was rejected. If the self-same amendment was incorporated by way of second application, I would have readily accepted the contention of Mr. Basu that such

application should be barred by the principle of *res judicata*. But in the second application, the opposite party No. 1 has taken a fresh ground that he was co-sharer of the "plot" and such amendment was necessitated in view of subsequent amendment of the Act during the pendency of the application. When the previous application for amendment was filed, the ground added by the present amendment was not available to the opposite party No. 1 and as such, the previous order rejecting the application for amendment cannot stand in the way of the opposite party No. 1 in filing the second application. I, thus, find no substance in the first contention of Mr. Basu that the second application for amendment should be barred by the principle of *res judicata* or constructive *resjudicata*.

17. As regards question of limitation, it is rightly pointed out by Mr. Roy Chowdhury that at the time of disposal of an application for amendment of pleadings, the Court will not consider whether the party applying for amendment will be able to prove such fact. In other words, at that stage, the Court will not go into the veracity of the statements made in the amendment application. On the basis of averment made in the plaint, it cannot be said that the original application was barred by limitation because such question can be adjudicated only when evidence will come as regards the entry of the transaction in the volume of registration in terms of Section 61 of the Registration Act.

18. In the case of *Gopal Sardar v. Karuna Sardar* (supra) all that has been decided by the Apex Court is that in the proceedings u/s 8 of the Act, Section 5 of the Limitation Act has no application and the Court had no occasion to consider whether Section 17 of the Limitation Act is also excluded. It is preposterous to suggest that in the Act there are indications implying that the said Section 17 of the Limitation Act should be excluded from its operation in the proceedings u/s 8 of the Act. The law is now well-settled that if a particular right of a person is infringed by another by taking aid of fraud, and the fact of infringement of such right is concealed from that person, in such a case, so long fraud is not discovered, the delay in approaching the Court cannot stand in the way of the Court in granting appropriate relief to the person upon whom fraud has been practised. See *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*,

19. The aforesaid well-known principle has been simply recognized by Section 17 of the Limitation Act. Therefore, even if Section 5 of the Limitation Act does not apply to proceedings for pre-emption, the principles that fraud vitiates all transactions and nobody can take away the right of a person by practising fraud, cannot be ignored for the purpose of aiding a wrong doer. According to Section 5 of the Act, a duty is cast upon the transferor or the transferee to give prior notice of such transfer to all co-sharers in the manner prescribed therein and the period of limitation for filing an application for pre-emption on the ground of co-sharership is three months from the date of service of such notice in terms of Section 5 of the Act. Therefore, if in a given case, a transaction is effected by not

complying with such provision in order to conceal the transaction from the co-sharers such concealment definitely amounts to fraud. But all these questions will be required to be decided on evidence and I have already indicated that at the time of considering an application for amendment of pleading, the Court will not go into the question of veracity or mendacity of the statements contained in the proposed amendment. (Sec Abdul Rahim Naskar Vs. Abdul Jabbar Naskar and Others, Moreover, it is settled law that limitation is only one of the factors to be taken into account while considering an application for amendment but limitation is not the absolute bar [See the observations of the Bench consisting of four Judges in the case of L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., and also of a recent decision of the Apex Court in the case of Ragu Tilak D John v. S. Rayappan and Ors., reported in 2001(2) SCC 472. In the case of Muni Lal v. Oriental Fire And General Insurance Company Ltd. and Anr. (supra) relied upon by Mr. Basu, a suit was filed claiming only a declaration that the plaintiff was entitled to return of a truck but subsequently, the plaintiff prayed for amendment claiming the price of the truck when such claim became barred by limitation. A Bench of two Judges of the Apex Court on the facts of that case was of the view that such claim should not be allowed after a valuable right had accrued in favour of a defendant. The said decision does not lay down as a proposition of law that a barred claim cannot be permitted to be raised by way of amendment in no circumstances. In the said decision, the decision of the larger Bench of the Supreme Court in the case of L.G Leach (supra) was not taken into consideration. Moreover, in this case , the question of limitation is a mixed question of law and fact and as such, the prayer cannot be held to be barred on the face of the plaint case. I have earlier pointed out that the ground sought to be added was not available to the pre-emptor at the time of filing the application for pre-emption and has been conferred by way of amendment during the pendency of the application with retrospective effect from 1969 and thus, the pre-emptor cannot be deprived of such benefit.

20. On consideration of the entire materials on record, I, therefore, find that at the stage of considering an application for amendment, the said question of limitation which is a mixed question of law and fact in this case, cannot be gone into and the learned Trial Judge rightly allowed the application for pre-emption in view of amended provision of the Act.

21. I, thus, find no reason to interfere with the order passed by the learned Trial Judge. The revisional application is, thus, devoid of any substance and is dismissed.

22. In the facts and circumstances, there will, however, be no order as to costs.