

(2017) 06 CAL CK 0034
In the Calcutta High Court
Case No : 698 of 2017

GOPI DAS MIMANI & ORS.

APPELLANT

Vs

SMT. MONIKA DAW & ORS.

RESPONDENT

Date of Decision : 28-06-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 7Rule 11](#)
[Order 7Rule 11\(d\)](#) -
[Code of Criminal Procedure, 1973](#), [Section 48\(2\)](#) - Pursuit of offenders into other Jurisdictions

Citation : (2017) 06 CAL CK 0034

Hon'ble Judges : Soumen Sen

Bench : SINGLE BENCH

Advocate : Surajit Nath Mitra, ?Sankarsan Sarkar, ?Aditya Kanadia, ? Shyam Sarkar, ?Arindam Mukherjee, ?Chyan Gupta, ?M.M.Chadra, ?S.Roy

Judgement

1. The defendant no.8 has filed an application for rejection of the plaint on the ground that the suit is barred by limitation.
2. The plaintiff has filed a suit on 19th September, 2016 praying, inter alia, for the following reliefs: a) A decree for declaration that the decree dated 28th July, 2004 passed in CS No.406 of 1998 (Vandana Real Estates Pvt. Ltd. & Ors., -vs- Smt. Monika Daw & Ors.) is null and void and nonest;
b) The decree dated 28th July, 2004 passed in CS No.406 of 1998 be set aside and/or cancelled and/or rescinded;
c) A decree for declaration that the eight several Deeds of Conveyance, particulars whereof are set out in Annexure "D" hereto be adjudged null and void and nonest;
d) A decree for delivery up and cancellation of eight several Deeds of Conveyance, particulars whereof are set out in Annexure "D" hereto;

3. Essential facts constituting the cause of action for filing the suit are:

4. The plaintiffs have entered into an oral agreement in April/May 1987 with Pranab Chand Daw, the original owner for purchase of 168 Cottahs of land situated at Howrah which is commonly known as Manglahat and has paid a sum of Rs.5 lakhs towards part consideration. The oral agreement was followed by notes being prepared on the said agreement on May 3, 1987 and then again on 15th October, 1987. There are three allayed subsequent letters/notes affirming and even modifying the said agreement being respectively dated January 1, 1993, March 5, 1995 and January 7, 1996.

5. One month after the note of discussion dated October, 1987 the entire Mangla Hat was gutted by fire. Thereafter, within four days the property was requisitioned by the Government of West Bengal. The said requisition proceeding was challenged by the plaintiffs by filing a writ petition as they were at that stage interested to purchase the property. Mimanis on May 16, 1988 were successful in setting aside the order of requisition. The said order was challenged before the Division Bench. The appeal was disposed of on 17th June, 1997 affirming the order of the learned Single Judge. However, in the meantime on 31st March, 1997 the Regulation Act of 1948 had gone out of the statute Book creating a further complication as both Mimanis & Daws claimed resumption of possession. Mimanis' claim was based on allaged agreement for sale and Daws claimed possession on the basis of their ownership. Daws refused to execute conveyance in favour of the Mimanis. This has lead to the filing of suit by Mimanis before the Howrah Court being Title Suit No. 105/2001 on April 20, 2001.

6. In the said proceeding an application for injunction was filed. The trial court refused to pass any such order. In an appeal preferred in this Court, the Hon"ble Division Bench passed a conditional order of injunction on February 12, 2002 which reads:- "We are therefore of the opinion that if they deposit the balance sum of Rs.163 lacs forthwith (in cash since Bank guaranteed only generate litigation and conversion of the same into money can never be certain), then they should be entitled to an appropriate and just interim order/reliefs. After and only after the appellant's deposit of Rs.163 lacs in cash with the Learned Registrar General of our Court by Wednesday week, there shall be an order of injunction restraining the respondents and especially the Daws, and Pranab Chand Daw, from parting with possession of the said Mangla Hat comprising of 168 cottahs or any part thereof, or entering into any agreement for sale in regard thereto or any part thereof. The order of injunction shall not prevent any of the said above respondents from either collecting money from stall owners or shop owners who are defacto or otherwise doing business on the said Hat/Market, nor prevent them from evicting or inducting such occupants, nor from building any structure on the said land or any part thereof, provided they do it with this understanding that in case the suit is lost their structure might be lost as an accretion to the land."

7. The order of the Division was challenged before the Hon"ble Supreme Court

being Special Leave Petition (C) No.4369 of 2002. The Special Leave Petition was disposed of by an order dated 5th April, 2002 with the modification that the defendants may not construct any building or structure on the suit land so as to alter the nature of the land. The other directions of the Hon"ble Division Bench, however, remained unaltered. The relevant observations of the Hon"ble Supreme Court are:- "But having regard to the basis on which the present suit has been filed and the nature of relief that has been sought for and further having regard to the fact that Rs.163 lakhs have been already been deposited pursuant to the direction of the High Court, we are inclined to modify the said direction so far as it relates to the construction of building or any part thereof until the disposal of the suit by the trial Judge. While, therefore, we do not intend to interfere with the impugned order of the High Court, except insofar as it relates to the permission to the owner to build any structure on the land, we direct that the defendants may not construct any building or structure on the suit land so as to alter the nature of the land. We direct the learned City Civil Judge, Howrah to dispose of the suit on priority basis within six months from today and if for any reason it is not possible, it must be disposed of within one year. The defendants undertake to file the written statement within two weeks from today. We make it clear that this direction of ours regarding injuncting the defendants from raising any structure would remain operative till the disposal of the suit and not thereafter."

8. The defendant no.6 in the meantime has filed a suit against Pranab Chand Deb, since deceased being CS No.406 of 1998 praying, inter alia, for the following reliefs:-

a) A decree for Specific Performance of Agreement for Sale dated 18th June, 1997 executed by and between the plaintiff and the original defendant in respect of the sale of the suit premises being premises No.1 Strand Road, Howrah, P.S. Howrah in faovour of the plaintiff and/or it's nominee or nominees or it's assignee or assignees;

b) Decree for direction upon the defendants to execute and register the requisite Conveyance or Conveyances in respect of the suit property being premises No.1, Strand Road, Howrah (as morefully and particularly described in the Schedule hereunder written) in favour of the plaintiff or it's nominee or nominees or it's assignee or assignees as the case may be upon receipt of the balance consideration money.

c) Alternatively, the Registrar, High Court, Original Side or any other officers or other Competent Authority be appointed to execute and register the requisite conveyance or conveyances in favour of the plaintiff or it's nominee or nominees or it's assignee or assignees as the case may be upon deposit of balance consideration money in Court.

d) Decree for permanent injunction restraining the defendants his or their or their men agents and servants to deal with any kind of transfer, alienate and/or

otherwise dispose of the suit property and/or any part or portion thereof.

9. During the pendency of the aforesaid suit Pranab Chand Deb died and the defendant nos. 2, 3 and 4 as legal heirs of the deceased defendants were substituted and brought on record.

10. In that suit a terms of settlement was filed by which the Daws had agreed to convey their respective shares in the said property in favour of the assignees of the defendant no.6. The said assignees were brought on record in the said proceeding and necessary amendments were carried out in the cause title. Eight individual deeds of conveyance were executed in favour of the defendant nos. 6, 7 and 8.

11. However, at the time of execution of the said several deeds, Daws were restrained by the order of the division Bench dated 12th February, 2002 from transferring and/or encumbering of the said property. The plaintiffs after being aware of such transfers, filed an application for leave to intervene and for setting aside of the said decree. The plaintiffs lost both before the learned Single Bench and the Division Bench. The sum and substance of the orders by which the said application was dismissed appears to be that since the plaintiffs are not the parties to the suit, they cannot apply for setting aside of the decree inasmuch as in a suit for specific performance, the plaintiffs cannot be added as by addition of the plaintiffs it would convert the suit for specific performance into the suit for title and possession.

12. Being aggrieved by the aforesaid orders, the plaintiffs prepared a Special Leave Petition.

13. The special leave petition was disposed of on 18th April, 2013 with the following observations: "After some arguments, learned senior counsel appearing for the petitioners sought permission to withdraw the special leave petition with liberty to file a suit. He may do so, in accordance with law."

14. Thereafter this suit has been instituted The plaintiffs construed this order as a liberty to file a suit and in paragraph 59 have made the following averments:- "59. The plaintiffs on being advised ventilated their grievances with regard to the decree dated 28th July, 2004 and the eight several Deeds of Conveyance pursuant thereto before this Hon"ble Court by filing an application in the said suit being C.S. No. 406 of 1998 which ended without such grievances being adjudicated. The plaintiffs had filed the application being G.A. No. 3262 of 2004 in C.S. No. 406 of 1998 in 2004 for setting aside of the compromise decree dated 28th July, 2004 which was dismissed on 15th October, 2004. Against such dismissal an appeal was preferred being A.P.O. No. 445 of 2004. The appeal so preferred was disposed of by an order dated 18th April, 2013. Against such order a Special Leave Petition was filed which was withdrawn on 24th January, 2004 which liberty to file a suit and as such no part of the plaintiffs' claim is barred by limitation. "

15. The order of the Supreme Court has been construed differently by the learned counsel representing the respective parties to suit their purposes and to their advantage. While the applicant defendant contended that the said order would not save limitation, the learned counsel representing the plaintiffs submit that there are sufficient indications in the order to the contrary. In any event, there are enough materials to justify the filing of the suit at this stage. The plaintiffs cannot be held remediless.

16. On behalf of the plaintiffs it is submitted that by reason of the order of the Division Bench dated 12th February, 2002 and the subsequent order of the Hon"ble Supreme Court dated 5th April, 2002, Daws were restrained from parting with possession of the said Mangla Hat property comprising of 168 cottahs or any part thereof, or entering into any agreement for sale in regard thereof, or any part thereof. Admittedly, the Daws have entered into an agreement with the nominees of the defendant no.6 after 12th February, 2002. The Daws with full knowledge of the said order made the transfer.

17. It is however not necessary at this stage to decide the rights of the respective parties but being reminded of the well established principle that fraud vitiates everything and the Court can annul a decree, if obtained by fraud. The pleadings of the plaintiffs have to be read as a whole and in a meaningful manner to find out if the suit is otherwise barred by limitation. The plaintiffs have proceeded on the basis that its remedy would lie by filing an intervention application in the suit filed by the defendant no.6 against the Daws, but such proceeding was held to be not maintainable.

18. Under Section 14 of the Limitation Act, the plaintiff is entitled to execution of time if it is established that the plaintiff has been prosecuting with due diligence another civil proceeding against the defendant where the proceeding relates to the same matter in issue and is prosecuting in good faith in a court which, from defect of jurisdiction or other cause of a like nature is unable to entertain it.

19. Much emphasis has been laid on the phrase "defect of jurisdiction or other cause of a like nature" to argue that in the instant case, the Courts have held that it had the jurisdiction and the Court had refused to entertain the plea of the plaintiffs on merits and, accordingly, Section 14(1) of the Limitation Act, cannot be availed of.

20. In this regard, the applicant has relied upon a judgment of the Hon"ble Supreme Court in Zafar Khan and Others Vs. Board of Revenue, U.P. and Others reported at 1984 (Supp) SCC 505 Paragraph 16. It is submitted that since the Court was competent to entertain the proceeding and has held against the plaintiffs on merits and in favour of the applicant/defendant, the plaintiff is not entitled to the benefit of Section 14(1) of the Limitation Act. Moreover, there is no pleading to that effect.

21. In order to appreciate the said argument, it is necessary to refer to the orders passed in the earlier proceedings.

22. The learned Single Judge dismissed the intervention application filed by the plaintiffs with the following observation:- "With regard to the contention of the petitioners that the suit has been compromised collusively I am of the opinion that there is no question of fraud involved herein. It is nobody's case that the suit was filed conclusively. The only case, which the petitioners make out that the compromise, was fraudulently obtained, is that the said compromise violates the order passed by the Hon'ble Division Bench and thereafter affirmed by the Hon'ble Supreme Court. Curiously enough the petitioners have not taken any steps against anyone for alleged violation of order of Court. I do not say that for that reason alone, the petitioners are not entitled to maintain this application, but however, the conduct of the parties certainly becomes material while deciding the disputes involved herein. It is an admitted position that there was no order of injunction operating against the plaintiffs. The terms of settlement filed before this Court clearly records that the possession was handed over to the plaintiffs long before passing of the order of injunction. This statement has been seriously disputed on behalf of the petitioners. It is contended that in other proceedings in affidavits the Daws have stated that they are in possession. In any view of the matter, these are question, which cannot be decided on affidavit evidences. But apart from anything, the most important question, which arises here, is whether this application can at all be entertained. Though it has been very strenuously argued on behalf of the petitioners that a decree for specific performance is preliminary in nature, I am of the opinion that a decree for specific performance is to be treated as a preliminary decree as between parties to the suit. A suit for specific performance cannot be equated with a suit for partition, which contemplates two sets of decree - one preliminary and another final. The preliminary decree is passed to ascertain the shares of the cosharers and the final decree is passed for actual physical partition after ascertainment of the sharers of the co-sharers. In the suit for specific performance when a decree is passed there are certain mutual rights and obligations cast upon the plaintiffs and the defendants inasmuch as a plaintiff is required to pay the balance consideration money and the defendant is required to execute the conveyance in favour of the plaintiff."

23. The Division Bench of this Court dismissed the appeal with the following observation:- "In a case of like nature, two Benches of the Apex Court dealt with the issue. In the case of Kasturi (supra) the Apex Court was of the view, a third party could not be a necessary party in a suit for specific performance and Order I Rule 10 of the Code of Civil Procedure could not have any role to play. Their Lordships considered Section 19 of the Specific Relief Act in this regard and observed, the suit for specific performance could only be made between the parties mentioned in Sub-sections (a) to (e) of Section 19. Any other person not listed therein would have no locus to intervene. Mr. Chowdhury contended, since the wrong was committed while obtaining the decree in a fraudulent manner, he would have right of intervention. The Apex Court considered identical submission and observed, they would be at liberty either to obstruct execution of the order

to disturb their possession by taking recourse to the relevant provisions of Code of Civil Procedure if they are available to them, or file an independent suit for declaration of title and possession. The Apex Court further observed, "if the decree is passed in favour of the appellant and send it for execution the stranger to the contract being the respondent have to be sued for taking possession if they are in possession of the decretal property". The other decision in the case of Bharat Karsondas Thakkar (supra) another Bench of the Apex Court considered the issue of the like nature and similarly observed and held, "The scope of a suit for specific performance could not be enlarged to convert the same into a suit for title and possession. A third party or a stranger to the contract could not be added so as to convert a suit of one character into a suit of a different character". These two decisions would squarely support the judgment and orders impugned. In the litigation at the instance of Mimanis, Mimanis deposited Rs.163 lacs as and by way of performance of their obligation under the contract. It was a unilateral Act on the part of Mimanis. Their suit is still to be finally disposed of after having their oral agreement established in Court. In any event, Mimanis not being a party to the agreement for sale could not be a party to the suit. Being a nonparty to the suit they were not entitled to ask for setting aside of the decree or challenge implementation of the same."

24. My respectful reading of the aforesaid decisions shows that both the Courts felt that the remedy of the plaintiff lies elsewhere and not in the frame of the suit between the defendants. The plaintiffs could not be permitted to ventilate their grievance or could seek a remedy in that suit. It is akin to a case of defect of jurisdiction or of like nature. If a Court is of the view that the remedy of the plaintiff lies elsewhere and such right is denied on the ground that in the present proceeding, the plaintiffs cannot have the relief, in my view, it would attract the phrase "defect of jurisdiction or other cause of a like nature" provided the earlier proceeding is pursued diligently. The merits of the plaintiffs' claim have not been gone into in the said proceeding and, in fact, could not have been gone into as the plaintiffs' right to the property has been adequately protected by prior orders of Court. The applicants argued that if the plaintiffs are alleging fraud, then they have notice of fraud at least in the year 2004 and a suit for cancellation ought to have been filed within a period of three years from 2004 and not after so many years.

25. The applicant has relied upon a decision of the Hon'ble Supreme Court in Yeswant Deorao Deshmukh Vs. Walchand Ramchand Kothari reported at AIR 1951 SC 16. In the said decision, the Hon'ble Supreme Court was considering the scope of Section 48(2) of the Code of Civil Procedure, 1908 and Section 18 of the Limitation Act, 1963. The issue was whether an execution application seeking to execute a final decree is barred by limitation. The decree was made in a suit for dissolution of a partnership and the taking of accounts. It was a dispute between the decree-holder and the judgment-debtor. However, on fraud, there is a very illuminating sentence in Paragraph 10 which reads:- "10. In the very nature of things, fraud is secret in its origin or inception and in the means

adopted for its success. Each circumstance by itself may not mean much, but taking all of them together, they may reveal a fraudulent or dishonest plan."

26. Read with this, the observation made in Paragraph 5 in S.P. Chengal Varaya Naidu Vs. Jagannath & Ors. reported at (1994) 1 SCC 1 Paragraph 5 is equally important which reads:- "5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Propertygrabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

27. Secrecy is the hallmark of fraud.

28. The plaintiff has averred in the plaintiff that the defendants have committed a fraud on Court by suppressing the earlier orders passed in a proceeding between the plaintiff and the Daws. The Daws were aware of the said orders, the present applicant and their assignors have at least constructive notice of such proceedings and orders and in such a situation, the suit cannot be held to be barred by limitation. The learned Senior Counsel has referred to Purna Chandra Kunwar Vs. Bejoy Chand Mahatab & Ors. reported at 17 CWN 549, Prabodh Chandra Mukherjee Vs. Pasupati Mukherjee & Ors. reported at 71 CWN 649 Paragraphs 22 to 22 and S.P. Chengal Varaya Naidu Vs. Jagannath & Ors. reported at (1994) 1 SCC 1 Paragraph 5.

29. The question of limitation is ordinarily a mixed question of law and fact. The construction of an order in order to defeat the claim of the plaintiffs or to dismiss the suit on the ground of limitation in absence of a glaring manifest time barred claim the suit cannot be dismissed. Moreover, establishment of fraud at the trial may save the suit.

30. The very fact that both the parties have relied upon earlier proceedings in order to justify their respective claim would show that the said issue with regard to limitation involves questions of law and fact which can only be conveniently decided at the trial. On behalf of the applicant defendant, it is submitted that in paragraph 59, the plaintiffs have not pleaded exclusion of time under Section 14 of the Limitation Act and the order dated 24th January, 2014 does not extend the

period of limitation to which a quick response was that the Hon"ble Supreme Court in S.P. Chengal Varaya Naidu (supra) observed that any order or decree obtained by fraud is void and can be declared so at any stage of the proceedings or even in collateral proceeding and the plaintiffs have in the pleadings have demonstrated such fraud. The applicant/defendant has relied upon Zafar Khan and Others (supra) in support of his submission of lack of pleading of Section 14 of the Limitation Act.

31. In paragraph 11 of the said report the Apex Court observed:- "In order to attract the application of Sec. 14(1), the parties seeking its benefit must satisfy the Court that: (i) that the party as the plaintiff was prosecuting another civil proceeding with due diligence; (ii) that the earlier proceeding and the later proceeding relate to the same matter in issue and (iii) the former proceeding was being prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. It may be assumed that the earlier proceeding under Sec. 144 of the Code of Civil Procedure was a civil proceeding for the purpose of Sec.14. It may as well as assumed in favour of the appellants that they were prosecuting the same with due diligence and in good faith, as they relentlessly carried the proceeding up to the High Court invoking its extraordinary jurisdiction. The first of aforementioned three cumulative conditions can be said to have been satisfied. "

32. In Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and Ors. reported at (2008) 7 SCC 169, the Hon"ble Supreme Court discussed the policy underlying Section 14 of the Limitation Act and explained it in the following words:- "The analysis of Section 14 of the Limitation Act shows that the following conditions have to be satisfied before this section can be pressed into service: (1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party; (2) Prior proceeding had been prosecuted with due diligence and in good faith; (3) Failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature; (4) Earlier proceeding and the latter proceeding must relate to the same matter in issue; and (5) Both the proceedings are in a court.

The policy of Section 14 of the Limitation Act is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. An element of mistake is inherent in invocation of Section 14. In fact, the section is intended to provide relief against bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain interpretation that the principle underlying the said section, namely,

that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Arbitration and Conciliation Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake of law or defect of procedure. Having regard to the intention of the legislature, equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded."

33. The plaintiff could not have amended its plaint pending before the Howrah Court in view of Section 2 of the Decrees and Orders Validating Act, 1936. It was precisely for that reason, the plaintiff on legal advice has diligently and in good faith prosecuted its remedy by filing the application for intervention which, however, have resulted in dismissal not on merits but on lack of jurisdiction or of like nature. Each of the facts narrated in the plaint if proved at the trial may result in a decree being passed in favour of the plaintiff. There perhaps cannot be any dispute that if on a bare reading of the plaint it is clear, glaring and manifest that the suit is *ex facie* barred by limitation the Court would unhesitatingly dismiss the suit even if not under Order 7 Rule 11(d) of the Code of Civil Procedure but under inherent power as it may amount to an abuse of the process of law.

34. The cumulative reading of the averments in the plaint at least *prima facie* shows that the plaintiff is entitled to the benefit of Section 14(1) of the Limitation Act. In any event if fraud is established that would vitiate the decree. As I said earlier, this is not a matter which can be gone into conveniently tried at this stage. It requires examination of facts and evidence at the trial of the suit.

35. The application fails. However, there shall be no order as to costs. The observations made are only for the purpose of deciding the instant application and not on the merits of the suit.