

(2014) 09 CAL CK 0108
In the Calcutta High Court

Case No : G.A. 1737 of 2014 and CS No. 175 of 2011

Sharmila Shetty

APPELLANT

Vs

Hemendra Barooah Benevolent and Family Trust

RESPONDENT

Date of Decision : 09-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11(d)
Specific Relief Act, 1963 — Section 34

Citation : (2014) 09 CAL CK 0108

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Pratap Chatterjee, Sr. Adv., Jishnu Saha, Sr. Adv., Soumey Roy Chowdhury, Sakya Sen, and S. Bagchi, Advocate for the Appellant; D.N. Sharma, Adv., S.N. Mukherjee and Ratnanko Banerjee, Sr. Advs, Advocate for the Respondent

Judgement

Soumen Sen, J.—This application has been filed at the instance of the defendant No. 10 for rejection of the plaint on the ground that the plaint does not disclose any cause of action against the defendant No. 10. It is stated that the suit is also barred by the laws of limitation.

2. This application is at the instance of the defendant Nos. 1 and 2 for rejection of the plaint. The applicant-petitioner prayed for dismissal of the suit on twofold grounds, namely, (I) the plaint does not disclose any cause of action, (II) the suit is barred by law.

3. The plaintiff instituted the suit claiming, inter alia, for declaration that the amendments of Deed of trust dated 5th April, 2011, by the Deeds dated 21st November, 2011, 2nd November, 2012 and 8th February, 2013 are wrongful and illegal and are consequently non-est. The plaintiffs have also prayed for declaration that some of the clauses of the Deed of trust dated 5th April, 2011 and are contrary to the law and are as null and void. The plaintiff No. 1 has also challenged her removal as a trustee of the Defendant No. 1. These are some of

the principal reliefs claimed in the suit. According to the plaintiffs, the plaintiff No. 1 and defendant No. 2 are amongst the original trustees of the trust created by Hemendra Prasad Barooah during his lifetime on 5th July, 2011, here in after referred to as HBBFT.

4. The defendant Nos. 3 and 4 have been wrongfully appointed as trustees and are wrongfully purporting to represent and hold themselves out of trustees as HBBFT. The suit was instituted in view of the wrongful removal as plaintiff no. 1 and trustee as well as the wrongful removal of the plaintiff nos. 1 and 2 as beneficiaries of HBBFT, for declaration that the defendant nos. 3 and 4 have been wrongfully appointed as trustees and defendant no. 5 has been wrongfully advisor of the said trust that the plaintiffs claimed for removal of the defendant Nos. 3 and 4 as trustees of the said trust and for reconstitution of the Board of Trustee of HBBFT.

5. The said Deed was, thereafter, purported amended on three occasions on 21st November, 2011, 2nd November, 2012 and 8th February, 2013 by executing and registering Deeds of amendment thereof. It is alleged that since creation of the trust all original trustees apart from Hemendra Prasad Barooah and the defendant No. 2, have been removed which includes the purported removal of the plaintiff no. 1 as trustee. The provisions of the trust Deed have been contravene with impunity in the matter of appointment of trustees. The original Deed of trust provides minimum number of trustees as seven, which was wrongfully amendment by reducing minimum number of trustee to four. Since, the death of Hemendra Prasad Barooah, HBBFT does not have the duly constituted Board of Trustee capable of discharging any of the functions of the trust or otherwise managing its affairs.

6. The said defendant nos. 2, 3, 4 and 5 are the wrong doers and taking advantage of the illegal control over HBBFT, are misappropriating valuable assets and property of various companies and entities which are Sister concern of B & A Ltd. and constituted join of the family property of the Barooah's. HBBFT claims to hold the substantial shares in various companies and entities, which are part of the business of the Barooah's. The affairs of such companies were being looked after by HBBFT following his debt Hemendra Prasad Barooah, defendant nos. 2, 3, 4 and 5 have been mismanaging in the affairs of the aforesaid companies and siphonic of their funds and assets. The defendant no. 1, is a trust and the defendant no. 2 claims himself as one of the trustees of the said trust.

7. Mr. Ratnanko Banerjee, learned Senior counsel appearing on behalf of the applicants submitted that the plaintiffs have no cause of action and the plaint filed in the suit does not disclose any cause of action in favour of the plaintiffs. The plaintiff no. 1 was initially appointed as a trustee at the time when the settler executed the Deed of trust dated 5th April, 2011. The plaintiff no. 1 has accepted the trust Deed by putting her signature in the trust Deed through her constituted attorney. The plaintiff no. 1 is estopped from challenging the trust Deed or any of the terms thereof. The trust is valid and in accordance with the

provisions of the Indian Trust Act, 1882. The reliefs claimed by the plaintiffs are barred by the laws of limitation. The plaintiffs have no locus standi to institute the suit, the plaintiff has no substantive right and cannot have any substantive right in respect of the trust on the asset and the property of the trust.

8. Mr. S.N. Mukherjee, Ld. Senior Counsel appearing with Mr. Ratnakar Banerjee, Senior Advocate supplementing the aforesaid submission submitted that the plaintiff has duly signed the Deed of Trust dated 5th April, 2011. Once the plaintiff has duly signed and accepted the said Deed, it is no more open for the plaintiff to challenge any of the clauses of the said Deed of Trust. The plaintiff seeks a declaration that clauses 7.1 and 9.6 of the Deed of Trust dated 5th April, 2011 are contrary to law and are required to be declared as null and void. This declaration is sought for after expiry of period of 3 years from the date of execution of the said Deed of Trust. The Ld. Senior Counsel has referred to Article 58 and 59 of the Limitation Act and submitted that the suit being filed seeking declaration of the aforesaid clause of the Deed of Trust beyond 3 years, is barred by laws of limitation and is not maintainable. It is submitted that the plaintiff cannot also escape lack of knowledge of the said Deed of Trust, since she was a party to the said Deed and the said Deed was executed by her Constituted Attorney. There is no allegation against the Constituted Attorney. In fact, the supplementary deed dated 21st November, 2011 the plaintiff was represented by her Constituted Attorney. The essential relief in the suit is for declaration of the said two clauses of the Deed of Trust dated 5th April, 2011 as invalid and contrary to law. The other reliefs are merely consequential. It is submitted that the plaintiff having accepted the due execution of the said Deed of Trust dated 5th April, 2011 and the settler having exercised such power for removal in terms of clause 9.6 of the parent Deed, the suit filed beyond period of 3 years seeking declaration about the invalidity of the said Deed of Trust is ex facie barred by limitation. The cause of action in the suit is the removal of the plaintiff by the Board of Trustees dated 17th October, 2011 in exercise of power under clause 9.6 of the Deed of 5th April, 2011. The plaintiff accepts that she was removed on the basis of such clauses. The question arises when the right to sue accrues.

9. Since the principle relief in the suit is barred by law of limitation no consequential relief could be passed. It is submitted that the Court is not precluded from considering the documents annexed to the plaint in order to find out if the plaint discloses a cause of action or the plaintiff does have any cause of action. If on a reading of the document which forms the basis of the claim it appears that the plaintiff does not have any cause of action, the suit is liable to be dismissed as vexatious and oppressive.

10. In support of the contention that the suit is barred by laws of limitation. Mr. Mukherjee has relied upon the decisions in N.V. Srinivasa Murthy and Others Vs. Mariyamma (dead) by Proposed LRs. and Others, and Surinder Kaur Vs. Ram Narula and Others, It is submitted that in both the decisions it has been held that if the suit is not filed during the period of three years when the cause of action

for obtaining the relief arises, the suit for declaration shall be barred by laws of limitation. It is further submitted that the Hon''ble Supreme Court N.V. Srinivasa Murthy (supra) has also held that by clever drafting of plaint a suit which is hopelessly barred by limitation should not be allowed to remain on record. The suit if it is barred by limitation would be liable to be dismissed under Order 7 Rule 11(d) of the Code of Civil Procedure.

11. Mr. Pratap Chatterjee the Ld. Senior Counsel appearing on behalf of the plaintiff submits that the principle argument that the suit is barred by laws of limitation is misconceived. The Ld. Senior Counsel refers to various paragraphs of the plaint and submits that the original deed of trust per se does not affect the right of the plaintiff and it was only on exercise of certain powers of the settler trustee on 21st November, 2011 that the right to challenge such clauses in the Deed of Trust accrued for the first time. The suit was filed within the period of three years from 21st November, 2011. Accordingly it cannot be contended that the suit is barred by laws of limitation. Mr. Chatterjee distinguished the aforesaid decision by submitting that in the aforesaid decisions the suit was dismissed since the consequential reliefs have not been claimed as it requires to be done u/s 34 of the Specific Relief Act. It is submitted that the essential question which should be posed is if on execution of the original Deed of Trust on 5th April, 2011 the right to sue accrues in favour of the plaintiff. It is submitted that the plaintiff is aggrieved when the settler exercised his power under the two impugned clauses of the Trust Deed on 21st November, 2011 and immediately thereafter within the period of limitation the plaintiffs have instituted the suit. The knowledge of the execution of the Deed of Trust is immaterial unless any act is done on the basis of the said Deed of Trust which would affect and or deny any legal character to which the plaintiffs are entitled in law. The existence of the said offending clauses in the original Deed of Trust per se would not give a cause of action unless power is exercised in terms of the aforesaid clauses thereby affecting the right of the plaintiff to continue as trustee. It is further submitted that the trustee is in a fiduciary capacity and is required to act for the benefit of the trust. It is submitted that even if it is assumed that the one or two relief's of the plaint are barred by limitation the entire suit cannot go since in the plaint, the plaintiffs have alleged mismanagement of trust by some of the defendant trustees. The Ld. Senior Counsel has referred to a decision in Daya Singh and Another Vs. Gurdev Singh (Dead) by L.Rs. and Others, and submit that what is essential in a suit for declaration under the special relief Act read with Article 58 of the Limitation Act is when the right to sue accrues. That is to say there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted as held in M.T. Bolo Vs. M.T. Koklan and others decided by the privy counsel and relied upon by the Hon''ble Supreme Court in Daya Singh (supra).

12. On a careful consideration of the decisions cited by the parties it appears that the right to sue accrue when the plaintiff was removed as a trustee. The prayer

(b) in the plaint cannot be read in isolation. The plaint is required to be read as a whole. The original Deed of Trust was amended by three dates on 21st November, 2011, 2nd November, 2012 and 8th February, 2013. The plaintiff claims declaration that the amendment to the Deed of Trust are wrongful. The first amendment has taken place on 21st November, 2011 by the said amendment the plaintiff no. 1 was removed as a trustee. The other reliefs are against defendant no. 3 and 4. It is alleged that their appointment as trustees under the three impugned deeds are invalid.

13. The expression right to sue has been recently considered by the Hon'ble Supreme Court in the Board of Trustees of Port of Kandla Vs. Hargovind Jasraj and Another, . In the said reported decision it was held:

22. "The expression "right to sue" has not been defined. But the same has on numerous occasions fallen for interpretation before the courts. In State of Punjab v. Gurdev Singh, the expression was explained as under: (SCC p. 5. Para 6)

"6. ...The words "right to sue" ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted...."

23. Similarly in Daya Singh v. Gurdev Singh the position was restated as follows: (SCC pp. 198-99, paras 13-16)

"13. Let us, therefore, consider whether the suit was barred by limitation in view of Article 58 of the Act in the background of the facts stated in the plaint itself. Part III of the Schedule which has prescribed the period of limitation relates to suits concerning declarations. Article 58 of the Act clearly says that to obtain any other declaration, the limitation would be three years from the date when the right to sue first accrues.

14. In support of the contention that the suit was filed within the period of limitation, the learned Senior Counsel appearing for the appellant-plaintiffs before us submitted that there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. In support of this contention the learned Senior Counsel strongly relied on a decision of the Privy Counsel in Bolo v. Koklan. In this decision Their Lordships of the Privy Counsel observed as follows: (IA p. 331)

"... There can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

15. A similar view was reiterated in C. Mohammad Yunus v. Syed Unnissa in which this Court observed: (AIR p. 810, para 7)

"7. ... The period of six years prescribed by Article 120 has to be computed from the date when the right to sue accrues and there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right."

In *C. Mohammad Yunus*, this Court held that the cause of action for the purposes of Article 58 of the Act accrues only when the right asserted in the suit is infringed or there is at least a clear and unequivocal threat to infringe that right. Therefore, the mere existence of an adverse entry in the revenue records cannot give rise to cause of action.

16. ... Accordingly, we are of the view that the right to sue accrued when a clear and unequivocal threat to infringe that right by the defendants..."

24. References may be made to the decisions of this Court in *Khatri Hotels (P) Ltd. v. Union of India* wherein this Court observed: (SCC p. 139, para 30)

"30. While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word "first" has been used between the words "sue" and "accrued". This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued."

25. The right to sue in the present case first accrued to the lessee on 13-12-1978 when in terms of order dated 8-8-1977 the lease in favour of the lessee was terminated. A suit for declaration that the termination of the lease was invalid hence ineffective for any reason including the reason that the person on whose orders the same was terminated had no authority to do so, could have been instituted by the lessee on 14-12-1978. For any such suit it was not necessary that the lessee was dispossessed from the leased property as dispossession was different from termination of the lease. But even assuming that the right to sue did not fully accrue till the date the lessee was dispossessed of the plot in question, such a dispossession having taken place on 14-12-1978, the lessee ought to have filed the suit within three years of 15-12-1978 so as to be within the time stipulated under Article 58 extracted above. The suit in the instant case was, however, instituted in the year 1996 i.e. after nearly eighteen years later and was, therefore, clearly barred by limitation. The courts below fell in error in holding that the suit was within time and decreeing the same in whole or in part".

14. Order 7 Rule 11(d) of CPC has limited application. It must be shown that the suit is barred under any law and such conclusion must be drawn from averments made in the plaint. No amount of evidence can be looked into. If the law by which the defendant claims rejection of the plaint on the ground of limitation such fact should be manifest from a reading of the plaint and does not call for

any investigation into any fact at all. In order to find out whether the suit is barred by limitation under Article 58 or 59 of the limitation Act, 1963, the same has to be manifest from a reading of the plaint and no amount of evidence can be looked into.

15. In view of the aforesaid it cannot be said at this stage that the suit is barred by laws of limitation.

16. The application for rejection of plaint accordingly stands dismissed; However, there shall be no order as to costs.