

(2013) 07 CAL CK 0053
In the Calcutta High Court
Case No : C.O. No. 1040 of 2013

Sri Amal Kundu

APPELLANT

Vs

Sri Sunil Kundu and Others

RESPONDENT

Date of Decision : 23-07-2013

Acts Referred:

Citation : (2014) 1 CHN 57 : (2014) 2 WBLR 189

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : S.P. Roy Chowdhury, Mr. Sabyasachi Bhattacharyya and Ms. S. Bhattacharyya, for the Appellant; S.P. Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Prasenjit Mandal, J.—This application is at the instance of the defendant and is directed against the order dated December 12, 2012 passed by the learned Civil Judge (Senior Division), 5th Court, Alipore in Title Suit No. 44 of 2010 thereby rejecting an application under Order 7 Rule 11 of the C.P.C. The plaintiffs/opposite parties herein instituted the aforesaid suit for a decree of declaration that the defendant has no right to claim the suit property as described in the schedule to the plaint, a decree of declaration that the decree passed in Title Suit No. 137 of 2001 dated October 12, 2001 had been obtained by fraud and the same is a nullity in the eye of law, a decree of declaration that if any deed of settlement favouring Anita Kundu be found to have been allegedly executed by Hari Mohan Kundu, since deceased, the same be declared as null and void and other consequential reliefs.

2. In the suit the defendant/petitioner herein entered an appearance and filed an application under Order 7 Rule 11 of the C.P.C. contending, inter alia, that the suit is barred by limitation and so, the plaint should be rejected. That application was rejected by the impugned order. Being aggrieved, the defendant has preferred this application.

3. Having heard the learned Counsel for the parties and on going through the materials on record, I find that admittedly Hari Mohan Kundu and Moni Mohan Kundu, two brothers, now deceased, hailed from Bangladesh and they got two plots at Tilak Nagar Colony.

4. The petitioners have contended that Hari Mohan got the plot No. 30, Tilak Narag Colony and he died on February 8, 1991, as a widower. He had no issue and so his brother Moni Mohan inherited the property left by Hari Mohan. Moni Mohan died on March 3, 1992 leaving behind the plaintiffs as his legal heirs. Thus, the plaintiffs became the owners of the property left by Hari Mohan. The defendant has no connection with Hari Mohan but he has contended that his sister namely Anita Kundu became the owner of the property of Hari Mohan by dint of a deed of settlement.

5. A suit being Title Suit No. 137 of 2001 before learned Civil Judge (Senior Division), 5th Court, Alipore was filed by the defendant against one person set by him as Shymal Saha wherein, it has been mentioned that Anita Kundu became the owner of the suit property by dint of the deed of settlement from Hari Mohan and after the death of Anita Kundu intestate as a spinster leaving behind the defendant as her heir and by the decree of compromise, the defendant became the owner of the property left by Hari Mohan.

6. The plaintiffs have also contended that fraud was practised and thus, a fictitious deed of settlement had been made and so, the said suit being Title Suit No. 44 of 2010 was filed by the heirs of Moni Mohan stating the cause of action to file the suit. Thereafter, the defendant filed the said application which was rejected by the impugned order. So, this application has been preferred.

7. Upon hearing the learned Counsel for the parties and on going through the materials on record, I find that the rejection of the plaint has been sought for on the ground of limitation and it is contended by Mr. S.P. Roy Chowdhury, learned Senior Advocate appearing for the petitioner, that the suit must be instituted within three years from the date when the deed of settlement had been made by Hari Mohan in favour of Anita Kundu or from the date when such fact came to the knowledge of the petitioners.

8. In the instant case, there being no clear disclosure when the deed was executed but, in fact, the deed was executed on May 16, 1990. According to the decision of T. Arivandandam Vs. T.V. Satyapal and Another, particularly the Head Note A, the application under Order 7 Rule 11 of the C.P.C. should have been allowed when there is no disclosure of a clear right to sue. The Trial Court must see that the bogus litigation can be shot down.

9. He has also referred to the decision of Kanailal Das and Another Vs. Jiban Kanai Das and Another, thus, he has submitted that the limitation of the right to sue under Article 58 being three years should be counted from the date of knowledge. So, in the instant case, as per materials on record when the matter came to the knowledge of the plaintiffs in the year 1992, it should be presumed

that the suit must be filed within three years from the date of knowledge. The instant suit having been filed in the year 2010 is not maintainable and so, the suit comes within the mischief of Order 7 Rule 11(d) of the C.P.C.

10. On the other hand, Mr. S.P. Mukherjee, learned Advocate appearing for the opposite parties has contended that since there is an allegation of fraud, a judgment or decree obtained by playing fraud on the court is a nullity and nonest in the eyes of law. It can be challenged in any court even in collateral proceedings, according to the decision of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, . Fraud is to be decided on the basis of evidence. It was also decided in 27 CWN 587 (Division Bench Judgment) to the effect that evidence is required for determination of the fraud as contended in the plaint. Mr. Mukherjee has also drawn my attention of the annotated book of evidence by S.P. Sengupta to the effect that the element of fraud is to be decided on evidence only.

11. In the instant case I find that the plaintiffs have described the cause of action arose on June 2, 2009 when for the first time the plaintiffs came to know about the judgment passed in the suit number T.S. 137 of 2001 on compromise and the same is continuing day-to-day. At 30, Tilak Nagar Colony under P.S. Jadavpur, Kolkata 700040 i.e. within the jurisdiction of the learned Court. So far as the rejection of plaint on the ground of being barred by limitation is concerned, only the plaint is to be looked into to see whether on perusal of the same it appears to be barred by the law of limitation.

12. In the instant case, there being a contention of fraud on the part of the plaintiffs against the defendant, the ground of fraud could be established only by evidence and not by mere averments in the plaint.

13. Therefore, the learned Trial Judge, in my view, has rightly observed that it is not possible to hold whether the suit is barred by the law of limitation or not. Evidence is required to determine this issue. In my opinion, the learned Trial Judge has rightly addressed the issue.

14. Accordingly this application is devoid of merits and is, therefore, dismissed.

15. Considering the circumstances, there will be no order as to costs. Urgent Xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.