

Ghulam Mohiuddin Vs. the Official Assignee and ors.

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Court : Kolkata

Decided On : Mar-27-1978

Reported in : AIR1978Cal463

Judge : Monjula Bose, J.

Acts : [Specific Relief Act, 1963](#) - Section 34; [Limitation Act, 1963](#) - Schedule - Article 113

Appeal No. : Suit No. 247 of 1971

Appellant : Ghulam Mohiuddin

Respondent : The Official Assignee and ors.

Advocate for Def. : Chowcharia, Adv. (for No. 3) and ;J. Mitra, Adv. (for No. 4)

Advocate for Pet/Ap. : T.P. Das, Adv.

Disposition : Suit dismissed

Judgement :

ORDER

Monjula Bose, J.

1. The claim in this suit is for respective declarations that the lease dated June 23, 1964, the agreement of tenancy dated May 1, 1964 and the tenancy referred to in

para 20 (c) of the plaint are null and void, inoperative and not binding on the plaintiffs. The admitted facts are inter alia that in Sept. 1962, the plaintiffs Nos. 1 and 2 alone with one Golam Rasul (since deceased) jointly purchased premises No. 2 Chingrihat'. a Lane, Calcutta at an auction sale by the Official Assignee, the defendant No. 1, held in execution of a mortgage decree passed against the then owner one Khaja Shamsuddin. The plaintiffs Nos. 3 and 4 are the heirs and legal representatives of the deceased Golam Rasul one of the joint purchasers. Subsequent to the said purchase certain facts came to light, namely that in a suit for dower being suit No. 1172 of 1958 filed by one Jamela Begum the defendant No. 2, the said Shamsuddin allowed an ex parte decree to be suffered against himself and in execution of the said decree, the said premises was caused to be attached and purchased by the decree-holder, the defendant No. 2 abovenamed. On May 10, 1963, the plaintiffs Nos. 1 and 2 and the said Golam Rasul the auction purchasers caused a suit being suit No. 833 of 1963 to be instituted against the defendants Nos. 1 and 2 inter alia for declarations that the said ex parte decree passed in favour of the defendant No. 2 was null and void, and that the sale in purported execution of the decree was also null and void, and for other reliefs. On Sept. 1, 1967, the defendant No. 2 consented to a decree being passed in the said suit No. 833 of 1963, setting aside the sale in her favour. Subsequently however the plaintiffs came to know further that the defendant No. 2 had during the pendency of the said suit No. 833 of 1963 purported to create a lease in favour of J. D. Norton and Sons Ltd. the defendant No. 3 and purported tenancies in favour of A. K. Products and Bengal Rubber Manufacturing Co. the defendants Nos. 4 and 5 abovenamed in respect of the said premises 2, Chingrihatta Lane, Calcutta. It is these tenancy agreements and the lease which are sought to be challenged in this suit. Only the defendants Nos. 3 and 4 have entered appearance and filed written statements in this suit.

2. On an application by the plaintiffs the plaint was allowed to be amended and it was inter alia pleaded further that no part of the plaintiffs' claim was barred by limitation.

3. The parties went to trial on the following issues settled, and by consent refrained from raising any other issue and in particular any issue of fact, which

were expressly left open to agitate in future proceedings, if any.

1 (a) Is the suit a suit for land as alleged by the defendants Nos. 3 and 4.?

(b) If so, has this Court jurisdiction to receive, try and determine this suit?

2. Is the suit maintainable under the provisions of the Specific Relief Act 1963?

3. Is the suit barred by limitation ?

4. To what relief, if any are the plaintiffs entitled?

4. By further consent the Judge's Brief of documents and correspondence in three parts were tendered as Ext. 'A'; an admitted list of dates as Ext. 'B' and an order dated the 14th Jan. 1965 as Ext. 'C'. No oral evidence was adduced.

5. Mrs. Chowcharia learned Advocate for the defendant No. 3 contended that the present suit is not maintainable inasmuch as the plaintiffs have refrained from claiming any other relief and even consequential reliefs, apart from the declarations sought. Under Section 34 of the Specific Relief Act 1963 the Court was enjoined not to make any declaration where the plaintiff being able to seek a further relief other than a mere declaration of title omits to do so. In the facts of the case she argues the further reliefs of cancellation and/or delivering up of the documents challenged and of possession, were available to the plaintiffs as admittedly the defendants have been in possession of the suit premises since 1964. In support of her contentions she cites *Ramsaran v. Smt. Ganga Devi* reported in : AIR 1972 SC2685 and *Jugraj Singh v. Jaswant Singh* reported in : [1971]1SCR38 .

6. Mrs. Chowcharia next contended that this suit is a suit for land situated outside the jurisdiction of this Court and therefore this Court had no jurisdiction to entertain and try the same. She relies on para 24 of the plaint to show that the plaintiff's case was that the defendants have set up a title to property adverse to the plaintiffs and are interested to deny the plaintiffs right title and interest, in the property. The claim in the plaint she submits affected a lease and/or tenancy agreements in respect of immoveable property outside the jurisdiction of the Court.

7. In support of her contention she cites *Moolji Jatha & Co. v. Khandesh Spinning and Weaving Mills Co. Ltd.* reported in AIR 1950 FC 83, and submits that suits for land include suits involving disputes as to title and/or inviting a decision on title to land.

8. Finally, she contended that the suit is barred by limitation as admittedly, the property was purchased by the plaintiffs on the March 29, 1963 and from the letters dated Feb. 10, 1965 from the Receiver to the defendant No. 3 and Feb. 19, 1965 from the defendant No. 3 to the Receiver enclosing a copy of the lease Exts. 'A' and 'B' the plaintiffs came to know of the claims of the defendant No. 3 and this would be relevant for computation of the period of limitation. She submitted that the suit is governed by Article 113 of the [Limitation Act, 1963](#) where the period of limitation is three years from the time a right to sue accrues. If Feb. 10, or 19th 1965 are taken as the dates when the plaintiffs had knowledge of the defendant's occupation in their capacity as tenants or at the latest Sept. 1, 1967, when the decree was passed declaring the sale to the defendant No. 2 as null and void, the suit having been filed 4 years thereafter is patently barred.

9. Mr. J. Mitra Learned Advocate for the defendant No. 4 adopted the arguments advanced on behalf of the defendant No. 3. He contended further that relief under Section 34 of the Specific Relief Act being discretionary the same should not be allowed in this case as admittedly the defendants Nos. 3, 4 and 5 are continuing in possession of the premises and no useful purpose will be served by passing a mere declaratory decree.

10. Mr. Mitra cited *Sailendra Nath v. Charu Chandra* reported in AIR 1929 Cal 422 and *Muhammed Israil v. Patna City Municipality* reported in AIR 1943 Pat 34 in support of his submissions that Court will not grant declarations likely to be infructuous.

11. Mr. Mitra also cited *Anila Bala Devi v. Madhabendu Narain* reported in AIR 1942 Cal 245 for the proposition that it is incumbent on the plaintiffs to seek the further relief of possession when they were admittedly out of possession.

12. Mr. Mitra next contended if the decree claimed in the present suit affected the property directly and/or the possessory title to land then the same must be held to be a suit for land. In support of this proposition he cited *Provas Chandra v. Ashutosh Mukherjee* reported in AIR 1930 Cal 258. He also cited *Pro-birendra Mohan Tagore v. State of Bihar* reported in : AIR1959 Cal767 (SB) for the proposition that on a consideration of the entire plaint the primary object of the suit should be discerned and it has to be ascertained thereon as to whether the suit has been filed for the purpose of obtaining a direction for possession or a decision on title or the object of the suit is something different but involves consideration on the question of title indirectly.

13. On the question of limitation he contended that the instant case was governed by Article 113 of the Limitation Act 1963 corresponding to Article 120 of the earlier Act. He cited *Pierce Leslie and Co. Ltd. v. V. O. Wapshare* reported in : [1969]3SCR203 where it was held that a declaratory suit without a prayer for possession would be governed by Article 120 of the earlier Act. According to Mr. Mitra the right to sue accrued to the plaintiffs on Sept. 1, 1967, when the dower decree and the sale in execution thereof were set aside.

14. Mr. T. P. Das learned Advocate for the plaintiffs on the other hand has contended that in all cases it is not obligatory that consequential reliefs should be claimed along with a declaration. As an authority for this proposition he cited *Kanailal Dholey v. Kalicharan Chatterjee* reported in : AIR1977 Cal499 . In that case, a declaration was sought to the effect that certain entries in the records of rights showing possession of the defendants as tenants were erroneous. On the basis of averments in the plaint that the defendants were in possession as agents for and on behalf of the plaintiffs and on the admission of the defendants in certain letters the Court held it was not necessary to ask for any further relief which had to be claimed in cases where the decree would otherwise be infructuous. He also cited *Yamunabai v. Ram Maharaj Sreedhar Maharaj* reported in AIR 1960 Bom 463, where the plaintiff claimed a declaration of her title to Inam properties, coupled with an injunction restraining the first defendant from collecting the rents and profits therefrom. The Court relying upon the fact that defendants were in constructive possession through tenants, and that the plaintiff desired constructive

possession alone, held that she was not bound to ask for actual physical possession from the tenants. He also cited *Gita Debi Bajoria v. Harish Chandra Saw Mill* reported in : AIR1971 Cal202 and *Vema-reddy Ramaraghava Reddy v. Konduru Seshu Reddy* reported in : AIR 1967 SC436 . The last decision cited was for the proposition that Section 42 of the said Specific Relief Act which is equivalent to the present Section 34 is not exhaustive and that the Courts have power to grant decrees for declaration independently of the said section.

15. For the same proposition he cited *Asensol Electricity Supply Co. v. Chunilal Das* reported in (1971) 75 Cal WN 704.

16. Mr. Das learned Advocate for the plaintiffs next contended that the suit not being one aimed for possession, or title or determination of any right or interest in immoveable property, the asking of a mere declaratory decree cannot make a suit for land. He cited in this context *Sm. Shyama Sundari Dasi v. Ramapati Chattopadhyaya* reported in : AIR1973 Cal319 where the plaintiff claimed a declaration that certain documents were void and invalid having been obtained by fraud and also for an injunction restraining the defendants from interfering with plaintiff's possession of land on the strength of the said documents. The Court held that the reliefs claimed were personal reliefs, not for determination of any right to or interest in land. Mr. Das also cited *Benode Behari Bose v. Srimati Nistarini Dassi* reported in (1905) 32 Ind App 193 (PC). It was held in that case that the primary object of the suit was to administer the estate of the deceased and In that context to set aside decrees obtained by fraud. Last cited was *Debendra Nath Chowdhury v. Southern Bank Ltd.*, reported in : AIR1960 Cal626 where It was held that a suit for specific performance of an agreement for sale of land with an alternative claim for damages is not a suit for land.

17. On the question of limitation Mr. Das contended that trespass is a continuing wrong and Article 120 is applicable in the Instant case as the cause of action was continuing, and fresh actionable wrong arose every time the plaintiff's rights were invaded. In support he cited *Jalandhar Thakur v. Jharula Das* reported in 41 Ind App 267: (AIR 1914 PC 72) and *Midnapore Zamindary Co. Ltd. v. Secy. of State* reported in AIR 1938 Cal 804.

18. On a careful consideration of the submissions of the respective parties, the contentions on behalf of the defendants Nos. 3 and 4 appear to be of greater substance. The decisions relied on by the learned Advocate for the plaintiffs do not appear to be applicable and are otherwise distinguishable on facts, A decree for specific performance of a contract for sale of land is a decree in personam directing the defendant to comply with the terms of the agreement. No doubt in Administration suite also orders can be passed affecting properties outside the jurisdiction of the Court and the cases cited are of no assistance to the plaintiffs. Following the principle enunciated in AIR 1950 PC 83, : AIR1959 Cal767 (SB) and (1905) 32 Ind App 193 (PC) (supra). I hold that whether this suit is one for land depends on its primary object, which in this suit is to assert the plaintiff's title to 2, Chingrihata Lane, Calcutta. In my opinion the suit is substantially one for an adjudication or a determination of rights and interests In an immoveable property and therefore is a suit for land. It is on this basis that the plaintiffs succeeded in their application for amendment.

19. I also find that the decree sought will not only directly affect the possessory or proprietary title to land but if passed will be of little consequence as a suit for possession will have to follow, if the defendants are to be evicted. In view of the principles enunciated in AIR 1942 Cal 245; : [1971]1SCR38 and : AIR 1972 SC2685 (supra) it was incumbent on the plaintiffs to seek the further reliefs including that of 'possession' and in the absence thereof, as also for the other reasons indicated above, the suit must fail. I also accept the contentions of the defendant that this suit is barred by limitation. In my view there can be no right to sue unless there is first an accrual of the right asserted, followed by its infringement by a clear and unequivocal threat. From the admitted facts Ex. 'B' it appears that such right to sue accrued to the plaintiffs on Sept. 1, 1967, when the decree and sale of the premises in favour of Jamela Begum the defendant No. 2 was set aside, and the defendants admittedly being in possession did not vacate the premises after receipt of the demand letter dated Sept. 6, 1967. This suit not being filed within 3 years from that date is clearly barred by limitation. There is little basis for the submission that there have been fresh Invasions to the plaintiffs rights. For all the reasons indicated above I answer the issues raised as follows:--

Issue No. 1 -- (a) Yes, this is a suit for land within the meaning of Clause 12 of the Letters Patent.

(b) No, as the land is situated outside local limits of the Original Jurisdiction of this Court

Issue No. 2 -- No, The suit is not in compliance of Section 34 of the [Specific Relief Act, 1963](#).

Issue No. 3 -- Yes, The suit is barred by limitation.

20. By reason of the answers to the above issues, this suit is dismissed. Each of the appearing defendants will be entitled to costs.

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