

Provabati Kunwar Vs. Kaiser Kunwar and ors.

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Court : Kolkata

Decided On : Jun-01-1959

Reported in : AIR1959Cal642

Judge : P.C. Mallick, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rules 15 and 17

Appeal No. : Suit No. 205 of 1936

Appellant : Provabati Kunwar

Respondent : Kaiser Kunwar and ors.

Advocate for Def. : K.P. Khaitan and ;Gupta, Adv.

Advocate for Pet/Ap. : R. Mitter, Adv.

Judgement :

ORDER

P.C. Mallick, J.

1. This is an application for amendment of plaint in a suit for partition. The plaintiff instituted this suit impleading the husband's other co-sharers as parties. Two other defendants--Monmohanmull and Bhowarmull have been impleaded. By a deed of adoption executed by the plaintiff the defendant Monmohanmull appears to be

adopted as a son of the plaintiff's husband. Bhanwarmull is the natural father of Monmohanmull. The deed is challenged and it is alleged that it is tainted with fraud. Leave under Clause 12 of the Letters Patent was obtained inasmuch as some of the properties were situate outside the jurisdiction of this court.

2. The plaintiff's case as made in the original plaint is that she as the widow of Jitmull an admitted co-owner was entitled to one-sixth share in the joint properties. On that title the instant suit was instituted. Allegations have been made in the plaint of fraud having been committed by the defendant Bhanwarlal by reason of which, it is contended that the deed of adoption has become void. Reference has also been made of a suit instituted by the co-sharers against herself and the defendants Monmohanmull and Bhanwarmull in the Ajmere Court wherein adoption and the deed was challenged. This Ajmere suit ultimately terminated by the judgment and decree of the Judicial Committee which upheld the adoption. It is to be conceded that no reference to this adoption was made in the plaint, except as it came up in connection with the plea of fraud with reference to the deed of adoption. It is alleged that the deed of adoption was brought about by fraud perpetrated on the plaintiff by the defendant Bhanwarmull, father of Monmohanmull, along with others. While pleading this case of fraud, it has been stated in the plaint that as a condition of adoption the plaintiff was to be in control of the property of her husband and to enjoy the usufruct during her natural life. The deed, which she was made to execute, was different and therefore the deed was alleged not to be binding on her.

3 In the written statement filed by the Lodhas, the other co-sharers, the plaintiff's claim to one-sixth share has been admitted and the right of Monmohanmull, the adopted son, has been disputed. Monmohanmull and Bhanwarmull contested the suit inter alia on the plea of res judicata and maintainability by reason of the decision in the Ajmere suit, being Suit No. 5 of 1924. Facts alleged in support of the case of fraud have been, denied.

4. With the consent of the parties, I heard two preliminary issues, namely, whether the instant suit is barred by res judicata by reason of the decision in the Ajmere suit and whether the suit was not maintainable in its present form. At the time

when the two preliminary issues were being argued before me, Mr. Mitter, learned counsel appearing for the plaintiff, submitted that apart from the case made out in the plaint that the plaintiff was the owner of one-sixth share of her husband's property, the plaintiff is, in any event, entitled to be in possession of the property during her life time, inasmuch as it was one of the conditions of adoption. Though these facts are to be found in the plaint, nevertheless, this alternate case has not been properly pleaded. At the time Mr. Mitter strenuously urged that having regard to the circumstances of this case, I ought not to be very strict in the matter of pleading and I ought to allow the plaintiff to make out this case as an alternate case, I indicated to Mr. Mitter that on the present pleading it was difficult for me to allow the plaintiff to make that alternate case. After the argument was concluded, I took some time to give my decision and in the meantime before I delivered judgment the present summons has been taken out by the plaintiff for amendment. In the petition in support of the summons it is stated in paragraph 5 that the petitioner felt, in the course of discussions in court, that certain facts have not been fully stated and that the alternate case has not been properly pleaded. In that view of the matter, the plaintiff is contending now that should this court hold that she is no longer entitled to challenge adoption on the ground of fraud, she should, nevertheless, be allowed to make out a case that as a condition of adoption she would be entitled to possession of the property during her life time, and as such she is quite competent to maintain this suit for partition.

5. This petition for amendment has been strenuously resisted by Monmohanmull, the adopted son, and Bhanwarmull, the natural father of the adopted son. Mr. Khaitan on behalf of Monmohanmull contended that I have already held in my judgment on the preliminary issues that the suit is not maintainable in its present form and that after having recorded this decision, I have got no Other alternative than to dismiss the present application, and that for the purpose of amendment I am functus officio. I do not accept this contention of Mr. Khaitan and I hold that I am still competent to deal with the matter including the present summons for amendment. The fact that I have held that because of the absence of a prayer for setting aside adoption, this suit is not maintainable in its present form does not debar me from considering whether in the circumstances of this case I should allow the plaintiff to make an alternate case.

6. Mr. Khaitan next contended that by the amendment the plaintiff is seeking to make a new case. The alternate case is certainly new. Whereas the case made in the original plaint is that the plaintiff is the owner of one-sixth share as Jeetmull's widow on the footing that there was no adoption, the alternate case is that as a condition of adoption she is entitled to possession during her natural life even though Monmohanmull is the owner of Jeetmull's one-sixth share. In other words whereas in the original plaint she claimed partition as owner of one-sixth share, the alternate case is that she has possessory title which entitles her to claim partition. This is undoubtedly true. An alternate case is necessarily a different case. Mr. Mitter however contends that an amendment is not necessarily to be rejected because the case is new and based on a different cause of action. He relies on a decision of the Supreme Court in case of *L.J. Leach and Co. Ltd. v. Jardine Skinner and Co.*, : [1957]1SCR438 . In that case, the Supreme Court allowed an amendment so as to enable the plaintiff to make a new case based on an entirely different cause of action. In the case cited, the plaintiff's claim was for damages for conversion. Having failed in trial court, the Appeal Court and finally in the Supreme Court, the plaintiff applied to the Supreme Court for amendment of the plaint so as to claim damages on the basis of breach of contract. The new case was based on a different cause of action. The Supreme Court allowed the amendment even though the claim for damages was barred on the date of the amendment. By allowing this amendment, the defendant was deprived of a very valuable defence, viz., the plea of limitation. In the instant case, the fact that the adoption was conditional has been stated in the j plaint, even though I agree with the learned counsel appearing for the defendants that these facts have been referred to with reference to the deed of adoption. One of the grounds on which the deed is challenged is that though the plaintiff only agreed to take Monmohanmull in adoption on condition that she would be in control of the estate during her life time, this condition has not been recorded in the deed. The case that adoption was conditional is therefore to be found in the plaint To make out an alternate case, the facts are there, though not pleaded in proper language. This is, what the plaintiff seeks to do now. The lady is a pardanashin Hindu lady and she had to depend for conducting the litigation on others. She has pleaded that she has been let down by people whom she trusted. She made out a case of fraud.

She was not allowed to make that case of fraud in the Ajmere Suit. Unfortunately, she is debarred from making out that case of fraud in the instant suit as well. But I find, on the allegations made in the plaint itself, that she may have an alternate case on the footing that she is entitled to possession during her life time and as such she is competent to institute this suit. I am not inclined to debar her from agitating that case.

7. The fact of adoption is no longer in controversy. The controversy sought to be raised in the plaint is whether the plaintiff's own act of adoption is binding on her having regard to the fraud of Bhanwarmull and others as alleged in the plaint. There is another point of controversy between the parties, viz., whether the adoption was conditional. This point though indicated has not been clearly made out in the plaint. This point of controversy is sought to be agitated in this suit by the present amendment. The plaint is admittedly inadequate to raise this controversy. But one paragraph in the plaint would have entitled the plaintiff to make this alternate claim she seeks now--the facts being already there. That one paragraph is to this effect that the plaintiff claims title as Jeetmull's widow to the one-sixth share in the properties in suit; alternately and in any event she is entitled to be in possession of the one-sixth share, during her natural life even if the adoption is held to be binding on her. In my judgment the plaintiff should not be debarred from making this alternate case. In the circumstances of the case I will stretch a point in favour of the plaintiff and I would not be stiff and unbending. I am inclined to exercise my discretion in her favour so as to enable her to submit this alternate case to the adjudication of the Court.

8. It is next contended that by allowing the plaintiff to amend her plaint the defendants are being deprived of a legal right which has accrued to the defendants by lapse of time. In other words the plea of limitation which the defendant could have availed of would be lost if the amendment is allowed. The suit no doubt has been instituted in 1936 and the amendment is being asked in 1959. But it does not necessarily follow that the new case is time barred. This argument is tenable if it is shown that a fresh suit on the amended claim would be barred by limitation on the date of the application. If however the claim on the amended plaint is within time at the date of amendment, this argument loses its

force. The claim on the amended plaint is for partition -- the same as in the original plaint though right to claim partition is on the basis that the plaintiff has possessory title. There are two sets of defendants (1) the other co-sharers (2) Monmohanmull. The other co-sharers, viz., the Lodha defendants do not dispute the plaintiff's right as co-sharer. None of them set up adverse title by ouster. It is clear as against the Lodha defendants there is no question of limitation. Is it time barred as against Monmohanmull? The plaintiff has not been dispossessed by Monmohanmull. In the Ajmere suit only plaintiff's title as the adopted son of Jeetmull has been declared. The Court was not called upon to decide whether the adoption was conditional. The decision in the Ajmere suit cannot therefore be considered to declare Monmohanmull's right to possession. Nor in fact he is in possession. How then can it be said that the claim made in the amended plaint is time barred having regard to the fact that the plaintiff still continues to be in possession and has not been dispossessed? This is a simple suit for partition by one co-sharer against another involving the determination of another question as to title and right to possession vis-a-vis her adopted son. She claims possessory title and she has never been dispossessed. How then the question of limitation arise? In any event adoption took place in 1924 and this suit was instituted in 1936. If as is contended by the defendants Article 120 applies in the instant case, the suit was barred at the original date of the institution of the suit. The defendants would not be worse off by reason of this amendment. There is a substantial point of limitation to be gone into in any event a question I was not invited to decide as a preliminary issue. The issue has yet to be decided. In the circumstances it can hardly be contended that the defendants are being deprived of a legal right which has accrued to the defendants by lapse of time. Mr. Mitter submits that even if the amended claim is time barred, that does not affect the power of the court to allow amendment if that is required in the interest of justice. The Supreme Court case referred to before is an authority for that proposition. I hold that in the instant case if the plaint is amended the defendant would not be deprived of any legal right which has accrued to them by reason of the lapse of time. Amendment cannot be refused on that ground.

9. Next it is argued that by reason of this delay many of the witnesses have died and if the plaint is allowed to be amended the defendants would suffer serious

difficulty in disproving the plaintiff's new case. In the affidavit in opposition the names of these witnesses who are competent to depose on the point & are now dead have not been given. Mr. Mitter points out that the case being already there in the original pleading, there is already evidence on this point taken on commission from witnesses who are competent to depose on the point, viz., on what condition the adoption was agreed to be taken. Further apart from Sir. Tej Bahadur all the relevant witnesses on the point are alive. Sir Tej Bahadur's evidence on the point has already been taken on commission. There is therefore no substance in this grievance. This argument of Mr. Mitter has force. I am unable to accept the defendants' argument in the absence of any indication in their affidavit of the names of the witnesses competent to depose on the point who are no longer alive. Even if one or two witnesses are no longer alive and the court holds that they were material witnesses on the point that is not sufficient ground to reject this application if the amendment is otherwise considered to be necessary in the interest of justice.

10. It is next argued that this suit was instituted after obtaining leave under Clause 12 of the Letters Patent. In such a suit no amendment can be ordered if it requires a fresh leave under Clause 12 of the Letters Patent. In the instant case the plaintiff has in the summons prayed for a fresh leave. This leave cannot be given and the court has no power to grant amendment in such cases. In support of this proposition two recent decisions of this court have been cited. In the case of *Kshitish Kumar v. State of Bihar*, : AIR1953 Cal639 Sinha, J. laid down the following proposition at page 286 : (of Cal LJ) : (at p. 641 of AIR) :

'Where by amendment of the plaint, a cause of action is altered or a new cause of action added, it is not a new suit but the old suit in new form. In such a case no amendment can be ordered if it requires leave to be granted under Clause 12 of the Letters Patent at the time of amendment.'

It follows that leave under Clause 12 of the Letters Patent cannot be granted in such a case at any stage after the institution of the original suit. In this cited case the jurisdiction was invoked on the ground that part of the cause of action arose within and part outside the jurisdiction of this court. It was not a suit for land.

11. The next decision cited is the decision of G.K. Mitter, J. in the case of Sreenath Das v. Debi Prosad Shaw, 94 Cal LJ 160. The subject matter of litigation was the cancellation of licence in respect to stalls in a Corporation market situate outside the jurisdiction of this court. The jurisdiction of the court was invoked on the ground that part of the cause of action arose within jurisdiction. It was held by the learned Judge that the suit was a suit for land and the land being outside jurisdiction this court has no jurisdiction to entertain it. Nevertheless the learned Judge discussed the question of the jurisdiction of the court on the footing that it was not a suit for land and followed the decision of Gentle, J. in the case of Baraset Basirhat Light Rly. Co. Ltd. v. District Board of the 24 Pargunnahs, AIR 1946 Cal 23 and of Sinha, J. in the case : AIR1953 Cal639 . Having regard to the decision of the learned Judge that the suit was a suit for land and that the land was situate wholly outside jurisdiction and the suit was dismissed on that ground, the observation of the learned Judge on the point is nothing more than an obiter.

11A. Mr. Mitter has also cited two decisions, one from Bombay and another, from Madras. The Bombay decision was that of Kania, J. in the case of Motilal Tribhovandas v. Shankarlal, Chhaganlal, AIR 1939 Bom. 345. This was also not a suit for land and the whole of the cause of action not having arisen within jurisdiction leave under Clause 12 was obtained to vest jurisdiction of the court. Subsequently the plaint was amended so as to substitute a new cause of action. No leave for amendment was either prayed for or obtained. At the trial the point was taken that there being no leave for the amendment the suit must fail. The learned Judge held that if an amendment, which would alter the cause of action, is made, it necessarily follows that fresh leave should be obtained in respect of the altered cause of action. In the cited case there not being such a leave, the suit was held to be bad and dismissed. This Bombay decision was considered in the two Calcutta cases noted above and it was pointed out that the learned Judge was not called upon to consider in that case directly whether in such cases the court had power to grant leave when the application for amendment was moved.

12. In the case of S.R. Muthuswami Gounder v. T. Krishnaswamy Iyengar : AIR1952 Mad533 , Krishnaswamy Naidu, J. held that where the court considers that the plaint has to be amended so as to include a cause of action which was not

originally in the plaint on the ground that such an amendment is necessary, it is not precluded from granting such an amendment merely for the reason that it was a suit instituted after obtaining previous leave under Clause 12 of the Letters Patent.

13. It is therefore clear that there is a substantial divergence of judicial opinion on this point. There is no compelling decision of our Appeal Court on the point. Again it is to be noticed that in all the cases the jurisdiction of the court was invoked on the basis of the cause of action having arisen in part within the jurisdiction of the court. In the instant case the suit is a suit for land situate partly within and partly outside jurisdiction. The title in the amended plaint is different from the title in the original but it is with reference to the same land which is situate partly within and partly outside the jurisdiction of this court. Would the same reasoning apply to a case where the jurisdiction of the court is invoked on the ground that land is situate in part within jurisdiction? In a suit for the purpose of jurisdiction, where the cause of action arose has absolutely no relevance. In the absence of a binding decision, I am not prepared to apply the same rule in the case of suits for land even if the rule is correct. Neither originally nor by the amendment jurisdiction of the court is invoked on the ground that part of the cause of action arose within the jurisdiction of this court. Cause of action has nothing to do and has no relevance in determining the jurisdiction of this court. I am therefore apt to think that the Calcutta authorities noted above are not direct decisions on the point of jurisdiction in the instant case. Sinha, J., in the case : AIR1953 Cal639 noted that the rules are very artificial and he was compelled to negative jurisdiction having regard to what he considered to be the uniform decisions of this court. I am not inclined to extend the rule so as to cover cases in which the jurisdiction of the court is invoked not because the cause of action in part has arisen within the jurisdiction of this court but because of the situs of the land. I am apt to think that in such a case no leave is necessary when plaint is sought to be amended. But it seems that there is another view) which cannot be ignored. According to that view the leave is not merely necessary but imperative and failure to obtain leave at the time of obtaining amendment would lead to the dismissal of the suit. Such being the serious consequence, I would grant the plaintiff leave under Clause 12 of the Letters Patent, so that she may not be confronted with this technical difficulty at the trial

supposing she succeeds in establishing that she has a good case that should be upheld. For reasons given above I make an order in terms of paragraphs (a) (b) and (c) of the Summons.

14. There is a prayer for leave to reverify certain allegations in the plaint as being true to knowledge and not as of submission. It is submitted that by allowing this, I would be curing a defect which according to Mr. Gupta, is vital. A suit cannot and ought not to fail because of imperfect verification and the court should give leave to rectify it at any time. I therefore allow the plaintiff to reverify the plaint in the manner she chooses.

15. The plaintiff is getting an indulgence and must pay the costs of this application as also costs of any additional Written Statement the defendants may file for which leave is given. The cost of this application of Monmohanmull is assessed at Rs.500/- and costs of Bhanwarmull assessed at Rs.200/- other defendants will pay their own costs. Certified for counsel.

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