

Sushma Singh Vs. Rabindra Singh

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Court : Kolkata Appellate

Decided On : Jan-19-2011

Judge : Dipankar Datta, J.

Appeal No. : C.O. 2711 of 2010

Appellant : Sushma Singh

Respondent : Rabindra Singh

Advocate for Def. : Mr. Ganesh Srivastava; Mr. Sukanta Das, Advs

Advocate for Pet/Ap. : Mr. Aniruddha Chatterjee; Mr. Javed K. Sanwarwala; Mr. Kushal Chatterjee, Advs

Judgement :

1. The petitioner is the defendant no.3 in Title Suit No.75/2008 pending on the file of the learned Civil Judge (Senior Division), at Sealdah. The said suit has been instituted by the opposite party no.1 herein against the petitioner and five other defendants for declaration and permanent injunction in respect of the properties mentioned in schedules A and B to the plaint.

2. The defendant no.3/petitioner filed an application under Order VII Rule 11, Civil Procedure Code, 1908 (hereafter the Code) read with Section 151 thereof. The grounds on which the learned Civil Judge was urged to reject the plaint are two fold viz. i) the suit is barred by limitation; and ii) the suit is hit by Section 34 of the

Specific Relief Act, 1963 (hereafter the Act). 2

3. The plaintiff/opposite party no.1 contested the application under Order VII Rule 11 by filing a written objection. The defendant no.3/petitioner filed a reply thereto. After the defendant no.3/petitioner prayed for rejection of the plaint, the plaintiff/opposite party no.1 has filed an application under Order VI Rule 17 of the Code praying for amendment of the plaint.

4. The application under Order VII Rule 11 of the Code was taken up for consideration by the learned Judge on May 25, 2010. Upon hearing the parties, none of the two grounds urged on behalf of the defendant no.3/petitioner found favour with the learned Judge. It was observed that the cause of action for filing the suit had accrued to the petitioner on and from May 15, 2008 and the suit having been filed six days thereafter, it was not barred by limitation. So far as the second ground is concerned, it was observed that the plaintiff/opposite party no.1 had impliedly stated in the plaint that the defendants are denying or interested to deny the title of the plaintiff and particularly that the defendants and their men and agents are showing the suit properties to third parties with a view to transfer or alienate the same to them. Accordingly, the learned Judge by order no.37 rejected the application under Order VII Rule 11 and fixed June 4, 2010 for hearing of the application under Order VI Rule 17.

5. This order dated May 15, 2010 is under challenge in the present application under Article 227 of the Constitution.

6. Mr. Chatterjee, learned advocate representing the defendant no.3/petitioner submitted that within the four corners of the plaint there is no pleading that the defendant no.3 had denied the title of the plaintiff and regard being had to the provisions contained in Section 34 of the Act, the question of passing a decree for declaration of the nature sought for in the plaint would not at all arise. It was next contended by him that although the opposite party no.1/petitioner had prayed for injunction, there was no statement in the body of the plaint that he was in possession of the suit properties; it was only after the Order VII Rule 11 application was filed that the plaintiff/opposite party no.1 grew wiser and filed the application under Order VI 3 Rule 17 for amending his plaint by asserting that he is

in possession of the suit properties. According to him, the learned Judge committed gross error of jurisdiction in not allowing the application under Order VII Rule 11.

7. In support of his submission, Mr. Chatterjee relied on the decisions reported in *T. Arivandandam v. T.V.Satyapal* reported in AIR 1977 SC 2421 and *I.T.C. Limited vs. Debts Recovery Appellate Tribunal & ors.* reported in AIR 1998 SC 634. A prayer was made to allow the revisional application and for rejection of the plaint in the title suit upon setting aside of the order of the learned judge.

8. The application was vehemently opposed by Mr. Srivastava, learned advocate for the plaintiff/opposite party no.1. He invited the Courts attention to paragraphs 5, 6, 7, 8 and 9 of the plaint to contend that on a meaningful reading thereof, it is clear that the plaintiff/opposite party no.1 has alleged encroachment of the suit properties by the defendants. He relied on Blacks Law Dictionary for ascertaining the meaning of the word encroach and submitted that sufficient indication is available in the plaint on a reading of its contents as a whole conveying that the defendants are denying and/or attempting to deny title and/or right of the plaintiff/opposite party no.1 in respect of the suit properties. He further referred to Order VII Rule 13 of the Code to contend that even if a plaint is rejected upon an application under Rule 11 of Order VII being allowed, that by itself would not preclude presentation of a fresh plaint in respect of the same cause of action. Reliance was placed by him on the decision in *Ahmed Hossein vs. Mt. Chembelli & ors.* reported in AIR 1951 (38) Cal 262 wherein it was ruled that Order VII Rule 11 does not take away power to amend a plaint when it discloses no cause of action and that all necessary amendments may be made even if Order VII Rule 11 applies. The decision in *Nellimarla Jute Mills Co. Ltd. vs. Rampuria Industries & Investment Limited* reported in (2009) 3 WBLR (Cal) 190 was also relied on wherein the decision in *Ahmed Hussein (supra)* was followed. It was held therein that it is the duty of the Court to allow amendments when it is necessary for ends of justice, if a plaint is liable to rejection on the ground of defective pleading making out no cause of action for moving Court. He, accordingly, prayed for rejection of the revisional application.

9. I have heard learned advocates for the parties and perused the pleadings in the plaint. Mr. Chatterjee did not advance any submission in respect of the reasoning assigned by the learned Judge while holding that the suit was not barred by limitation; hence, question of examining that aspect does not arise here. The point as to whether the plaint filed by the plaintiff/opposite party no.1 was liable to rejection in terms of Order VII Rule 11 has to be determined looking into the plaint and nothing else. It is clear from a reading of the plaint that the defendants have been accused of taking advantage of absence of boundary wall and fencing as well as non-demarcated condition of the suit properties and are now trying to encroach the premises belonging to the plaintiff/opposite party no.1 without having any authority whatsoever. It is further evident therefrom that the defendants have been accused of threatening the plaintiff/opposite party no.1 with construction by any means and that they are adamant in nature having no regard for law. It is also averred in the plaint that the suit properties are being shown by the defendants to outsiders with a view to transfer and/or alienate the same taking advantage of its non-demarcation. These averments according to Mr. Chatterjee are not sufficient for obtaining a decree of declaration in terms of Section 34 of the Act.

10. Section 34 of the Act reads as under :

34. Discretion of court as to declaration of status or right. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief. Provided that . 5

11. It is trite law that while examining a plaint in course of deciding whether the plaint deserves to be rejected or not on application of Order VII Rule 11, the contents of the plaint have to be treated as correct. Alleged defect in pleadings, as referred to by Mr. Chatterjee, may result in the relief claimed not being granted but may not bar entry for adjudication. Law does not require that in order to maintain a suit for declaration under Section 34 of the Act, mechanical reproduction of the exact words of the statute to the effect that the defendant is

denying or is interested to deny the title or right of the suitor must be traceable in the plaint. All that is required is expression through words, in whatever form but not creating illusion of cause of action, that conveys the alleged acts and deeds of the defendant which, if established, would entitle the suitor to a decree declaring his right to property or title to a legal character under Section 34 of the Act. In such case, the spirit and substance must prevail over the letter and form.

12. Question as to whether a suit for specific performance is liable to fail where there is no averment of the nature required by clause (c) of Section 16 of the Act in the plaint came up for consideration before the Supreme Court in *Syed Dastagir v. T.R. Gopalakrishna Setty* reported in (1999) 6 SCC 337. It was held in paragraph 9 as follows :

9. So the whole gamut of the issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the plaintiff has to comply with in reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid section, 6 or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. In India most of the pleas are drafted by counsel hence the aforesaid difference of pleas which inevitably differ from one to the other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test whether he has performed his obligations, one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded maybe in any form. The same plea may be stated by different persons through different words; then how could it be constricted to be only in any particular nomenclature or word. Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea.

The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of readiness and willingness has to be in spirit and substance and not in letter and form. So to insist for a mechanical production of the exact words of a statute is to insist for the form rather than the essence. So the absence of form cannot dissolve an essence if already pleaded.

13. Drawing inspiration from the aforesaid decision, it must be held that the form does not matter; what is of essence is the substance of the allegations made in the plaint. If on a wholesome appreciation thereof it is comprehended to convey that the suitors title to a legal character or right to any property is being denied by any person or he is interested in denying such title to such right, without there being specific words of the nature mentioned in Section 34 of the Act, the suitor cannot be told off at the gates. No specific phraseology or language is required to take such a plea.

14. Turning to the facts of the present case, it does appear that the averments contained in paragraphs 5 to 9 do convey alleged attempt of the defendants to encroach the suit properties leading to institution of the suit. According to Blacks Law Dictionary, encroach means to enter by gradual steps or stealth into the possession or rights of another; to trespass or intrude. To gain or intrude unlawfully upon the land property or authority of another.

15. The plaintiff/opposite party no.1 having alleged that the defendants have and are seeking to further encroach the suit properties, it sufficiently conveys the sense of entering upon ones possession or intruding ones right unlawfully. This is the pith and substance of his plea. The essence of the plaintiffs plea has been duly pleaded which cannot be dissolved on the plea of the defendant no.3/petitioner that the exact words of Section 34 of the Act have not been pleaded in the plaint. The plaintiff/opposite party no.1, therefore, cannot be ruled to have failed to raise a plea warranting rejection of the plaint in the suit having regard to Section 34 of the Act, in terms of Order VII Rule 11. 16. Regarding the second contention raised by Mr. Chatterjee, I am of the clear opinion that the ratio

of the judgments relied on by Mr. Srivastava provide complete answer to it despite the facts being not exactly similar. 8 17. I have considered the decisions cited by Mr. Chatterjee. It has been held Arivandandam (supra) that unless on a meaningful consideration of the plaint a clear right to see surfaces, the Court ought to nip the motion in the bud. The Court traced the history of previous litigations and expressed deep sense of anguish and concern for the abuse of the process of Court and of law by the petitioner. Such is not the case here. In I.T.C. (supra) it was held that while dealing with an application under Order VII Rule 11, the Court ought to examine whether a real cause of action has been pleaded in the plaint or something has been stated which is purely illusory to get rid of the rigorous thereof. The pleading here, read as a whole, does not reveal creation of an illusory cause of action. The decision in I.T.C. (supra) is, therefore, of no assistance to the defendant no.3/petitioner.

18. There is no merit in this application. The order under challenge is upheld. The application stands dismissed. There shall be no order as to costs.

Urgent Photostat certified copy of the order, if applied for, be given to the parties at an early date.

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