OD-6

GA No. 3675 of 2015
CS No. 369 of 2014
GA No. 1118 of 2015
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction

MERLIN PROJECTS LIMITED
Versus
SMT. GINIYA DEVI AGARWALA & ANR.

BEFORE:
The Hon'ble **JUSTICE SANJIB BANERJEE**
Date : 20th July, 2016.

Appearance:
Mr. Abhrajit Mitra, Senior Advocate
Mr. Aniruddha Roy, Advocate
Mr. Arindam Mukherjee, Advocate
Ms. Sananda Mukhopadhyay, Advocate
...for the petitioner.
Mr. Tilak Bose, Senior Advocate
Mr. Mainak Bose, Advocate
Mr. Sanjay Bose, Advocate
...for Respondent No.1.
Mr. Utpal Bose, Senior Advocate
Mr. Abhishek Banerjee, Advocate
...for respondent Nos. 2, 3, 4 and 6.
Mr. D. N. Roychowdhury, Advocate
Mr. Aniruddha Sinha, Advocate
...for respondent Nos. 10 to 13.

The Court : The farce that judicial proceedings have now been reduced to is exemplified by this vexatious suit, the maladroit drafting of its plaint to create the illusion of a cause of action where there is none and the irresponsible waste of time to sustain the sham action.

The two primary players are land sharks: the plaintiff and the proposed sixteenth defendant. The other parties to the original plaint and the proposed added defendants are the dispensable foot soldiers in this war over turf.

The substance of the suit as originally filed was that the plaintiff had entered into a memorandum of understanding with the original defendants (the first of whom was dead before the suit was filed; but, thankfully, the second was the only heir of the deceased first defendant) in the year 2002 which contemplated that a development agreement would be entered into by the original defendants and the other co-owners of a Tollygunge property. The original defendants held 8.33% undivided share in the entire property. The memorandum of understanding, a copy whereof is incorporated as a part of the original plaint, envisaged a development agreement to be concluded within a year of the execution of such memorandum. The development agreement in respect of the entirety of the premises was never entered into or executed. Though the original defendants were not required to expressly terminate the memorandum of understanding of 2002 as it was only an understanding to enter into a development agreement, they effected a formal termination in December, 2008 by returning the token sum of Rs.11,000/- which had been received from the plaintiff. The original plaint was founded on the plaintiff not encashing the instrument by which the sum of Rs.11,000/- was returned by the original defendants. It was sought to be asserted that since the original memorandum of understanding of 2002 still survived, the plaintiff was entitled to specific performance of the development agreement envisaged therein. In other words, an understanding to enter into a development agreement of 12 years prior to the institution of the suit was cited for bringing a suit to claim title to a valuable property.

By the amendment which has been proposed, the plaintiff relies on a draft development agreement, which is unexecuted and unsigned, apparently prepared by a lawyer who may have been engaged by the plaintiff to take care of the partition in the Agarwala family. By citing the unsigned and unexecuted development agreement, specific performance of such agreement is sought such that the entire of the property remains in a limbo and the shadow under Section 52 of the Transfer of Property Act looms large over the same. After all, the proposed sixteenth defendant may have poached on the plaintiff's territory and the suit, or the proposed amendment, was only to make such proposed defendant suffer therefor

It is also evident from the proposed amended plaint that all the co-owners of the land in question have entered into a development agreement with the proposed sixteenth defendant and such agreement has been registered. The project which the proposed sixteenth defendant may undertake at the land in question remains under a cloud. Bookings to be made at such project would be scared away by the mere pendency of the suit and the plaintiff would enjoy the benefit of the doctrine of *lis pendens* despite not caring to apply for any interlocutory injunction in the suit.

The recklessness with which the proceedings have been conducted by the plaintiff appears from, inter alia, a supplementary affidavit which has been filed to correct some of the mistakes in the proposed amended plaint. The schedule of mistakes runs into nine pages and covers 22 sub-paragraphs.

Indeed, the mendacity of this suit would appear from how the expression "the said premises" is used in the second paragraph of the plaint and such expression becomes elastic in its use over the many meaningless paragraphs thereafter, whether in the existing plaint or in the proposed amended plaint.

The original defendants, or the surviving original defendant, has applied for rejection of the plaint. The rejection is on the ground that the claim is hopelessly barred by limitation, even if the proposed amendment is taken into account; and, there does not appear to be any cause of action for the suit being instituted or the same being continued with. The first defendant says that in view of Article 54 in the Schedule to the Limitation Act, 1963, this suit could not have been instituted against the original defendants in 2014 nor could it had been instituted against the proposed added defendants at the time that the amendment application was filed in 2015. The surviving original defendant has relied on the judgments of the Supreme Court reported at (1997) 2 SCC 611 and AIR 2011 SC 41. In either case, the Court recognised that the claim for specific performance was carried after the expiry of the period of limitation.

Paragraph 13 of the plaint as it now stands claims that the memorandum to enter into a development agreement was entered into in August, 2002. The subsequent averments speak of the plaintiff paying the token amount of Rs.11,000/- to the original defendants and the plaintiff obtaining possession of the part of the premises in the possession of certain branches of the Agarwala family almost simultaneously. The impression given in the original plaint is that the plaintiff is in possession of the premises, though it is evident from the

application to amend the plaint and the proposed amendments that the plaintiff is not in possession of the entirety of the premises but may only be in possession of a couple of godowns thereat. It is not even clear from the plaint or its proposed amended version as to what is the extent of the area covered by the suit property.

In an attempt to sustain the plaint and have the application for amendment allowed, the original plaint, almost in its entirety, has been placed and the salient parts of the proposed amendments have also been read out. As to the objection on the ground of limitation urged by the first defendant, it is submitted on behalf of the plaintiff that the law is clear and the judgments cited on behalf of the first defendant are distinguishable on facts.

In addition, the last sentence of paragraph 21I of the proposed amended plaint has been placed with much vigour to assert that the cancellation of the agreement of 2002 had been given a go-by. It is also mentioned elsewhere in the plaint that the fact that the original or the proposed added defendants had given a go-by to the cancellation of the agreement in 2002 is evident from the fact that they had not attempted to dispossess the plaintiff from the couple of godowns at the property that the plaintiff claims to be in possession of.

It is elementary that a suit for specific performance of a contract has to be filed within three years of the date fixed for the performance; or if no such date is fixed; within three years of the time when the plaintiff has notice that the performance is refused.

As far as the original defendants are concerned, it is evident that the time fixed for the performance of whatever was required to be performed by the

August, 2002 agreement expired after a year of the execution of such agreement. In any event, such agreement was specifically terminated by what is described in the plaint to be an undated letter which was made over by the original defendants to the plaintiff along with an instrument for payment dated December 8, 2008 for the refund of the sum of Rs.11,000/-. There is no averment in the plaint of anything done by the original defendants thereafter for the plaintiff to obtain the benefit of any provision of the Act of 1963 for the clock of limitation to stop running and the cause of action qua the agreement of 2002 to be alive to be pursued at the time of the institution of the suit in 2014. Merely because the plaintiff did not encash the instrument for payment or the original defendants or any other took no step to evict the plaintiff from a part of the premises allegedly under the plaintiff's possession would be of no relevance in counting the period of limitation.

By the proposed amendment, the plaintiff claims a veritable development agreement having been entered into between the plaintiff and original defendants and all the owners of the land in question. However, there was never any development agreement entered into between the plaintiff and the original defendants or between the plaintiff and the other owners. The unsigned and undated document of 2009 which is cited as the development agreement cannot be seen to be a concluded contract and, specific performance thereof would not be permissible nor would the plaintiff be entitled thereto. In any event, the entirety of the premises is originally described to measure about 2.78 acre but all

the co-owners have not been sought to be added as defendants by the proposed amendment.

The plaintiff claims to have entered into an agreement on August 10, 2002 with the Shree Narayan Agarwala branch of the Agarwala family on the same lines as the August, 2002 agreement with the original defendants. However, only a suit for injunction, valued at Rs.100/-, was instituted in such regard before the Alipore Court in the year 2009 against the Shree Narayan Agarwala branch without any prayer for specific performance of any agreement and without any leave being obtained under Order II Rule 2 of the Code. The attempt to rope in such matter by the proposed amendment is clearly barred by law.

Though the original legal principle was that if the suit as instituted was not maintainable, no amendment would be allowed to cure the defect; contemporary judicial thought has made room for defective plaints to be cured by amendments, if only to avoid a multiplicity of judicial proceedings.

If the proposed amendments to the plaint are taken into consideration and the proposed amended plaint is seen to be one filed on the date of the institution of the suit, even then the plaintiff would have no cause of action against the Agarwala defendants and, as a consequence, against the proposed sixteenth defendant. At the highest, the nebulous agreement between the plaintiff and the proposed added defendants was entered into in or about the year 2009. The suit was instituted in 2014 and even if the proposed amendment dates back to the date of the institution of the suit, the claim on such count would be barred by limitation.

Since the suit as originally instituted was after the expiration of the period prescribed by the laws of limitation, it was incumbent on the plaintiff to plead the grounds upon which exemption from such law was claimed. Again, since the proposed amendment would, at the highest, date back to the date of institution of the suit, which date was after the expiration of the period prescribed by the laws of limitation in respect of the additional reliefs claimed, the plaintiff ought to have indicated the grounds to explain the delay or claim exemption in accordance with law therefor. The original plaint and the proposed amended plaint are singularly lacking in such aspect.

Indeed, it has been submitted on behalf of the plaintiff that the proposed amendment seeks merely to amplify what is already stated in the original plaint; though it is evident from the proposed amended plaint that an altogether different claim is sought to be made by the proposed amendment. That this is a mischievous suit would also be evident from the palpably absurd valuation thereof at Rs.11 lakh for rights in a 2.78 acre land or even a 1.39 acre land that would be of value of several crores of rupees. It may do well, in this context, to notice paragraphs 31 and 32 of the plaint that are not sought to be changed by the proposed amendment:

> "31. No part of the plaintiff's claim or cause of action leading to filing of the above suit is barred by laws of limitation.
>
> "32. The suit for the purpose of jurisdiction and court fees is valued at Rs.11,00,000/- and the plaintiff has paid an ad-valorem court fees in respect thereof. The plaintiff undertakes to pay additional court fees if the amount already paid is found deficient."

If the plaintiff has no cause of action or no right to pursue the cause of action against the Agarwala defendants, the plaintiff has no right to chase the proposed sixteenth defendant, at least not in this Court or via the present suit.

Since the suit fails primarily on the ground of limitation and the plaint disclosing no cause of action, the aspect of this suit being a suit for land has not been gone into; though plaintiff may have failed even on such count.

One can only express concern that fake litigations as the present one clog the courts and deprive the worthy causes from being attended to. The words of a judicial giant pronounced nearly four decades ago in the judgment reported at (1977) 4 SCC 467 still reverberate:

> "7. We regret the infliction of the ordeal upon the learned Judge of the High Court by a callous party. We more than regret the circumstance that the party concerned has been able to prevail upon one lawyer or the other to present to the Court a case which was disingenuous or worse. It may be a valuable contribution to the cause of justice if counsel screen wholly fraudulent and frivolous litigation refusing to be beguiled by dubious clients. And remembering that an advocate is an officer of justice he owes it to society not to collaborate in shady actions. The Bar Council of India, we hope will activate this obligation. We are constrained to make these observations and hope that the cooperation of the Bar will be readily forthcoming to the Bench for spending judicial time on worthwhile disputes and avoiding the distraction of sham litigation such as the one we are disposing of. ..."

The plaint relating to CS No. 369 of 2014 is directed to be taken off the file since it appears to be ex-facie barred by limitation and not disclosing any cause of action. As a consequence, GA No. 1118 of 2015 succeeds and GA No. 3675 of 2015 fails.

The plaintiff will pay costs to the original surviving defendant assessed at Rs.5 lakh and to the West Bengal State Legal Services Authority of Rs.2 lakh.

Urgent certified website copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(SANJIB BANERJEE, J.)

S. Kumar / sg.