

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 364 OF 2014

Sanjay Yashwant Kandpile
residing at Podi No. 1,
Matru Pitru Chayya, Panvel
District Raigad

... Appellant

vs.

1. Kandpile Theaters
a partnership firm having address at
"K Mall, Sub Plot No. 2, 3,4, 5
F.P. No. 413/2, Railway Station Rd.
Panvel, Navi Mumbai – 410 206.
2. Mr. Subhash Rajaram Kandpile
Gangaram Niwas, N. Joshi Marg,
Byculla (W), Mumbai.
3. Deepak Jagannath Kandpile
1255, Narmada Sadan,
Shivaji Road, Panvel – 410 206.
4. Ajay Yashwant Kandpile,
Flat No. A-703, Neel Kanth Darshan
Mumbai-Pune Highway,
Panvel, District Raigad.
5. Amey Ashok Kandpile
R/H Plot No. 26, Sector-16,
Kopar Khairane, Navi Mumbai.
6. Yashwant Gangaram Kandpile
Podi No. 1, Panvel,
District Raigad.
7. Rajaram Gangaram Kandpile
(since deceased)
7A) Smt. Tarabai Rajaram Kandpile (wife)
7B) Suresh Rajaram Kandpile (Son)
7C) Sunil Rajaram Kandpile (Son)
Residing at "Rajtara Sankulan"

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| <p>Survey No. 347, Plot No. 14Opp
Sant Sawata Mali Hall Panvel
Station Road, Panvel.
7D) Mrs. Alka Ramesh Kachare
(daughter)</p> <p>8. Smt. Pushpa Jagannath Kandpile
1355, Narmada Sadan, Shivaji Road,
Panvel, Dist. Raigad.</p> <p>9. Smt. Shalini Yashwant Kandpile
Podi No. 1, Panvel, Tal. Panvel.</p> | <p>{</p> <p>}</p> | <p>... Respondents</p> |
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Mr. Vishal Kanade, Advocate i/b. Mr. Satish Raut for the appellant.
Mr. A.V. Anturkar, Senior Advocate a/w. Mr. Dormaan Dalal, Advocate for respondent nos. 1 to 5.
Mr. N.V. Walawalkar, Senior Advocate i/b. Mr. Ajit Kenjale, Advocate for respondent nos. 7(A), 7(B), 7(C) and 8.
Mr. C.G. Gavnekar, Advocate i/b. Mr. Suhas Deokar for the respondent nos. 6 and 9.

**CORAM : SMT. VASANTI A. NAIK &
C.V. BHADANG, JJ.**
DATE : 15th January, 2015.

JUDGEMENT (Per C.V. Bhadang, J.)

This Court had issued a notice for final disposal of this Appeal on 19th March, 2014. We have heard the learned counsel for the parties.

2. **Admit.** The appeal is being disposed of finally with consent.
3. The appellant is the original plaintiff while the respondents are the original defendants in Special Civil Suit No. 179/2013. That suit was filed by the appellant for declaration, partition and injunction before the learned Civil Judge, Senior Division at Panvel. It appears that the original

defendant nos. 1, 3, 4 and 5 filed an Application(Exhibit 25) while the original defendant no. 8 filed an Application (Exhibit 32) under Order 7 Rule 11 of the Code of Civil Procedure (for short 'Code') seeking dismissal of the suit on the ground that it does not disclose a cause of action. The appellant filed reply to the applications opposing the same. The learned trial Court, after hearing the parties, has allowed both the Applications by an order dated 21st February, 2014 and by an order of even date below Exhibit 1, the suit has been disposed of. Feeling aggrieved, this Appeal is filed challenging the order dated 21st February, 2014.

4. We have heard Mr. Kanade, learned counsel for the appellant, Mr. Anturkar, learned senior counsel appearing for the respondent nos. 1 to 5, Mr. Walawalkar, learned senior counsel appearing for the respondent nos. 7(A), 7(B), 7(C) and 8 and Mr. Gavnekar, the learned counsel for respondent nos. 6 and 9. With the assistance of the learned counsel for the parties, we have perused the impugned order.

5. The appellant had filed the suit seeking partition of certain properties as described in Schedule I annexed to the plaint and in respect of properties described in Schedule II a leave under Order 2 Rule 2 of the Code has been sought for, i.e. to file a subsequent suit in respect of those suit properties. It appears that the appellant and the respondents

(excluding the original defendant no. 1/respondent no. 1-M/s. Kandpile Theaters which is a partnership firm) are the successors of a common ancestor, namely, Gangaram Krishnaji Kandpile who died on 25th February, 1971 leaving behind him certain ancestral properties. Gangaram had 5 sons, namely, Late Hanumant, Late Laxman, Late Jagannath, Rajaram (defendant/respondent no. 7) and Yeshwant (defendant/respondent no. 6). According to the appellant, there was a partition between Gangaram and his brothers on 23rd March, 1947 in which Gangaram had received a share out of joint family properties. The appellant further came with a case that there was a partition between the brothers of Yeshwant on 21st September, 1979 and a theater by name "Gangaram Cinema" was given in partition in favour of three brothers, namely, Rajaram, Late Jagannath and Yeshwant. It was contended that the three brothers continued the said property jointly without any partition. The said Gangaram Cinema has been constructed over property bearing Survey Nos. 335 and 347 divided in various plots over a land admeasuring 4820 sq.mtrs. The original theatre on the plot/s has been demolished and the parties has constructed a mall thereon namely, "K Mall". Further according to the appellant, the respondent no. 6-Yeshwant effected partial partition on 2nd March, 2013 in respect of part of the properties of his family between the members of respondent nos. 6's family excluding the suit properties and some other properties. However,

according to the appellant, during the said partial partition in the year 2013, the appellant came to know that the suit property has been transferred in the name of respondent no. 1 of which the respondent nos. 2, 3, 4 and 5 are the partners vide Deed of Transfer dated 7th December, 2005 which has been registered under a Confirmation Deed dated 10th November, 2010. The appellant came with a case that the Deed of Transfer dated 7th December, 2005 is neither with his consent nor to his knowledge. The appellant thus claimed that the property as described in Schedule I annexed to the plaint continues to be the joint family/ancestral property. The appellant claimed 6.25 % share therein. The appellant also claimed a declaration that the agreement dated 7th December, 2005 between respondent nos. 6 to 8 and 2 to 5 is void and not binding on the share of the appellant.

6. The contesting respondent/defendants in their Application under Order 7 Rule 11 of the Code, contended that the appellant has not described the suit property with sufficient details, so as to identify it. It was also contended that all the properties are not included in the suit. The original defendant nos. 1 and 8 are not members of the joint family. Some other members who are necessary parties are not joined. Thus, the suit suffers from the vice of misjoinder as well as non-joinder of necessary parties. It was contended that on the saying of the appellant himself the property was partitioned thrice and thus, the property in

respect of which a partition is claimed cannot be said to be an ancestral/joint family property. It was thus claimed that the suit does not disclose any cause of action.

7. The appellant vide reply (Exhibit 34) denied the contents in the Application. It was contended that the three brothers, namely, Rajaram, late Jagannath and Yeshwant continued the said property as joint family in the year 2010. The appellant also denied that the suit suffers from misjoinder or non-joinder of the parties. It was also contended that this cannot be a ground on which a plaint can be rejected under Order 7 Rule 11 of the Code. It was contended that the plaintiff has reserved his right for suit for partition in respect of some of the properties, as he is not having all the information regarding it. It was also contended that the contention that the property is not described properly also does not come within the ambit of Order 7 Rule 11 of the Code.

8. The learned trial Court found that it is necessary to go through the documents filed on record specifically various partition/partnership deed in order to decide the controversy. The learned trial Court has also noticed that admittedly the suit properties were ancestral properties of the parties and its first partition deed (erroneously described as Partnership Deed) dated 23rd March, 1947 between Krishnaji and his sons Gangaram, Sadashiv and Mahadeo would indicate that the property in the hands of

Gangaram was the ancestral property. It has also been found that Suvey Nos. 335 and 347 were given to the share of Gangaram, Mahadeo and Krishnaji. Thereafter on 7th December, 1956 another Partition Deed was effected between Gangaram and his sons, namely, Hanumant, Laxman, Rajaram, Jagannath and Yeshwant. By the said partition deed, the suit property being Survey No. 335 and 347 were allotted to the share of Jagannath Gangaram. Thereafter on 21st September, 1979 there was again a partition effected between the five brothers. In the said Partnership Deed, it was mentioned that the ancestral property was partitioned on 8th December, 1956 by registered Partnership Deed. However, on account of certain additions, there was yet another partition effected in the year 1972. Even thereafter some businesses were run jointly and some of the properties were acquired by CIDCO and it became necessary to make certain corrections in the Partition Deed, therefore, this Partition Deed was effected. Again, there is a registered Partition Deed dated 2nd March, 2013 effected between the plaintiff, brother of plaintiff and their wives and respondent no. 6. The learned trial Court has found that in respect of some properties, partition was also effected between the father, i.e. Yeshwant, defendant no. 6 and his sons, i.e. the appellant and respondent no. 4.

9. The learned trial Court has lastly found that there is no material to show that the suit property continued to be the ancestral property and

therefore, found that there was no cause of action for filing the suit. In the face of such a finding, the applications filed under Order 7 Rule 11 of Code came to be allowed and the suit has been dismissed.

10. It is submitted by Mr. Kanade, the learned counsel for the appellant that while deciding as to whether the plaint can be rejected under Order 7 Rule 11 of the Code, the Court has to confine itself to the contents and allegations made in the plaint. It is thus submitted that the plaint on the face of it, should show that it suffers from a lack of cause of action, for filing the suit. It is submitted that the Court cannot look into any other material much less to defence either actually raised or probable or any other material, in order to ascertain, whether the plaint can be rejected for failing to disclose a cause of action. The learned counsel submitted that the contents regarding non-joinder/misjoinder of the parties and/or any description of the suit property would not come within the purview of Order 7 Rule 11 of the Code. The learned counsel submitted that although there were certain partitions effected, the appellant came with a case that the parties continued to hold it jointly and this required an enquiry which can only be done when the parties go for a trial. It was submitted that the learned trial Court was not justified, in such circumstances, in dismissing the suit by holding at the threshold that in such a case the parties would hold the properties as tenants in common

and not as joint tenants. It was further submitted that the finding recorded by the learned trial Court that the suit property loses its character as a joint family property cannot be sustained.

11. On the contrary, the learned senior counsel for the respondents has supported the impugned order. It is submitted that indeed the learned trial Court has confined itself to the allegations in the plaint and the documents which have been filed by the appellant himself. It is submitted that as held by this Court in **SNP Shipping Services Pvt. Ltd. and Ors. vs. World Tanker Carrier Corporation & Anr., reported in AIR 2000 Bom. 34**, while looking into the question whether a plaint can be rejected under Order 7 Rule 11(a) of the Code, the plaint as well as the documents on which it is based, can always be looked into. It is submitted that admittedly there were certain partitions effected between the parties which the appellant himself has alleged in the plaint and thus, the finding recorded by the learned trial Court is legal and proper and requires no interference.

12. We have considered the rival circumstances and the submissions made. It is now well settled that while looking into the question whether a plaint can be rejected under Order 7 Rule 11 of the Code, the Court has to confine itself to the allegations made in the plaint. In other words, the Court cannot look into any defence and/or cannot embark upon any

enquiry at this stage in order to find out whether the plaintiff has any case to succeed. Thus, the allegations in the plaint taken as they are, should be sufficient to indicate that no cause of action arises, for the relief as claimed. It is only in such an eventuality that the Court would be justified in rejecting the plaint under Order 7 Rule 11 of the Code.

13. In the present case, the learned trial Court has observed in paragraph 15 of the impugned order that if the three brothers enjoy the property jointly, they would become tenants in common and not joint tenants and the property would lose its character as a joint family property. We are afraid that though the principle as referred therein may not be disputed, such a finding cannot be recorded at the threshold. This would essentially require the defence, if any and evidence to be considered and decided. We find that the trial Court has considered the documents filed by the parties and effects thereof in coming to the conclusion that the plaint does not disclose any cause of action. Thus, if we were to confine ourselves to the allegations and contents in the plaint itself, it cannot be said that the plaint discloses no cause of action. We find that in the given circumstances, it cannot be held that the suit is not disclosing any cause of action. In so far as other grounds, namely, non-joinder/misjoinder of the properties are concerned, they would not fall within the ambit of the provisions of Order 7 Rule 11 of the Code. Even so far as the reliance placed on the decision in the case of **Smt.**

Premlata Shahu and Anr. vs. Chandrakant Gayaprasad Shahu & Ors., it would appear that the appellant/plaintiff had indeed claimed for a leave under Order 2 Rule 2 in this suit. In the case of **Premlatha Shahu** there was a subsequent suits and the plaintiff had failed to seek such a leave in the previous suit. In such circumstance, it was held that such a leave cannot be claimed in the succeeding suit. We find that the ratio would not be applicable to the facts of the present case. On consideration of the rival circumstances and submissions made, we find that this is a case in which the parties will be required to be given an opportunity to lead evidence and the plaint cannot be rejected at the threshold taking recourse to the provisions of Order 7 Rule 11 of the Code.

14. In that view of the matter, the First Appeal is allowed. The impugned order dated 21st February, 2014 is hereby set aside. The Applications Exhibit 25 and Exhibit 32 are hereby dismissed. Consequently, the order dated 21st February, 2014 passed below Exhibit 1 would not stand. The suit stands restored to its original number, for disposal according to law.

15. In the circumstances, there shall be no order as to costs.

(C.V. BHADANG, J.)

(VASANTI A. NAIK, J.)