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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 350 OF 2015

Shri Vikas Vinayak Bhadale

.. Applicant

Vs.

Shri Nivrutti Mahadu Sonmale and others .. Respondents

Mr. Nilesh M.Wable, Advocate for the Applicant.

CORAM : R. G. KETKAR, J.

DATE : 15th JULY, 2015

P.C. :

. Heard Mr. Nilesh M.Wable, learned Counsel for the applicant at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), original defendant No.31 has challenged the judgment and order dated 26/02/2015 passed by the learned 4th Joint Civil Judge, Junior Division, Pune below Exhibit 90 in Regular Civil Suit No. 2290 of 2013. By that order, the learned trial Judge rejected the application taken out by the applicant, hereinafter referred to as defendant No.31 under Order 7 Rule 11 of Code of Civil Procedure, 1908 (for short 'C.P.C.') on the grounds of i) non-joinder of necessary party ii) non-joinder of property iii) mis-joinder of the property iv) undervaluation of the Suit v) bar of limitation.

3. In support of this Application, Mr.Wable strenuously contended that respondents No. 1 to 8, hereinafter referred to as plaintiffs, instituted Suit for partition and separate possession of their 1/2 share in the suit property, more particularly described in paragraph 1 of the plaint. The plaintiffs also sought cancellation of the sale deed dated 04/04/2012 executed by defendants No. 1 to 28 in favour of defendants No. 29 to 31 for a consideration of Rs.47 lacs. He, therefore, submitted that the plaintiffs will have to pay court fee under Section 6(iv)(ha) of Maharashtra Court Fees Act. As against this, in paragraph 13, the plaintiffs have valued the Suit for Rs.6,000/- and on that basis, had paid the court fee. He, therefore, submitted that plaint is liable to be rejected under Order 7 Rule 11 (b) of the C.P.C.

4. Mr.Wable submitted that Maruti Sonmale died leaving behind two sons Bahiru and Mahadu. The defendants are the legal representatives of Bahiru and plaintiffs are the legal representatives of Mahadu. He submitted that on 30/07/1953, Bahiru had purchased survey No. 1/2 from one Maruti Kushaba Bhadale. It is self acquired property of Bahiru. The heirs and legal representatives of Bahiru had executed sale deed in favour of defendants No. 29 to 31 on 04/04/2012 whereunder they had sold entire survey No. 1, Hissa No. 2. In pursuance thereof, defendants No. 29 to 31 are in possession. The plaintiffs are claiming possession of this property. In

view thereof also, the plaint is liable to be rejected under Order 7 Rule 11(b) of C.P.C. as it is under valued.

5. He further reiterated his submissions as regards non-joinder of necessary party, non-joinder of property, misjoinder of property and that Suit is barred by limitation.

6. In support of his submissions, he relied upon following decisions.

- i) Suhrid Singh Vs. Randhir Singh, (2010) 12 Supreme Court Cases 112.
- ii) Abdul Gaffar Vs. Niranjan Kumar, AIR 2005 Bombay 259.
- iii) Shri Abdulsattar Gulabbhai Bagwan Vs. Shri Vaibhav Lxmangiri Gosawi, 2012(2) ALL MR 310.
- iv) Goel Ganga Developers Pvt. Ltd Vs. Shatrunjay Constructions & Developers Pvt.Ltd. In Writ Petition No. 7926 of 2012 dated 05/12/2012.
- v) M/s.Prism Reality Vs. Mr.Govind Yashwant Khalade and others in Writ Petition (Stamp) No. 24111 of 2014 dated 20/01/2015.
- vi) Asha Sopan Maithane Vs. Ramkrushna Punjaji Wanare, 2011 (4) Bom. C.R. 637.

7. In particular, Mr.Wable heavily relied upon the decision of this Court dated 05/12/2012 in the case of **Goel Ganga Developers Pvt. Ltd** in *Writ Petition No. 7926 of 2012 (Coram: Ranjit More.J)* and Abdulsattar's case. He submitted that in Goel Ganga's case, this Court has considered the decision of the Apex Court in the case of **Suhrid Singh** (*supra*) and it was held that the

prayer clause (bb) is covered by provisions of Section 6(iv)(ha) of the Act. Mr.Wable also relied upon the decision of this Court in the case of **Shri Abdulsattar Gulabbhai Bagwan** (*supra*) and in particular paragraphs 13 & 15 thereof.

8. I have considered the submissions advanced by Mr.Wable. I have also perused the material on record. In the case of **Suhrid Singh** (*supra*), the Apex Court has observed in paragraph 7 as under :

“Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to A and B, two brothers. A executes a sale deed in favour of C. Subsequently A wants to avoid the sale. A has to sue for cancellation of the deed. On the other hand, if B, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by A is invalid/void and non est illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If A, the executant of the deed, seeks cancellation of the deed, he has to pay ad valorem court fee on the consideration stated in the sale deed. If B, who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if B, a non- executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad valorem court fee as provided under Section 7(iv)(c) of the Act.”

9. In the light of the tests laid down by the Apex Court in

paragraph 7 extracted hereinabove, one has to consider the prayers made in the Suit. By prayer clause (a), plaintiffs have sought partition and separate possession of their 1/2 share in the suit property. By prayer clause (b), the plaintiffs have sought declaration that the sale deed executed by defendants No. 1 to 28 in favour of defendants No. 29 to 31 on 04/04/2012 is not binding on their share and that it is illegal. In other words, plaintiffs have not applied for cancellation of the sale deed. That apart, plaintiffs are also not party to the sale deed executed by defendants No.1 to 28 in favour of defendants No. 29 to 31. In view of the decision of the Apex Court in the case of **Suhrid Singh** (*supra*), I am more than satisfied that plaintiffs are not liable to value the Suit on the basis of Section 6(iv) (ha) of the Act.

10. In the case of **Goel Ganga Developers Pvt. Ltd** (*supra*), the learned Single Judge of this Court was considering the prayer clause (bb) in Regular Civil Suit No. 320 of 2011. By prayer clause (bb), the plaintiffs therein sought declaration that sale deed dated 28/10/2010 executed by defendant No.1 in favour of defendant No.2 is illegal, malafide and without any effect and not binding on the plaintiff. After considering the decision in the case of **Suhrid Singh** (*supra*), the learned Single Judge observed in paragraph 11 as under :

“As per the observations of the Apex Court in paragraph 7 of **Suhrid Singh's case** (*supra*), sale can be avoided at the instance of executant of a deed as well as at the instance of person who is non-executant of a deed. The plaintiff though not a party to the sale between defendant No.1 and defendant No.2 also can avoid the sale by filing suit for declaration that the deed executed between defendant No.1 and defendant No.2 is invalid, non est and he is not bound by it. In the light of the this discussion, I am satisfied that the relief claimed plaintiff in prayer clause (bb) is covered by the provisions of Section 6(iv)(ha).

11. The learned Single Judge was of the view that plaintiff was praying for avoidance of the sale deed, therefore, prayer clause (bb) is covered by Section 6(iv)(ha) of the Act. The learned Single Judge in the fact situation has held that prayer clause (bb) is covered by Section 6(iv)(ha) of the Act. In the present case, I have already held that by prayer clause (b), plaintiffs have sought declaration that the sale deed is not binding on them and is illegal.

12. In Abdulsattar's case (*supra*), the learned Single Judge, in paragraph 12 recorded concession made on behalf of counsel for respondent/defendant that there was no dispute as regards valuation insofar as prayer clause (A) is concerned. The dispute revolved around valuation insofar as prayer clause (A1) which was incorporated in the plaint by way of amendment on account of sale deed dated 15/12/2008 executed by defendants No. 1 & 2 in favour of defendants No. 3 to 5 therein. By that prayer, plaintiff had sought declaration that so called sale deed is not binding upon the plaintiff. After considering this, the learned Single Judge observed in

paragraph 15 thus:

“The submission of the learned counsel for the Petitioner that in the said suit what was sought was the declaration of the agreement in question as void which relief is covered by Section 6(iv)(ha) of the said Act. However, in the instant case, the Petitioner is not seeking any such relief in the suit but only claiming a declaration that the sale deed dated 15/12/2008 is not binding upon him. In my view, the same would not make any difference as what in effect the Plaintiff is seeking by way of prayer clause A(1) is the avoidance of the said agreement dated 15/12/2008, and therefore, Section 6(iv)(ha) would be attracted. As observed herein above, even if prayer clause A were to be granted to the Plaintiff, nevertheless the agreement in question in favour of the Defendant Nos.3 to 5 would have to be set aside, and therefore, the relief sought by way of prayer clause A(1) would have to be valued in terms of Section 6(iv)(ha).”

13. Perusal of paragraph 15 extracted hereinabove, shows that the learned Single Judge came to the conclusion that by prayer clause A(1), plaintiff was seeking avoidance of agreement dated 15/12/2008 and therefore, Section 6(iv)(ha) would be attracted. Applying tests laid down in paragraph 7 of the Apex Court's decision in the case of **Suhrid Singh** (*supra*), the decisions rendered by the learned Single Judges of this Court do not assist the case of defendant No.31. The Apex Court observed in paragraph 7 of Suhrid Singh's case that where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and

declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to A and B, two brothers. A executes a sale deed in favour of C. Subsequently A wants to avoid the sale. A has to sue for cancellation of the deed. On the other hand, if B, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by A is invalid/void and non est illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If A, the executant of the deed, seeks cancellation of the deed, he has to pay ad valorem court fee on the consideration stated in the sale deed. If B, who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if B, a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad valorem court fee.

14. Mr.Wable submitted that considering the prayer clause (a) of the Suit, the plaintiffs are also seeking possession and therefore, they have to pay ad valorem court fee on the consideration of the sale deed viz.Rs.47 lacs. I have already indicated that plaintiffs have claimed partition and separate possession of their 1/2

share in the suit property and by prayer clause (b), they have sought declaration that sale deed is not binding on their share. The decisions of the learned Single Judges of this Court in the case of **Goel Ganga Developers Pvt. Ltd** (*supra*) and **Abdulsattar** (*supra*) will not apply to the facts of the present case.

15. As far as other objections are concerned, the learned trial Judge has dealt with these objections in paragraphs 8 & 9. In paragraph 8, the learned trial Judge has dealt with the objections as regards limitation and observed that defendant No.31 has merely contended that the Suit is barred by limitation without stating how it is barred by limitation. Defendant No. 31 has not pleaded specifically on that point. The learned trial Judge, therefore, was of the opinion that issue of limitation is a mixed question of law and facts and plaint cannot be rejected on the grounds under Order 7 Rule 11(d) of C.P.C. As far as the objection of misjoinder of the parties, non-joinder of the property is concerned, in paragraph 9, the learned trial Judge observed that the same cannot be decided in the absence of any evidence and therefore, plaint cannot be rejected on that ground.

16. In view thereof, I do not find that the learned trial Judge committed any error in passing the impugned order. Hence, Application fails and the same is dismissed. Order accordingly.

(R. G. KETKAR, J.)