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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELATE JURISDICTION
FIRST APPEAL NO.880 OF 2015

Sandeep Padmakar Joshi & Ors. ...Appellants
vs.
Muralidhar Prabhakar Dixit & Ors. ...Respondents

Mr.R.S.Apte, Senior Advocate i/b Mr.Sham Walve a/w
Mr.Sachin Gorwardkar for the Appellants
Mr.C.G.Gavnekar i/b Mr.Suhas Deokar for the
respondents

CORAM : A.S.OKA, &
 REVATI MOHITE DERE, JJ.
DATE : AUGUST 17, 2015

ORAL JUDGMENT: (PER A.S.OKA,J.)

1 Heard the learned senior counsel appearing for the appellants and the learned counsel for the respondents. He states that the Advocate on record will file Vakalatnama for all the respondents within a period of two weeks from today. Considering the nature of the controversy, the appeal is forthwith taken up for final disposal.

2 The appellants are the original plaintiffs. By the impugned Judgment and Decree, the plaint has been rejected by the learned 5th Joint Civil Judge (S.D.), Nashik in exercise of powers under Rule 11(d) of Order VII of the Code of Civil Procedure, 1908 (for short 'the said Code') read with section 9-A of the said Code. The submission of the learned senior counsel for the appellants is that

though the power under clause (d) of Rule 11 is purportedly exercised, there is no specific finding recorded as to how the bar of suit is attracted. His contention is that the impugned Judgment shows non-application of mind. The learned counsel for the respondents invited our attention to the affidavit in reply filed by the fifth respondent on behalf of himself and on behalf of the sixth and eighth respondent and in particular paragraphs 22 and 23 thereof and urged that no case was made out for grant of ad-interim relief.

3 We have considered the submissions. The first prayer made in the suit filed by the appellants was that the consent decree dated 7th December 2009 passed in Special Civil Suit No.197 of 2001 was not binding on the appellants and was also not binding on the suit property. The second prayer was for a declaration that the sale deed dated 2nd April 2011 in respect of the plot Nos.75 to 79 was not binding on the appellants. The third prayer was a similar prayer as regards the sale deed in respect of the plot Nos.71 to 74. The fourth prayer was as regards the plot Nos.80 to 83. Further, the appellants sought a decree of partition by metes and bounds.

4 The original defendant Nos.2A to 2E made an application invoking section 9A of the said Code as well as Rule 11 of Order VII of the said Code on the ground that the suit was barred. On the said application made at Exhibit 21-D, it appears that the learned Judge passed the impugned Judgment and

Decree.

5 We have carefully perused the impugned Judgment which runs into only two pages. First and second paragraphs are the preliminary paragraphs recording the nature of the prayer in the application at Exhibit 21-D. The paragraphs 3 and 4 refer to the decision cited by the learned counsel representing the parties. Paragraphs 5 and 6 record the submissions and the reasons are only in paragraphs 7 to 9 which read thus:

"7 The ratio laid down in the case of Damodar Tukaram Gaunkar and Jethalal C. Thakkar are of the Hon'ble co-equal bench and of our Hon'ble Parent High Court, Bombay. Both the ratios are on fraud played by one party on the other and arriving at a compromise and maintainability of the second suit challenging the compromise.

8 To resolve the dispute as to which ratio is to be followed reliance is placed on :

AIR 1988 Mumbai 9

The SLAO V/s.Municipal Corporation of Greater
Bombay

AIR (MAD) 1962, 450

R. Rama Reddiar V/s. Rengammal

On considering the ratio's laid down from the two rulings cited supra, what depicts case, when two ratio's are contrary to each other, then the ratio which is more appeal to

the facts and circumstances needs to be followed.

9 To the facts and circumstances of the present case in hand the ratio laid down Damodar Tukaram Gaunkar is appealing."

6 After carefully reading the aforesaid paragraphs, we found it very difficult to understand as to what the learned Judge wants to convey. This is a case of complete non application of mind and non consideration of issues which arose for determination before the learned Judge.

7 As far as the application for rejection of the plaint is concerned, at any stage of the suit, the Court is empowered to exercise the power to reject the plaint after hearing all concerned parties. For considering the prayer for rejection of the plaint, only the averments made in the plaint are required to be seen. If the learned Judge wanted to decide the preliminary issue on the jurisdiction, the learned Judge was under an obligation to frame a preliminary issue of jurisdiction and to decide the same after giving an opportunity of adducing evidence. The learned counsel for respondent states that the preliminary issue was already framed. However, there is no reference to any such preliminary issue in the impugned Judgment and order.

7 Considering the manner in which the learned

Judge has dealt with the matter, there is no option but to set aside the impugned Judgment and to remand the matter. If a preliminary issue of jurisdiction is already framed in accordance with section 9-A of the said Code, or if such preliminary issue arises, the learned Judge will have to decide the same along with application at Exh.21 submitted by the respondents for rejection of the plaint.

8 We direct the Registrar (Judicial-I) to place a copy of the impugned Judgment and order before the Registrar General to enable him to take appropriate steps on the administrative side.

10 Hence, we pass the following order:

- (I) Impugned Judgment and decree dated 2nd May 2015 is hereby quashed and set aside and Special Civil Suit NO. 266 of 2012 is restored to the file of the learned trial Judge;
- (II) We direct the parties to appear before the learned 5th Joint Civil Judge (S.D.), Nashik on 14th September 2015 at 11.00 a.m.;
- (III) If the preliminary issue is already framed, the learned Judge shall hear the preliminary issue of jurisdiction as well as the application made by some of the defendants at Exhibit 21-D together and shall decide the same in accordance with law;
- (IV) If the application under section 9A of the Code of Civil Procedure, 1908 is still pending, the learned Judge will decide the same and if a

case is made out for framing a preliminary issue of jurisdiction, the learned Judge shall frame the preliminary issue of jurisdiction;

(V) If application under section 9A is still pending, the same shall be decided within a period of one month from the date fixed for appearance of the parties. In that case, hearing of the application at Exh.21-D shall be deferred till the decision on the application under section 9A ;

(VI) All contentions on merits are kept open;

(VII) Appropriate order shall be passed by the learned trial Judge as expeditiously as possible and preferably before 31st December 2015;

(VIII) First Appeal is partly allowed on above terms;

(IX) Civil Application No.2475 of 2015 does not survive and accordingly ad-interim relief granted earlier stands vacated.

(REVATI MOHITE DERE,J.)

(A.S.OKA,J.)