

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 896 OF 2013

Rajendra Chandaram Singh Applicant
Vs
Ms Prem Dinanath Bhoyar and Ors. .. Respondents

Mr. Sandesh Patil, Advocate for Applicant.
Mr. R.D.Suryawanshi, Advocate for Respondents no.1 to 5.

CORAM : R.G.KETKAR,J.
DATE : 28/07/2015

PC:

1. Heard Mr. Sandesh Patil, learned counsel for the applicant and Mr. R.D.Suryawanshi, learned counsel for respondents no.1 to 5 at length. Mr. Patil orally prays for deleting respondents no.6 to 14 on the ground that no relief is claimed against them in the present proceedings and respondents no.1 to 5, being original plaintiffs, are the only contesting respondents. In view thereof, leave to delete respondents no. 6 to 14 is granted. Amendment shall be carried out forthwith.

2. Rule. Mr. Suryawanshi waives service for respondents no. 1 to 5. At the request and by consent of the parties, Rule is made returnable forthwith and Application is taken up for final hearing.

3. By this Application under section 115 of C.P.C., original defendant no.10 has challenged the Judgment and order dated 15.7.2013 passed by the learned 7th Jt. Civil Judge, Sr.Dn., Thane

below Exh. 24 in special Civil Suit No.12 of 2011. By that order, the learned trial Judge rejected the application taken out by the applicant, hereinafter referred to as 'defendant no.10', under Order VII, Rule 11(a) and (d) of C.P.C. for rejection of Plaint.

4. In support of this Application, Mr Patil submitted that initially defendant no.10 had instituted Special Civil Suit No.1208 of 1994, inter alia, praying for declaration that Agreement dated 25.1.1994, Power of Attorney dated 25.1.1994 and declaration dated 25.1.1994 are valid and subsisting and is binding on the defendants; for decree of specific performance of the suit agreement by executing a Conveyance in respect of the land more particularly described in Annexure-A in favour of the plaintiff or his nominee and for execution of the conveyance duly registered in the office of the Sub Registrar, Thane, among other prayers. He submitted that the suit was decreed on 5.1.1995 and the defendants therein did not challenge that decree. The said decision had attained finality. He submitted that following properties were subject matter of that suit.

<u>Survey No.</u>	<u>Hissa No.</u>	<u>Area (Sq.Mtrs)</u>
140	4	252.30
89	6	25.00
89	5	379.00
132	1	582.00
136	1	1239.00
136	2	202.00
183	3&5	8100.00
109	17 Pt	51.00
124	B	25.00

107	1	1774.00
139	5	202.00
139	4	126.00
143	5	1720.00
143	6	25.00
156	1	11510.00
Pardi no.30		1416.00

5. Mr. Patil submitted that thereafter defendants no. 4 to 6 in Special Civil Suit No.1208 of 1994 and 2 others instituted Civil Suit No.12 of 2011 inter alia praying for declaration that they are the owners of the property more particularly described in First, Second, Third and Fourth Schedule of paragraph 1 of the Plaint (for short, 'suit property'); that the defendants have no right, title and interest in that property; for declaration that Consent Decree dated 5.1.1995 obtained by defendant no.10 in Special Civil Suit No.1208 of 1994 pertaining to suit property as well as 5th and 6th property is illegal and null and void and same is not binding on the plaintiffs; for declaration that the deed of conveyance dated 3.5.2010 registered in the office of Sub Registrar Assurance executed by defendants no. 1 to 6 in favour of defendant no.10 in respect of the suit property as well as the said fifth, sixth and seventh property is illegal, null and void and for cancellation of that instrument, among other prayers.

6. Mr. Patil submitted that defendant no.10 took out application on 20.7.2011 Exhibit 24 for rejection of plaint under Order VII, Rule 11(a) and (d) of C.P.C. He submitted that

application Exhibit-24 was decided on earlier occasions and the said orders were challenged in this Court. Lastly, the order dated 22.5.2012 passed by the learned trial Judge below Exhibit-24 was challenged in this Court by instituting Civil Revision Application No.597 of 2012. By order dated 13.6.2013, this Court (Coram: R.M.Savant, J.) set aside that order and directed the trial Court to de-novo consider application Exhibit 24 in terms of directions contained in that order. In pursuance thereof, the learned trial Judge rejected the application by the impugned order.

7. In support of this application, Mr Patil submitted that the suit is barred in view of provisions of Order 23, Rule 3-A of C.P.C. He submitted that the plaintiffs have challenged Consent Decree dated 5.1.1995 passed in Special Civil Suit No.1208 of 1994 on the ground that defendant no.10 has obtained that decree by playing fraud. In view of the decision of the Apex Court in the case of Horil Vs. Keshav, 2012 (5) SCC 525, challenge to decree allegedly obtained fraudulently is also covered in the expression 'decree passed on the compromise was not lawful'. He submitted that on this ground the learned trial Judge ought to have dismissed the suit. Apart from that, he submitted that the suit, on the face of it, is barred by limitation as the plaintiffs have challenged the decree passed on 5.1.1995 by instituting the suit on 1.1.2012. Mr Patil has taken me through Annexure A at page 31A of the C.R.A., copy of Complaint in Special Civil Suit No.1208 of

1994, copy of Plaint in present suit, namely Special Civil Suit No.12 of 2011, order dated 13.6.2013 passed by this Court in C..R.A. No.597 of 2012 as also the impugned order. He submitted that in paragraph 21 of the impugned order, the learned trial Judge held that separate suit challenging compromise decree is not barred where the decree is challenged by playing fraud. The said finding runs contrary to the decision of the Apex Court in the case of Horil (supra).

8. On the other hand, Mr. Suryawanshi supported the impugned order. He submitted that perusal of the application Exhibit 24 shows that defendant no.10 did not agitate bar of Order 23 Rule 3-A of C.P.C. He further submitted that perusal of averments in the Plaint as also prayers clause in the present suit shows that some of the properties are different from the properties covered in the earlier suit. In other words, present suit includes the properties which were subject matter of the earlier suit and in addition thereto there are other properties as well. In addition, plaintiffs no. 4 and 5 were also not party in the earlier suit. As far as prayer clause (d) is concerned, that was not the subject matter of the earlier suit. By prayer clause (d) the plaintiffs have prayed for declaration that the deed of conveyance dated 3.5.2010 executed by defendants no.1 to 6 in favour of defendant no.10 is illegal, null and void and is liable to be set aside. He, therefore, submitted that as all the prayers in

the present suit as also the properties are not covered by the earlier suit, the learned trial Judge was justified in rejecting the application filed under Order 7, Rule 11 (d). He further submitted that as defendant no.10 did not agitate that suit is barred in view of order 23, Rule 3-A, the said question could not have been gone into by the trial Court.

9. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the properties at page 31A of C.R.A. were covered by the decree passed in Special Civil Suit No.1208 of 1994 passed on 5.1.1995. Mr Suryawanshi submitted that the properties situate at village Mira, Tq. and Dist Thane, were the subject matter of the earlier suit and some of the properties mentioned in the Second Schedule situate at Mira, Tq. and Dist Thane were not the subject matter of the earlier suit. With the assistance of the learned counsel appearing for the parties I have perused the material on record. In the order dated 13.6.2013 passed by this Court in C.R.A. No. 597 of 2012 and in particular paragraph 9 thereof, statement made on behalf of defendant no.10 that in so far as second schedule is concerned, defendant no.10 (petitioner therein) does not claim properties mentioned at Item no.1 and item no.2 was recorded. In so far as third schedule is concerned, statement of defendant no.10 that he has no concern with the property at item no.2 ie.

Survey no.136/3/4 was recorded. In other words, defendant no.10 conceded the position that some of the properties in the present suit were not forming part of subject matter of the previous suit.

10. As far as prayer clause (a) of the present suit is concerned, concededly some of the properties set out therein were also part of the subject matter of the previous suit. Similarly as far as prayer clause (c) is concerned, in view of the decision of the Apex Court in the case of Horil (supra), the plaintiffs cannot challenge the consent decree dated 5.1.1995 on the ground of fraud in so far as the properties covered in the first schedule is concerned. To that extent I find merit in the submission of Mr Patil. However, the properties which are not subject matter of the previous suit and consequently decree passed on 5.1.1995 as also prayer clause (b) can certainly be investigated in the present suit and on that ground it cannot be said that the order passed by the learned trial Judge is wrong. As far as the ground of limitation is concerned, the plaintiffs have also challenged deed of conveyance dated 3.5.2010. As noted earlier, suit is instituted on 1.1.12011. It, therefore, cannot be said that prayer clause (d) is barred by limitation.

11. In the case of Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner, (2004) 3 SCC 137, only part of the Plaint cannot be rejected under Order 7, Rule 11 of C.P.C. In that case, it was observed that some of the reliefs cannot be granted by Civil

Court would not entail automatic rejection of the entire plaint. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the Plaint. Mr. Suryawanshi submitted that in the application Exhibit -24, defendant no.10 did not agitate bar of Order 23, Rule 3-A. It is not possible to accept this submission in view of Order dated 13.6.2013 passed by this Court in C.R.A. No.5970 of 2012 and in particular paragraph 11 thereof. This Court directed the trial Court to decide application Exh-24 de novo in terms of the directions contained in that judgment. It is clarified that while finally deciding the suit, the learned trial Judge will keep in mind the decision of the Apex Court in the case of Horil (supra) as also the fact that some of the properties in the present suit were subject matter of the previous suit. Subject to this clarification, Petition fails and the same is dismissed. Rule is discharged. In the circumstances of the case, there shall be no order as to costs.

(R.G.KETKAR, J.