

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

CIVIL REVISION APPLICATION NO. 1165 OF 2014

Red Brick Corporation

Vs

Applicant

M/s Bhalla Developers & Ors

.. Respondents

Mr. Prasad K. Dhakephalkar, Senior Advocate, with Mr. Vishal Kanade, Mr. Sanjay Udeshi i/b M/s Sanjay Udeshi & Co, for Applicant.

Mr. Prashant D. Patil, Advocate for Respondent no.1.

Mr. Rohit P. Sakhadeo, Advocate for Respondents no.11 to 13.

CORAM : R.G.KETKAR,J.
DATE : 07/08/2015

PC:

1. Heard Mr. Prasad K. Dhakephalkar, learned senior counsel for the applicant, Mr. Sanjay Udeshi, learned counsel for respondent no.1 and Mr. Rohit Sakhadeo, learned counsel for respondents no.11 to 13 at length. On the motion made by Mr. Dhakephalkar, respondents no. 2 to 10 are deleted from this application as no relief is claimed against them in the present application. On the motion made by Mr. Dhakephalkar, leave to delete respondents no.2 to 10 is granted. Amendment shall be carried out forthwith.

2. Rule. Learned counsel for the respective respondents

waive service. 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 the Code of Civil Procedure, 1908, (for short, 'C.P.C.'), original defendant no.10 has challenged the Judgment and order dated 14.11.2014 passed by the learned 2nd Jt. Civil Judge, Jr. Dn., Panvel, below Exhibit 49 in Regular Civil Suit No. 115 of 2014. By that order, the learned trial Judge rejected the application filed by defendant no.10 under Order VII, Rule 11 of C.P.C.

4. In support of this Application, Mr. Dhakephalkar submitted that respondent no.1, hereinafter referred to as 'plaintiff', claims that defendant no.1 executed Agreement of Sale as also Power of Attorney on 24.10.1997. The plaintiff also claims that Agreement to Lease was executed on 22.7.1997. The plaintiff has instituted present suit on 1.4.2014, inter alia, praying for perpetual injunction restraining defendant no.10 from carrying out construction of building, namely, Premier Residency, Ground Plus seven floors on plot no.01, admeasuring 752.83 sq.meters, Sector no.14, Taloja-Panchanand, Tal.Panvel, District-Raigad (for short, 'suit property'); for perpetual injunction restraining respondents no.10 to 13 from alienating the suit property in any manner in favour of third party.

5. In paragraph 17, the plaintiff sought leave under Order II,

Rule 2 to file a substantive suit for specific performance of Agreement dated 26.10.1997 and other reliefs of declaration in respect of the suit property. He submitted that on 6.3.2006, registered Tripartite Agreement was entered into by and between defendant no.1, defendant no.2 and CIDCO. By that Agreement, defendant no.1 transferred his interest in favour of defendant no.2. On 3.1.2007, registered Tripartite Agreement was executed by and between defendants 2, defendant no. 3 and CIDCO. By that agreement, defendant no.2 transferred his interest in favour of defendant no.3. On 4.4.2007, registered Tripartite Agreement was entered into by and between defendant no.3, 4 to 9 and CIDCO whereunder defendant no.3 transferred his interest in favour of defendants no. 4 to 9. On 9.12.2011, registered Tripartite Agreement was entered into by and between defendants no.4 to 9, defendant no.10 and CIDCO. Under that Agreement, defendants no. 4 to 9 transferred their interest in favour of defendant no.10.

6. Mr. Dhakephalkar submitted that by executing the registered Tripartite Agreement dated 6.3.2006 by and between defendants no. 1, 2 and CIDCO, defendant no.1 refused to perform his part of contract. The plaintiff should have, therefore, instituted suit within three years from 6.3.2006. The plaintiff has not challenged the tripartite Agreements dated 6.3.2006, 3.1.2007, 4.4.2007 and lastly 9.12.2011. The plaintiff has

instituted suit for simplicitor injunction. Though in paragraph 17, the plaintiff sought leave under Order II, Rule 2 to institute a substantive suit for specific performance of the agreement dated 26.10.1997 and for declaration, till date no suit for specific performance is instituted.

7. Mr. Dhakephalkar further submitted that almost 85% construction of the building is complete. Defendant no.10 took out application-Exhibit 49 on 3.5.2014 under Order VII, Rule 11 for rejection of the Plaint, inter alia, on the grounds that the suit does not disclose any cause of action as contemplated by Order VII, Rule 11(a); the suit is under value as contemplated under Order VII, Rule 11 (b); on the face of averments in the Plaint, the suit is barred by law of limitation; upon proper valuation, the Court of Civil Judge, Jr. Dn., will have no pecuniary jurisdiction to entertain and try the suit.

8. Mr. Dhakephalkar submitted that the learned trial Judge has recorded the submissions advanced by the learned counsel appearing for the parties in paragraphs 5 to 9 and thereafter recorded conclusions in paragraph 10. In paragraph 10, the learned trial Judge observed that the plaintiff has instituted suit by seeking leave under Order II, Rule 2 to file a substantive suit for specific performance of the Agreement dated 26.10.1997 and reliefs of declaration in respect of the suit property. Having regard to the reliefs claimed in the present suit, it cannot be said

that the suit is under value. The learned trial Court also observed that it cannot be held that the suit for injunction without claiming relief of specific performance is not maintainable. In paragraph 11, the learned trial Judge held that after considering the documents on record, defendant no.10 did not establish that the plaint is liable to be rejected in view of Order VII, Rule 11 of C.P.C.

9. Mr. Dhakephalkar submitted that the learned trial Judge did not assign any reasons and merely recorded conclusions in paragraphs 10 and 11 of the impugned order. Though various contentions were raised in the application Exh.49 for rejecting the plaint, the same are also not dealt with by the learned trial Judge. In fact, there is absolutely no finding as to why the suit is within limitation and the plaint is not liable to be rejected under Order VII, Rule 11 (d). Mr. Dhakephalkar submitted that in fact the learned trial Judge should have dismissed the suit by following decision of the Apex Court in the case of T. Arvandandam Vs. T.V.Satyapal, (1977) 4 SCC 467. He also relied upon the decision of the Apex Court in the case of Hardeh Ores (P) Ltd Vs. Hede and Company, (2007) 5 SCC 614.

10. On the other hand, Mr. Patil supported the impugned order. He submitted that while instituting the suit for perpetual injunction, the plaintiff has specifically sought leave under Order II, Rule 2 to file a substantive suit for specific performance of

Agreement dated 26.10.1997 and reliefs of declaration in respect of the suit property. The suit for injunction simplicitor is perfectly maintainable. The plaint also discloses cause of action as contemplated by Order VII, Rule 11(a). Having regard to the prayers made in the Plaint, it cannot be said that suit is under valued and Plaint is liable to be rejected as contemplated by Order VII, Rule 11 (b). As far as the submission that plaint is liable to be rejected under Order VII, Rule 11(d) is concerned, he submitted that limitation is a mixed question of law and fact and, therefore the learned trial Judge was justified in not rejecting the Plaint under Order VII Rule 11(d). He submitted that the plaintiff is contemplating to institute suit for relief of specific performance of Agreement dated 26.10.1997 and other reliefs.

11. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff has instituted suit for perpetual injunction. The suit is instituted on 1.4.2014. In the plaint itself, the plaintiff has referred to the registered Tripartite Agreements dated (1) 6.3.2006 entered into by and between defendant no.1, defendant no.2 and CIDCO, (2) 3.1.2007 entered into by and between defendants no.2, no.3 and CIDCO; (3) 4.4.2007 entered into by and between defendants no.3, 4 to 9 and CIDCO, (4) 9.12.2011 entered into by and between defendants 4 to 9, defendant no.10 and CIDCO.

12. The plaintiff has not challenged these agreements in the present suit. In paragraph 17, the plaintiff has sought leave under Order II, Rule 2 to file a substantive suit for specific performance of the Agreement dated 27.10.1997 and other reliefs of declaration in respect of the suit property. Mr. Patil submitted that the plaintiff is contemplating to institute suit for relief of specific performance. The fact remains that till date the plaintiff has not challenged these Tripartite Agreements as also has not instituted suit for specific performance.

13. It also appears from record that during the pendency of the suit, the plaintiff filed application Exhibit-5 for injunction restraining defendant no.10 from creating third party interest. In other words, the plaintiff did not pray for injunction restraining defendant no.10 from carrying out construction. By order dated 14.11.2014, the learned trial Judge allowed the application and restrained defendant no.10 from creating third party interest. Aggrieved by that decision, defendant no.10 preferred Misc. Civil Appeal No.117 of 2014. By order dated 26.3.2015, learned Ad-hoc District Judge-2 Raigad-Alibag allowed the Appeal and dismissed application Exh.5. Mr. Patil was not in a position to point out that the plaintiff has challenged dismissal of Exh.5 application.

14. Perusal of the impugned order shows that while rejecting the application, the learned trial Judge did not assign any reason.

The learned trial Judge also did not consider whether the plaint is liable to be rejected under Order VII, Rule 11(a) or Order VII, Rule 11(d). The learned trial Judge had merely recorded conclusions in paragraphs 10 and 11 of the impugned order. In view thereof, impugned order cannot be sustained and is liable to be set aside. As learned trial Judge has not recorded any reasons, the application will have to be considered afresh.

15. Learned counsel appearing for the parties state that next date of hearing before the trial Court is 14.8.2015. Learned counsel appearing for the parties state that the parties will appear before the trial Court on that date and for that purpose fresh notice need not be issued to them. In view thereof, application is disposed of in following terms:

- (i) Impugned order dated 14.11.2014 is quashed and set aside and application Exh.49 is restored to the file of the trial Court.
- (ii) Learned trial Judge will deal with the contentions recorded in this order as also other contentions that may be raised by the parties and pass a reasoned order.
- (iii) All the contentions of the parties on merits are expressly kept open.
- (iv) Parties will appear before the learned trial Judge on 14.8.2015 and for that purpose no fresh notice be issued to them. Learned trial Judge is requested to decide Application Exh.49 within three months from the date of appearance of the

parties uninfluenced by the observations made herein.

(v) Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)