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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.616 OF 2014

IN

SUIT NO. 160 OF 2008

Vasant Shankar Walanj & Ors.	...Applicants
And	
Mrs. Annete Bulchandani	...Plaintiff
vs	
Mrs. Iris Fernandes & Ors.	...Defendants.

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Mr. Pratik Sakseria with Mr. Nimay Dave, i/b. Bachubhai Munim & Co., for the Plaintiff.

Mr. Chetan Kapadia with Mr. Rahul Totla, i/b. Mr. N.J. D'Monte, for Defendant Nos. 5 to 10.

Dr. Birendra Saraf with Mr. Sharad Wakchaure, i/b. M/s. Kishore Thakordas & Co., for Defendant Nos. 11 to 14.

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CORAM : S.C. GUPTE, J.

DATED : JANUARY 6, 2015

(Oral Judgement):

. This Chamber Summons is taken out by the Applicants, who are original Defendant Nos. 11 to 14, for revocation of the leave granted under Clause XII of the Letters Patent to the Plaintiff to file the present suit, and dismissal of the suit for want of jurisdiction.

2. The present suit is filed by the Plaintiff for specific performance of an agreement for sale dated 2 February 1990 executed by one Dr. Ceasar M. Fernandes (predecessor-in-title of Defendant Nos.1 to 4 in the present

suit), since deceased, and Defendant Nos. 1 to 4. By this agreement, late Dr. Ceasar M. Fernandes and Defendant Nos. 1 to 4 agreed to sell to the Plaintiff the suit property (consisting of land at Lonawala, District Pune along with a bungalow standing therein) for an aggregate consideration of Rs.26.50 lacs. Defendant Nos. 5 to 10 are heirs of one Dr. Michael Fernandes, brother of the said Dr. Ceasar M. Fernandes. It is the case of the Plaintiff that the agreement dated 2 February 1990 was valid, subsisting and binding on the vendors, including Defendant Nos. 1 to 10 herein; that the Plaintiff is ready and willing to perform his part of the contract; that in defiance of the said agreement dated 2 February 1990 and with an intent to defeat the legitimate rights of the Plaintiff provided therein, late Dr. Ceasar M. Fernandes and Defendant Nos. 5 to 10 executed an Indenture of Sale dated 1 March 2007 in favour of Defendant Nos. 11 to 14; and that, in any event, the said Indenture of Sale does not, in any manner, effect the rights created in favour of the Plaintiff under the suit agreement dated 2 February 1990 inasmuch as Defendant Nos. 11 to 14 are not bonafide purchasers for value without notice and as such are bound to specifically perform the suit agreement jointly with Defendant Nos. 1 to 10 and/or severally in favour of the Plaintiff. The Plaintiff has, in the premises, sought a declaration in the suit that the suit agreement dated 2 February 1990 is valid, subsisting and binding on Defendant Nos. 1 to 14 and prayed for a decree of specific performance against Defendant Nos. 1 to 14 jointly and/or severally. The Plaintiff has also prayed for a declaration that the Indenture of Sale dated 1 March 2007 is invalid and not binding on the Plaintiff.

3. The present Chamber Summons is filed on the footing that the property, which is the subject matter of the suit, is situated outside the jurisdiction of this Court and that the suit being a suit for land, no leave

under Clause XII ought to have been granted and that the leave granted under Clause XII of Letters Patent ought to be revoked. It is the case of the Applicants that at least in so far as the prayer for declaration of invalidity in respect of the Indenture of Sale/Conveyance dated 1 March 2007 is concerned, the suit seeks an interference with the title of Defendant Nos. 11 to 14 with the suit property and is, therefore, a suit for land, which is outside the jurisdiction of this Court. Accordingly, it is submitted that the leave granted under Clause XII ought to be revoked and the suit be dismissed for want of jurisdiction.

4. Dr. Saraf, learned Counsel appearing for the Applicants submits that the suit, which seeks cancellation of conveyance or deed of sale in respect of land or immovable property and thereafter seeks specific performance of an agreement for sale executed by the vendor, is not a suit simplicitor for specific performance. It is submitted that suit insofar as it seeks cancellation of a deed of sale in respect of land or immovable property is a suit in respect of title as well as possession of land or immovable property. It is submitted that such a suit does not find any sanction of Chapter II or any other provision of the Specific Relief Act. Dr. Saraf relies upon a judgment of the Federal Court in **Messrs Moolji Jaitha and Co. v. The Khandesh Spinning and Weaving Mills Co. Ltd.**¹ and a judgment of the Calcutta High Court in the case **Rashmoy Das v. Rajashree Enclave Pvt. Ltd.**² in support of his contention. It is submitted by learned Counsel that cancellation of the sale deed in favour of Defendant Nos. 11 to 14 will entail adjudication of title and possession of the suit property, thus, making the suit one for land, which this Court lacks territorial jurisdiction to entertain or try. Dr. Saraf refers to the various averments in the plaint, as

1 AIR 1950 FC 83 : 1949 FCR 849

2 AIR 2011 Calcutta 148

also the relief sought in the suit in respect of the sale deed dated 1 March 2007 and submits that the suit is not merely for enforcement of a *right in personam* against the Defendant vendors but for interfering with the right of Defendant Nos. 11 to 14 in the suit property, which is a *right in rem*. It is submitted that it is a fundamental principle of law that questions relating to the title or ownership of land shall be determined by Courts having jurisdiction over the land. Learned Counsel also relies upon a decision of this Court in the case of **Ramprasad Ramchandra Rathod v. Manik Radhakisan Misal**³ and a decision of the Madras High Court in **D. Muthukumaraswamy alias Rajakumar by power of attorney agent M.S. Dakshinamoorthy**⁴ in support of his submissions.

5. Mr. Kapadia, learned Counsel appearing for Defendant Nos. 5 to 10 (who represent the original vendors of the suit property), supports the submissions of Dr. Saraf. Mr. Kapadia submits that the real nature of the present suit is a suit on title and not a suit *simplicitor* for specific performance. Learned Counsel submits that in the case of a suit for land, the residence of the Defendant or the place of accrual of cause of action is immaterial and no leave under Clause XII can be granted. Relying upon the decision of the Supreme Court in **Lala Durga Prasad v. Lala Deep Chand**⁵ it is submitted by learned Counsel that the only form of decree properly contemplated in a suit for specific performance involving a subsequent transferee is joinder of the subsequent transferee in the conveyance so as to pass on his title to the Plaintiff purchaser and cancellation of conveyance of the suit property in favour of the subsequent transferee is foreign to such specific performance suit, which is considered by the Supreme Court as an

3 1987 (3) Bom CR 36

4 1970 The Madras Law Journal Reports 328

5 1954 SCR 360 : AIR 1954 SC 75

inappropriate relief in a specific performance suit. It is next contended by the learned Counsel relying on the decision of the Supreme Court in **Bharat Karsondas Thakkar v. Kiran Construction Company**⁶ that joinder of Defendant Nos. 11 to 14 and plea of invalidity of the sale deed executed in favour of these Defendants completely changes the nature and character of the suit from being a suit for specific performance of an agreement to one for declaration of title and possession followed by a prayer for specific performance for an agreement for sale.

6. On the other hand, Mr. Sakseria, learned Counsel for the Plaintiff, submits that the suit does not involve adjudication of title to land or immovable property. Learned Counsel relies upon the decision of the Supreme Court in the case of **Adcon Electronics Pvt. Ltd. v. Daulat**⁷ in support of his submissions. Learned Counsel submits that the Plaintiff does not question anyone's title to the suit property in the present suit. Learned Counsel, relying upon the averments in the plaint, explains the circumstances in which a declaration of invalidity of the sale deed executed by Defendant Nos. 1 to 10/ their predecessors in favour of Defendant Nos. 11 to 14 is sought by the Plaintiff. Learned Counsel distinguishes the case of **Kiran Construction Co.** (supra) and submits that the facts of the present case are completely different from that case. Learned Counsel also relies upon the judgments of the Supreme Court in the case of **Kasturi v. Iyyamperumal**⁸ and **Suhrid Singh V. Randhir Singh**⁹ in support of his submissions. Learned Counsel further submits that the application for revocation of leave filed at a belated stage, as in the present case, is not maintainable and ought not to be granted. Learned Counsel relies upon the

6 (2008) 13 Supreme Court Cases 658

7 (2001) 7 Supreme Court Cases 698

8 (2005) 6 Supreme Court Cases 733

9 (2010) 12 Supreme Court Cases 112

judgment of the Supreme Court in the case of **Chittaranjan Mukherji v. Barhoo Mahto**¹⁰ in this behalf.

7. The Federal Court in **Moolji Jaitha and Co.** (supra) considered the expression 'suit for land' used in Clause XII of Letters Patent. The question in the case of **Moolji Jaitha & Co.** was, what was the ambit of the expression 'suit for land' used in Clause XII. Kania C.J., after considering the divergence of views of Indian Judges in respect of the expression 'suit for land', noted that the view of a majority of Judges appeared to be that the expression 'suit for land' should not be construed narrowly, limiting to suits for recovery of possession or to obtain a declaration of title to land only. The learned Judge noted that at the same time the wider meaning of the expression, so as to cover all suits relating to land, i.e. which has anything to do with land, does not appear to be accepted by anyone. The question, thus, was where to draw the line. The learned Judge noted that the Courts have differed in the matter of drawing this line under different circumstances and the same Court has taken divergent views on the point, giving no exhaustive enumeration of the suits covered by the expression 'suit for land'. The learned Judge then put the matter thus,:

“It is sufficient to say that taking the suit as a whole, one has to consider whether it is for the purpose of obtaining a direction for possession or a decision on title to land, or the object of the suit is something different but involves the consideration of the question of title to land indirectly.”

8. All other Judges of the Federal Court deciding the case of **Moolji Jaitha and Co.** appear to agree with this expression of law by Kania

¹⁰ A.I.R. 1953 S.C. 472 (Vol. 40, C.N. 115)

C.J. Justice Fazl Ali, albeit obiter, holds that the expression 'suit for land' covers the three following classes of suits :- (1) suits for the determination of title to land; (2) suits for possession of land; and (3) other suits in which the reliefs claimed, if granted, would directly affect title to or possession of land. Patanjali Sastri J. also holds that the words 'suits for land or other immovable property' in Clause XII, besides obviously covering claims for recovery of possession or control of land, are apt to connote also suits which primarily and substantially seek an adjudication upon title to immovable property or a determination of any right or interest therein. Even Mahajan J. holds that where the nature of the suit is such that in substance it involves a controversy about land or immovable property and the court is called upon to decide conflicting claims to such property and a decree or order is prayed for which will bring about a change in the title to it, that suit can be said to be in respect of land or immovable property; but where incidentally in a suit, the main purpose of which or the primary object of which is quite different, some relief has to be given about land, the title to it not being in dispute in real sense of the term, then such a suit cannot fall within the four corners of this expression. B.K. Mukherjea J., for his part, holds that 'suit for land' means a suit which is instituted with the object of establishing title to land or any interest in the same or for possession or control thereof; and the decree sought for must be intended *proprio vigore* to be enforceable against, and binding on, the land itself.

9. The judgment of the Federal Court in **Moolji Jaitha and Co.** (supra) has been followed by all Courts in India. It may, thus, be taken as established law that in all cases where the Court is called upon to consider whether the particular suit before it is a suit for land, the Court has to consider the real object of the suit. If in substance the controversy in the

suit is about title to land or immovable property and what the Court is primarily or substantially called upon to consider are conflicting claims in that behalf, which will entail or bring about a change in the title to the land or immovable property or possession thereof, the suit can be said to be 'for land'. On the other hand, where the main purpose or primary object of the suit is quite different, the fact that the relief to be given in such a suit may incidentally affect a land or immovable property- even a title or possession thereof – does not make the suit a suit for land.

10. A case in point would be the decision of the Privy Council in **Benode Behari v. Nistarini Dassi**¹¹, considered by Kania C.J. in **Moolji Jaitha and Co.** In **Benode Behari's** case, the Plaintiff had brought the suit for the administration of the estate of her husband, who had been a resident of Calcutta, and for the construction of his will. In that suit, the Plaintiff applied for cancellation of a certain deed of trust, an award, a decree filing the award and giving judgment in accordance with it and certain leases in favour of the executor of the lands on the ground of fraud. The lands in respect of which these deeds of trust, award, decree and leases were executed fell within the jurisdiction of the Court in Calcutta. Jurisdiction of the Calcutta Court, particularly to grant such relief, was challenged before the Privy Council. The Judicial Committee held that the Calcutta Court had jurisdiction in the matter. The Judicial Committee considered that the primary object of the suit was the administration of the estate of a deceased person resident within the jurisdiction of the Court. So also was the principal executor resident there and the actual administration going on there. The Judicial Committee held that the High Court of Calcutta, in its ordinary jurisdiction, had the right to order administration of this estate,

¹¹ 32 I.A. 193 : (33 Cal. 180)

and as ancillary to such an order, to set aside deeds obtained by the fraud of the executor. So also, Their Lordships held that the Calcutta Court was entitled, for the due administration of the estate, to set aside leases of land outside the territorial limits of their jurisdiction, those leases having been made as an incident of the same fraud.

11. The rationale behind the decision in **Moolji Jaitha & Co.** is discussed by Mahajan J. as follows :-

"This construction of the expression "suit for land" in Cl. 12 is in conformity with the rule that questions relating to the title or ownership of land shall be determined not only by the *lex situs* but also in *forum situs*. The statute does not override the fundamental juridical distinction which obtains in every organized community in the world, viz., that between decrees that affect the status of the individual or family or bring about *proprio vigore* an immediate change in the ownership of property, and decrees which merely purport to compel the defendant to do or abstain from doing something which the Court orders. Such decrees operate on the conscience of the defendant but not on his land. The subject-matter of a suit would not be land or immovable property on this construction if the question concerning the land only arises incidentally in a suit, the real subject-matter of which is not land or immovable property but say the administration of an estate or of a trust or taking accounts of a partnership in which no decree or order is claimed in respect of proprietary or possessory title to land or immovable property."

12. A suit for specific performance falls within this category of suits. A suit for specific performance is a suit to enforce a personal obligation of the defendant vendor to convey the suit property to the plaintiff purchaser. The real subject matter of such a suit is subsistence and validity of an agreement for sale and its enforcement at the instance of the plaintiff

purchaser.

13. The Supreme Court in the case of **Adcon Electronics Pvt. Ltd.** (supra), after considering the judgment of the Federal Court in **Moolji Jaitha and Co.** (supra), laid down the law as follows :-

"15. From the above discussion it follows that a "suit for land" is a suit in which the relief claimed relates to title to or delivery of possession of land or immovable property. Whether a suit is a "suit for land" or not has to be determined on the averments in the plaint with reference to the reliefs claimed therein; where the relief relates to adjudication of title to land or immovable property or delivery of possession of the land or immovable property, it will be a "suit for land". We are in respectful agreement with the view expressed by Mahajan, J. in Moolji Jaitha case."

14. The present suit undoubtedly is for specific performance of an agreement for sale. The question is : Is the nature of such a suit any different because whilst claiming specific performance of the suit agreement, the Plaintiff has incidentally asked for a declaration regarding invalidity of a sale deed executed by his vendor, namely, the Defendant, in favour of a subsequent purchaser in breach or fraud of the suit agreement.

15. The position of a third party subsequent purchaser in a suit for specific performance as between the purchaser plaintiff and the defendant vendor is considered by the Supreme Court in the context of the form of decree that may be suitably passed in favour of such plaintiff in the case of **Lala Durga Prasad** (supra). The Supreme Court in that case noted the practice of the courts in India which had not been uniform. The Supreme Court noted three distinct lines of thought that emerged from Indian cases. According to one point of view, the proper form of decree was to declare the

subsequent purchase void as against the plaintiff and direct conveyance by the vendor alone. The second line of thought considered that both vendor and vendee should join a conveyance in favour of the plaintiff purchaser, whilst the third line would limit execution of the conveyance to the subsequent purchaser alone. In the first line of thought, as noted by the Supreme Court, we reach the position that the title to the property has validly passed from the vendor and resides in the subsequent transferee. The sale to him is not void but voidable at the option of the earlier 'contractor'. As the title no longer rests in the vendor it would be illogical from a conveyancing point of view to compel the vendor to convey to the plaintiff unless steps are taken to re-vest the title in him either by cancellation of the subsequent sale or by reconveyance from the subsequent purchaser to him. In the next line of cases, conveyance is directed to be executed by the subsequent purchaser alone on the footing that the title now only resides in him. In the opinion of the Supreme Court, however, proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff.

16. What is important to remember in the context of our case is that these are merely different forms of decree that may be passed in a specific performance suit. Whatever may be the proper form of decree, the suit is still a suit for specific performance seeking transfer of title to the agreement purchaser in performance of the suit agreement. It is immaterial whether the plaintiff has prayed for a particular form of decree for effectively seeking such transfer of title – whether by cancellation of the subsequent sale in favour of the subsequent transferee and conveyance by the vendor or by a conveyance by the subsequent transferee alone or by

joinder of both the original vendor and the subsequent transferee to the conveyance so as to pass complete title to the plaintiff. In other words, what the plaintiff essentially seeks in such a suit is specific performance of the suit agreement and cancellation of the sale in favour of the subsequent transferee is only a matter of form of decree sought by him. It does not change the character of the suit.

17. Shorn of all appendages and details, the controversy in the present suit involves enforcement of personal obligations of the Defendant vendors to convey the property to the Plaintiff. It is alleged that in breach and defiance of these obligations, the Defendant vendors have entered into a collusive transaction with third party purchasers. The Plaintiff seeks alternatively a declaration of invalidity of this transaction or joinder of the transferees in passing title to the Plaintiff. The plea seeking cancellation or invalidity of the subsequent conveyance arises in the present suit only incidentally. The suit is essentially for an enforcement of a personal obligation undertaken by the Defendant vendors. Whichever be the form of decree that may have to be passed in the suit, the effect is to pass the title effectively to the Plaintiff in fulfillment of that personal obligation for the purpose of which alone the suit is filed. That the suit incidentally involves denuding of title of a third party does not change the character of the suit. The suit is still very much a suit for enforcement of a personal obligation undertaken by the original vendor.

18. In that view of the matter, the present suit is properly filed. Leave under Clause XII is properly granted in the suit and there is no question of revocation of such a leave.

19. Since I have come to the conclusion that the leave has been properly granted in favour of the Plaintiff, I do not propose to elaborately consider the Plaintiff's objection to the permissibility of the application for revocation of leave on the ground of delay. Suffice it to say that the question whether or not the suit is a suit for land and consequently whether or not the leave is properly granted, goes to the root of the matter, which cannot be disposed of on the ground of mere delay. The Supreme Court decision in the case of **Chittaranjan Mukherji** (supra) relied upon by the learned Counsel is clearly distinguishable. In the first place, it was not a case where the Court inherently lacked jurisdiction. The question before the Court placed in the application for revocation in that case was that the Court in which the suit was instituted was not a 'forum convenience', and therefore, the leave ought to be revoked. In our case, if indeed the suit were a suit for land, this Court would inherently lack jurisdiction to entertain the suit. Secondly, in that case the party applying for the revocation of leave granted under Cl. 12 to file a certain suit in Calcutta had not only acquiesced in the steps taken by the plaintiff to carry forward the progress of the suit incurring considerable expenses but, made use of the existence of the suit to obtain such interlocutory reliefs as he thought would be to his own advantage, at the hands of the Court at Calcutta. In the facts of that case the Supreme Court held that the proceedings in the suit had been allowed to reach a stage where it would result in grave injustice if the Court were to hold that the forum convenient was not Calcutta but Bihar and revoke the leave on that ground. These facts are clearly distinguishable from the facts in our case.

20. The Chamber Summons is, accordingly, dismissed. There shall be no order as to costs.

(S.C. GUPTE, J.)