

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

First Appeal No.84 of 2015

(M/s.Deepawali Construction Pvt. Ltd., Nagpur .vs. Vinayak Jyotiba Jadhav)

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders

CORAM : B.P.DHARMADHIKARI &
S.B.SHUKRE, JJ.

DATE : 21.4.2015.

Heard Mr.Anand Parchure, learned Counsel for the appellant, Mr.B.G.Kulkarni, learned Counsel for the respondent and Mr.Mehta, learned Counsel for the applicant in Civil Application No.412 of 2015.

Said Civil Application is filed under Order 1, Rule 10 of the Code of Civil Procedure for joining applicant Sushil s/o. Sohanlal Agrawal as a party/respondent.

Special Civil Suit No.867 of 2007 filed by the appellant against respondent Vinayak Jyotiba Jadhav for declaration, permanent injunction and specific performance of contract has been dismissed on 1.7.2014 by the 4th Joint Civil Judge (Sr.Dn.), Nagpur while rejecting application of plaintiff at Exh.39 under Order 12, Rule 6 of the Code of Civil Procedure.

The trial Court while deciding that application framed an issue whether the appellant/plaintiff is entitled to get the said relief under Order 12, Rule 6 of the Code of Civil Procedure and then proceeded to answer it in the negative. Because of that answer, it has dismissed the suit.

During hearing, we gathered that the suit for specific performance has been filed on the basis of an agreement between the appellant and the respondent. The trial Court has found that the period of three years from the said agreement expired on 15.2.1999. The suit came to be filed on 24.8.2007 and it was only for declaration and permanent injunction. The relief of specific performance of contract came to be added for the first time on 1.1.2014. The trial Court has noted that, thus, this relief has been added almost after 14 years and is, therefore, barred by limitation. It, therefore, found the suit not maintainable. In the paragraph thereafter, it noted that respondent Vinayak has changed his defence twice by taking contradictory pleas and therefore, possibility of collusion between the parties could not have been ruled out. It also found that there was no evidence by the plaintiff on the point of compensation. Compensation was not claimed in the application at Exh.39.

Thus, while considering a limited prayer to decree the suit on the basis of admission, the trial Court has travelled beyond Order 12. It was open to the trial Court to refuse to accept alleged admission and to call upon the parties to lead evidence to substantiate their contention. However, without extending that opportunity, the suit itself could not have been dismissed. In application at Exh.39, the appellant has stated that recording of evidence was not necessary. He was relying upon alleged admission contained in Written Statement given by Vinayak. If trial Court was not ready and willing to accept those statements of Vinayak as admissions or then as evidence sufficient to

decide the suit, it ought to have extended opportunity to the plaintiff to lead evidence. That also has not been done.

Before this Court, above named Sushil has come up with a case that there has been an agreement in favour of Sushil and full stamp duty has been paid upon it. The agreement records payment of full consideration and parting of possession in favour of Sushil. Mr.Mehta, learned Counsel submits that based upon said agreement as two lands i.e. lands bearing Khasra Nos.10 and 11 are involved, Sushil has filed two Civil Suits and in those Civil Suits, possession has been protected. He also submits that, in the present matter, after grant of that status quo and after several orders, a relief of specific performance has been inserted. According to him, the appellant claims that Vinayak has executed Power of Attorney in its favour. The learned Counsel contents that there is collusion between the appellant and the respondent.

However, applicant Sushil was not party before the trial Court and he has not moved any such application in Special Civil Suit No.867 of 2007.

In this situation, as we find that the suit should not have been dismissed while rejecting the application at Exh.39, we set aside the Judgment and Decree dt.1.7.2014 and Special Civil Suit No.867 of 2007 is restored back to the file of 4th Joint Civil Judge (Sr.Dn.), Nagpur.

Applicant Sushil in Civil Application no.412 of 2015 is free to move appropriate application in those proceedings and the trial Court is free to consider it in accordance with law on its own merits.

Parties are directed to appear before the trial

Court on 15.6.2015.

With these directions, we allow the appeal and dispose of the same. No costs.

JUDGE

JUDGE

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