

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

CIVIL REVISION APPLICATION NO. 43 OF 2016

Smt. Kalpana Shivajirao Jadhav
Age : 52 years, occup. Household,
R/o Gunjoti, Tq. Omerga,
Dist. Osmanabad

.. Applicant/
Ori. Plaintiff

versus

1. Fakuk Imamsab Umapure,
Age: 54 years, occup. Business,
R/o Gunjoti, Tq. Omerga,
Dist. Osmanabad

2. Mainoddin Isamoddin Umapure,
Age: 49 years, occup. Business,
R/o Gunjoti, Tq. Omerga,
Dist. Osmanabad

3. Husen Gulab Saudagar,
Age: 56 years, occup. Business,
R/o Gunjoti, Tq. Omerga,
Dist. Osmanabad

.. Respondents/
original
Defendants

Mr. M. P. Kale, Advocate h/f Mr. B. A. Shinde, Advocate for
applicants

Mr. Mahesh K. Bhosle, Advocate, holding for Mr. P. V. Barde,
Advocate for respondents

CORAM : SUNIL P. DESHMUKH, J.
DATE : 13th October, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned
counsel for parties finally, by consent.

2. Applicant is original plaintiff who has filed regular civil suit no. 83 of 2012 on the file of Joint Civil Judge, Senior Division, Omerga against respondents-defendants, seeking perpetual injunction restraining them from interfering with peaceful possession of the plaintiff over the suit property more particularly described in the plaint.

3. Applicant is aggrieved by the order of rejection dated 30-01-2016 passed by the Joint Civil Judge, Senior Division, Omerga, whereunder request under application Exhibit-65 filed by present applicant for rejection of counterclaim of the respondents-defendants under Order VII, rule 11 of the Code of Civil Procedure, 1908 has been declined.

4. In aforesaid regular civil suit, the respondents-defendants appeared and claimed that the transaction with reference to which there have been pleadings in the plaint, is not a sale transaction but is executed for security of amount of ₹ 5,00,000/- .

5. In the suit, defendants filed counter-claim seeking redemption of the property under the counter-claim and valued the same at ₹ 63,000/-. Said valuation matches with the amount under the transaction claimed by plaintiffs with defendants.

6. Having regard to aforesaid, plaintiff filed application at Exhibit-65 purportedly under Order VII, rule 11 of the Code of Civil Procedure claiming that counter-claim is undervalued and as a matter of fact, the defendants are liable to pay court fees on ₹ 5,00,000/- as claimed by them in the written statement to the plaint.

7. After hearing the parties, trial court while deciding Exhibit-65 discussed factual position and provisions of the Code of Civil Procedure in paragraphs no.5, 6,7,8,9 and 10 reading thus;

" 5. Perused the documents on record. Admittedly, original plaintiff has filed suit for perpetual injunction on the strength of sale deed executed by original defendant no. 1 in her favour. According to original defendants, the transaction entered between original defendant no. 1 and original plaintiff is of mortgage and not sale. According to them original plaintiff got executed sale deed from original defendant no. 1 for security of loan amount of ₹ 5,00,000/-. Though in written statement exh.32 they have pleaded about mortgage for security of loan of ₹ 3,00,000/-, it is worth to note that the said mortgage is in respect of house property no. 1444 which is not the suit property. Thus, the alleged mortgage transactions mentioned in written statement and counter claim are totally different.

6. Though original defendants have not given details of mortgage in format, it is material to note that they have specifically pleaded details of alleged mortgage such as consideration, interest and even redemption in para no. 6 and 6 of the counter claim. They have also pleaded specifically the cause of action arose for filing the counter claim. Thus, the counter claim prima-face discloses cause of action. In these circumstances the

rulings in the cases of Pushpa A. Kalantri Vs, Purushottam C. Rathi, Soumik Sil Vs. Subhash Chandra Sil and P. V. Guru Raj Reddy Vs. P. Neeradha Reddy cited supra are of no assistance to the original plaintiff as these rulings are on the point of non – disclosure of cause of action.

7. *The question as whether the sale deed filed along with exh.26 was executed for security to the loan amount or whether it was pure sale transaction are to be decided on entire evidence which may be adduced by the parties. Issues to that effect have also been framed on 19/06/2015 at exh.64. Therefore, at this stage validity of the said deed cannot be decided.*

8. *It is worth to note that the counter claim is not solely based upon oral mortgage but it is based on the alleged facts that sale deed executed in favour of original plaintiff was for security of the loan taken by original defendant no.1 therefore, the ruling laid down in the case of B. Ramulu Vs. G. Ramaswamy, cited supra is of no assistance to the original plaintiff.*

9. *In the sale deed filed along with list exh.26 amount of ₹ 63,000/- has been shown as consideration. The original defendants have valued the counter claim at ₹ 63,000/- i.e. on the consideration amount of the sale deed. It is worth to note that they have prayed for redemption of the said deed itself. Furthermore, the question of consideration for alleged mortgage and it's repayment is to be decided on entire evidence. In these circumstances, in my view, it can be said at this stage that counter claim is properly valued.*

10. *Order 34 Rule 7 of CPC provides the manner in which the Court shall pass a preliminary decree in redemption suit. Therefore, the said issue can be decided at the time of passing of decree, if the original defendants succeed. " ,*

and has rejected the application.

8. Having regard to aforesaid, the trial court appears to have considered that ostensibly at the stage at which the proceedings are, the counter-claim may not be said to be undervalued and indicated that said issue may be amenable for consideration at subsequent appropriate time or stage, if the same comes up for consideration after hearing the parties. The impugned order would not be flawed at this stage.

9. Civil revision application, as such, stands dismissed. Rule stands discharged.

SUNIL P. DESHMUKH,
JUDGE

pnd