IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6705 OF 2013

Bhagwan Gundu Mohite … Petitioner
Vs.
Janabai Bhagwan Mohite and another … Respondents

Mr. Prashant S. Bhavake for Petitioner.
Mr. Abhijit P. Kulkarni for Respondents.

CORAM : R. G. KETKAR, J.
DATE : APRIL 15, 2016

P.C. :

Heard Mr. Bhavake, learned Counsel for petitioner and Mr. Kulkarni, learned Counsel for respondents at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 23.01.2013 passed by the learned 9th Joint Civil Judge, Junior Division, Kolhapur below exhibit-36 in Regular Civil Suit No.274 of 2010. By that order, the learned trial Judge allowed the application made by respondents, hereinafter referred to as defendants, and directed the petitioner, hereinafter referred to as plaintiff, to value the Suit on the basis of compensation @ Rs.26,53,500/- and pay the deficit Court fees within two months from the date of the order.

3. Plaintiff has instituted Suit inter alia praying for declaration of ownership in respect of property more particularly described in paragraph 2 of the plaint; for perpetual injunction restraining the defendants from creating third party interest and collecting amount of compensation as also from causing obstruction to the plaintiff's possession.

4. During the pendency of the Suit, defendants filed application exhibit-12 under Section 8 of the Maharashtra Court Fees Act (for short 'Act') and application exhibit-14 for rejection of plaint under Order VII, Rule 11(c) of the Code of Civil Procedure, 1908 (for short 'C.P.C.') on 06.04.2010. By order dated 14.06.2010, the learned trial Judge rejected the application exhibit-14 on merits. Application exhibit-12 on the ground that it is rendered infructuous as the application below exhibit-14 for rejection of plaint was rejected on merits and that same reasons are reliefs were sought in the application. Defendants thereafter filed application exhibit-32 on 01.07.2010 for review of order dated 14.06.2010 rejecting application exhibit-14. On 18.06.2011, the learned trial Judge passed order as 'filed the application' as the Advocate for defendants remained absent.

5. Mr. Bhavake submitted that defendants thereafter filed application exhibit-36 on 30.08.2011 for directing the plaintiff to pay the deficit court fees having regard to the claim made in prayer clause (b). By the impugned order, the learned trial Judge allowed the application as indicated earlier. It is against this order, petitioner-plaintiff has instituted the present Petition.

6. Mr. Bhavake submitted that in view of - (i) order dated 20.06.2011 below exhibit-12, (ii) order dated 14.06.2010 below exhibit-14 as also (iii) order dated 18.06.2011 below exhibit-32, the application made by defendants at exhibit-36, itself, was not maintainable. The decisions rendered in this applications operate res judicata and therefor, the learned trial Judge was not justified in allowing the application. He further submitted that prayer clause (b) is purely consequential and dependent upon grant of prayer clause (a). Even on this ground, the learned trial was not justified in directing the plaintiff to pay the deficit Court fees.

7. On the other hand Mr. Kulkarni supported the impugned order. He submitted that the contentions advanced by the petitioner were considered in paragraphs 6 and 7 of the impugned order. For the reasons recorded therein, no case is made out for invocation of powers under Article 227 of the Constitution of India.

8. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. Perusal of application exhibit-12 shows that defendants made application under Section 8 of the Act for holding inquiry for the purpose of finding out the requisite Court fees. By order dated 20.06.2011, the learned trial Judge disposed of the application on the ground that defendants had made application exhibit-14 for rejection of plaint under Order VII, Rule 11(c) of C.P.C. The same was rejected on merits. Application exhibit-12 was made for same reasons and reliefs and hence the same was rendered infructuous. It is, therefore, necessary to consider prayers made in application exhibit-14 and the order dated 14.06.2010 by which the said application was rejected.

9. Perusal of application exhibit-14 shows that defendants made application for rejection of plaint under Order VII, Rule 11(c) of C.P.C. on the ground that in terms of prayer clause (a), plaintiff sought declaration of ownership and since the suit property is worth Rs.26,53,500/-, the valuation is incorrectly made.

10. Defendants thereafter filed application exhibit-32 for review of order dated 14.06.2010 passed below exhibit-14. That was dismissed on 18.06.2011 on the ground that Advocate for defendants did not remain present. Perusal of the application exhibit-14 shows that defendants have prayed for holding inquiry in respect of prayer clause (a) made by the plaintiff. That application was not in respect of prayer clause (b).

Application exhibit-14 was rejected on 14.06.2010. Perusal of that order also shows that the learned trial Judge has considered prayer clause (a) of the Suit. In other words, the Court has no occasion to consider prayer clause (b) made in the Suit. Application exhibit-12 was disposed of as infructuous in view of the order dated 14.06.2010 passed below exhibit-14. Review Application exhibit-32 was disposed of as filed on 18.06.2011 and as defendants remained absent. The learned trial Judge has considered these aspects in paragraphs 6 and 7 of the impugned order. In paragraph 7, the learned trial Judge categorically recorded a finding that defendants did not file any application in respect of prayer clause (b).

11. As noted earlier, plaintiff has sought injunction restraining the defendants from collecting compensation of Rs.26,53,500/- and the said fact is not disputed by the plaintiff. In view thereof, plaintiff will have to pay the Court fees as per Article 7 of Schedule I of the Act. Article 7 reads thus,

SCHEDULE I

AD VALOREM FEES

Number **1**	**2**	**Proper fee** **3**
7. Any other plaint, application or petition (including memorandum of appeal), to obtain substantive relief capable of being valued in terms of monetary gain or prevention of monetary loss, including cases wherein application or petition is either treated as a plaint or is described as the mode of obtaining the relief as aforesaid.	……	A fee on the amount of the monetary gain or loss to be prevented, according to the scale prescribed under Article 1.

12. In the case of ***M. M. Breweries Ltd. Vs. Oceanic I. & E. Corpn.***, **1980 Mh.L.J. 804**, it was observed in paragraph 4 thus,

“4. As regards the point of jurisdiction, it is necessary first to look at the frame of the suit itself. The sum and substance of the allegations and averments made by the plaintiffs in the suit is that they are entitled to the premium of Rs. 2,48,535 from the second defendants under the agreement dated the 14th July 1978, and that the second defendants are not entitled to claim the refund of the same because they are guilty of certain breaches of the contract. The first defendants, according to the plaintiffs, therefore, are not bound or liable to pay any sum under the two bank guarantees and the second defendants have no right to demand any payment from the first defendants or to enforce the said bank guarantees. It further appears that in order to secure the bank guarantees from the first defendant -Bank, the plaintiffs had created a charge in favour of the first defendants on a flat being Flat No. 101, 17th Floor, Darya Mahal "A" Nepean Sea Road, Bombay -26 and belonging to one of the partners of the plaintiffs. The plaintiffs therefore in the plaint have also averred that in view of the fact that the first defendants are not bound to make the payment under the said guarantees, they were also not entitled to sell or in any manner dispose of the said flat for realising their security after making the said payment to the second defendants. The plaintiffs have then prayed for the following reliefs :

“(a) for a declaration that the second defendants are not entitled to demand, recover or receive any payment under either of the said two bank guarantees from the first defendants or to enforcement either of the said two bank guarantees and that the first defendants have no right to make any payment to the second defendants under either of the said two bank guarantees;

(b) for a permanent perpetual injunction restraining the second defendants from demanding, recovering or receiving any payment from the first defendants under either of the said two bank guarantees and from enforcing any of the said two bank guarantees;

(c) for a perpetual injunction restraining the first defendants their servants and agents or employees from making any payment to the second defendants under either of the said two bank guarantees and from selling or in any manner disposing of or alienating the said flat being Flat No. 101, 17th Floor, Darya Mahal 'A', Nepean Sea Road, Bombay 400 026 and belonging to one of the partners of the plaintiffs.”

It is therefore more than clear that the plaintiffs in terms want to prevent the loss of the said amount of Rs. 2,48,535 to themselves. On the face of it, therefore, the relief claimed in the suit is capable of being valued in terms of money. The plaintiffs, however, filed the present suit in the City Civil Court, Bombay, whose pecuniary jurisdiction is only up to Rs. 50r000, on the ground that the suit fell in the category covered by sub-clause(iv), (j) of section 6 of the Bombay Courts Fees Act, 1959. The said provision of section 6 reads as follows :-

Section 6. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:

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(iv)(j) In suits where declaration is sought, with or without injunction or other consequential relief and the subject matter in dispute is not susceptible of monetary evaluation and which are not otherwise provided for by this Act (-ad valorem fee payable, as if the amount or value of the subject-matter was three hundred rupees)".

The aforesaid provision is attracted only when three conditions are satisfied, namely, that the suit is (i) for declaration, (ii) the subject-matter in dispute is not susceptible of monetary evaluation and (iii) the suit is not otherwise provided for under the Act. Prayer(a) in the present suit is for a declaration that the second defendants are not entitled to demand, recover or receive any payment under the two guarantees or to enforce either of the said guarantees and that the first defendants have no right to make any such payment to the second defendants under either of the two guarantees. The subject-matter in dispute further is the amount due under the said two bank guarantees and the same is clearly susceptible of monetary evaluation. Further Item 7 of Schedule I of the said Act covers a suit such as the present one, and there-fore, the third condition mentioned in the section 6(iv), (j) is also not satisfied in the present case. The said Item 7 of Schedule I is as follows:-

"Any other plaint, application or petition(including memorandum of appeal), to obtain substantive relief capable of being valued in terms of monetary gain or prevention of monetary loss, including cases wherein application or petition is either treated as a plaint or is described as the mode of obtaining the relief as aforesaid."

As is clear from what has been stated earlier, the present suit is for a substantive relief of a declaration that under the two bank guarantees, the second defendants are not entitled to demand, recover or receive any amount and the first defendants have no right to make such payment to the second defendants. The suit is also for an injunction restraining the first defendants from making the said payment and the second defendants from enforcing the same thereby preventing a loss to the plaintiffs of the amount

> guaranteed under the said two guarantees. The suit therefore clearly falls under the said Item 7 of Schedule I of the said Act."

13. Mr. Bhavake submitted that prayer clause (b) is purely consequential and is dependent upon prayer clause (a). On the other hand, Mr. Kulkarni submitted that property is already acquired and the parties are divested of their title. In view thereof, what remains is prayer clause (b). By prayer clause (b), plaintiff has sought for perpetual injunction restraining the defendants from collecting compensation among other reliefs. Applying the tests laid down in **M. M. Breweries Ltd.** (*supra*), I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

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