

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 100 OF 2016

SAI REALITY

...Applicant

Versus

SHRI. RAVINDRA GENBA HARGUDE
AND ORS

...Respondents

....

Mr. Ashutosh M. Kulkarni, Advocate for the Petitioner.

....

CORAM : R. G. KETKAR, J.

DATE : 24th FEBRUARY, 2016

P.C.

1. Heard learned Counsel for the applicant, at length.
2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'CPC'), the applicant has challenged the judgment and order dated 3.9.2015 passed by learned 7th Joint Civil Judge, Senior Division, Pune below Exh.67 in Special Civil Suit No.195/2013. By that order, learned trial Judge rejected the application made by the applicant, hereinafter referred to as 'defendant no.4' under Order VII Rule 11(a),(d) of CPC for dismissal of the suit on the ground that there is no cause of action as contemplated under Order VII Rule 11(a) of CPC as also the suit is barred by limitation as contemplated by

order VII Rule 11(d) of CPC and the suit is also bad for non-joinder of necessary parties, namely, Dattu Mahadu Kedari and Kaluram Dattu Kedari.

3. Respondent No.1, hereinafter referred to as the 'plaintiff', has instituted the suit *inter alia* praying for declaration that he has one anna share having area of 29 Are or equivalent to six paisa in the suit property; for partition of his share by metes and bounds; in the event the Court comes to the conclusion that partition by metes and bounds cannot be effected, then for declaration that the plaintiff has right of preemption to purchase 15 anna share equivalent to 94 paisa share of other co-sharers in area admeasuring 9 Hectare 19 Are; for mandatory order of demolition of the sewerage treatment plant constructed by Pimpri Chinchwad Municipal Corporation; for cancellation of the registered sale deed and power of attorney and for declaration that the sale deeds and power of attorneys are not binding on the plaintiff and his shares amongst other prayers.

4. During pendency of the suit, defendant No.4 filed application under Order VII Rule 11 of CPC on the ground that

there is no cause of action for filing the suit as also the plaintiff has challenged the sale deed and power of attorney executed on and from 2007 to 2011, the suit is barred by law and that the suit is also bad for non-joinder of the parties.

5. By the impugned order, learned trial Judge rejected the application. It is against this order, defendant No.4 has instituted the present application.

6. Mr. Kulkarni submitted that Genu Burde died leaving behind two sons Raghu and Bhau. Bhau died in the year 1966 leaving behind son Dhondiba and daughter Kondabai. Dhondiba died on 5.9.1980 leaving behind widow Sarubai (since deceased) and sons defendant No.1 Kailas and defendant No.2 Balu. Defendant Nos.1 and 2 and other co-sharers have executed the sale deeds and power of attorneys in favour of defendant No.4.

7. Mr. Kulkarni submitted that Kondabai died on 23.1.1999 leaving behind husband Dattu Kedari and son Kaluram Kedari. The plaintiff claims that Dattu and Kaluram executed the deed of assignment in his favour on 21.12.2012 and on that basis he has instituted the present suit for partition amongst other prayers. Mr. Kulkarni submitted that in the first

place, there is no cause of action for filing the suit as is evident from perusal of para-8 of the plaint. In para-8 the plaintiff asserted that Kondabai died leaving behind husband Dattu and son Kaluram. They acquired 1 anna share of Kondabai which is equivalent to 6 paisa, by succession. However because of their personal difficulties, they could not institute the suit for partition. In view thereof, on 21.12.2012 they executed assignment deed in favour of the plaintiff by accepting Rs.5,50,000/-. He submitted that the plaintiff accepted that Dattu and Kaluram could not file the suit for partition. If that be so, the plaintiff who claims interest on the basis of the deed of assignment also equally cannot institute the suit for partition.

8. Mr. Kulkarni submitted that the plaintiff has sought cancellation of the sale deeds and power of attorneys executed from 2007 and 2008 and the suit is instituted in the year 2013. He submitted that the prayer is for cancellation of these instruments. He has to institute the suit within the period of three years as per article 59. He, therefore, submitted that the plaint is liable to be rejected under Order 11 Rule 7(d) of CP. Finally, he submitted that the suit is liable to be dismissed for non-joinder of Dattu and Kaluram.

9. I have considered the submissions advanced by Mr.Kulkarni learned Counsel for the petitioner. I have also perused the material on record.

10. Mr. Kulkarni submitted that in view of the assertions made in para-8 of the plaint, there is no cause of action for filing the suit for partition and other reliefs. It is not possible to accept this submission. Defendant No.4 has not disputed the claim made by plaintiff that on 21.12.2012 Dattu and Kaluram executed deed of assignment in his favour. Thus, *prima facie* the plaintiff has acquired interest of Dattu and Kaluram in the suit property. The plaintiff being third party/stranger to the family of Genu Borde, his remedy is to institute a Suit for partition and separate possession. Accordingly he has instituted the suit and, therefore, it cannot be said that the plaint does not disclose cause of action.

11. Mr. Kulkarni submitted that the suit is also barred by limitation as sale deeds and power of attorneys of 2007 and 2008 are challenged by filing suit in the year 2013. Perusal of the prayer clause clearly shows that apart from cancellation of these sale deeds and power of attornies, the plaintiff has also

claimed declaration that the sale deeds and the power of attorneys are not binding on his share. Understood thus, it cannot be said that the prayer for declaration that the suit transactions are not binding on his share is barred by limitation. Finally, it is contended that the suit is barred for non joinder of necessary parties, namely, Dattu and Kaluram. As noted earlier, they have executed deed of assignment in favour of the plaintiff on 21.12.2012. Learned trial Judge has considered this aspect in para-8 of the impugned order and observed that they are neither necessary nor proper party. Even otherwise, I do not find that there is any merit in the submission as the plaintiff has not claimed any relief against Dattu and Kaluram. If that be so, it cannot be said that they are necessary parties. It also cannot be said that they are proper parties as their presence is absolutely not necessary for deciding the controversy between the parties. Hence, no case is made out for interfering with the impugned order. Application fails and the same is dismissed. It is made clear that defendant No.4 is at liberty to raise such contentions as are available, at the time of final decision in the suit. It is further made clear that where a decree is appealed from by the applicant, any error,

defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contended by section 105(1) of Civil Procedure Code.

(R. G. KETKAR, J.)

Deshmane (PS)