

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.123 OF 2016

Bhavarlal Durgalal Lohar and others ... Applicants
Vs.
Dinesh Kumar Jain and others ... Respondents

Mr. Kiran Bapat i/b. Mr. Mahendra Shingade for Applicants.
Mr. Onkar Gupte for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : MARCH 17, 2016

P.C. :

Heard Mr. Bapat, learned Counsel for applicants and Mr. Gupte, learned Counsel for respondent No.1 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants have challenged the judgment and order dated 09.02.2016 passed by the learned Joint Civil Judge, Junior Division, Vashi, Navi Mumbai below exhibit-1 in Regular Civil Suit No.372 of 2015. By that order, the learned trial Judge directed respondent No.1, hereinafter referred to as plaintiff, to make an application for amending the pleadings as to valuation to fall in line with Order VII, Rule 1(I) of C.P.C. as amended by Bombay High Court Amendment to state as to what is valuation and the provisions under which i.e. Section 6(iv)(j) of the Maharashtra Court Fees Act (for short 'Act'), the Court fee is computed separately for each of the relief claimed. The plaintiff was directed to deposit the court fees as per the valuation within 10 days from the date of the order. The court fees was to be paid along with application for amendment only to amend paragraph 39 of the pleadings. The learned trial Judge also held that the Civil Judge Junior Division has jurisdiction to try and decide the Suit. It

was also clarified that if the plaintiff fails to comply that order within 10 days, the plaint shall stand rejected as per Order VII, Rule 11(b) of C.P.C.

3. Mr. Bapat submitted that respondent No.1, hereinafter referred to as plaintiff, has instituted Suit inter alia for declaration that - the applicants herein have illegally, fraudulently and dishonestly demolished the shop No.3 of the building consisting of ground plus two upper floors on plot No.786 admeasuring about 99.833 sq.mtrs. situate at Village Shiravane, Navi Mumbai; defendants No.1 to 8 have committed breach of oral agreement entered by them with plaintiff or or about 23.09.2015 for allotting him shop No.3 admeasuring about 101.93 sq. ft. carpet area on the ground floor and one residential unit being flat No.G-001 admeasuring about 143.43 sq.ft. carpet area also on the ground floor of the new building along with one car parking space in the new building in lieu of the plaintiff permitting defendants No.1 to 8 to redevelop the plot and handing over the vacant possession of the said shop to defendants No.1 to 8 and for directing defendants No.1 to 8 jointly and / or severally to reconstruct a new shop similar to the said shop at its original location among other prayers. He submitted that prayer clauses (b) and (c) are referable to Section 6(v) of the Act.

4. Mr. Bapat submitted that plaintiff will have to value the Suit as per Section 6(v) of the Act and Rule 2 of the Maharashtra Suits Valuation (Determination of Value of Land for Jurisdictional Purposes) Rules, 1983 (for short 'Rules') and where the subject matter is house or garden according to the market value of the house or garden, as the case may be. As the plaintiff has claimed relief qua shop, he has to pay the court fee on the basis of market value of the said shop, which is used for commercial purposes. If plaintiff values the Suit accordingly, the Court

of Civil Judge, Junior Division will have no pecuniary jurisdiction to entertain and try the Suit.

5. By prayer clause (b) of the plaint, plaintiff has sought possession of shop premises admeasuring 101.93 sq.ft. carpet area and residential premises of 143.43 sq.ft. carpet area. Having regard to the market value of the residential and commercial premises in Village Shiravne, the total value as per the alleged oral agreement will be to the tune of Rs.15,75,000/- and again beyond the pecuniary jurisdiction of the Court of Civil Judge, Junior Division.

6. Mr. Bapat submitted that as the Suit is for possession of the commercial as well as residential premises, plaintiff will have to value the Suit under Section 6(v) of the Act. In support of this submission, he relied upon the following decisions:

- a. ***I. A. Apartments Vs. Ramniklal*, 2013 (1) Mh.L.J. 99;**
- b. ***Nagin Mansukhlal Vs. Haribhai Manibhai*,
1979 Bom.C.R.348;**
- c. ***Nilima S. Navalkar Vs. Nipun I.Thakkar*,
2010(2) Bom.C.R. 110.**

7. On the other hand, Mr. Gupte supported the impugned order. He submitted that plaintiff was owner of shop No.3 on the ground floor of building constructed on plot No.786. In June 2015, defendants No.1 to 4 approached the plaintiff with proposal that they intend to redevelop the plot. During the course of negotiations, it was agreed between the parties actual carpet area of shop No.3 ought to be measured by the Architect appointed by the parties. Both the Architects agreed that the carpet area of the shop was about 242.72 sq.ft. Defendants No.1 to 8 offered commercial unit admeasuring about 255 sq.ft. carpet area and

one car parking on the ground floor in the new building to be constructed by the defendants No.1 to 8 on the said plot free of cost on ownership basis in lieu of which the plaintiff was to offer the quiet, vacant and peaceful possession of shop No.3 to defendants No.1 to 8 and permit them to redevelop the said plot by demolishing the said building and constructing a new building on the said plot. In other words, he submitted that plaintiff has rightly valued the Suit under Section 6(iv)(j) of the Act and the submission advanced on behalf of the defendants that plaintiff is liable to value the Suit under Section 6(v) of the Act is wholly misconceived.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Plaintiff has instituted Suit inter alia praying for-

“(a) that this Hon'ble Court be pleased to order and /or declare that the Defendants have illegally, fraudulently and dishonestly demolished the said Shop;

(b) that this Hon'ble Court be pleased to order and / or declare that the Defendants Nos.1 to 8 have committed a breach of the oral agreement entered by them with the Plaintiff on or about 23rd September 2015 for allotting him the said Premise in the new building in lieu of the Plaintiff permitting the Defendant Nos.1 to 8 to redevelop the said Plot and handing over the vacant possession of the said Shop to the Defendant Nos.1 to 8;

(c) that this Hon'ble Court be pleased to order and / or decree the Defendant Nos.1 to 8 jointly and / or severally to re-construct a new Shop similar to the said Shop at its original location;

(d) that this Hon'ble Court be pleased to order and / or direct the Defendant No.9 to revoke the Commencement Certificate dated 21st October 2015 granted by the Defendant No.9 to Defendant Nos.1 to 4;

(e) that this Hon'ble Court be pleased by a mandatory

injunction order the defendant Nos.1 to 8 not to re-develop the said Plot.”

9. It is not in dispute that plaintiff was owner and occupier of shop No.3. Perusal of paragraph 9 of the plaint, prima facie, shows that parties agreed that plaintiff will handover possession of shop No.3 and in lieu thereof, defendants No.1 to 8 will construct the building and handover commercial premises admeasuring 255 sq.ft. carpet area and one car parking on the third floor free of cost on ownership basis. In paragraph 15 of the impugned order, the learned trial Judge noted that plaintiff is the owner and having possession over shop No.3, which was demolished by defendants No.1 to 4. Plaintiff has sought declaration that defendants No.1 to 8 have demolished his shop without his consent fraudulently and dishonestly. Plaintiff has further sought declaration that defendants No.1 to 8 have committed breach of agreement dated 23.09.2015, which is declaration of character. It was also observed that the oral agreement as per the draft agreement produced by the plaintiff with list exhibit-3 at exhibit-L, no consideration amount has been mentioned in the said agreement. The plaintiff is seeking a declaration regarding the breach of the oral agreement and as per that he has paid court fee under Section 6(iv)(j) of the Act. In paragraph 18, the learned trial Judge observed that the breach of oral agreement dated 23.09.2015 is not susceptible of monetary evaluation since no such consideration amount was fixed between plaintiff and defendants No.1 to 8. The learned trial Judge also observed that plaintiff is not purchasing the suit property in pursuance of oral agreement dated 23.09.2015 and the agreement is for exchange of promises. The learned trial Judge also observed in paragraph 19 that as plaintiff is not asking for possession, Section 6(v) of the Act is not applicable.

10. Mr. Bapat relied upon decision of this Court in the case of **I. R.**

Apartments (*supra*). In that case, plaintiff came with the case that the defendants had agreed to purchase 37 flats from the plaintiff. An agreement to that effect was entered into on 26.07.2008. Plaintiff came with the case that defendant assured that he would pay the balance price and on such assurance, according to the plaintiff, he handed over possession of the flat on humanitarian grounds. In spite of handing over possession, the defendant did not pay the balance amount. The plaintiff, therefore, issued notices to the defendant calling upon them to pay the balance amount. As they did not pay the balance amount, he terminated the agreement and thereafter instituted Suit for declaration that plaintiff was and is ready and willing to perform his part of contract; for declaration that defendant is not ready and willing to perform his part of contract; for declaration that plaintiff rightly terminated the agreement and for possession of the suit flat. It is in that context, this Court observed that as the plaintiff is claiming possession of the suit flat, he has to pay the court fee as per Section 6(v) of the Act. In my opinion, the said decision is not applicable as plaintiff has not sought possession of the premises.

11. Mr. Bapat also relied upon decision of this Court in the case of **Nagin Mansukhlal** (*supra*). In that case, plaintiff had sought mandatory injunction to direct the defendant to forthwith remove himself, his servants and agents, together with his belongings from the said flat and to handover vacant and peaceful possession of the said flat to the plaintiff. It is in that context, the Division Bench of this Court held that the Suit in substance is for possession. In that case, the issue of payment of court fees did not arise.

12. In the case of **Nilima S. Navalkar** (*supra*), after considering prayer of the plaintiff for declaration that defendant is not entitled to act

contrary to the undertaking and consent dated 08.05.2007 given in favour of the plaintiff, this Court held that in substance, the Suit is for specific performance. In my opinion, this decision is also not applicable to the present case.

13. I have already indicated the prayers made by the plaintiff as also perusal of the pleadings shows that plaintiff was owner and possessor of shop No.3. He agreed to surrender the said shop to defendants for redevelopment of plot subject to giving him shop premises. The learned trial Judge rightly held that the plaintiff is not purchasing the property in pursuance of the oral agreement and the agreement is for exchange of promises. The learned trial Judge, therefore, rightly held that the Suit is not susceptible to monetary evaluation and accordingly rejected the application. I do not find that the learned trial Judge has committed any error. It is not in dispute that in pursuance of the impugned order, plaintiff has carried out amendment in the plaint and after considering the amended plaint also, I do not find that it exceeds pecuniary jurisdiction of the Court of Civil Judge, Junior Division. Hence, Application fails and the same is dismissed.

14. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)