

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION*

SECOND APPEAL NO. 135 OF 2016

Director, Meera Agricultural Pvt. Ltd. & Ors. ... Appellants.

V/s.

Mr. Arvind Ambadas Rai and Ors. ... Respondents.

***Along with
SECOND APPEAL NO. 109 OF 2016***

Mr. Jayraj Manharsingh Zala. ... Appellant.

V/s.

Mr. Arvind Ambadas Rai and Ors. ... Respondents.

Mr.G.S,Godbole a/w Ms.Shruti Tulpule, for Appellants in S.A. No.135 of 2016.

Mr.Sham Walve, for the Appellant in S.A. No.109 of 2016.

Mr.P.N.Joshi a/w Mr.Rahul Motkari, for Respondent No.1 in both the Appeals.

***CORAM : N.M.Jamdar, J.
Monday, 1 August 2016.***

Oral Order :

The Appellants in Second Appeal No.135 of 2016 and Appellant in Second Appeal No.109 of 2016 challenge the judgment and order passed by the learned District Judge, Nashik dated 3 July 2015 allowing the Appeal and setting aside the order passed by the Civil Judge Senior Division Nashik, below Exhibit 32 in Regular Civil Suit No.67 of 2013.

2. Both the Appeals are argued together and are disposed by this common order.

3. Facts in Second Appeal No.135 of 2016 and Second Appeal No.109 of 2016 are that the Respondent – Plaintiff filed Regular Civil Suit No.67 of 2013 in the Court of Civil Judge Senior Division, Nashik seeking various prayers in respect of encroachment, layout plan sanctioned in favour of the Appellants. During the trial an order was passed on framing preliminary issue in respect of jurisdiction of the Court on 10 July 2014. During the course of the trial, an order was passed by the learned Civil Judge, on 28 March 2013 disposing of the applications taken out in respect of framing the preliminary issue. This order was challenged in Civil Revision Application No.527 of 2013 by the Appellants in Second Appeal No.135 of 2016 and the Civil Revision Application was disposed of directing the learned Civil Judge, to frame issue as regards jurisdiction of the Court in view of Section 149 of Maharashtra Regional and Town Planning Act, 1966 (MRTP Act). Thereupon the learned Civil Judge, by judgment and order dated 10 July 2014 dismissed the suit on the ground of lack of jurisdiction in view of bar of Section 149 of MRTP Act. The Respondent-Plaintiff filed Regular Civil Appeal No.139 of 2014 in the District Court, Nashik which was considered as an Appeal under Section 96 of the Code of Civil Procedure. The learned District Judge, allowed the Appeal by

the impugned order.

4. Mr.Godbole learned counsel for the Appellant in Second Appeal No.135 of 2016 advanced submissions which were adopted by Mr.Walve in Second Appeal No.109 of 2016. He submitted that the basis of the order passed by learned District Judge, is incorrect as this Court had directed the learned Civil Judge, to decide the issue under Section 9A of the Code of Civil Procedure and the learned District Judge, has carried out the exercise under Order VII Rule 11 of the Code of Civil Procedure. He submitted that the scope of Section 9A is wider and the entire basis of the pleadings dealt with in the order of the District Judge is wrong. This submission cannot be accepted. Whatever may be the provision referred to, the main question is whether the ingredients thereof were followed or not. When an application was taken out, the application was filed under the provisions of Section 9A. The learned Judge framed the issue. The Respondent-Plaintiff adduced oral evidence. The Appellants filed pursis that the Appellants do not want to cross-examine the Respondent-Plaintiff and also filed a pursis that they will not adduce evidence on the preliminary issue. In view of this position, Court was left with examination of documents, the main document being the plaint.

5. Mr.Godbole relied upon the layout plan which according to

him was pursuant to a scheme sanctioned by the Planning authority. It was his contention that the learned District Judge, has erroneously held that there was no Planning authority under the provisions of MRTP Act or the Bombay Provincial Municipal Corporation Act, 1949 (BPMC Act) involved in the present controversy and the plan was by revenue authorities. He submitted that observations regarding the provisions of the BPMC Act, are perverse. Mr.P.N.Joshi, the learned counsel for Respondent No.1 submitted that in the plaint, the Respondent-Plaintiff has specifically prayed that the layout plan was obtained by fraud by the Appellants.

6. Though the learned District Judge, has made certain incorrect observations in some aspects of the matter, on another grounds the order can be sustained. It is indicated, though briefly, by the learned District Judge, in the impugned order is the ground of collusion pleaded by the Respondent-Plaintiff. If the plaint is examined it is the case of the Respondent-Plaintiff that the Respondent-Plaintiff suffers from various ailments and does not reside at the suit site. His sons are residing abroad. The Plaintiff had gone to visit his son abroad and upon return he found that the Appellants in collusion with the authorities fraudulently prepared the layout plan and encroached upon the suit property. When he questioned the Planning authority it transpired that the Appellants along with the authorities taking advantage of his absence fraudulently prepared layout plan. It is held by the learned Single Judge (*A.S.Oka, J.*) of

this Court in a decision dated 5 May 2011 in First Appeal No.1635 of 2010 that the bar under the MRTP Act is not absolute. It is also a settled position of law that on the Suit based on grounds such as fraud, collusion and lack of jurisdiction cannot be said to be not maintainable even though an enactment bars civil suit and in certain circumstances civil suit is maintainable. If plaint is perused it cannot be said that the allegations are bereft of any particulars. Whether the Respondent-Plaintiff will succeed in his endeavour in the trial, is a matter on the merits of the controversy.

7. In the circumstances, the conclusion reached by the learned District Judge that the Suit, is maintainable, is correct in law and the argument advanced do not give rise to any substantial question of law. Second Appeals are accordingly dismissed.

(N.M.Jamdar, J.)