

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Civil Revision Application NO. 663 OF 2016

Mr Sunil Digambar Patil And Anr ...Applicants
Versus
Mrs Muktabai Bajirao Jadhav And Ors ...Respondents

....
Mr.Siddharth Wakankar, Advocate for the applicants.

....
CORAM : R. G. KETKAR, J.

DATE : 5th DECEMBER, 2016

P.C.

1. Heard Mr.Siddharth Wakankar, learned Counsel for the applicants, at length.
2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, C.P.C.) the applicants, hereinafter referred to as 'defendants No.3 & 4', have challenged the judgment and order dated 22.9.2016 passed by the learned 2nd Jt. Civil Judge, Senior Division, Pune below Exhibit-35 in R.C.S. No.1173/2013. By that order the learned trial Judge rejected the application made by defendants No.3 & 4 under Order VII Rule 11(d) of C.P.C. for rejecting the plaint.
3. In support of this application, Mr.Wakankar submitted that respondents No.1 to 3, hereinafter referred to as the

'plaintiffs', have instituted the suit for declaration (a) that they are owners of undivided 1/6th share in the property described in paragraph-1 of the plaint, (b) that the sale deed executed by defendants No.1 & 2 on 10.5.2006 in favour of defendants No.3 & 4 is not binding on the 1/6th undivided share of the plaintiffs. The plaintiffs also sought injunction restraining defendants No.3 & 4 from obstructing their possession over the suit property.

4. During pendency of the suit, the plaintiffs filed application under Order VI Rule 17 of CPC for amending the plaint. By the proposed amendment, the plaintiffs contended that in the description of the suit, they have stated that the suit is for declaration, injunction and partition. Factually the plaintiffs have not claimed partition. The plaintiffs therefore prayed for deleting the word 'partition' and thereby substituting the word 'for injunction'. The learned trial Judge allowed the application. The plaintiffs thereafter added prayer clause C-1. By that prayer, the plaintiffs sought injunction against defendants No.3 & 4 from creating third party interest in respect of the suit property.

5. Mr. Wakankar submitted that basically the plaintiffs

should have sued for partition. He relied upon proviso to Section 34 of the Specific Relief Act, 1963 (for short, 'Act') to contend that as the plaintiffs are entitled to relief of partition besides the declaration and since they have not claimed the relief of partition, the suit is liable to be rejected under Order VII Rule 11(d) of C.P.C. He relied upon the decision of **Vinay Krishna v. Keshav Chandra and another, AIR 1993 SC 957** to contend that the plaintiffs are not in exclusive possession of the suit property. In the plaint, they have asserted that they are in joint possession of their undivided share. Unless they pray for partition by metes and bounds and for possession of their 1/6th share, no relief could be granted.

6. Mr. Wakankar also relied upon the decision of **Union of India v. Ibrahim Uddin and another, (2012) 8 SCC 148** to contend that the suit seeking declaration of title of ownership of property is not maintainable.

7. I have considered the submissions advanced by Mr. Wakanar. I have also perused the material on record. Section 34 of the Act reads thus :

“34. Discretion of court as to declaration of status or

right.-- Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.--A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

8. Perusal of Section 34, extracted hereinabove, shows that any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled. In such a suit, the plaintiff need not ask for any further relief. Proviso thereto lays down that no court shall make any such declaration where the plaintiff, being able to

seek further relief than a mere declaration of title, omits to do so.

9. In the present case the plaintiffs have sought two fold declarations, namely, that they have 1/6th share in the suit property and secondly the sale deed dated 10.5.2006 executed by defendants No.1 & 2 in favour of defendants No.3 & 4 is not binding on their 1/6th share. Perusal of the plaint shows that the plaintiffs have claimed that they are in possession of their respective shares. While rejecting the application, the learned trial Judge has observed in paragraph-6 that in the plaint, the plaintiffs have averred that they are in possession of 1/6th share of the property. In paragraph-7, the learned trial Judge has referred to **Vinay Krishna** judgment (supra). The learned trial Judge observed that while deciding the application under Order VII Rule 11, the Court has to only consider the averments made in the plaint and said application cannot be decided on the basis of the contentions raised in the written statement. From the averments made in the plaint, it cannot be said that the plaintiffs are not in possession of the suit property and said aspect requires recording of evidence. The learned trial Judge accordingly held that at this stage it cannot be held that the suit

is not maintainable in view of Section 34 of the Act.

10. In the case of **Vinay Krishna** (supra), the proceedings before the Apex Court arose out of final disposal of the suit. In paragraph-10 Apex Court observed that the Courts below have concurrently found that the plaintiff was not in exclusive possession. In the present case, the suit is yet to be tried on merits. In view thereof, I do not find that the decision in **Vinay Krishna** advances the case of defendants No.3 & 4.

11. In the case of **Union of India** (supra), the Apex Court has held that when the plaintiffs are not in possession and are seeking possession, they cannot maintain suit for declaration of title. In the present case, the plaintiffs have averred that they are in possession of the suit property.

12. In view thereof as also for the reasons recorded by the learned trial Judge in paragraphs-6 and 7 of the impugned order, I do not find any merit in the application. Hence, Civil Revision Application fails and the same is dismissed.

(R. G. KETKAR, J.)