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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION STAMP NO. 33870 OF 2015

M/s.Pasaydan Developers and others ... Petitioners

Vs.

Smt. Lata Manohar Kerkar and others ... Respondents

Mr.S.M.Gorwadkar, Senior Advocate i/b Ravi G. Shinde, for
Petitioners.

CORAM : R.G.KETKAR, J.
DATE : 08th JANUARY, 2016

P.C. :

Heard Mr.S.M.Gorwadkar, learned Senior Counsel for
the petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the judgment and order dated 30/10/2015 passed by the learned Civil Judge, Senior Division, Pune below Exhibit 138 in Special Civil Suit No. 1313 of 2011. By that order, the learned trial Judge rejected the application made by the petitioners under Order 6 Rule 17 of Code of Civil Procedure, 1908 (for short 'C.P.C.'). The parties shall hereafter be referred to as per their status before the trial Court.

3. Mr. Gorwadkar submitted that defendants No. 1 to 3 are the owners of the property, more particularly described in the Suit.

They executed development agreement in favour of the defendant No.9. Defendant No.9, in turn, assigned development rights in favour of the plaintiffs. There is no direct privity of contract between the plaintiffs and defendants No. 1 to 3. He invited my attention to paragraph 50 of the plaint wherein it is asserted thus :

“The plaintiffs submit that an amount of Rs.33,00,000/- (Rupees Thirty Three Lakhs Only) was due and payable to the defendant nos. 1 to 3 after the execution of the Agreement, dated 31-07-2004.....”

4. He submitted that on 31/07/2004, development agreement is executed by defendants No.1 to 3 in favour of defendant No.9. Defendant No.9 is liable to pay balance consideration of Rs.33 lacs to defendants No. 1 to 3. The plaintiffs are not responsible and liable to pay alleged amount of Rs.33 lacs. The plaintiffs, therefore, took out application for amendment of the plaint on 08/09/2015 for deleting paragraph 50 thereby substituting the said paragraph as per the Schedule appended to the application. He submitted that as the plaintiffs are not liable to pay Rs.33 lacs to defendants No. 1 to 3, the learned trial Judge ought to have allowed the application for amendment.

5. I have considered the submissions advanced by Mr.Gorwadkar. I have also perused the material on record. With the assistance of Mr.Gorwadkar, I have gone through the plaint. In paragraph 16, plaintiffs asserted that the total consideration payable

by defendant No.9 to defendants No. 1 to 3 under the agreement dated 31/07/2004 was Rs.42 lacs. It was further asserted that out of that amount, Rs. 7 lacs was agreed to be paid by defendant No.9 to the 4 confirming parties. The balance consideration of Rs.35 lacs was to be paid by defendant No.9 to defendants No. 1 to 3 at the instance of confirming parties.

6. In paragraph 17, plaintiffs asserted that out of 35 lacs payable by defendant No.9, an amount of Rs.2 lacs was paid to defendants No. 1 to 3 and an amount of Rs.2,10,000/- was paid to the confirming parties at the instance of defendants No. 1 to 3 at the time of execution of the said agreement. Therefore, amount of Rs. 33 lacs was due and payable by defendant No.9 to defendants No. 1 to 3.

7. In paragraph 23, plaintiffs asserted that defendant No.9 transferred/assigned rights in respect of the suit property obtained by them under agreement dated 31/07/2004 to the plaintiffs vide development agreement dated 17/08/2004. In paragraph 24, plaintiffs further asserted that rights in respect of the suit property described in paragraphs 1(a) were obtained by the plaintiffs for a total consideration of Rs.75,34,800/- and out of that amount, Rs.37,67,400/- was paid by the plaintiffs to the confirming party No. 1 i.e. defendant No.9 at the time of execution of development agreement dated 17/08/2004.

8. Perusal of the plaint does not, prima facie, indicate that plaintiffs asserted payment of Rs. 33 lacs either by defendant No. 9 or plaintiffs to defendants No. 1 to 3. In that context, if we peruse the assertions made in paragraph 50 extracted hereinabove, plaintiffs submitted that amount of Rs.33 lacs was due and payable to defendants No. 1 to 3 after the execution of the agreement dated 31/07/2004.

9. By the impugned order, the learned trial Judge rejected the application mainly on the ground that plaintiffs want to withdraw the admission given in paragraph 50 of the plaint. If plaint as a whole is read, it would be evident that defendant No.9 was liable to pay Rs.33 lacs to defendants No. 1 to 3 and as defendant No.9 assigned their rights in favour of the plaintiffs, naturally, the plaintiffs are liable to make good that amount i.e.Rs. 33 lacs. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the application. Hence, Petition fails and the same is rejected. 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.)