

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.563 OF 2015
IN
NOTICE OF MOTION NO.874 OF 2009
IN
SUIT NO.1396 OF 2008

M/s. Sarthak Developers .. Appellant

Vs

Hajra Zakaria Aghadi and Others. .. Respondents

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Shri Robin Jaisinghani along with s. Jacinta D'Silva for the Appellant.

Shri Shoaib I. Memon along with Ms. Shaheen for the Respondent
Nos.1 to 3.

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CORAM : A.S. OKA & P. D. NAIK, JJ

DATED : 22ND MARCH 2016

PC.

. Heard the learned counsel appearing for the Appellant.

The Appellant is the Original third Defendant. We have heard the learned counsel appearing for the first and second Respondents who are the Original Plaintiffs.

2. The challenge in this Appeal is to the order dated 19th October 2014 passed by the learned Single Judge by which the Notice of Motion taken out by the present Appellant for rejection of the Plaint under Clause (a) of Rule 11 of Order VII of the Code of Civil Procedure, 1908 (for short “the said Code”) has been dismissed.

3. The first submission of the learned counsel appearing for the Appellant is that the substantive case made out in the affidavit-in-support of the Notice of Motion was that the Plaint does not disclose cause of action and, therefore, under Clause (a) of Rule 11 of Order VII of the said Code, the same ought to have been rejected. He invited our attention to the findings recorded by the learned Single Judge in Paragraph 3 of the impugned order. He submitted that the observation made by the learned Single Judge that it is not the case of the Appellant that the Plaint does not disclose any cause of action is completely erroneous inasmuch as in the affidavit-in-support, in Paragraph 1, a specific contention has been raised that the Plaint deserves to be rejected as the same does not disclose any cause of action.

4. The learned counsel appearing for the Appellant submitted that as the case of the Appellant under Clause (a) of Rule 11 of the Order VII of the said Code has not been considered, the Appellant has not been given a fair trial. He urged that therefore, by setting aside the impugned order, the learned Single Judge may be directed to rehear the Notice of Motion. He relied upon what is held by the Apex Court in Paragraph 44 in the decision in the case of *Ajit Kumar Nag V. General Manager (PJ), Indian Oil Corporation Ltd., Haldia and Others*¹. He invited our attention to the averments made in the Plaint. He

1 (2005)7 SCC 764

submitted that it is not disclosed in the Pleint as to what is the precise nature of the right claimed by the first to third Respondents in respect of the property in question and as to what is the relationship between late Zakaria Aghadi and the first to third Respondents. He urged that it is not spelt out as to what was the right of late Zakaria Aghadi and in what manner, the first to third Respondents are affected by the documents and especially the Conveyance Deed dated 6th October. 2006 in respect of which a declaration is claimed in the suit. He submitted that unless the precise rights claimed by the first to third Respondents are set out in the Pleint and unless it is demonstrated as to how the first to third Respondents will be affected by the documents in respect of which a declaration has been claimed in the suit, it cannot be said that the first to third Respondents have a cause of action to file a suit. Relying upon the averments made in the Pleint, he submitted that in any event, the suit is bound to fail. The learned counsel appearing for the first to third Respondents supported the impugned order.

5. We have perused the averments made in the Pleint as well as the findings recorded by the learned Single Judge. For the reasons which we have recorded, we do not agree with the submission made by the learned counsel appearing for the Appellant that the learned Single Judge has not considered the case made out on the basis of Clause (a) of Rule 11 of Order VII of the said Code. In fact, we find that the first

sentence in the Paragraph 3 of the impugned order will have to be read with the earlier part of the impugned order.

6. Coming to the Complaint, substantive prayer is the prayer clause (a) for declaration as regards the five documents set out therein.

Prayer clause (a) reads thus:

“(a) that it may be declared by this Hon'ble Court that (i) the Deed of Conveyance dated 06/10/2006 registered with the Sub-Registrar of Assurances at Andheri-3 under Serial No.BDR-9/9188/2006 dated 09/10/2006 at Exhibit 'O' to the Complaint, (ii) Development Agreement dated 08/10/2006 registered with the Sub-Registrar of Assurances at Andheri -3 under Serial No.BDR-0/9189/2006 dated 09/10/2006 at Exhibit 'P' to the Complaint, (iii) Registered Power of Attorney dated 09/10/2006 at Exhibit 'Q' to the Complaint, (iv) Deed of Conveyance dated 16/11/2006 registered with the Sub-Registrar of Assurances at Andheri-1 under Serial No.BDR/1/9414/2006 dated 16/11/2006 at Exhibit 'R' to the Complaint, (v) Development Agreement dated 16/11/2006 registered with the Sub-Registrar of Assurances at Andheri-1 under Serial No.BDR-1/9415/2006 dated 16/11/2006 at Exhibit 'S' to the Complaint and (vi) Registered Power of Attorney dated 16/11/2006 at Exhibit 'T' to the Complaint are bad in law, illegal and liable to be set aside as they have been executed in violation of the rights of the Plaintiffs and on the basis of forged and fabricated documents and do not convey the title in favour of the Defendant Nos.4 and 5 societies.”

7. Prayer clause (a) indicates what is the case of the Plaintiff.

The case is that the documents are bad-in-law and they are executed in violation of their rights and on the basis of forged documents. In

Paragraph 1 of the Complaint, the first to third Respondents have averred thus:

“1. The Plaintiffs state that the Plaintiffs have filed this Suit for challenging the fraudulent documents executed by the Defendant Nos.1 & 2 in favour of the Defendant Nos.4 & 5 to defeat the rights of the Plaintiffs in the property being (i) All that piece and parcel of land or ground, hereditaments and premises situated at Yari Road, Village Versova, Taluka Andheri bearing C.T.S. No.1231/2 forming part of land bearing survey No.16 within the Registration District of Andheri, District Mumbai Suburban within Greater Mumbai admeasuring 1642.14 square yards equivalent to 1373 square meters or thereabouts together with structure or buildings standing thereon known as Cozy Apartments assessed by the Assessor and Collector under Municipal Rates and Taxes under No.K(West) Ward No.KW-17-0755-031 and KW-6426(3)/6C) (ii) All that piece and parcel of land or ground, hereditaments and premises situated at Yari Road, Village Versova, Taluka Andheri bearing C.T.S. No.1231/10 forming part of land bearing Survey No.19 (Part) within the Registration District of Andheri, District Mumbai Suburban within Greater Mumbai admeasuring 1091.45 square yards equivalent to 912.58 square meters or thereabouts together with structure or buildings standing thereon known as Kohinoor Apartments (hereinafter referred to as the said properties) and more particularly described at Exhibit-'A' and Exhibit 'B' to the Complaint.”

8. It is alleged in Paragraph 2 of the Complaint that the Appellants have bypassed the rights of the first to third Respondents and that they executed a conveyance in favour of fourth and fifth Defendants who, in turn, have executed a Development Agreement with the Appellant. In Paragraph 7(a) of the Complaint, the first to third Respondents stated that

they are the wife, daughter and grand-son respectively of late Zakaria Aghadi. In Clause (e) of Paragraph 7, the first to third Respondents have asserted the nature of the rights allegedly acquired by the said late Zakaria Aghadi under the Agreement dated 5th March 1980. At this stage, when the prayer is for rejection of the Complaint under Clause (a) of Rule 11 of Order VII of the said Code, it is not necessary for the Court to go into the merits of the correctness or otherwise of the assertions made in the Complaint. Suffice it to say that according to the case of the first to third Respondents, late Zakaria Aghadi acquired certain rights under the Agreement dated 5th March 1980 and the said rights are sought to be defeated by the documents in respect of which a declaration has been claimed by way of substantive relief. The relationship between late Zakaria Aghadi and the first to third Respondents has been also set out in the Complaint. Therefore, it is impossible to come to a conclusion that the Complaint does not disclose any cause of action.

9. Now we come to the impugned order. In Paragraph 2 of the impugned order, the learned Single Judge has reproduced paragraphs 3 to 5 of the affidavit-in-support of the Notice of Motion for rejection of the Complaint. Paragraphs 3 to 5 of the said affidavit-in-support read thus:

“3. The present suit has been filed as the plaintiffs' claim that the conveyances have been executed

by defendant nos.1 and 2 as the Constituted Attorneys of the original owners on the strength of forged Powers of Attorney and the execution of the conveyances is in violation of the rights of Zakaria Aghadi under his Agreement dated 5th March, 1980 with defendant no.1. The plaint fails to disclose as to how the present plaintiffs are entitled to file the present suit and claim the reliefs which have been claimed in the suit. The Agreement dated 13th January, 1981 between Zakaria Aghadi and defendant no.6 which is annexed to the plaint shows that Zakaria Aghadi had granted development rights to defendant no.6 and under the Agreement, Zakaria Aghadi was obliged to cause the original owners and defendant no.1 to execute conveyances in favour of the society/ies which were to be formed. It is the plaintiffs' case that defendant no.6 thereafter constructed a building and the purchasers of the tenements/units in the building formed a Co-operative Housing Society known as Sabri Co-operative Housing Society Ltd., which is impleaded as defendant no.4 to the suit. The conveyances in favour of defendant no.4 were executed by defendant nos.1 and 2 on 6th October, 2006. The plaint fails to disclose how execution of these conveyances in favour of defendant no.4 gave rise to a cause of action in favour of the plaintiffs to file the present suit.

4. As a matter of fact, the contents of the Agreement between Zakaria Aghadi and defendant no.6 indicate that Zakaria Aghadi assigned all his rights vested in him by virtue of his Agreement with defendant no.1 to defendant no.6. In consideration thereof Zakaria Aghadi was to receive a sum of Rs.4,00,000/- under the said agreement. Although, it has been alleged in the present suit that a sum of Rs.2,00,000/- was not paid by defendant no.6, no relief has been sought for recovery of the said amount which in any event would be hopelessly barred by limitation. Moreover, neither does non payment by defendant no.6 furnish a cause of action for the

present suit, nor is such a cause of action for the present suit, nor is such a cause of action disclosed in the plaint.

5. Moreover, the plaintiff has not disclosed in the plaint as to how they are entitled to the rights of Zakaria Aghadi under the Agreement which is annexed to the plaint. As a matter of fact, the contents of paragraphs 7(e), (f), (g) and (j) indicate that Zakaria Aghadi had entered into the Agreement, a copy whereof is annexed to the plaint, in his capacity as a partner of a firm known as M/s. Bombay Builders. It is therefore, in effect the plaintiffs' case that Zakaria Aghadi treated all rights under the Agreement as rights belonging to the partnership firm known as M/s. Bombay Builders. There is nothing stated in the plaint, which would even remotely indicate as to how the plaintiffs are entitled to rights which allegedly belonged to M/s. Bombay Builders and/or as to how the said rights have devolved upon them."

10. If we read Paragraph 3 of the affidavit-in-support which is quoted by the learned Single Judge, it is apparent that the Appellant itself has understood what is the cause of action for filing the suit. Paragraph 3 itself indicates as to what is the right claimed by the first to third Respondents as the successors of said late Zakaria Aghadi. After quoting the paragraphs 3 to 5 of the affidavit in support, the learned Single Judge in paragraph 3 of the impugned order has observed that it is not the case of the Appellant that the Plaint does not disclose any cause of action. This observation is based on what is stated by the Appellant in paragraph 3 of the affidavit-in-support of the Notice of Motion which is quoted in Paragraph 2 of the impugned order.

Therefore, the observation made by the learned Single Judge in Paragraph 3 cannot be read in isolation and will have to be read in light of what is observed in the earlier paragraphs. Therefore, we do not agree with the submission of the learned counsel appearing for the Appellant that the learned Single Judge has not considered the case of the Appellant for rejection of the Plaint under Clause (a) of Rule 11 of Order VII of the said Code. Therefore, there is no question of considering the prayer of the Appellant for remand. Thus, in our opinion, the Plaint does disclose cause of action and, therefore, the prayer for rejection of Plaint by exercising the power under Clause (a) of Rule 11 of Order VII of the said Code was rightly rejected by the learned Single Judge. Accordingly, there is no merit in the Notice of Motion. Accordingly, the Appeal is dismissed. However, we make it clear that the observations made in this judgment and order are only for a limited purpose of considering the averments made in the Plaint in the context of the prayer for the rejection of the Plaint and none of the observations shall be construed as the findings recorded on the merits. All issues in the pending suit will remain open.

(P. D. NAIK, J)

(A.S. OKA, J)