IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.855 OF 2017
IN
SUIT NO.308 OF 2017
WITH
CHAMBER SUMMONS NO.574 OF 2017
IN
SUIT NO.308 OF 2017

Badal M. Mittal And Anr. ... Plaintiffs
Versus
Omprakash M. Mittal And 2 Ors. ... Defendants

.....

Mr. Navroz Seervai, Senior Counsel, a/w. Ms. Gulnar Mistry, Counsel, Mr. Mr. Soura Sulha Ghosh and Mr. Samarth Choudhary, i/b. M/s. Hariani & Co., for the Plaintiffs.

Mr. Dinyar Madon, a/w. Mr. Mandar Soman, i/b. Bhakti Popat, for the Defendants.

.....

CORAM : S.C.GUPTE, J.

DATED : 7 JULY 2017

(ORAL JUDGMENT):

. This suit is filed by the Plaintiffs, who are brothers, against Defendant No.1, who is their other brother, and Defendant Nos. 2 and 3, who are respectively their sister-in-law and nephew. The subject matter of the suit is a flat, being Flat No.10A on the 8th Floor of a building known as "Mittal Bhawan-I" at Pedar Road in Mumbai. It is the Plaintiffs' case that late Maliramji Mittal, father of the Plaintiffs and Defendant No.1, and his family were occupying this flat originally. The share certificate in respect of the flat stood in the name of late Maliramji Mittal. It is the Plaintiffs' case that their brother - Defendant No.1 shifted to Bangalore permanently in 1982. After the death of Maliramji in the year 1996, the suit flat was transferred in the name of his wife, late Smt. Sitadevi Mittal, mother of the Plaintiffs and Defendant No.1. She resided in the flat till her death in December 2016. It is the Plaintiffs' case that, during her life time, Sitadevi executed a registered gift deed dated 19 October 2015 gifting and transferring the suit flat in their favour. It is the Plaintiffs' case that since the execution of the gift deed, the Plaintiffs have had complete and unobstructed possession and ownership of the suit flat. The share certificate in respect of the flat stands in their name. The Plaintiffs submit that Defendant No.1 used to occasionally visit the suit flat, both during the life time of Maliramji and thereafter, during the life time of Smt. Sitadevi. Whenever he came to the suit flat during this period, he was allowed to make use of two rooms in the flat. It is the grievance of the Plaintiffs that on 4 February 2017, the Defendants visited Mumbai and stayed in these two rooms as guests after taking keys to the suit flat from the Plaintiffs. A few days later, on 7 February 2017, the Plaintiffs found the suit flat locked, the original lock having been replaced by the Defendants and a new lock installed in its place. The keys to this new lock were not provided to the Plaintiffs. In the premises, the Plaintiffs have filed the present suit under Section 6 of the Specific Relief Act, claiming dispossession otherwise than by due process of law and seeking to recover possession of the suit flat.

2. The Notice of Motion taken out by the Plaintiffs claims a mandatory order and direction against the Defendants to put the Plaintiffs in possession of the suit flat. The Defendants contest the Notice of Motion.

The Defendants have also taken out a Chamber Summons, being Chamber Summons (L) No.645 of 2017, purportedly under Order 7 Rule 10 of the Code of Civil Procedure for return of plaint on the ground that this Court does not have jurisdiction to entertain and try the present suit.

Chamber Summons (L) No.645 of 2017 :

3. This application is on the footing that the present suit, having been filed under Section 6 of the Specific Relief Act and, accordingly, not being on title, is a suit seeking to enforce a statutory right and that the suit, accordingly, should be valued under Section 6(iv) (j) of the Bombay Court Fees Act, which is an entry providing for suits for declarations, whether with or without injunction or other consequential reliefs, where the subject-matter in dispute is not susceptible for monetary evaluation, and which are not otherwise provided for by the Act. According to this entry, *ad valorem f*ee is payable as if the amount or value of the subject-matter was three hundred rupees. Based on this, it is submitted that considering the requirement of the suit having to be filed in the lowest court having pecuniary jurisdiction over the subject matter, this Court has no jurisdiction to entertain the present suit.

4. Learned Counsel for the Defendants relies on a judgment of a learned Single Judge of our Court in the case of **Sushila Uttamchand Jain vs. Rajesh Kumar Prakashchand Jain**[1]. Relying on this judgment, it is submitted that a suit under Section 6 of the Specific Relief Act is for enforcing of a statutory right and must be valued under Section 6(iv)(j) of

1 2012(5) ALL MR 526

the Bombay Court Fees Act, since such statutory right is not capable of being valued and the court fees are not otherwise provided for. The learned Single Judge of our Court in the case of **Sushila Uttamchand Jain** did hold that a suit under Section 6 of the Specific Relief Act, being a suit for enforcement of a statutory right, namely, the right under Section 6 of the Specific Relief Act, must be valued under Section 6(iv)(j) of the Bombay Court Fees Act. Whilst coming to this conclusion, the learned Judge appears to have relied on two earlier cases decided by our Court. One of these cases, namely, the case of **Maria Philomina Pereira vs. Rodrigues Construction**[2], was a suit for specific performance of an agreement for sale. The Court in that case held that the plaintiff was trying to enforce a statutory right conferred on her under the provisions of Maharashtra Ownership Flats Act, 1963 and, therefore, the suit was not required to be valued for specific performance under Section 6(xi) of the Bombay Court Fees Act but would fall under Section 6(iv)(j). In **Vrindavan Co-Op. Housing Society vs. Karmarkar Brothers**[3], also the Court considered the question as to how a suit filed to enforce a statutory right should be valued.

5. In my opinion, the judgment of the learned Single Judge in **Sushila Uttamchand Jain** is clearly *per incurium*. Firstly, it does not take into account the applicable provision of law contained in the Schedule to the Court Fees Act. Article 1 of Schedule I of the Act, which provides for *ad valorem* fees payable on a suit presented to any civil court, requires the court fees to be calculated on the basis of the amount or value of the subject matter in dispute subject to a maximum of Rupees 3 lakhs. Article

2 1990(2) Bom.C.R. 77
3 1983 (2) Bom. C.R. 267

2 provides for a plaint in a suit for possession under Section 6 of the Specific Relief Act. In case of such suit, the fee prescribed is one-half of the amount prescribed in the scale provided under Article 1. This clearly implies that even in the case of a suit under Section 6 of the Specific Relief Act, the amount or value of the subject matter in dispute is ascertainable and court fee is to be computed *ad valorem* on the basis of such amount or value. Secondly, there are Division Bench judgments of our Court, particularly in the cases **Shah Ratilal Manilal vs. Shah Chandulal Chhotalal**[4], **Hiranand Assumal vs. Mohandas Vishindas Chainani**[5] and **Lakhiram Ramdas vs. Vidyut Cable And Rubber Industries**[6], which clearly suggest that in a suit for possession, whether against a defendant claiming to be a licensee, whose licence has been determined, or against a trespasser, the Court fees are payable *ad valorem* as in the case of any other suit for possession based on market value of the property, of which possession is sought. **Shah Ratilal**'s case was a suit for possession of a house from a licensee. The trial Court, on the defendant's objection, went into the question of the Court fee and came to the conclusion that the subject matter of the suit was not the house itself but the right to eject the defendant. At that time, suits for possession of immovable property fell under s.7(v)(e) of the Court Fees Act and were to be valued according to the value of the subject-matter, namely, the property. Taking it that the subject matter of the suit was the right to eject the defendant, the learned Judge found that the value of that right was the value at which the defendant's right to remain in the house could be valued; and looked at from that point of view he considered that the value which the plaintiff put

4 AIR 1947 Bom 482
5 1977 Mh.L.J. 501
6 1963 Mh.L.J. 942

upon his-claim, namely Rs.5,000 odd, could be accepted even though the market value of the house itself was about four times as much. The division bench of our Court hearing a revision from this order set it aside and held that court fees were payable on the value of the house under Section 7(v) (e) of the Court Fees Act, 1870 (equivalent to Section 6(v) of Bombay Court Fees Act). This is what the division bench had to say:

> "In plain English the subject-matter of a suit is what the suit is about. It is not the same thing as the object of the suit. The object of the suit is the claim, in other words possession of the house. The subject of the suit is the house. That this is the correct view to take is, I think, clear also from the wording of s.7(5) itself. The section says that suits for the possession of land, houses or gardens are to be valued according to the subject-matter and the sub-section goes on to say that where the subject matter is land, the value shall be determined according to cls. (a), (b), (c) or (d) and where the subject-matter is a house or garden, the value shall be deemed to be the market value of the house or garden. In other words the section contemplates the subject matter of a suit for the possession of land as being the land, the subject matter of a suit for the possession of a garden as being the garden and the subject-matter of a suit for the possession of a house as being the house, and there is no suggestion to be derived from the section itself or, so far as I know, from anywhere else that the subject-matter ought to be taken to be anything else. I can imagine hard cases arising out of this provision; I can imagine cases where paying the Court-fee on the value of a house might in all the circumstances be an unduly heavy price to pay in the event of the suit being lost. But we cannot do anything about that. The law seems to be as I have said; and if the law is harsh, it can always be amended."

Lakhiram's case (supra) was a suit for a mandatory injunction against the defendants, who were licensees and whose licence had been terminated. The argument before the court was that the plaintiff had merely sought a declaration coupled with a mandatory injunction for the defendants' removal from the premises and a preventive injunction restraining them from re-entering or interfering with the plaintiff's possession, and the suit must accordingly be valued under Section 6(iv)(j) of the Bombay Court Fees Act. The argument was rejected by the court, holding the suit to be in substance a suit for possession, however ingenuously the substantive prayer for possession was circumvented by asking for mandatory and preventive injunctions instead. It reiterated the law laid down in **Shah Ratilal**'s case (supra) quoted above and negatived the contention that it was a case for a declaration with consequential relief of injunction falling within clause (j) of Section 6(iv) of the Bombay Court Fees Act. Since the plaintiff had in effect asked for possession, for which there was a provision in the Act, in Section 6(v), clause (j) was held to be inapplicable. This position of law was also reiterated by yet another division bench of our Court in **Hiranand Assumal**'s case (supra). In fact, in **Hiranand Assumal**, the Division Bench quoted with approval a judgment of Chandrachud, J., as he then was, in a Civil Revision Application bearing on this point. That was a case, where the subject matter in dispute was a shop in a building. It was in possession of the defendant as a tenant on a monthly rent. This shop was given by the defendant to the plaintiffs on a monthly fee. The plaintiffs had brought the suit, from which the aforesaid revision application arose, against the defendant under Section 6 of the Specific Relief Act, alleging that they were in possession of the shop as licensees of the defendant and were wrongly dispossessed by the defendant. Chandrachud, J. agreed with the manner in which the trial court determined the market value of the shop. The suit was held to be correctly valued on the basis of such market value of the shop and not on the basis of statutory right to be enforced by the plaintiffs under Section 6 of the Specific Relief Act.

6. Even otherwise, clause (v) of Section 6 of the Court Fees Act clearly indicates that it applies to all suits for “possession of land, houses and gardens” and in such suits, Court fees are to be paid, and the suits to be valued, on the basis of the value of the subject matter, namely, the land, house or garden, as the case may be. The source of right claimed for seeking such possession is not material. Such right may be either statutory or contractual or even a common law right. Whatever be the right and howsoever it is sourced, so long as the relief claimed in the suit is 'possession of land, houses or gardens', it is a suit falling within clause (v) of Section 6 of the Court Fees Act. The subject matter of a suit filed under Section 6 of the Specific Relief Act is not enforcement of statutory right under Section 6 but recovery of possession of immovable property. The basis for claiming such recovery may be Section 6 of the Specific Relief Act. Another way of looking at such a suit is what is indicated by our Court in **Shah Ratilal**'s case (supra). The object of the suit may be the claim, i.e. enforcement of a statutory right under Section 6 of the Act, but the subject of the suit is still the house, i.e. the flat, and the valuation must be on the value of the subject.

7. Learned Counsel for the Defendants submits that a decree passed in a specific performance suit under sub-section (1) of Section 6 is a temporary decree; it does not bar any person from suing to establish his title to such property and to recover possession thereof from the decree-holder. Learned Counsel in this behalf relies on sub-section (4) of Section 6. There is nothing in law to indicate that a decree passed under sub-section (1) is a temporary decree. Sub-section (4) merely implies that any

decree passed under sub-section (1) does not bar any person from establishing his title to the property. That does not mean a decree under Section (1) is not final. The thrust of the Defendants' argument is that anyway a decree under sub-section (1) of Section 6 of the Specific Relief Act is a decree, which is liable to be defeated by another decree that may be passed in a title suit by the true owner. The suggestion appears to be that court fee based on the market value of the property for such a decree is harsh on the plaintiff. In the first place, for a suit under Section 6 of the Specific Relief Act, the legislature has provided for only half the court fees payable on a regular suit for possession. But secondly, and more importantly, even if paying such court fee on the value of the property could be termed as an unduly heavy price to pay, to repeat the words of the Division Bench in **Shah Ratilal**'s case, "we cannot do anything about it …… if the law is harsh, it can always be amended".

8. In the premises, there is no merit in the challenge laid by the Defendants on the basis of the suit valuation. The Chamber Summons is, accordingly, dismissed. Costs to be costs in the cause.

Notice of Motion No.855 of 2017 :

9. Coming now to the Notice of Motion of the Plaintiffs, after the matter is heard at some length, it is agreed between the parties that the Notice of Motion can be disposed of by directing an adhoc arrangement at site, which will obtain during the pendency of the suit, without prejudice to the rights and contentions of the parties. It is, accordingly, by consent ordered that pending the hearing and final disposal of the suit, the parties,

namely, the Plaintiffs and Defendant Nos. 1 to 3 shall be entitled to jointly use the suit flat. As and when the Defendants or any of them come to Mumbai, they shall be entitled to use the two rooms, referred to above, exclusively and the common areas including the kitchen, hall and dining of the suit flat merely jointly with the Plaintiffs. The Plaintiffs, it is needless to add, shall have access and use of the suit flat exclusive of the two rooms all the time including two bedrooms in their possession where the cupboards of their deceased mother are kept. Learned Counsel for the Defendants states that his clients shall remove the CCTV Cameras placed inside and outside the suit flat, latest by 22 July 2017. The statement is accepted. The keys to the main door of the suit flat shall remain with the Plaintiffs as well as Defendant No.1. The cupboards of the deceased mother of the Plaintiffs and Defendant No.1, which are placed in the two rooms referred to above, shall continue to be kept locked as of now and not opened by the parties until further orders. This order shall substitute the ad-interim order passed on 3 March 2017. In case of any difficulty, either party has liberty to apply.

10. The order disposing of the Notice of Motion is passed without prejudice to the rights and contentions of the parties. It is made clear that whilst passing that order, this Court has not applied its mind to the merits of the controversy.

11. No order as to costs on the Notice of Motion.

(S.C.GUPTE, J.)