

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 493 OF 2018**

MINESCAPE MINERALS PVT. LTD., ... PETITIONER

Versus

SUDHIR MURARI SAWARDEKAR
& 5 ORS. ... RESPONDENTS

Shri C.A. Coutinho, Advocate for the Petitioner.

Shri V.R. Tamba with Shri Paresh Sawant, Advocates for the
Respondent Nos. 1 to 5.**CORAM : C.V. BHADANG, J.****DATE : 24th JULY 2018****ORAL ORDER:**

The challenge in this petition, at the instance of the original plaintiff, is to the order dated 05.01.2018, passed by the learned Senior Civil Judge at Quepem in Special Civil Suit No. 3/2011/A. By the impugned order, the learned Trial Court has framed the following issue, which is directed to be tried as a preliminary issue:

“Whether, in absence of challenge to the sale deeds both dated 08.01.2010 and registered in the office of the Sub-Registrar of Sanguem, can the relief as sought for by the plaintiffs be granted ?”

2. I have heard Shri Coutinho, the learned Counsel for the petitioner and Shri Tamba, the learned Counsel for the

respondent nos. 1 to 5. Perused record and the impugned order passed.

3. It is contended by Shri Coutinho, the learned Counsel for the petitioner that there are no pleadings in the written statement, on the basis of which, the aforesaid issue could have been framed. In other words, it is contended that it is not pleaded in the written statement that the relief in the suit, cannot be granted for want of challenge to the two sale deeds dated 08.01.2010. Secondly, it is contended that the said issue could not have been directed to be tried as a preliminary issue. It is contended that under Order XIV, Rule 2(2) of CPC, only issue relating to the jurisdiction of the Court or a bar to the suit created by any law, can be tried as a preliminary issue. It is submitted that the issue as framed above, neither relates to the jurisdiction of the Court or a bar to the suit created by any law and thus, could not have been directed to be tried as a preliminary issue.

On behalf of the petitioner, reliance is placed on the decision of the Supreme Court, in the case of **Ramesh B. Desai & Others Vs. Bipin Vadilal Mehta & Others, 2006(6) ALL MR (SC) 56** and the decision of this Court in the case of **N.P. Karandikar (since deceased) & Others Vs. Nanji Khimji &**

Co., 2006(4) Bom.C.R. 520.

4. On the contrary, it is submitted by Shri Tamba, the learned Counsel for the respondent nos. 1 to 5 that the issue is framed on a demurrer. It is submitted that the allegations in the plaint itself, are sufficient for the Court to have framed the issue. It is submitted that even otherwise, the issue as framed, arises on a pure question of law and the Trial Court was justified in framing the issue and further directing it to be tried as a preliminary issue, within the meaning of Order XIV, Rule 2(2) of CPC.

5. I have carefully considered the circumstances and the submissions made and I do not find that any case for interference is made out. The petitioner has filed the aforesaid suit, for directing the respondents/defendants, jointly and severally to pay to the petitioner the sum of Rs.24,48,247/-, which is the amount of consideration, which the petitioner had paid in respect of the two sale deeds. The basis of the claim is that the vendors had no marketable title for selling the suit property to the plaintiff. In short, it appears to be the basis of the claim of the petitioner that there was failure of consideration, in as much as, the vendors did not possess

marketable title, which can be transferred in the name of the petitioner.

6. The respondents in their written statement (as amended) had resisted the suit and had raised certain preliminary objections and had *inter-alia* claimed that the gift deed dated 10.05.1984 on 16.06.1984 and the rectification deed dated 30.08.1985 are bad in law.

7. Be that as it may, the issue only pertains to whether, in the absence of challenge to the two sale deeds dated 08.01.2010, relief as sought for by the petitioners, for refund of consideration along with interest, could have been framed. On a careful consideration of the pleadings in the plaint, as well as the written statement (as amended), I do find that the issue, which is otherwise a pure question of law, has rightly been framed by the Trial Court. The matter can be looked at from another angle. If, the petitioner succeeds in obtaining the refund of the consideration, as claimed, what happens to the sale deeds ? Thus, the issue only concerns itself, as to whether, the petitioner should have challenged and sought cancellation of the sale deeds, for being entitled to get refund of consideration and interest etc. It is neither necessary nor appropriate to go into

the merits of the matter. However, there is nothing wrong by the Trial Court in framing the issue as aforesaid.

8. This takes me to the second contention whether, the issue could have been directed to be tried as a preliminary issue. The Hon'ble Supreme Court, in the case of **Ramesh B. Desai** (supra) has held thus, in para 12 of the judgment:

Though there has been a slight amendment in the language of Order XIV, Rule 2 CPC by the Amending Act, 1976, but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issue of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

It can thus be seen that only where a issue is a mixed issue of law and fact or where the decision on issue of law depends on the decision of fact, when it cannot be tried as a preliminary issue. In other words, a pure issue of law (where the decision of such issue does not depend on the decision of fact), can always be tried as a preliminary issue. In the present case, the question whether, the petitioner is entitled to the relief as sought, in the absence of challenge to the two sale deeds, is a

pure question of law. It is not dependent on any decision of fact and therefore, there is nothing wrong in directing the said issue to be tried as a preliminary issue. Even in the case of **N.P. Karandikar** (supra), on facts, it was found that the issue of maintainability of the proceedings under the Maharashtra Rent Control Act, could be tried as a preliminary issue.

9. I have carefully gone through the impugned order and I do not find that it suffers from any infirmity, so as to warrant interference. That apart, the impugned order, cannot be said to have resulted into any manifest injustice on the petitioner. On either counts, no interference is called for in the exercise of the supervisory jurisdiction under Article 227 of the Constitution of India. The petition is without any merit and is accordingly dismissed, with no order as to costs.

C.V. BHADANG, J.

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