

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION (ST.) NO.6384 OF 2017

Nensee Constructions Pvt. Ltd. ... Applicant
Vs.
Madhavsingh Gordhandas and others ... Respondents

Mr. Ghanshyam Upadhyay i/b. Law Juris for Applicant.
Mr. R. A. Thorat, Senior Advocate i/b. Madekar & Co. for Respondent
No.1.

CORAM : R. G. KETKAR, J.
Reserved on : OCTOBER 31, 2018
Pronounced on : NOVEMBER 19, 2018

P.C. :

As the regular Court presided over by Hon'ble Mr. Justice R. D. Dhanuka has passed 'Not Before Me' order, applicant has moved this Court as per the administrative order passed by the Hon'ble the Chief Justice.

1. Heard Mr. Upadhyay, learned Counsel for the applicant and Mr.Thorat, learned Senior Counsel for the respondent No.1 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), the applicant, hereinafter referred to as 'defendant No.9', has challenged the order dated 20.08.2016 passed by the learned Judge, City Civil Court, Mumbai in Notice of Motion No.1303 of 2011 in Suit No.9777 of 1987 (High Court Suit No.604 of 1987). By that order, the learned trial Judge rejected the Motion taken out by defendant No.9 under Order VII, Rule 11(a) and (d) of C.P.C. for rejection of the plaint with exemplary costs of Rs.10,000/-, out of which Rs.5,000/- to be paid to the first respondent, hereinafter referred to as 'plaintiff' and balance amount of Rs.5,000/- is to be remitted to DALSA, Mumbai. The relevant and material fact that are necessary for disposal

of the present C.R.A., briefly stated, are as follows. The parties shall be referred to as per their status before the trial Court.

3. Plaintiff came with the case that plaintiff, defendants No.1 and 2 and Karsandas (since deceased) are the sons of Gordhandas (for short 'Gordhandas'). Gordhandas was the owner of an immovable property bearing C.T.S.No.5376 to 5381 admeasuring about 850 sq.yards together with structure standing thereon situate at Joshi Lane, Tilak Road, Ghatkopar (East), Mumbai 400 077 (for short 'said property'). Gordhandas expired on 06.08.1964. He left behind a Will executed on 31.03.1964 bequeathing his interest in favour of mother of the plaintiff, Gomatibai. She was given life interest in the said property. The Will provided that after a demise of Gomatibai, all the four sons shall have equal share in the said property. After the death of Gordhandas, the said property was transferred to the name of Gomatibai.

4. Plaintiff came with the case that some time in November 1976, there was a meeting among plaintiff, defendants No.1 and 2 and Karsandas. It was decided to develop the said property. Plaintiff was not willing for development as proposal required plaintiff to invest money which plaintiff was not in a position to do. Defendants No.1 and 2 and Karsandas agreed to invest money and develop the said property. It was agreed that plaintiff who would, after demise of mother, acquire 1/4th share in the said property, would give up the same to the other brothers on their providing a flat in the new building on ownership basis to the plaintiff. It is contended that the said proposal was made and accepted on the representation made by defendants No.1 and 2 and Karsandas that the F.S.I. available would permit total construction of about 5200 sq.ft. It was further agreed that in the event of F.S.I. available being more than 5200 sq.ft, all the four brothers will have equal share in the construction to be made in excess of 5200 sq.ft. It was further agreed that plaintiff

will not be required to contribute any amount for such additional construction.

5. Plaintiff contended that after a few days of a meeting, defendants No.1 and 2 and Karsandas asked the plaintiff to sign the agreement prepared by them. Defendants No.1 and 2 and Karsandas represented that the same was prepared as per the discussion and agreement arrived at in a meeting. Plaintiff fully relied upon defendants No.1 and 2 and Karsandas and without perusing the same and without obtaining copy of the same, signed the agreement. The said agreement is not registered with office of the Sub-Registrar at Bombay. Gomatibai died on 31.07.1977.

6. Plaintiff contended that defendants thereafter constructed the building on the plot of land and put the plaintiff in possession of one of the flats in the said building. Under the guise of rent, defendants collected maintenance from the plaintiff. The defendants falsely alleged that the relationship between the plaintiff and defendant is that of tenant and landlord, and accordingly, instituted Suit, namely, R.A.E.Suit No.535 of 1985 in the Small Causes Court, which was, at the relevant time, pending.

7. Plaintiff alleged that the agreement was not as per the discussion that took place in the meeting. Plaintiff was advised that the document does not amount to transfer of plaintiff's right, title and interest in the said property in favour of defendants No.1, 2 and Karsandas. Plaintiff continues to be joint owner of the said property with defendants No.1, 2 and Karsandas. Plaintiff accordingly instituted Suit on 17.02.1987 for declaration that he has 1/4th share, right, title and interest in the said property.

8. Pending the present Suit, on 22.12.1998, R.A.E.Suit No.535 of 1985 was dismissed. Aggrieved by that decision, Appeal No.159 of 1999 was preferred before the Appellate Bench of the Small Causes Court. Appeal was dismissed on 26.06.2002. The orders passed by the trial Court and the appeal Court were not challenged. On 09.06.2006, it is the case of the plaintiff that he learned that defendants No.1 to 8 had conveyed the said property to defendant No.9. Plaintiff came to know about this fact in the month of August, 2006. Plaintiff amended the plaint on 20.04.2007 and challenged the Deed of Conveyance dated 09.06.2006. On or about 29/30.05.2007, in pursuance of agreement for sale, defendant No.9 purportedly sold area admeasuring about 1100 sq.ft. on the ground floor of the suit property to defendant No.10. After amending the plaint and impleading defendant No.9 as a party defendant, the plaintiff took out Notice of Motion No.3283 of 2011 and Notice of Motion No.2088 of 2012 for injunction restraining defendant No.9 from creating further interest. By order dated 05.11.2014, City Civil Court issued injunction. Defendant No.9 has not challenged that order.

9. In April 2011, defendant No.9 took out present Notice of Motion for dismissal of the Suit under Order VII, Rule 11(a) and (d) of C.P.C. Defendant No.9 filed affidavit dated 20.04.2011 in support of the Motion. Defendant No.9 contended that it had purchased the said property from the heirs of Gordhandas excluding the plaintiff vide registered conveyance deed dated 09.06.2006. Plaintiff had relinquished his rights in favour of other heirs by a family arrangement, which is reduced into writing in November 1976. The said writing is part of Deed of Conveyance entered into between heirs of Gordhandas and defendant No.9. Relying upon the representation of other heirs, defendant No.9 purchased the said property after completing all legal formalities

through Solicitors, such as, title search, public notice inviting objections. Defendant No.9 entered into transaction as a bonafide purchaser for valuable consideration without notice. Defendant No.9 was not aware of pending dispute between the plaintiff and defendants, who are legal representatives of Gordhandas. Defendant No.9 contended that as the plaintiff is residing in one of the flats, constructed in the said property, he was fully aware of the transaction. Plaintiff did not raise any dispute from the date of publication of the notice till conveyance, which was executed in their favour. Plaintiff also did not register any lis pendens nor raised any objection to the public notice published at the instance of defendant No.9. It is only upon impleadment of defendant No.9 and service of the present proceedings, defendant No.9 came to know about pending disputes between the plaintiff and other legal representatives of Gordhandas.

10. The other legal representatives of Gordhandas, who executed conveyance in favour of the defendant No.9, suppressed pendency of the present Suit from them. The executants of the Deed of Conveyance also instituted Suit No.1947 of 2007 dragging defendant No.9 into litigation. That Suit was withdrawn on 23.07.2009 on the basis of the consent terms. Defendant No.9 contended that Suit is not maintainable as it does not disclose any cause of action as contemplated by Order VII, Rule 11(a) of C.P.C. The Suit is also barred by law of limitation as contemplated under Order VII, Rule 11(d). Defendant No.9 contended that plaintiff has not challenged the family arrangement of November 1976 in the present Suit or any other proceedings. Plaintiff has derived the benefit under the family arrangement. He is bound by it and is estopped from challenging the same. Plaintiff, therefore, has no cause of action to institute the Suit. As the plaintiff has not challenged the family arrangement within a period of 3 years, the same is binding and

subsisting. As the Suit is instituted in the year 1987, it is clearly barred by law of limitation. Defendant No.9 contended that limitation is a question of jurisdiction and this goes to the root of the matter. In the circumstances, defendant No.9 prayed for rejection of the plaint.

11. Plaintiff filed reply in November 2011 opposing the Motion. By order dated 20.08.2016, the learned trial Judge dismissed the Motion with exemplary costs of Rs.10,000/-. It is against this order, defendant No.9 has instituted the present C.R.A.

12. In support of this C.R.A., Mr. Upadhyay submitted that the plaint is liable to be rejected under Order VII, Rule 11(a) as it does not disclose any cause of action. The Suit is also liable to be rejected under Order VII, Rule 11(d) on the ground that it is hopelessly barred by limitation. The family arrangement was executed in November 1976 and the present Suit is instituted in the year 1987. Plaintiff has not challenged the family arrangement either in the present Suit or in any other proceedings. Plaintiff had derived benefit under the family arrangement. Thus, the family arrangement was acted upon and as the plaintiff had derived the benefit thereunder, he is estopped from challenging the family arrangement. He further submitted that family arrangement is not compulsorily registrable.

13. Mr. Upadhyay, in support of his contention that family arrangement is not compulsorily registrable, relied upon the following decisions:

- a. ***Tek Bahadur Bhujil Vs. Debi Singh Bhujil***, AIR 1966 SC 292, and in particular paragraph 11 thereof;
- b. ***Kale and others Vs. Deputy Director of Consolidation***, AIR 1976 SC 807, and in particular paragraph 25 thereof;

- c. ***Amteshwar Anand Vs. Virender Mohan Singh*, AIR 2006 SC 151;**
- d. ***Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel*, AIR 2006 SC 3304;**
- e. ***Hari Shankar Singhania Vs. Gaur Hari Singhania*, AIR 2006 SC 2488; and**
- f. ***Manish Mohan Sharma Vs. Ram Bahadur Thakur Ltd.*, AIR 2006 SC 1690.**

14. Mr. Upadhyay, in support of his submission that plaintiff, having derived benefit under the family arrangement, is estopped from challenging the same, relied upon the following decisions:

- a. **Kale and others** (*supra*);
- b. ***Narendra Kante Vs. Anuradha Kante*, (2010) 2 SCC 77;**
- c. ***Ranganayakamma Vs. K. S. Parekh (D) by LRs*, (2008) 15 SCC 673;**

15. Mr. Upadhyay in support of his contention that Suit is clearly barred by limitation, relied upon the following decisions:

- a. ***Ningawwa Vs. Byrappa*, AIR 1968 SC 956;**
- b. ***Ram Prakash Gupta Vs. Rajiv Kumar Gupta*, (2007) 10 SCC 59;**
- c. ***Foreshore Co-operative Housing Society Limited Vs. Praveen D. Desai*, (2015) 6 SCC 412;**
- d. **Ranganayakamma** (*supra*);
- e. ***Raptakos Brett & Co. Ltd. Vs. Ganesh Property*, (1998) 7 SCC 184;**

16. Mr. Upadhyay in support of his contention that plaint is liable to be rejected as it does not disclose cause of action, relied upon the

following decisions:

- a. ***T. Arivandandam Vs. T. V. Satyapal*, AIR 1977 SC 2421;**
- b. ***Roop Lal Sathi Vs. Nachhattar Singh*, AIR 1982 SC 1559;**
- c. ***I.T.C. Limited Vs. Debts Recovery Appellate Tribunal*, AIR 1998 SC 634;**
- d. ***Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner*, AIR 2004 SC 1801;**
- e. ***Saleem Bhai Vs. State of Maharashtra*, AIR 2003 SC 759** to contend that the trial Court can exercise power under Order VII, Rule 11 at any stage of the trial;
- f. ***Soumik Sil Vs. Subhas Chandra Sil*, AIR 2014 SC 1931.**

17. On the other hand, Mr. Thorat supported the impugned order. He submitted that plaintiff has specifically contended that his signature on the so called family arrangement of November 1976 was obtained by misrepresentation. The Suit is instituted in the year 1987 i.e. within 2 years after the Suit of eviction against the plaintiff was instituted in the year 1985. He submitted that Gomatibai died on 31.07.1977 and in any case, in terms of Article 65 of the Limitation Act, the Suit is instituted within 12 years. He further submitted that in the eviction suit, the learned trial Judge has held that as the family arrangement is not registered, it cannot be relied upon. The said finding was confirmed by the Appellate Bench of the Small Causes Court and these findings have attained finality. He submitted that it settled principle of law that while deciding the application under Order VII, Rule 11, the Court has to proceed on the premise that the allegations made in the plaint are true. The Court cannot consider the defence raised by the defendant. The plaint has to be read meaningfully and the cause of action has to be gathered from the plaint read as a whole. In support of this submission, he relied upon the following decisions:

- a. ***P. V. Guru Raj Reddy VS. P. Neerada Reddy*, (2015) 8 SCC 331;**
- b. **Ram Prakash Gupta** (*supra*); and
- c. **Sopan Sukhdeo Sable** (*supra*)

He, therefore, submitted that no case is made out for interfering with the impugned order.

18. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, defendant No.9 has taken out this Motion under Order VII, Rule 11(a) and (d) of C.P.C. for rejection of the plaint on the ground that the plaint does not disclose cause of action and that Suit is hopelessly barred by limitation. It is settled principle of law that while considering the application under Order VII, Rule 11, the Court has to proceed on the basis of the assertions made in the plaint. The Court has to accept the assertions made in the plaint as true. While deciding application under Order VII, Rule 11, defence raised by the defendant cannot be considered. Whether the plaint discloses cause of action or not has to be determined upon careful and meaningful reading of the plaint. The cause of action has to be gathered from reading of the plaint in its entirety.

19. Plaintiff has come with the case that Gordhandas was the owner of the said property. He had executed Will dated 31.03.1964 bequeathing the said property to Gomatibai. The Will also provided that after demise of Gomatibai, all the four sons shall have equal shares in the said property. In November 1976, family arrangement was executed between the plaintiff on one hand and defendants No.1, 2 and Karsandas on the other. On 31.07.1977, Gomatibai died. Thus, during the lifetime of Gomatibai, family arrangement was executed. The learned trial Judge has considered this aspect in paragraph 12 and has observed that when

the family arrangement was entered into between the parties in the year 1976, their rights in the said property were not crystalized. As the plaintiff's rights were not crystalized, the execution of family arrangement of the year 1976 loses significance. Prima facie, I do not find that the learned trial Judge has committed any error in recording this finding.

20. In paragraph 13, the learned trial Judge referred to findings recorded by the learned trial Judge while dismissing R.A.E.Suit No.535 of 1985 and the said decree being confirmed by the Appellate Court in Appeal No.159 of 1991. The learned trial Judge observed that family arrangement of the year 1976 required registration. With the assistance of the learned Counsel appearing for the parties, I have perused the family arrangement. The family arrangement records that by that document, plaintiff has relinquished his 1/4th share, right, title and interest in favour of his brothers out of natural love and affection. In other words, it is not a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation as observed in paragraph 10(4) of **Kale's decision** (*supra*), which is to the following effect:

“10. In other words to put the binding effect and the essentials of a family settlement in a concretized form, the matter may be reduced into the form of the following propositions:

(1) ...

(2) ...

(3) ...

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for

information of the Court for making necessary mutation. In such a case, the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) (sic) [Section 17(1)(b)] of the Registration Act and is, therefore, not compulsorily registrable.”

21. In the present case, the family arrangement does not record previous relinquishment by the plaintiff and that by very document, plaintiff has relinquished his share, right, title and interest. *Prima facie*, in my opinion, the said document would require registration as it does not record previous oral relinquishment by the plaintiff. In view thereof, *prima facie*, I do not find that the learned trial Judge committed any error in observing that the family arrangement would require registration.

22. In paragraph 14, the learned trial Judge observed that plaintiff alleged that defendants No.1, 2 and Karsandas had obtained his signature by misrepresentation. In view of the decision in **Ningawwa** (*supra*), the family arrangement of the year 1976 is void and plaintiff need not seek relief in respect of such null and void document. The learned trial Judge also referred to the decision in **Ramchandra Singh's case** (*supra*) where it is held that fraud vitiates entire transaction. For the reasons recorded by the learned trial Judge in paragraphs 11 to 18, I do not find that the learned trial Judge has committed any error in rejecting the Motion.

23. Mr. Upadhyay relied upon decisions of **Ningawwa** (*supra*), **Ram Prakash Gupta** (*supra*), **Foreshore CHSL** (*supra*), **Ranganayakamma** (*supra*), **Raptakos Brett & Co. Ltd.** (*supra*), **T. Arivandandam** (*supra*), **Roop Lal Sathi** (*supra*), **I.T.C. Limited** (*supra*), **Sopan Sukhdeo Sable** (*supra*), **Saleem Bhai** (*supra*), **Soumil Sil** (*supra*) and **P. V. Guru Raj Reddy** (*supra*). In my opinion, the said decisions are not

applicable to the facts of the present case. Hence, C.R.A. fails and the same is dismissed.

24. At this stage, Ms Singh orally applies for stay of this order for a period of two weeks from today. Mr. Behl opposes on the ground that C.R.A. is pending since 2017 and no ad-interim order was operating.

25. As the C.R.A. was pending since 2017 and no ad-interim order was operating, oral application made by Ms Singh is rejected. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab