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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 389 OF 2017

Arjan G. Jawahrani	...	Petitioner
V/s.		
Haresh G. Jawahrani	...	Respondent.

Mr. Girish J. Paryani, for the Petitioner.
Mr. Shrinivas Bhavé a/w Mr. Gaurav Yadav
with Ms. Sunayana Kashid i/by Bhavé &
Co. for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 25th JANUARY, 2018.

P.C. :

1] Heard learned counsel counsel for the petitioner and
learned counsel for the respondent.

2] By this Revision Application, filed under Section 115 of
Code of Civil Procedure, the petitioner is challenging the order dated
17.6.2017, passed by Civil Judge Junior Division Ulhasnagar, below
Exh.30 in R.C.S.No.99 of 2016.

3] Application Exh.30 was moved by the present petitioner
Under Order VII Rule 11(d) of the Code of Civil Procedure. The

petitioner is original defendant. It was his contention that respondent has filed suit simpliciter for declaration and injunction and in the plaint itself in paragraph No.5, he has categorically admitted that petitioner-defendant is in possession of the suit property. Though he demanded the said possession, petitioner has refused to hand over. Thus, it is submitted that the appropriate remedy for respondent was to file suit for possession of the suit property. Instead thereof, respondent has filed suit for declaration that petitioner-defendant has no right to make construction on the suit property, without the permission of Ulhasnagar Municipal Corporation and without the consent of respondent and further that petitioner-defendant has no right to dispose of or to create any third party interest in the suit property. Respondent has also asked for the relief of perpetual injunction restraining the petitioner from carrying out illegal construction or create third party interest in the suit property.

4] According to learned counsel for the petitioner, the suit simpliciter for declaration and injunction, without seeking substantial relief of possession, when admittedly respondent was in possession of the suit property, cannot be tenable and hence as such suit is expressly barred by the provisions of section 34 of the Specific Relief Act, 1963, the trial Court should have rejected the plaint under

Order VII Rule 11(d) of Code of Civil Procedure,. The trial Court has, however, rejected petitioner's application without advertng to the provisions of Section 34 of the Specific Relief Act 1963, and hence according to him, the impugned order passed by the trial Court is required to be quashed and set aside.

5] In support of his submission, learned counsel for the petitioner has relied upon the provisions of section 34 of the Specific Relief Act, which can be reproduced as follows :-

“34. Discretion of court as to declaration of status or right:-

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation - A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee”.

6] The main grievance of learned counsel for the petitioner is on the Proviso to said section which lays down that no court shall make any such declaration where the plaintiff being able to seek further relief, than a mere declaration of title, omitted to do so.

7] In this case, he has submitted that respondent-plaintiff was very much able to seek further relief that of the possession of the suit property. However, he has sought relief of simplicitor declaration. Though he has asked relief of injunction, that relief cannot be granted, unless respondent is in possession of the suit property and therefore, the suit is not maintainable, in view of Proviso to Section 34 of the Specific Relief Act 1963.

8] To substantiate this submission, learned counsel for the petitioner has also placed reliance on the judgment of Apex Court in case of **Anthula Sudhakar -vs- P. Buchi Reddy (dead) by Lrs and others, [(2008) 4 SCC 594]**, wherein specific question was raised in the appeal, as to whether on the facts of that suit, the plaintiff ought to have filed suit for declaration and injunction. While answering the said question, it was held in paragraph No.21 (a) as follows :-

“21. To summarise, the position in regard to suits for prohibitory injunction relating to imovable property, is as under ;-

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

9] According to learned counsel for the petitioner, therefore, without being in possession of the suit property and without claiming possession thereof, when respondent could have easily asked for the said possession, the suit filed by the respondent simpliciter for declaration cannot be tenable. Hence on this ground itself, trial Court should have rejected the plaint.

10] However, in my considered opinion, this submission cannot be accepted, for the simple reason that at the stage of deciding application for rejection of the plaint under Order VII Rule 11(d) CPC, the Court is not expected to enter into the question of facts. It may be

true that under the Proviso to section 34 of the Specific Relief Act, no court shall make any such declaration whether plaintiff, being able to seek relief than a mere declaration of title, omits to do so. However, in the present case, suit of the respondent is not only for declaration alone, but he has also filed suit for injunction, wherein two sorts of injunction are sought, that of restraining petitioner from carrying out construction and another for restraining petitioner from creating third party interest.

11] Assuming that respondent is not in possession of the suit property, in that case also, when he claims to be the owner, then it follows that he has right to claim injunction restraining the petitioner from carrying out construction or from creating third party interest therein. For seeking such relief, averments in the plaint about ownership and title over the suit property are sufficient. Hence, suit cannot be called as simpliciter for declaration. Therefore, bar of Proviso to Section 34 of the Specific Relief Act cannot be said to be attracted in this case at this initial stage atleast.

12] In view of the judgment of the Apex Court, relied upon by learned counsel for the petitioner, there may be possibility that at the end of the trial, respondent may not get necessary relief of

declaration and injunction on the count that he has not sought possession of the suit property. However, merely on that count, it cannot be said that suit itself is not maintainable as there is no cause of action to file suit. The aforesaid judgment of the Hon'ble Apex Court also does not lay down the wide proposition, which learned counsel for the petitioner advances that, under Order VII Rule 11(d) CPC, if in a suit for declaration and injunction, if plaintiff is not in possession of the suit property and he has also not asked for such possession, the plaint has to be rejected at the threshold itself. One cannot lose sight of the probability of plaintiff amending the suit subsequently for claiming such relief of possession. Be that as it may, plaint cannot be rejected on this count.

13] The trial Court has, even if not considered all these aspects, having regard to the legal position, discussed above, rightly dismissed the application filed by the petitioner for rejection of the plaint.

14] Hence no interference is warranted therein in the revisional jurisdiction of this Court.

15] Revision, therefore, stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]