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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.325 OF 2018 WITH
NOTICE OF MOTION (L) 1112 OF 2017

Union of India through
the Deputy Salt Commissioner ...Appellant
vs.
Suresh Kishanchand Melwani & Ors. ...Respondents

Ms S.I.Shah I/b S.I.Shah & Co. for the appellant
Mr.Chirag Balsara a/w Mr.D.V.Deokar and Mr.Pinkin
Mody I/b Parimal K. Shroff & Co. for the respondent
Nos.1 to 28.

CORAM : A.S.OKA, &
M.S.SONAK,JJ.
DATE : SEPTEMBER 18, 2018

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ORAL JUDGMENT: (PER A.S.OKA,J.)

1 Heard the learned counsel for the appellant and the learned counsel for the respondent Nos.1 to 28. The Respondent Nos.29 and 30 are the formal parties. Considering the narrow controversy involved in this appeal, the same is forthwith taken up for final disposal. The appellant is the plaintiff and the respondents are the defendants. For the sake of convenience, we are referring the parties with reference to their status before the learned Single Judge.

2 In the suit subject matter of this Appeal, a prayer is made a for declaration that the plaintiff is the owner of the suit land more

particularly described in the plaint. There is also a prayer made for passing a Decree for possession against the defendant Nos.1 to 28 and for mesne profits etc. The impugned order dated 17th October 2015 has been passed by the learned Single Judge on two Notices of Motion. Notice of Motion No.858 of 2012 was taken out by the plaintiff for temporary injunction. Notice of Motion No.1379 of 2012 was taken out by the defendant Nos.1 to 28 praying for rejection of the plaint by exercising the power under Rule 11 of Order VII of the Code of Civil Procedure, 1908 (for short "the said Code"). The prayer for rejection of the plaint was on the footing that on plain reading of the averments made in the plaint, the suit is barred by limitation. By the impugned order, the learned Single Judge disposed of Notice of Motion No.858 of 2012. The learned Single Judge did not consider the prayer made by the respondent Nos.1 to 28 for rejection of the plaint and proceeded to frame a preliminary issue on the bar of limitation.

3 The submission of the learned counsel for the appellant is that the Notice of Motion taken out by the plaintiff has been dismissed without considering the same on merits. The submission is that the Notice of Motion could not have been dismissed without considering the merits of the prayer for injunction. The learned counsel for the defendant Nos.1 to 28 supported the impugned order.

4 We have considered the submissions. We have
carefully perused the impugned order. In paragraph
2 of the impugned order, the learned Single Judge
has observed thus:

“2 The defendants have taken out Notice of Motion No.1379 of 2012 in the above suit seeking rejection of the suit under the provisions of Order 7 Rule 11 of the CPC of the Code of Civil Procedure being barred by law of limitation and for stay of further hearing of Notice of Motion No.858 of 2012 and the above suit. In view of the fact that Motion No.1379 of 2012 was taken out for the purpose of staying further proceedings in the suit and for seeking rejection of the claim on the ground of limitation, it is appropriate that the Motion be taken up first in point of time. Accordingly, I have proceeded for hearing the counsel for the parties on Notice of Motion No.1379 of 2012.”

5 To an extent the learned Single Judge is right when he preferred to hear the Notice of Motion for rejection of the plaint first, as there was a prayer made in the said Notice of Motion for stay of the suit and rejection of the plaint on the ground of bar of limitation. In paragraph 3 of the impugned order, the learned Judge expressed a view that in normal course, it would have been sufficient to frame a preliminary issue. However, he was of the view that detailed reasons will have to be assigned. In paragraphs 4 to 6, the learned Single Judge has noted the submissions on merits of both the Notices of Motion. In paragraph 7, the learned Single Judge specifically recorded the submission made by the learned counsel for the defendant Nos.1 to 28 that

as a preliminary issue has been raised, it is necessary that the same be framed before proceeding further. His submission is also recorded that the same will have to be decided before proceeding with the suit and granting interim relief. A submission is recorded that the mandatory provision of section 9A of the said Code will have to be invoked by framing a preliminary issue of jurisdiction. The finding in paragraph 10 clearly indicate that the learned Single Judge never intended to finally decide the Notice of Motion for injunction. While referring various contentions raised by the learned Additional Solicitor General of India (ASG) in support of the Notice of Motion for injunction, the learned Single Judge in paragraph 10 observed that those aspects will have to be gone into in detail at the time of hearing of Notice of Motion No.858 of 2012 and the suit itself. Further, the learned Single Judge observed that the defendants have raised an issue of limitation which cannot be treated as frivolous. In paragraph 11, the learned Single Judge observed that the pendency of the earlier Notice of Motion No.858 of 2012 and Notice of Motion No.1379 of 2012 for framing the preliminary issue will not curtail the rights of the plaintiffs to seek appropriate relief against any development at site. Taking the observations made in the impugned order as correct, there was no justification for disposing of the Notice of Motion for temporary injunction taken out by the plaintiffs. We may note here that under Rule 11 of

Order VII of the said Code, there is a power vesting in the Court to entertain a prayer for rejection of the plaint at any stage of the suit. It is well settled that while deciding the prayer for rejection of the plaint, only the averments made in the plaint are required to be considered. That exercise was not done by the learned Single Judge.

6 It is obvious from the findings recorded by the learned Single Judge that he exercised the power under section 9A of the said Code by framing a preliminary issue of limitation. By Maharashtra Ordinance No.XVIII of 2018, section 9A has been deleted. Sub-section 1 of section 3 of the said Ordinance provides that even if any evidence is adduced by the parties on the preliminary issue framed under section 9A, the same shall be considered by the Court along with other evidence, if any, led on the other issues in the suit, at the time of final hearing of the suit. In the present case, admittedly, the preliminary issue has not been decided. Now, in view of the mandate of sub-section 1 of section 3 of the said Ordinance, preliminary issue will have to be treated as an issue framed under Order XIV which will have to be decided along with the other issues. Nevertheless, the learned Single Judge will have to hear the Notices of Motion taken out by the plaintiff and the defendant Nos.1 to 28 on merits. As held earlier, the prayer for temporary injunction in the Notice of Motion taken out by the plaintiff has not been considered on

merits and in fact the observations in the impugned order show that the learned Single Judge intended to keep the said Notice of Motion pending. The prayer for rejection of the plaint has not been considered on merits and the said prayer will have to be considered in accordance with law.

7 We are sure that since the Notices of Motion are of the year 2012, necessary priority will be given by the learned Single Judge to the disposal of the said Notices of Motion.

8 Accordingly, we pass the following order:

(i) Preliminary issue framed under the impugned order shall be tried along with other issues at the time of final hearing of the suit;

(ii) Hence, the directions issued under clauses (ii) and (iii) of the operative part of the impugned order will not survive;

(iii) Notice of Motion No.858 of 2012 is restored to the file by setting aside clause (v) of the operative part of the order;

(iv) Now, Notice of Motion Nos.858 of 2012 and 1379 of 2012 shall be decided by the learned Single Judge in accordance with law;

(v) We make it clear that we have made no adjudication on merits of the controversy in the suit as well as both the Notices of Motions and all the questions are left open to be decided by the learned Single Judge in accordanced with law;

(vi) Appeal is partly allowed on above terms.

(M.S.SONAK, J.)

(A.S.OKA, J.)