

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 14.08.2018

Judgment Delivered on : 04.09.2018

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

O.S.A.No.211 of 2018
and
C.M.P.No.10401 of 2018

T.K.S.Pugazhendhi .. Appellant
Vs.

1. Kanishk Gold Private Limited,
having Regd. Off. at No.39, North Usman Road,
Prashanth Real Gold Tower,
7th Floor, T.Nagar, Chennai-600 017,
Represented by its Managing Director/Authorized Signatory
Mr.Boopesh Kumar Jain.

2. Mr.Boopesh Kumar Jain, S/o Bhoormal Jain,
Managing Director,
Kanishk Gold Private Limited,
Residing at The Art, 32 and 33, Kothari Road,
Nungambakkam, Chennai-600 034.

3. Neeta Boopesh Kumar Jain, W/o Boopesh Kumar Jain,
Director of Kanishk Gold Private Limited,
Residing at The Art, 32 and 33, Kothari Road,
Nungambakkam, Chennai-600 034.

4. State Bank of India, Overseas Branch,
Represented by its Assistant General Manager,
No.86, Rajaji Salai, Chennai-600 001.

.. Respondents

Original Side Appeal filed under Clause 15 of the Letters Patent and Order 36 Rule 1 of the Original Side Rules of this Court against the fair and decretal order dated 27.04.2018 passed by the learned Single Judge in Application No.2946 of 2018 in C.S.(Diary) No.15941 of 2018 on the file of this Court.

A.2946 OF 2018:

Application praying this court to grant leave to the applicant/plaintiff to institute the suit before this court for the properties described in the schedule in the suit situated outside the jurisdiction of this Hon'ble court.

For appellant : Mr.N.S.Nandakumar
For respondents : Mr.P.Solomon Francis for RR-1 to 3
Mr.M.L.Ganesh for R-4

JUDGMENT

R.SUBBIAH, J

This Original Side Appeal (O.S.A) has been filed against the fair and decretal order dated 27.04.2018 passed by the learned Single Judge in Application No.2946 of 2018 in C.S.(Diary) No.15941 of 2018 on the file of this Court, directing return of the plaint, by giving liberty to the appellant to re-present the same before the competent Court having jurisdiction over the matter, within a period of two months from the date of return.

2. The appellant herein is the plaintiff and the respondents herein are the defendants in the suit. The appellant/plaintiff has filed the said suit for the following reliefs:

(i) to declare the sale deed dated 29.12.2016, Registered as Doc.No.5058 of 2016 executed between the plaintiff and the first defendant in respect of the item Nos.1 and 2 of the suit properties, as null and void and not binding on the plaintiff in terms of Clause 6 of the Memorandum of Understanding (MoU), dated 27.12.2016 executed by the first defendant in favour of the plaintiff for treating the sale deed;

(ii) to declare the sale deed dated 30.12.2016, Registered as Doc.No.5075 of 2016 executed between the plaintiff and the first defendant in respect of the item Nos.3 and 4 of the suit properties, as null and void and not binding on the plaintiff in terms of Clause 6 of the MoU, dated 27.12.2016 executed by the first defendant in favour of the plaintiff for treating the sale deed;

(iii) to direct the defendants 1 to 3 to pay a sum of Rs.50,00,000/- as liquidated damages to the plaintiff; and

(iv) to direct payment of the costs of the proceedings as cause in the suit.

3. For easy reference, the rank of the parties are shown hereto as they are ranked in the suit as plaintiff and defendants.

4. For effective adjudication of this appeal, we are of the opinion that it would be appropriate to extract the relevant averments in the plaint:

(a) The plaintiff is doing Real Estate business of purchasing lands and laying out and developing them as plots and selling the same, apart from constructing apartments/flats and related activities. The plaintiff is carrying on his business in his proprietary concern of SP Enterprises and also in his own name. In the second week of December 2016, the plaintiff approached one leading finance agent Rajesh Bhatia, and handed over his business brochure to arrange finance for his business. The said finance agent arranged a meeting with the second defendant in the Accord Hotel, Bazulla Road, T.Nagar, Chennai in or about the third week of December 2016 and introduced the second defendant and told that the second defendant and his wife, the third defendant, are big jewellery merchants and are also having other business activities in an extensive manner and that they require an immovable property security for their short term credit facilities consummate with the value of the property offered as security.

(b) The first defendant-Company is a Private Limited Company and is represented by defendants 2 and 3 as husband and wife. The second defendant proposed that he will provide 25% of the market value of the property of not less than Rs.15 Crores in value as interest free loan, if such a property is offered as security in the name of the first defendant and they will execute agreement for providing interest free refundable loan and re-conveyance of the property to be offered as security after one year for the same consideration mentioned in the instrument with all indemnities for the right, title and interest to the property to be offered as security. The second defendant told that he and his wife, the third defendant, are owning the first defendant-Company. They have no real intention to purchase the suit property as absolute sale, except to use it for limited security purposes with the fourth defendant-Bank. The second defendant further represented that the fourth defendant-Bank and its officials are ready to release the funds on the basis of the arrangement.

(c) The plaintiff believed the representations and assurances of the second defendant and he told the second defendant that he is in possession and enjoyment of the suit properties, which could be offered for short duration and also told about certain loan commitments and pendency of registration of sale deeds in his name on the properties. The defendants 1 to 3 agreed for releasing the advances to conclude the contract as interest free loan. Accordingly, the first defendant represented by the second defendant, executed a comprehensive MoU on 27.12.2016 at Chennai to the plaintiff with mutual obligations and stipulation for interest free lending and to obtain conveyance deed from the plaintiff for the proposed credit facility to be obtained by the defendants 1 to 3. Few obligations to be performed by the plaintiff are also stated in the MoU. The plaintiff is given option to repay the interest free loan amount either in full or in part, and the defendants 1

to 3 assured by mutual consent to re-convey the suit properties after discharging the loans, if any obtained by them (vide Clause 13 of the MoU).

(d) The defendants 1 to 3 started releasing the funds from 29.12.2016 as their performance of the MoU through the fourth defendant-Bank. The defendants requested the plaintiff for executing the sale deeds dated 29.12.2016 and 30.12.2016 over the suit properties in terms of the MoU, dated 27.12.2016. The plaintiff realised that the fourth defendant-Bank is an active party for arranging the MoU and the suit sale deeds, which came to be sham and nominal deeds, to cover up the illegal financial dealings of the defendants 1 to 3 with the fourth defendant-Bank. The transfer of funds proves the privity of contract and secret understanding between the defendants 1 to 3 and the fourth defendant-Bank for creating suit sale documents and to give a colour of banking transaction by the fourth defendant. Hence, the plaintiff has filed the suit for the reliefs stated above.

5. The appellant/plaintiff has filed application seeking leave to institute the above suit within the jurisdiction of this Court, since the suit properties in item Nos.1, 2, 3 and 4 are situated outside the jurisdiction of this Court. It is stated by the plaintiff that part of cause of action arose outside the jurisdiction of this Court.

6. The respondents 1 to 3/defendants 1 to 3 have filed counter affidavit to the said application, stating that the nature of the suit filed by the appellant is one of the suit for land. The suit properties are situated outside the jurisdiction of this Court, and thereby, the suit is not maintainable before this Court.

7. The fourth respondent-Bank has also filed counter affidavit to the said application, stating that no cause of action much less part of cause of action has arisen before this Court for filing the present suit. Furthermore, the suit properties are situated outside the jurisdiction of this Court and the suit has to be filed only before the Court having territorial jurisdiction over the matter. The application seeking leave to file suit, lacks merits.

8. The learned Single Judge, after hearing the learned counsel for the parties, dismissed the application seeking leave to sue, by observing as follows:

"13. In view of the above said pronouncements and on a perusal of the reliefs sought in the plaint, it is revealed that the Plaintiff seeks to have control over the land. This effectively means that the suit is only for land and consequently, this court will not have jurisdiction to try the same. Consequently, the C.S.Diary No.15941 of 2018 is directed to be returned

to the plaintiff on proper acknowledgement and identification. The plaintiff is at liberty to re-present the same before the competent court having jurisdiction within a period of two months from the date of return. Accordingly, this application is dismissed. No costs."

Aggrieved by the above order passed by the learned Single Judge, the present O.S.A. is filed by the plaintiff.

9. Learned counsel appearing for the appellant/plaintiff submitted that the plaintiff is carrying on business in Real Estate for more than three decades. Due to recession in the Real Estate sector, few monetary dealings in respect of completion of purchase of properties and development of lands for lay-out and selling, are pending for the appellant. In such a situation, the appellant approached the financier, who introduced the second and third defendants, who are husband wife and Directors of the first defendant-Company, for finance. The first defendant-Company is having registered office at Chennai and carrying on business at Chennai. Therefore, the cause of action for the suit arose only within the jurisdiction of this Court. Hence, for the purpose of advancing loan, MoU, dated 27.12.2016 was entered into between the appellant/plaintiff and the first respondent/first defendant-Company at Chennai. It is a concluded contract signed by the second defendant for the first defendant-Company on the basis of the Board Resolution signed by the husband and wife as Directors. The contractual obligation for payment of interest free loan by the respondents 1 to 3 to the appellant is that the appellant has to offer his property for the respondents for his short term finance to be obtained.

10. Learned counsel for the appellant/plaintiff further submitted that the respondents 1 to 3/D1 to D3 have expressly made their intention that they proposed to offer the property as security in respect of credit facilities proposed to be sanctioned by the Bank/financial institution, after obtaining the registered sale deed in their favour. Therefore, no absolute sale is contemplated. In fact, no sale consideration was also passed. It is only a contract simpliciter. In this regard, learned counsel for the appellant/plaintiff invited the attention of this Court to Clause 6 of the MoU, which reads as follows:

"6. The Parties herein mutually confirm that in the event of default if any committed by the Party of Second Part in making payment of 25% of total market value of the schedule mentioned property, the execution and registration of sale deed to be executed by the Party of First Part in favour of Party of Second Part shall be construed as null and void instrument and

shall have no effect as absolute sale deed in common parlance."

11. It is the further submission of the learned counsel for the appellant/plaintiff that the contractual relationship did not create title to the respondents in respect of the suit properties and it became a contingent contract of sale. For implementation of the contract, the defendants 1 to 3 did not disclose the Banks/financial institutions through which the defendants 1 to 3 proposed to pay interest free loan and proposed to obtain short term credit. The contract simpliciter does not confer title of the respondents 1 to 3 in respect of the suit properties of the appellant for more than one year and did not claim any charge on the suit properties by the Bank. Moreover, no relief is claimed as against the fourth defendant/Bank. Therefore, absolutely there is no question of transfer of title involved in this case, and hence the entire cause of action in respect of the loan transaction had taken place within the jurisdiction of this Court. In this regard, the learned counsel for the appellant/plaintiff relied on a decision of the Supreme Court reported in 2015 (8) SCC 219 (Excel Dealcomm Private Limited Vs. Asset Reconstruction Co (India) Ltd.), wherein the Apex Court observed as follows:

"13. A suit for land is a suit in which the relief claimed relates to the title or delivery of possession of land or immovable property (see Adcon Electronics (P) Ltd. VS. Daulat - 2001 (7) SCC 698). Further, it is an established rule that to determine whether it is a suit for land, the court will look into barely the plaint and no other evidence (Indian Mineral & Chemicals Co. Vs. Deutsche Bank - 2004 (12) SCC 376). ... "

12. Relying on the abovesaid decision of the Supreme Court, learned counsel for the appellant/plaintiff submitted that a bare reading of the plaint and the reliefs prayed for in the suit, shows that it is only for cancellation of deed as per Clause 6 of the MoU, dated 27.12.2016, and hence, on the basis of the above ratio, the present suit cannot be considered as one for land. In support of his submissions, learned counsel for the appellant/plaintiff relied on various decisions.

13. The sum and substance of the contentions of the learned counsel for the appellant is that the suit is filed only for declaration and there is no question of control over the land involved in this case, and it is his assertive submission that the suit is not one for land, and therefore, this Court has jurisdiction to entertain the suit. It is his further submission that the nature of transaction is commercial in nature, and

therefore, the suit can be entertained only in the Commercial Division of this Court. Hence, he prayed for setting aside the impugned order passed by the learned single Judge.

14. Countering the above submissions, learned counsel for the respondents 1 to 3 submitted that the transaction between the plaintiff and the respondents 1 to 3/D1 to D3 is only sale transaction and is a mere transfer of sale of the suit properties and there is no commercial transaction involved in this case between the plaintiff and the defendants 1 to 3. The alleged dispute involves immovable properties and the same cannot be termed to be commercial transaction. It is purely a suit for land situated outside the jurisdiction of this Court. Therefore, the plaintiff has to file the suit within the jurisdiction where the suit properties are situated. In support of his submissions, learned counsel for the respondents 1 to 3 relied on various decisions.

15. Learned counsel for the fourth respondent/fourth defendant-Bank submitted that although the appellant has filed the suit for declaration that the sale deeds executed in favour of the respondents 1 to 3 are void and not binding on the appellant in terms of Clause 6 of the unregistered MoU, dated 27.12.2016, yet the appellant has not sought for any relief as against the fourth respondent, despite knowing the fact that the suit properties are offered as collateral security for the credit facilities extended by SBI consortium banks running into more than Rs.842.47 Crores as on 31.01.2018 in favour of the respondents 1 to 3. Further, the appellant has not sought for any relief against the fourth respondent-Bank to declare that the equitable mortgage executed by the first respondent is null and void. As per Section 34 of the SARFAESI Act and Section 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, the Civil Courts have no jurisdiction to try the suit in relation to recovery matters by the secured creditors. Further, Section 35 of the SARFAESI Act over-rides all the other Acts and hence, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, will not outplay the SARFAESI Act. In fact, the fourth respondent has already taken symbolic possession of the secured property as early as on 22.03.2018 by causing possession notice under Section 13(4) of the SARFAESI Act and any person aggrieved by the SARFAESI Act measures, can file SARFAESI Application under Section 17 of the SARFAESI Act before the Debts Recovery Tribunal. Hence, the appellant is precluded from raising the legal plea that only Civil Court has got jurisdiction to try the declaratory relief. The declaratory relief as sought for in the suit will have a bearing on the suit properties. Under such circumstances, since the suit properties fall outside the jurisdiction of this Court, the suit is not maintainable. In support of his submissions, learned counsel for the fourth respondent-Bank relied on various decisions.

16. Keeping the above submissions made by the learned counsel appearing for the parties, we have carefully perused the materials available on record.

17. In view of the above submissions made by the learned counsel appearing for the parties, the only question that has to be considered in this appeal is as to whether the suit filed by the appellant/plaintiff is a suit for land, and if so, whether this Court has got jurisdiction to entertain the suit.

18. It is the submission made by the learned counsel for the appellant/plaintiff that the subject matter of the suit is only commercial dispute, and therefore, it cannot be construed as a suit for land. In the MoU, the defendants 1 to 3 have expressly made their intention that they proposed to offer the properties as security in respect of the credit facilities proposed to be sanctioned by the bank/financial institution after obtaining registered sale deed in their favour, and therefore, no absolute sale is contemplated. Moreover, no sale consideration is passed and that being so, this Court has got jurisdiction to try the suit. Therefore, the appellant/plaintiff filed Judge's Summons with affidavit under Order 3 Rule 1 read with Order 14 Rule 8 of the Original Side Rules of this Court to institute the suit under commercial dispute of the cause of action with the proposed plaint in C.S.D.No.15941 of 2018 under Order 4 Rule 1 of the Original Side Rules of this Court read with Order 7 Rule 1 CPC and Section 31 of the Specific Relief Act and Section 7 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act.

19. Before dealing with the above question, the nature of the suit has to be decided only based on the prayer sought for in the plaint, namely for declaratory relief as quoted supra.

20. Ultimately, after trial, if the declaration as sought for by the plaintiff is granted and if the suit is decreed as prayed for by the plaintiff, then it will alter the title of the suit properties. Therefore, the alleged dispute between the plaintiff and the defendants 1 to 3 with regard to the immovable properties, cannot be termed to be commercial transaction. In this regard, it would be appropriate to examine the meaning of the Commercial Dispute as per Section 2(1)(c) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, which reads as follows:

"Section 2: Definitions: (1) In this Act, unless the context otherwise requires,--

.. ..

(c) "Commercial dispute" means a dispute arising out of--

(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;

- (ii) export or import of merchandise or services;
- (iii) issues relating to admiralty and maritime law;
- (iv) transactions relating to aircraft, aircraft engines, aircraft equipments and helicopters, including sales, leasing and financing of the same;
- (v) carriage of goods;
- (vi) construction and infrastructure contracts, including tenders;
- (vii) agreements relating to immovable property used exclusively in trade or commerce;
- (viii) franchising agreements;
- (ix) distribution and licensing agreements;
- (x) management and consultancy agreements;
- (xi) joint venture agreements;
- (xii) shareholders agreements;
- (xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;
- (xiv) mercantile agency and mercantile usage;
- (xv) partnership agreements;
- (xvi) technology development agreements;
- (xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;
- (xviii) agreements for sale of goods or provision of services;
- (xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;
- (xx) insurance and re-insurance;
- (xxi) contracts of agency relating to any of the above; and
- (xxii) such other commercial disputes as may be notified by the Central Government.

Explanation:- A commercial dispute shall not cease to be a commercial dispute merely because--

- (a) it also involves action for

recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;

(b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions. "

21. A reading of the definition of "commercial dispute" extracted above, shows that the agreements relating to immovable properties used exclusively in trade or commerce alone will fall within the purview of the commercial dispute. In the case on hand, we do not find any commercial nature of the dispute. The prayer sought for declaration of sale deeds as null and void, will not fall within the purview of the commercial transactions.

22. Out of the decisions relied on by the learned counsel appearing for the parties, it is useful to place reliance on a decision of a Division Bench of this Court reported in 2006 (1) CTC 270 (Thamiraparani Investments Pvt. Ltd. Vs. Meta Films Pvt. Ltd.), wherein it was held as follows:

"12. Further, a reading of paragraph 20 of the plaint clearly shows that the allegation of the plaintiff is that since the defendant is encroaching upon the suit "A" schedule property which is beyond the territorial jurisdiction of this Court, the plaintiff has sought for a decree for permanent injunction. It is not disputed that the registered office of the defendant is at No.157/1, G.N.T.Road, Chinnambedu Post, Kavarapet-601 206, Tiruvallur District, which is situated outside the jurisdiction of this Court and the defendant has no office within the jurisdiction of this Court. The present suit being one for bare injunction, it is a suit for land. In other words, it is a suit for the purpose of acquiring possession of or safeguarding possession of or establishing title to or a right in land viz., the suit schedule property. It is well settled that the expression "suit for land" should not be confined and limited to suits for recovery of possession of land or to obtain a declaration of title to land only. The present suit being one for control of land

lying outside the jurisdiction of this Court, this Court has no jurisdiction to entertain the suit and consequently, the learned single Judge has rightly revoked the leave."

23. A reading of the above judgment of the Division Bench of this Court shows that the suit in this case is only for land. In this regard, it is also worthwhile to notice a recent judgment of a Division Bench of this Court in O.S.A.Nos.104, 105, 110, 111, 122 and 123 of 2017, dated 23.07.2018 (M/s.Harsha Estates, Rep. by its Managing Partnership Dr.M.Shivabhagyam and others Vs. Dr.P.Kalyana Chakravarthy and others), wherein it has been held as follows:

"10. An analysis of all the above judgments brings out the following principles of law to decide whether a suit is for "suit for land".

(i) In a suit the reliefs claimed, if granted, would directly affect title to or possession of the land it will be "suit for land".

(ii) If the object of the suit is something different, but involves the consideration of the question of title to land indirectly, it will also be "suit for land".

(iii) A suit where the claim is for recovery of possession or control of land, it will be "suit for land".

(iv) In a suit where determination of any right or interest over an immovable property is involved, it will be "suit for land".

(v) A suit for bare injunction restraining the defendant from interfering with the possession and enjoyment of the property by the plaintiff, will be "suit for land".

(vi) In a suit for bare injunction where the plaintiff seeks to restrain the defendant from dealing with the suit property by creating a charge or alienating or encumbering the property, will also fall

within the ambit of a "suit for land". This Court in M/s.Raja Holdings, Financiers and Merchants, Partnership Firm represented by its Partner Lalitha Raja--in O.S.A.No.2/2018, dt.10.07.2018 has considered this issue in detail.

vi (a) In a suit for Specific Performance of an agreement of sale wherein the relief of delivery of possession of the suit property has been specifically claimed, it will be "suit for land".

vi (b) In a suit for Specific Performance where the suit is only for enforcement of the agreement simpliciter without seeking for any other relief, the same will also fall within the ambit of "suit for land" since the relief of possession is inherent in the relief of Specific Performance.

vi (c) In a suit for Specific Performance, where the suit is only for enforcement of the agreement simpliciter and the plaintiff specifically claims to be in possession of the suit property and there is no denial of the said fact by the defendant, the said suit will not come within the ambit of "suit for land".

vi (d) In a suit for Specific Performance where the plaintiff apart from seeking to enforce the agreement also seeks a relief of injunction against the defendant, not to interfere with his possession and enjoyment or not to create any charge or encumbrance or not to alienate the suit property, such suits will also come within the ambit of "suit for land".

24. In this case, the suit is not coming within the ambit of commercial transactions. It is a suit for land. In the abovesaid recent judgment of a Division Bench of this Court in O.S.A.Nos.104, 105, 110, 111, 122 and 123 of 2017, dated 23.07.2018, it has been held that if the object of the suit is something different, but involves the consideration of the question of title to land indirectly, it will also be "suit for land".

25. As stated earlier, if the declaratory relief as sought in this case is granted, it will alter the title to the suit properties, and it is the suit for control of land. Under such circumstances, when the suit properties are situated outside the jurisdiction of this Court, this Court will not have jurisdiction to entertain the suit. Thus, we do not find any infirmity in the impugned order passed by the learned Single Judge. Accordingly, the appeal is dismissed. No costs. Consequently, C.M.P. is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

TO:

1.The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+1cc to Mr.N.S.Nandakumar, Advocate sr.no.60752
+1cc to Mr.P.Solomon Francis, Advocate sr.no.60772
+1cc to Mr.M.L.Ganesh, Advocate sr.no.61312

O.S.A.No.211 of 2018

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