

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL REVISION APPLICATION NO. 21 OF 2019

MALINI MAULI USKAIKAR AND 4 ORS., ... Petitioners

Versus

MOHAN NAMDEV USKAIKAR AND 14 ORS., ... Respondents

Adv. Nilesh V. S. Shirodkar for the Applicant.

Adv. Ajit R. Kantak with Adv. R. Kantak for Respondent nos.1,2, 4 To 7, 9 to 11.

Coram:- C. V. BHADANG, J.

Date:- 30th July, 2019.

Oral Order:

The challenge in this Revision application is to the order dated 16/2/2019 passed by the learned Senior Civil Judge at Panaji in Special Civil Suit no.14/2013/A. By the impugned order, an application for rejection of the plaint filed by the petitioner no.5 (original defendant no.7) for rejection of the plaint has been dismissed.

2. The brief facts are that, the respondents have filed the aforesaid suit for partition and separate possession along with some consequential reliefs against the petitioners and others. The respondents nos.10 and 11, (who are the plaintiff nos.10 and 11) are the purchasers of the share of the respondent

nos.1 to 9, who are the plaintiff nos.1 to 9. The only contention raised on behalf of the petitioners is that a specific portion admeasuring 3710 sq.mts could not have been transferred by the respondent nos.1 to 9 in favour of the respondent nos. 10 and 11. Admittedly, the petitioner no.5 (the defendant no.7) has filed Special Civil Suit no.5/12/B for preemption and for declaration of the sale deed dated 27/7/2006 executed by the respondent nos.1 to 9 in favour of the respondent nos.10 and 11 as null and void.

3. The petitioner no.5 filed an application for rejection of the plaint on the ground that the plaint does not disclose cause for action and it is barred by law namely, Article 2177 of the Portuguese Civil Code. The learned trial court by the impugned order has dismissed the application.

4. I have heard Mr. Shirodkar, the learned counsel for the petitioners and Mr. Kantak, the learned counsel appearing for the respondents. Perused record.

5. Mr. Shirodkar, the learned counsel for the petitioners has submitted that the respondent nos.10 and 11 (the original plaintiffs nos.10 and 11) cannot be joined as plaintiffs along with the original plaintiffs nos.1 to 9 in filing the suit for partition, in as much as the respondent nos.10 and 11 are

strangers and the sale deed dated 27/7/2006 executed by the plaintiff nos.1 to 9 in respect of a specific share, is in breach of the provisions of Article 2177 of the Portuguese Civil Code. For this purpose reliance is placed on the decision of this Court in the case of **Cruz Fernandes and others Vs. Gregorina Estefania Sofia Fernandes alias Sofia Fernandes and others 1991 (4) Bom. C.R. 400**. It is submitted that the respondent nos.10 and 11 have no cause of action to file the suit for partition. The learned counsel for the petitioner submitted that the trial court has erroneously observed that the sale deed is not challenged .

6. Mr. Kantak, the learned counsel for the respondents has supported the impugned order. It is submitted that at the stage of considering a prayer for rejection of the plaint, the Court is only required to look into the contents of the plaint and not any probable defence. It is pointed out that the petitioners appears to have no objection for the plaintiff nos.1 to 9 continuing to prosecute the suit. It is pointed out that the only objection is as regards the plaintiff nos.10 and 11 being joined as plaintiffs in the suit. It is pointed out that plaint cannot be rejected only qua some of the plaintiffs and thus the application under Order VII Rule 11 of C.P.C filed by the petitioner no.5 is entirely misplaced.

7. I have carefully considered the circumstances and the submissions made. At the out set it is necessary to note that the petitioners have no objection for the original plaintiff nos.1 to 9 continuing to prosecute the suit for partition, albeit subject to the claim of the petitioners for preemption. Both the suits namely Special Civil Suit No.14/2013/A and Special Civil Suit No.5/2012/B are now clubbed and are being tried by the same Court. It is evident that the petitioners cannot seek rejection of the plaintiff only qua some of the plaintiffs. The learned counsel for the respondents in my considered view is right that the application under Order VII Rule 11 of C.P.C is misconceived. It is not in dispute that the plaintiffs nos. 1 to 9 have 3/5th share, while the petitioners have 1/5th share in the suit property. Thus it cannot be accepted that the plaint which is filed in which the plaintiff nos.1 to 9 are also the co- plaintiffs have no cause of action to file the suit. The contention based on Article 2177 also in my considered view cannot be gone into at this stage, as that is an issue which would essentially arise in the suit in which the petitioners are seeking to enforce their preemption rights.

8. I have carefully gone through the impugned order and I find that it does not suffer from any infirmity so as to require interference.

9. It is true that the trial court has observed that there is no challenge at

the instance of the petitioners to the sale deed dated 27/7/2006 in Special Civil Suit no.5/2012/B which appears to be not correct, as the said sale deed is indeed challenged in the said suit. However, that alone is not sufficient to reject the plaint in Special Civil Suit no.14/2013/A. I have carefully gone through the impugned order and I find that the ultimate finding of dismissal of the application for rejection of the plaint does not suffer from any infirmity so as to require interference. The Civil Revision application is dismissed with no order as to costs. Rival contentions of the parties on merits in the suit are left open.

C. V. BHADANG, J.

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