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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.456 OF 2016

Yashwant Baban Nighut

..Petitioner.

V/s.

Baliram, Kuka Patil & Ors.

..Respondents.

Mr.Dilip Bodake I/b. Ganesh S.Shelar for the petitioner.

Mr.Vivek Salunkhe with Vishal Jathar i/b. MDB & Partners for respondent No.25.

CORAM : M.S.SONAK, J.

DATE : APRIL 5, 2019

ORAL JUDGMENT

Heard Mr.Bodake, learned counsel for the petitioner and Mr.Salunkhe, learned counsel for respondent No.25.

2. On August 18, 2016 this Court made the following order:-

“The learned Counsel for the Petitioner submits that the reliance placed by the learned Civil Judge on the decision of this Court in the case of Prism Reality, Pune v/s. Govind Yashwant Khalade and Ors reported in 2015(2) Mh. L.J. 472, is misplaced as is misplaced as in that case what was challenged was a sale deed, which is not the present case and therefore, the provisions of Section 6(iv)(ha) of Bombay Court Fees Act are not applicable.

2. *Issue notice to the unrepresented Respondents, returnable*

on 19 September 2016. In addition, the Petitioner is permitted to serve private notice through Registered Post A.D./Speed Post/Fax and file affidavit of service before the returnable date. Parties are put to notice that depending upon the time available, the Court will take up the Writ Petition for final disposal at the admission stage.”

3. Mr.Bodake, learned counsel for the petitioner states that the respondents are served. He also points out that the impugned order has been made on the application taken out by respondent No.25, who is now represented by Mr.Salunkhe.

4. Rule. Rule, made returnable forthwith by consent and at the request of learned counsel for the parties.

5. Challenge in this petition is to the order dated October 29, 2015 made by the learned trial Judge, the operative portion of which reads as follows:-

“1. The plaintiff is directed to make proper valuation of the suit and accordingly, pay requisite Court Fees under the provisions of section 6(iv) (ha) of the Bombay Court Fees Act, within one month from the date of this order, failing to which suit will be dismissed by passing order below Exh.1.

2. On compliance of above directions, keep the matter for further order according to law. ”

6. In the present case, the petitioner, the original-plaintiff, has prayed for the following reliefs in prayer clause (b) :-

“b) It may further be declared that the agreement of development and irrevocable power of attorney dtd. On 15-1-2008 executed by and between the defendant No.1 to 24 and the defendant No.25 and 26 is also illegal and not binding on the plaintiff. ”

7. The petitioner, at paragraph 15 of the plaint has valued the suit in the following manner:-

“15. The plaintiff submits that all the suit lands are agricultural lands therefore the total annual assessment of the same multiplied by Rs.250/- will be value of the suit lands for the purpose of court fee and jurisdiction. Even though the plaintiff has only one half interest in the same, by way of abundant caution value of the suit at Rs.1000/- an affixed the relevant Court fee of Rs.200/- thereto. ”

8. Although, the averments in paragraph 15 as aforesaid are not quite happily worded, upon consideration of the relief in terms of prayer clause (b), it is evident that the petitioner has sought for declaration in respect of the agreement of development by irrevocable power of attorney dated January 15, 2008 executed between defendant Nos.1 to 24 and defendant Nos.25 and 26. From this, it is quite clear that the petitioner-plaintiff is not himself a party to this agreement or the power of attorney. This important distinction has escape the attention of the learned trial Court who has directed the petitioner to

value the suit under the provisions of section 6(iv)(ha) of the Maharashtra Court Fees Act ('the Act' for short).

9. Section 6(iv)(ha) of the Act pertains to suits for avoidance of sale, contract for sale, etc. This provision states that in a suit for declaration that any sale, or contract for sale or termination of contract for sale of any movable or immovable property is one half of *ad valorem fee* leviable on the value of the property is required to be paid.

10. This provision is however attracted to a situation where the party to a document seeks its avoidance. In the present case, the petitioner is admittedly not a party to the document.

11. Similar issue arose in the case of *Surhid Singh alias Sardol Singh V/s. Randhir Singh and others*¹ where, the declaration applied for was that agreement of sale is illegal and not binding upon the plaintiff. The Apex Court distinguished a suit for injunction and for declaration that an agreement is not binding upon the plaintiff. At paragraphs 7, this is what the Hon'ble Apex Court has observed :-

"7. Where the executant of a deed wants to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out

¹ (2010) 12 SCC 112

by the following illustration relating to 'A' and 'B' two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non-binding/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs.19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B', a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv) (c) of the Act."

12. On the basis of the aforesaid, it is quite obvious that the view taken by the trial Judge cannot be sustained, because, in the situation in which we are concerned, there was no question of requirement of the petitioner to make valuation and pay Court fees under the provisions of section 6(iv)(ha) of the Act.

13. In fact, the view taken by learned trial Court is contrary to

the law laid down in *Shri Rohidas Chandrakant Ubale V/s. Smt. Maya Ramdas Ubale & Ors* [**Writ Petition No.5945 of 2014 decided on September 3, 2014**].

14. Accordingly, the impugned order is liable to be set aside and hereby set aside.

15. Mr.Salunkhe, however, points out that the petitioner in this case has even otherwise inadequately valued the suit. He submits that since it is the case of the petitioner that value of the Court fees were required to be paid under section 6(iv)(j) of the Act, the petitioner should have valued the suit at Rs.69,00,000/- since that was value reflected in the agreement which the petitioner seeks to avoid. Mr.Salunkhe submits that section 6(iv)(j) of the Act applies only where the subject matter of the dispute is not susceptible to monetary valuation. He submits that in the present case, the subject matter of the dispute is susceptible to monetary valuation. He, therefore, argued that this issue of valuation be kept open to be decided along with other issues.

16. Mr.Bodake, learned counsel for the petitioner also agrees that this issue shall be framed and decided with all other issues in the suit so that both the parties have opportunity to lead evidence on the aspect of valuation.

17. In the peculiar facts of the present case, the course

suggested by learned counsel for the parties can be adopted by learned trial Judge. However, if the learned trial Judge comes to a conclusion that the subject matter of the suit ceases his pecuniary jurisdiction, then, the learned trial Judge would be free to make appropriate orders as permissible in law.

18. Accordingly, this petition is partly allowed. The impugned order is set aside. However, the issue of valuation has to be decided afresh as proposed by learned counsel for the parties.

19. The interim order granted earlier is vacated.

20. The parties to appear before the learned trial Judge on April 16, 2019 at 11.00 a.m. and file an authenticated copy of this order.

21. There shall be no order as to costs.

22. All concerned to act on the basis of an authenticated copy of this order.

(M.S.SONAK, J.)