

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

MISC. CIVIL APPLICATION NO. 24 OF 2019
WITH
CIVIL APPLICATION NO. 336 OF 2019

Jagdish Ramdhan Singh ... Applicant
V/s.

Keki Rattansha Kalapesi (since deceased)
& Ors. ... Respondents

Mr. Prerak Sharma a/w Niranjan Amin I/b B. Amin & Co. for the Applicant.

Mr. Gaurav Mehta a/w Yogesh Gaikwad, Ms. Anasamah Sayed I/b M/s. Bilawala & Co. for the Respondent Nos. 2A, 2B-(i), 2(B)(iii), 2C, 2D, 2E and R-3.

CORAM: K.K.TATED, J.
DATED : 23/09/2019

P.C.

1 Heard learned Counsel for the parties.

2 By this Misc. Civil Application under Section 24 of the Code of Civil Procedure, 1908, the Applicant original Plaintiff is seeking transfer of his suit No. 7581 of 1981 (old No. 1065 of 1981) from Bombay City Civil Court at Bombay to High Court (Original Side) for hearing and final disposal along with suit No. 4060 of 2001 filed by the Respondent Nos. 2 and 3.

3 The learned Counsel for the Applicant submits that initially the Applicant filed suit No. 1065 of 1981 before this Court on original side in respect of land bearing Survey No. 37 and 42 admeasuring about 2,79,994 sq. yards equivalent to 2,34,102.97

sq. meters situated at Charkop in Borivali Taluka, Mumbai – 400 067 for specific performance of agreement dated 28.07.1977 and the Agreement of renewal dated 29.05.1980. He submits that during the pendency of the said suit, they filed application for amendment to seek some reliefs against Respondent Nos. 2 and 3. He relies on prayer clauses in that suit, which reads thus:

“(a) that it be declared by this Hon’ble Court that the agreement dated 28th July 1977 exhibit ‘B’ to the plaint and the agreement of renewal dated 29th May 1980 exhibit ‘C’ to the plaint are valid, subsisting and binding on defendant no.1;

(a) (i) that it be declared by this Hon’ble Court that the said alleged Deed of Assignment alleged to have been executed on 31st December, 1981 by Defendant No.1 and confirmed by Defendant No. 2 in favour of Defendant no. 3(Exhibit ‘D-1’ to the plaint) is executed as aforesaid with the full knowledge by the Defendants of the rights of the Plaintiff under the Said previous valid, and subsisting Agreement dated 28th July, 1977 (Exhibit ‘B’ to the Plaint) and the Agreement for Renewal dated 29th May, 1980 (Exhibit ‘C’ to the Plaint) and that the said alleged Deed of Assignment dated 31st December, 1981 executed by Defendant No.1 and confirmed by Defendant No.2 (Exhibit ‘D-1’ to the Plaint) in favour of Defendant No. 3 is sham, bogus, concocted, fabricated and got up collusively, illegal, null and void and not binding on the Plaintiff and that the said Deed of Assignment does not effect or convey any right, title or interest in the said property in favour of Defendant No. 2 and/or Defendant No. 3;

(a) (ii) That it may be declared by this Hon’ble Court that the alleged Deed of Assignment dated 31st December 1981 (Exhibit ‘D-1’ to the Plaint) and/or any duplicate or authenticated copy thereof to the delivered up as the case may be and be cancelled by and under the orders and direction of this Hon’ble Court;

(a) (iii) That it may be declared by this Hon’ble Court that the Plaintiff is entitled in the alternative to a declaration that the alleged Deed of Assignment dated

31st December, 1981 (Exhibit 'D-1' to the Complaint) or any duplicate or authenticated copy thereof is validly avoided from the date of its alleged execution or from such other date as this Hon'ble Court may deem fit;

(b) that defendant no. 1 be ordered and decreed to specifically perform the said agreement for sale and for that purpose to execute a deed of conveyance, in favour of the said Amir Nensey as the nominee of the plaintiff and to execute all other deeds and documents that may be necessary for the said purpose'

(b) (i) Defendant Nos. 2 and 3 be ordered and decreed to specifically perform the said previous, valid and subsisting Agreement dated 28th July, 1977 (exhibit 'B' to the Complaint) and the Agreement for Renewal dated 29th May 1980 (Exhibit 'C' to the Complaint) in favour of the Plaintiff and/or his nominee or nominees and that Defendant Nos. 2 and 3 do hand over vacant and peaceful possession of the said property to the Plaintiff and/of his nominee or nominees and to do all other necessary things for due completion for sale;

(b)(ii) For an order and perpetual injunction of this Hon'ble Court restraining the Defendants, their servants and agents from in any manner dealing with, disposing off, transferring, alienating or parting with possession of or inducting any third party in respect of the said property alleged to have been assigned/transferred as aforesaid;

(c) that in the alternative to prayers (a) and (b)

(i) that the defendant no.1 be ordered and decreed to pay to the plaintiff a sum of Rs. 2,27,750/- as per particulars exhibit Exh. E to the complaint and further interest on the principal sum of Rs. 1,50,000/- at the rate of 18% per annum from the date of the suit till payment or realisation;

(ii) that it may be declared by this Hon'ble Court that the amount and interest mentioned in prayer (c)(i) above is validly secured in favour of the plaintiff by a statutory charge on the said immovable property more

particularly described in exhibit 'A' to the plaint;

(iii) that defendants be ordered to pay to the plaintiff the sum of Rs. 9,00,000/- as per particulars exhibit 'F' to the plaint with interest thereon at the rate of 18% per annum from the date of the suit till payment or realisation;

(iv) that in the even of defendants committing default in payment to the plaintiff of the amount and interest mentioned in prayer (c) (i) on or before the date to be fixed by this Hon'ble Court, the Commissioner for Taking Accounts or the Court Receiver do sell the said immovable property more particularly described in exhibit 'A' to the plaint by and under the decree and directions of this Hon'ble Court by public auction or private treaty and do apply the net sale proceeds thereof in or towards the satisfaction of plaintiff's claim mentioned in prayers (c) (i) and (c) (ii) above.

(v) that in the event of the said immovable property more particularly described in exhibit 'A' to the plaint being put up for sale by public auction, liberty be granted to the plaintiff to bid there at and in the event of the plaintiff being declared the purchaser thereof, further liberty be granted to the plaintiff to set-off the purchase price against the plaintiff's claim mentioned in prayers (c)(i) and (c) (iii) above;

(d) that pending the hearing and final disposal of the suit Court receiver or some other fit and proper person be appointed as receiver of the said immovable property more particularly described in exhibit 'A' to the plaint with all powers under Order XL Rule 1 of the Code of Civil Procedure;

(e) that pending the hearing of final disposal of the suit, defendants by himself, his servants and agents be restrained by an order and injunction of this Hon'ble court from selling to defendant no. 2 or to any other person or from disposing of, encumbering, mortgaging or otherwise dealing with the said immovable property or any part thereof or from parting with possession thereof or creating any tenancy or licence or any other rights in respect of the said immovable property more particularly described in exhibit 'A' to the plaint or any part thereof;

(e)(i) That pending the hearing and final disposal of the suit the defendants their servants and agents be restrained by an order and injunction of this Hon'ble Court from in any manner dealing with, disposing off, transferring, alienating or parting with possession of or inducting any third party in respect of the said property alleged to have been assigned/transferred as aforesaid;
(f) for ad-interim reliefs in terms of prayers (d) and (e) (e)(i) above;
(g) that the defendants be ordered and decreed to pay to the plaintiff the costs of the suit;
(h) for such further and other reliefs as the nature and circumstances of the case may require.”

4 The learned Counsel for the Applicant submits that by prayer clause a(i), a(ii), a(iii), b(i) and b(ii) Applicant is seeking specific relief against the Respondent Nos. 2 and 3 in respect of the same suit property.

5 The learned Counsel for the Applicant submits that Respondent Nos. 2 and 3 also filed suit No. 4060 of 2001 before this Court at original side on 20.10.2001 in respect of same suit property for declaration that they are absolute owners of the same. Prayer clauses of the said suit reads thus:

“(a) that this Hon'ble Court will be pleased to declare that the Plaintiffs are the absolute owners of the suit lands bearing Survey No. 37 admeasuring 22 acres 6 gunthas and Survey No. 42 admeasuring 35 acres 28 gunthas totalling 57 Acres 34 gunthas situate at village Charkop, Taluka Borivali, Mumbai and more particularly described in the Schedule being Exhibit 'A' hereto and the Defendants 1 to 4 or any of them have no rights, title or interest therein or in any part thereof;

(b) that this Hon'ble Court be pleased to declare that the Order dated 5th June 1995 (being Exhibit 'M' hereto) passed by the Tahsildar, (Borivli), Order dated 15th January 1996 (being Exhibit 'O' hereto) passed by the

addl. Collector and Order dated 24th November 2000 (being Exhibit 'P' hereto) passed by the Additional Commissioner do no create any right, title or interest of any nature whatsoever in favour of Defendants 1, 2 and 3 and/or any one of them in the suit lands or any part thereof;

(c) that this Hon'ble Court be pleased to declare that Defendants No. 1 to 4 have no right of any kind in the suit lands by virtue of any document or orders of revenue authorities or otherwise howsoever;

(d) that the Defendants No. 1, 2, 3 and 4 both by themselves, their servants and agents be restrained by a perpetual order and injunction or this Hon'ble Court from in any manner (i) claiming any right, title or interest of any kind in the suit lands and (ii) from entering upon or trespassing on or interfering with or disturbing the Plaintiffs' exclusive use and possession of the said suit lands or any part thereof;

(e) that pending the hearing and final disposal of the suit this Hon'ble Court may be pleased to restrain Defendants No. 1 to 4 by themselves, their servants and agents by a temporary order and injunction from in any manner (i) claiming any right, title or interest of any kind in the suit lands and (ii) from entering upon or trespassing on or interfering with or disturbing the Plaintiffs' exclusive use and possession of the said suit lands or any part thereof;

(f) interim and ad-interim reliefs in terms of prayers (e);

(g) costs of the suit be provided for;

(h) for such further and other reliefs as the nature and circumstances of the case may require.”

6 The learned Counsel for the Applicant submits that because of change of pecuniary jurisdiction of the Bombay City

Civil Court at Bombay the suit filed by the Applicant bearing No. 1065 of 1981 was transferred for hearing and final disposal to the Bombay City Civil Court at Bombay and renumbered as Suit No. 7581 of 1981.

7. The learned counsel for the applicant submits that the Applicant preferred Notice of Motion No. 2417 of 2016 in suit no. 1065 of 1981 for re-transferring the said suit to the High Court at original side for hearing along with suit No. 4060 of 2001. He submits that Notice of Motion was allowed by this Court by order dated 07.08.2016. He submits that the said order was challenged by Respondent Nos. 2 and 3 by preferring Appeal No. 25 of 2018. He submits that at the time of hearing of the said Appeal, they withdrawn Notice of Motion No. 2417 of 2016 with liberty to file appropriate proceeding before this Court. Hence, the Applicant filed the present application under Section 24 of CPC for the same reliefs. He submits that issue involved in both the matters are identical. He submits that the Applicant, by his suit No. 1065 of 1981 is seeking specific performance of the suit property whereas, the Respondent Nos. 2 and 3 by their suit No. 4060 of 2001 is seeking declaration that they are absolute owners of the same suit property. He submits that even at the time of deciding Notice of Motion No. 2417 of 2016 this Court by its order dated 07.08.2017 recorded all these facts. The said order reads thus.

“P.C.

1 *This Notice of Motion is taken out to re-transfer the Suit No. 1065 of 1981 to this Court which was initially filed in this Court and got transferred to the City Civil Court because of the increase in*

pecuniary jurisdiction of the City Civil Court and also to be heard along with Suit No. 4060 of 2001.

- 2 *No affidavit in reply is filed opposing the application. To a query by the Court, the counsel appearing for defendant nos. 2 & 3 was candid to state that the subject matter of Suit No. 1065 of 1981 is the same as the subject matter of Suit No. 4060 of 2001. In my view, the evidence also probably be overlapping and if this application is allowed judicial time would also be saved.*
- 3 *In the circumstances, Notice of Motion allowed in terms of prayer clauses-(a) and (b) and disposed accordingly.*
- 4 *Ms. Neha Bhatt appearing for defendant nos. 2 & 3 states that defendant no.2 has expired and during the course of this week she will forward photo copy of death certificate and also list of legal heirs. Statement accepted.*
- 5 *Mr. Sharma appearing for the applicant states that no sooner they get the details from Bilawala and Co., the plaintiff will take steps to bring the legal heirs on record.*
- 6 *Ms. Bhatt states though the Court had granted two weeks time to file additional written statement on 14.09.2016, additional written statement has not been filed because they lost the papers.*
Mr. Sharma for plaintiff states he will provide a photo copy of the plaint to Bilawala and Co. Therefore, additional written statement to be filed within four weeks from today.”

8 On the basis of these submissions, the learned Counsel for the Applicant submits that in the interest of justice, this Hon'ble Court be pleased to transfer his suit No. 7581 of 1981 (old No.

1065 of 1981) to this Court at original side for hearing and final disposal on its own merits along with suit No. 4060 of 2001 filed by the Respondent Nos. 2 and 3. He submits that if the present application is not allowed, irreparable loss will be caused to the Applicant. He further submits that there may be possibility of the two contrary orders passed by both the Courts.

9 On the other hand, the learned Counsel Mr. Gaurav Mehta submits that, he received instructions to appear on behalf of Respondent Nos. 2 and 3. He submits that he undertakes to file vakalatnama on behalf of them within three weeks from today. Undertaking is accepted. He further submits that suit filed by the Applicant i.e. suit No. 7581 of 1981 already abated against Respondent No.1 Keki Kalapesi. No one is appearing on behalf of Respondent No.1.

10 The learned Counsel for the Respondent Nos. 2 and 3 submits that there is no substance in the present Misc. Civil Application under Section 24 of Code of Civil Procedure, 1908. He submits that, the issue involved in both the matters are altogether different, though the property is one and the same. He submits that, Applicant by his Suit No. 7581 of 1981 is seeking specific performance of agreement dated 28.07.1977 and agreement for renewal dated 29.05.1980. Whereas, Respondent Nos. 2 and 3 by their suit No. 4060 of 2001 are seeking declaration that they are absolute owners on the basis of the registered documents. Therefore, there is no question of transferring the Applicant's suit from Bombay City Civil Court at Bombay to High Court for hearing together. He further submits

that there is delay on part of the Applicant to make present application under Section 24 of the Code of Civil Procedure, 1908. He submits that Applicant had knowledge about the suit filed by Respondents in the year 2002 itself, inspite of that he failed and neglected to make an appropriate application immediately. Therefore, on this ground also application filed by the Applicant is required to be dismissed with costs. He further submits that, in a suit filed by the Respondents, they made other parties as defendant also. Therefore, there is no question of hearing both the matters together. On these submissions, the learned Counsel for the Respondent Nos. 2 and 3 submits that the application is required to be dismissed with costs.

11 I heard both the sides at length. Bare reading of the paragraph 1 of the suit No. 1065 of 1981 filed by the Applicant and paragraph 2 of suit filed by the Respondent Nos. 2 and 3 i.e. suit No. 4060 of 2001 shows that both the suits are in respect of same property. In both the suits, both parties are seeking ownership of the suit property. Therefore, the evidence may be common in both the suits. Not only that, Respondent Nos. 2 and 3 are also parties in a suit filed by the Applicant and Applicant is also party in suit filed by Respondent Nos. 2 and 3 i.e. 4060 of 2001.

12 Considering this fact and the earlier order dated 07.08.2016 passed by this Court in Notice of Motion No. 2417 of 2016 in Suit No. 1065 of 1981, I am satisfied that Applicant has made out case for allowing this Misc. Civil Application.

13 Hence, following order is passed:

- a) Misc. Civil Application is allowed.
- b) Suit filed by the Applicant bearing No. 7581 of 1981 (old High Court Suit No. 1065 of 1981) pending before Bombay City Civil Court at Bombay is transferred to the Bombay High Court at original side for hearing and final disposal on its own merits along with Suit No. 4060 of 2001 filed by the Respondent Nos. 2 and 3.
- c) Civil Application No. 336 of 2019, is disposed of.
- d) No order as to costs.

(K.K.TATED, J.)