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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.171 OF 2015 IN
CHAMBER SUMMONS NO.616 OF 2014 IN
SUIT NO.160 OF 2008

Vasant Shankar Watanji & Ors. ...Appellants
vs.
Mrs.Annete Bulchandani & Ors. ...Respondents

Mr.Simil Purohit a/w Mr.Sharad Wakchoure I/b Kishore
Thakordas & Company for the appellants
Mr.Mayur Khandeparkar a/w Mr.Shailesh Poria I/b
Economic Law Practice for the respondent No.1
Mr.Chetan Kapadia a/w Mr.Abhishek Bhadang for the
respondent Nos.6 to 10.

CORAM : A.S.OKA AND M.S.SONAK,JJ.

DATE ON WHICH JUDGMENT IS RESERVED: OCTOBER 30,2018

DATE ON WHICH JUDGMENT IS PRONOUNCED:JANUARY 29,2019

[As Shri M.S.Sonak, J. is sitting at Goa Bench, the signed Judgment is pronounced by A.S.Oka, J. as per Chapter XX Rule 296 (iii) of the Bombay High Court (Original Side) Rules].

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

1 The issue involved in this Appeal in short is whether the suit filed by the first respondent (original plaintiff) is a "suit for land" within the meaning of clause XII of the Letters Patent of this Court. The present appellants are the original defendant Nos.11 to 14. The first respondent-plaintiff was granted a leave under clause XII of the Letters Patent. The present appellants took out Chamber Summons No.616 of 2014 praying for revocation of the leave granted under clause XII. By the impugned Judgment and order, the learned

Single Judge has dismissed the Chamber Summons by holding that the subject suit cannot be said to be a "suit for land".

2 With a view to appreciate the submissions, a brief reference to few facts will be necessary. For the sake of convenience, we are referring to the parties with reference to their status in the suit. The case of the plaintiff is that Dr. Jerome Fernandes (alias Jeromino Xavier Anacleto Fernandes) and Mrs. Sibyl Artemesia Fernandes were the owners of the suit property described in Schedule A to the plaint. The suit property consists of a land and a bungalow at Lonavala, Taluka Maval, District Pune. According to the case of the plaintiff, after the demise of the aforesaid two owners, the defendant No.9-Dr. Michael Fernandes and late Dr. Ceaser M. Fernandes were their legal representatives. Under the Will executed by Dr. Jerome Fernandes, Dr. Ceaser M. Fernandes was appointed as the sole executor as well as the sole beneficiary of the suit property. According to the case of the plaintiff, the said Mrs. Sibyl A. Fernandes also left a Will under which Dr. Ceaser M. Fernandes was appointed as the sole executor and the sole beneficiary of the Will. Both the Wills were probated. Therefore, according to the case of the plaintiff, late Dr. Ceaser M. Fernandes became the absolute owner of the property. He along the defendant nos. 1 to 4 executed an agreement for sale dated 2nd February 1990 (described in the suit as "the said agreement) by which they agreed to

sell the suit property to the plaintiff for total consideration of Rs.26,50,000/-. The plaintiff paid the consideration of Rs.3,00,000/- under the said agreement.

3 It appears that the defendant Nos.5 to 10 filed proceedings for revocation of the probate granted to Dr.Ceaser M. Fernandes in respect of the Will of Mrs.Sibyl A. Fernandes. By order dated 13th April 1992, the probate granted on 26th January 1993 was set aside. The defendant Nos.5 to 10 also filed a petition for revocation of probate granted to Dr.Ceaser M. Fernandes in respect of the Will of Dr.Jerome Fernandes. The plaintiff has referred to the interim order dated 7th February 1996 passed in the revocation petition. The case of the plaintiff is that the interim order dated 7th February 1996 restrained certain parties thereto from creating third party rights in respect of the suit property. The case made out in the plaint is that the said Dr. Ceaser and the defendant nos.5 to 10 executed a conveyance dated 1st March 2007 in respect of the suit property in favour of the defendant Nos.11 to 14. The said conveyance was executed at Lonavala in District Pune. The plaintiff pointed out that the Deed of Family Arrangement dated 8th February 1999 is annexed to the conveyance dated 1st March 2007 which provides that the suit property exclusively vested in the defendant nos.5 to 10.

4 In paragraph 10 of the plaint, the plaintiff

has contended that the conveyance dated 1st March 2007 executed in favour of the defendant Nos.11 to 14 is bogus, sham and collusive and has been executed only with an object of defeating his rights. Paragraphs 13 to 17 and 32 of the plaint are material which read thus:

"13 The plaintiff states that admittedly the said family arrangement has never been disclosed and/or even referred by either the Late Dr.Ceasar M. Fernandes and/or Defendant Nos.5 to 10 before this Hon'ble Court in Miscellaneous Petition No.19 of 1995. The plaintiff further states that the Defendant Nos.5 to 10 have never from the year 1999 till date applied for withdrawal of the said petition in terms of the said Family Arrangement and have on the contrary even as late as on 28th day of June 2007 continued pursue the said Miscellaneous Petition No.19 of 1995 and applied for appointment of a handwriting expert for the purposes of challenging the grant of probate in respect of the Will dated 20th August 1979 of the late Dr.Jerome Fernandes with an intent of misleading the Court by purporting to show that the partners were contesting these proceedings.

14. The plaintiff submits that the aforesaid facts clearly demonstrate the fraud and

collusion played by late Dr.Ceasar M.Fernandes and Defendant Nos.1 to 10 on the plaintiff herein as also on this Hon'ble Court. The Plaintiff submits that the aforesaid Indenture of Sale executed in favour of Defendant Nos.11 to 14 is merely an eyewash with an intent to defeat the legitimate rights of the plaintiffs herein and to usurp the property to themselves in view of the rise on the property prices.

15. The plaintiff further submits that the said Family Arrangement is in any event an unstamped and unregistered document and therefore does not create any right, title and/or interest in favour of the parties thereto as stipulated therein and is thus of no consequences in law.

16. Without prejudice to the aforesaid, the plaintiff submits that in any event, the said Indenture of Conveyance dated 1st March 2007 cannot and does not in any manner whatsoever effect the right vested in the plaintiff herein pursuant to the suit Agreement dated 2nd February 1990 in as much as Defendant Nos.11 to 14 herein are not bonafide purchasers for value without notice and as such are bound to specifically perform the suit Agreement jointly and/or severally in favour of the Plaintiff herein.

17. The Plaintiff states that in fact, Defendant Nos.11 to 14 have express and/or constructive notice of the rights of the Plaintiff in the suit property in as much as the said Family Arrangement dated 8th February 1999 categorically mentions about the rights of the Plaintiff herein. Defendant Nos. 11 to 14 have despite the said knowledge failed and/or neglected to either issue a public notice inviting objections before purchasing the said property and/or have also failed to make due and diligent enquiries before entering into the said transaction and as such, have purchased the said property subject to the rights of the Plaintiff herein. In view of the aforesaid, the Plaintiff submits that defendant Nos.11 to 14 are not bonafide purchasing for value without notice and are jointly and/or severally liable to specifically perform the suit agreement."

18....

"32. The Plaintiff states that the said Agreement dated 2nd February 1990 was made and executed at Bombay. Defendant Nos.1 to 4 reside and/or carry on business for gain at Bombay. Defendant Nos.5 to 10 are residing in the United Kingdom. Defendant No.12 resides in Bombay and/or carries on business

for gain in Bombay. However, Defendant Nos.11, 13 and 14 reside outside the jurisdiction of this Hon'ble Court. The immoveable property in respect of which specific performance is sought is situated outside the territorial jurisdiction of this Hon'ble Court. The Plaintiff submits that however, the suit agreement in respect of which the specific performance is sought is made and executed at Bombay, which constitutes a material part of the cause of action and as such upon leave being obtained under clause XII of the Letters Patent of this Hon'ble Court has jurisdiction to entertain, try and dispose of the present Suit."

5 It is also necessary to refer to the material prayers in the plaint. The said prayers are prayer clauses (a) to (f) which read thus:

"(a) that this Hon'ble Court be pleased to declare that the Agreement for Sale dated 2nd February 1990 in respect of the suit property described in Exhibit "B" hereto is valid, subsisting and binding on Defendant Nos.1 to 14;

(b) that this Hon'ble Court be pleased to declare that the Indenture of Sale/Conveyance dated 1st March 2007 as invalid, void ab-intio and/or not binding upon the Plaintiff

herein;

(c) that this Hon'ble Court be pleased to order and decree Defendant Nos. 1 to 14 to jointly and/or severally specifically perform the suit Agreement dated 2nd February 1990; (being Exhibit "B" hereto)

(d) that this Hon'ble Court be pleased to order and decree Defendant Nos. 1 to 14 to jointly and/or severally do all such acts, deeds and things (including executing documents) as may be necessary for giving complete effect and efficacy to the decree of specific performance of the Agreement dated 2nd February 1990 as sought for by the Plaintiff in prayers (a) and (c) above;

(e) that this Hon'ble Court be pleased to order and decree the Defendant Nos. 1 to 10 by pay to the Plaintiffs damages quantified at Rs. 1,23,50,000/- as per the Particulars of Claim. Hereto annexed and marked as Exhibit D is the copy of the Particulars of Claim;

(f) that in the event of this Hon'ble Court coming to a conclusion that it is impossible to grant the relief of specific performance then in such an event only Defendant Nos. 1 to 14 be ordered and decreed to jointly and/or severally pay to the Plaintiffs damages quantified as the value of the suit property on the date of passing of the decree."

contention of the defendant Nos.11 to 14 who took out the Chamber Summons was that the suit property is situated outside the Ordinary Original Civil Jurisdiction of this Court and the suit being a "suit for land", a leave under clause XII could not have been granted. The submission was that the fact that a declaration of invalidity in respect of the conveyance dated 1st March 2007 was claimed shows that the relief was claimed by the plaintiff in respect of the title claimed by the defendant Nos.11 to 14. After considering the prayers made in the suit and the averments made in the suit, the learned Single Judge came to the conclusion that the suit is essentially filed for enforcing the personal obligations of defendants who were vendors of the plaintiff and therefore, the suit cannot be called as a "suit for land". The learned counsel for the appellant has taken us through the averments made in the plaint. He submitted that in paragraph 11 of the plaint, the plaintiff has referred to a Deed of Family Arrangement under which the title in respect of the suit property was vested in defendant Nos.5 to 10. He pointed out that on the basis of the said title that the said defendants executed the conveyance dated 1st March 2007 in favour of the defendant Nos.11 to 14. Inviting our attention to the averments in paragraphs 10, 12 and 14 of the plaint, he urged that the plaintiff is claiming that the said Deed of Conveyance is collusive and sham and has been executed with malafide intentions. He submitted that on the basis of the said contention

that prayer (b) has been made which claims a declaration that the conveyance dated 1st March 2007 is void, *ab-initio* and not binding on the plaintiff. He urged that it cannot be said that the suit is for enforcing the personal obligations of the defendants. The submission is that the nature of reliefs claimed in the suit show that the prayers are essentially for re vesting the title of the suit property in the vendors of the plaintiff by claiming a declaration that the subsequent sale deed is void. He submitted that the possession of the suit property has been handed over to the purchasers under the Conveyance dated 1st March 2007. Therefore, the prayer for possession appears to be implicit in the prayer for specific performance. He submitted that as the prayer for possession will have to be considered against the persons who are strangers to the said agreement, the suit is essentially a "suit for land".

7 The learned counsel for the respondent Nos.6 to 10 supported the learned counsel appearing for the appellants. He also relied upon certain decisions which we have referred in the subsequent part of this Judgment. The learned counsel for the first respondent-plaintiff supported the impugned order. He submitted that the defendant Nos.1 to 5 are claiming title on the basis of the Deed of Family Arrangement which is executed subsequent to suit agreement by the persons who are bound by the suit agreement. Hence, the defendant Nos.5 to 10 are

claiming title on the basis of subsequent documents and even they are bound by the suit agreement. He submitted that the prayer (b) in the plaint for a declaration in respect of the Conveyance dated 1st March 2007 is based on the fact that the execution of the Conveyance is made in breach of the interim order passed by this Court and therefore, the said document is null and void. He would, therefore, submit that no interference is called for with the impugned order.

8 We have given careful consideration to the submissions. Clause XII of the Letters Patent of this Court reads thus:

"Clause XII. Original jurisdiction as to suits. – And We do further ordain that the said High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, or the Bombay City Civil Court."

9 The issue which is involved in this Appeal is whether the suit subject matter of this Appeal is a "suit for land" within the meaning of clause XII.

In a very old decision of a Division Bench of this Court in the case of His Highness Shrimant Maharaj Yaswantrav Holkar vs. Dadabhai Curesetji Ashburner¹, it was held that a suit for specific performance of agreement of sale of immoveable property is not covered within the meaning of expression "suit for land". In the case of M/s.Moolji Jaitha & Company vs. The Khandesh Spinning and Weaving Company Limited², there was a divergence of opinion expressed by the learned Judges of five Judges Bench of the Federal Court in regard to the same expression. In paragraphs 81 and 102, Justice Mahajan observed thus:

"81 In the decided cases great emphasis has been laid on the preposition "for" in the expression "suit for land" in order to determine the true construction to be placed on this phrase. In a large number of cases it has been observed that the natural meaning of the preposition "for" is "to obtain" or "to recover" and hence the expression "suit for land" was intended to cover only suits for the recovery of land. In some cases it was said that the preposition "for" in the context is capable of bearing another meaning as well, *i.e.*, it can be said to have been used in the sense of "concerning" or "relating to", as for instance when used in the expressions, "suit for libel", "suit for wrongful dismissal", etc. In my judgment, the emphasis on the preposition "for" occurring in the expression "suit for land" has led to a wrong approach to the construction of the phrase "suit for land" in Clause 12 of the Charter. The preposition "for" had necessarily to be used after the word "suit" in the context of Clause 12 in order to indicate the subject of the suit, the

1 1890 14 ILR 14 Bombay 353

2 AIR (37) 1950 FC 83

cognizance of which was taken away from the Court. To limit the meaning of the preposition "for" and to say that it only means "to obtain" or "to recover" does not seem to me a very natural way of construing it when it is indicative of the subject of a suit. If the preposition "for" was used indicating a particular kind of relief claimed in a suit in respect of which jurisdiction was conferred or taken away, then appropriately it could have been used in the sense "to obtain" or "to recover", *viz.*, "a suit for possession" would mean a suit to obtain possession or to recover possession, "a suit for money" would mean a suit to get money; but a "suit for land" cannot be very appropriately said to mean a "suit to get possession of land" because in respect of this subject a number of reliefs may be open. In a clause dealing with jurisdiction according to classes of suits and not reliefs the preposition "for" cannot appositely be used in a limited sense. In its dictionary meaning in a most general sense it indicates that with reference to which anything is done in Order to affect it. It can also bear the following meaning: "regarding", "concerning", "qua", "affecting", "touching" and "in respect to". It seems to me that the expression "suit for land" in the clause in the dictionary sense means suits in respect to land or affecting land. This grammatical construction however is likely to lead to some confusion and vagueness unless properly understood and applied. No definition expressed in general words can possibly be satisfactory in the sense of covering every case which may arise. The only method is to see if the facts of any particular case fall within the meaning of the words and the question has to be decided with reference to the essential nature of the relief sought. Except in the manner indicated above it is not possible to give a definition to the expression "suit for land". If an attempt is made to find a comprehensive definition of the phrase, it will eventually be discovered that it has created further complications. I therefore content myself by saying that where the nature of the suit is such that in substance it involves

a controversy about land or immoveable property and the court is called upon to decide conflicting claims to such property and a decree or order is prayed for which will bring about a change in the title to it, that suit can be said to be in respect of land or immoveable property; but where incidentally in a suit, the main purpose of which or the primary object of which is quite different, some relief has to be given about land, the title to it not being in dispute in the real sense of the term, then such a suit cannot fall within the four corners of this expression. In each case the court has to determine the true nature of the suit and then to say whether the suit is in substance a suit which affects land or immoveable property or whether it falls in the category "other cases". Cases can be visualized where no dispute as to title is raised but compensation is claimed for trespass or for any wrong done to immoveable property, or where a mortgagee abandons the security and claims a money decree in respect of a mortgage debt. All such cases will be outside the definition because though they may have reference to land or immoveable property, no dispute as to title to such property has to be decided in them and the relief does not directly operate on the land.

102 Finally, I would like to say a word about suits for specific performance regarding which conflicting decisions have been pronounced by the High Courts in India, In my opinion, if the suit is for specific performance and a decree for possession of the land sold is claimed, such a suit would certainly be a suit for land; but if the suit is simpliciter for specific performance, *i.e.*, for the enforcement of the contract of sale and for execution of a conveyance, in that event there can be no good ground for holding that such a suit is a suit for determination of title to land or that the decree in it would operate on the land. It is curious that in some cases in Calcutta a distinction has been drawn between a vendor's suit for specific performance and a

purchaser's suit for specific performance. The nature of the suit in both contingencies is the same, though in one case the vendor is prepared to offer a deed while in the other case the court has to direct that a deed be executed but the nature of the suit does not change by that circumstance. The suit is not for land because it is a suit for specific performance of a contract, and does not involve any declaration as to title about land. The only question in issue in such a case is whether the contract was made and if so, are there any reasons why it should not be specifically enforced. No controversy as to title to land is directly raised when the court is not called upon to adjudicate on title. Cases therefore which have held that a suit for specific performance simpliciter is a suit for land must be held to have been wrongly decided. I am in respectful agreement with the decision of the Madras High Court in *Velliappa Chettiar v. Govinda Doss* [I.L.R. 52 Mad. 809.] ."

10 In the case of *Adcon Electronics Private Limited vs. Daulat and another*³, the interpretation of the same expression in clause XII of the Letters Patent of this Court came up for consideration of the Apex Court. In paragraph 15, the Apex Court expressed an agreement with the views expressed by Justice Mahajan in the case *Adcon Electronics Private Limited* (supra) which we have quoted above. Thereafter, the Apex Court proceeded to consider the effect of section 22 of the Specific Relief Act, 1963 (for short "the said Act of 1963"). After consideration of section 22 of the said Act of 1963, in paragraphs 16 and 17, the Apex Court observed thus:

3 (2001) 7 SCC 698

“16. In a suit for specific performance of contract for sale of immovable property containing a stipulation that on execution of the sale deed the possession of the immovable property will be handed over to the purchaser, it is implied that delivery of possession of the immovable property is part of the decree of specific performance of contract. But in this connection it is necessary to refer to Section 22 of the Specific Relief Act, 1963 which runs:

“22. Power to grant relief for possession, partition, refund of earnest money, etc.—(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.”

17. It may be seen that sub-section (1) is an enabling provision. A plaintiff in a suit of specific performance may ask for further reliefs mentioned in clauses (a) and (b) thereof. Clause (a) contains reliefs of possession and partition and separate possession of the property, in addition to specific performance. The mandate of sub-section (2) of Section 22 is that no relief under clauses (a) and (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed. **Thus it follows that no court can grant the relief of possession of land or other immovable property, subject-matter of the agreement for sale in regard to which specific performance is claimed,**

unless the possession of the immovable property is specifically prayed for.

11 After adverting to the averments made in the plaint in the suit subject matter before it, the Apex Court in paragraph 18 observed thus:

“18. In the instant case the suit is for specific performance of the agreement for sale of the suit property wherein relief of delivery of the suit property has not been specifically claimed, as such it cannot be treated as a “suit for land”.

12 Reliance is placed on the Judgment and Order of the Apex Court in the case of Excel Dealcomm Private Limited Vs Asset Reconstruction Company (India) Limited and others⁴. Similar clause XII in the Letters Patent of Calcutta High Court came up for consideration of the Apex Court. In paragraph 13 of the said decision, the Apex Court referred to the decision in the case of Adcon Electronics (supra) and held that the suit for land is a suit in which relief claimed relates to the title or delivery of the possession of land or immoveable property. The Apex Court further held that it is established Rule that to determine whether it is a suit for land, the Court will look into barely the plaint and no other evidence. Paragraph 15 of the said decision refers to section 22 of the said Act of 1963 and holds that section 22 categorically bars any Court to grant such relief of possession in the suit for specific performance unless specifically sought. In the

⁴ (2015) 8 SCC 219

facts of the case before the Apex Court, it was observed that the prayer sought in the suit was for issuance of the Sale Certificate which is provided in the Appendix V to the Rules framed under the Securitization and Reconstruction of Financial Assets, Enforcement of Security Interest Act, 2002. The Apex Court observed that the Sale Certificate sought in the prayer requires the delivery of possession and therefore, the prayer for possession was implicit in the prayers made. In the case of Samar Vijaykumar Pupala and another Vs. Shalini Hambir and others decided on 31st July 2014 in Appeal (L) No.359 of 2014, a Division Bench of this Court considered the aforesaid decision and applied a test whether from the averments made in the plaint, the suit as filed is primarily and substantially for enforcement of a contract. A Division Bench of this Court in the case of Wimco Limited, Mumbai vs. Matoshree Shelters Private Limited and another⁵ had an occasion to interpret Clause XII of the Letters Patent. The Division Bench extensively considered all the earlier decisions including the decision of the Apex Court in the case of Babu Lal vs. M/s.Hajari Lal Kishori Lal and Others⁶ and the decision in the case of Adcon Electronics (supra). Paragraphs 21, 22 and 23 of the decision in the case of Wimco Ltd (supra) reads thus:

21. Learned counsel for the respondents submitted that since in the instant case possession is specifically

5 2009 (5) Mh.L.J. 615

6 (1982) 1 SCC 525

claimed by the plaintiffs, the said suit should also be treated as a suit for land. On the basis of the judgments of the Federal Court as well as the Supreme Court, which we have discussed above, it is required to be found out as to whether the suit in question is really a suit for title or essentially a suit for possession. In order to determine the said aspect, the Court is required to consider the averments made in the plaint as well as the nature of the transaction entered into between the parties. After considering the averments in the plaint as well as the documents of MoU, agreements and the Power of Attorney, one thing is certain that the soul of the transaction in question is the MoU which is a starting point of entering into the transaction between the parties. The MoU is the basis on which subsequent documents were executed by the parties i.e. agreements and the power of attorney. As per the agreements between the parties, the defendants were to carry out certain work on behalf of the plaintiffs. It cannot be disputed that the plaintiffs by entering into the said transaction has never lost its title over land in question and as such it is an admitted fact that the title has all throughout remained in the plaintiffs. The suit, therefore, in question can never be said to be a suit in connection with the title and the plaintiff has also not sought for any declaration of title. The entire transaction was entered into on the basis of MoU. If that be so, in our view, the defendants were put into possession on the basis of MoU and the possession can be said to be a mere permissive one. Looking to the prayer clauses (a) and (b) which we have noted in the earlier part of our judgment, it is clear that the main prayer of the plaintiffs is for a declaration to the effect that the MoU in question is inoperative and no longer binding on the plaintiffs. We may make it clear that we are not concerned with the merits of the said averments as ultimately that is a matter of trial. We are discussing this aspect only with a view to find out as to whether the jurisdiction of this Court can be said to be excluded under clause 12 of the Letters Patent simply because there is a relief for possession sought for by the plaintiffs in the suit. In a given case, if a suit is filed on the ground that the MoU is entered into by fraud or misrepresentation and if the prayer is made that such MoU is not binding on the Plaintiffs, then such a suit can be said to be maintainable under clause 12 before the Original Side of this Court. If, on the basis of the averment in the plaint, a prayer is sought for to the effect that the MoU has become inoperative on the ground that the defendants have committed breach of the conditions, we fail to understand as to how, even if

an incidental prayer for possession is made which is based only on the basis of prayer clauses (a) and (b) of the suit, such a suit is not maintainable under clause 12 of the Letters Patent. As pointed out earlier, the entire transaction is based on the MoU and the subsequent agreements. In our view, so far as the prayer regarding possession is concerned, it is mainly and solely dependent upon the prayers (a) and (b). In case the plaintiffs fail to get relief in the suit in connection with the declaration sought for, naturally plaintiffs cannot get any relief in connection with handing over possession as the prayer for handing over possession is solely and mainly depend upon the relief claimed by the plaintiffs regarding declaration sought for in the suit in connection with the MoU and other agreements. It cannot be disputed that in case the said prayers have been rejected, the prayer for possession becomes redundant and no decree can be passed in that behalf.

22. Considering the aforesaid aspect, in our view, the suit is essentially based on the prayer that the MoU has become ineffective or inoperative. The prayer in connection with the declaration sought for by the plaintiffs regarding MoU, in our view, is perfectly within the jurisdiction of the Original Side of this Court and , therefore, the suit is maintainable on the Original Side of the Bombay High Court. As pointed out earlier, it can never be said to be a suit for title nor essentially it is a suit for possession. Possession is a consequential prayer based on the prayer for declaration in connection with the MoU and agreements in question. As per the submission of the learned counsel for the appellants, the defendants were given only permissive possession for development on the basis of MoU and other documents. The possession of the defendants is solely based on the basis of an MoU between the parties. If the document is held to be void or inoperative, naturally the defendants possession cannot be said to be in any way legal or valid. In our view, simply because in subsequent prayers of the plaint, possession prayer is sought for, it cannot be said that the suit in question is a suit for land. If a suit for specific performance is maintainable on the Original Side of this Court, even if the property is situated at a different place or in the different State, as the case may be, the suit of such a nature wherein declaration is sought for in connection with the MoU and agreement can certainly be said to be maintainable here as the defendant has given mere permission to get the possession only for enforcing MoU as well as subsequent agreements. For example, the defendants also could have filed a suit before this Court for the specific

performance of the agreements. If such suit is maintainable, we fail to understand as to why suit wherein declaration for cancellation of MoU is sought for is not maintainable on the Original Side of this Court. Simply because an incidental prayer for possession is made which is dependent upon earlier prayers of the plaint, as held by the Federal Court even in a case of a mortgage of immovable property, the plaintiffs in a given case can give up his claim for security and such suit is still maintainable on the Original Side of the Bombay High Court as it can never be said that the suit is essentially for land.

23. In order to find out the territorial jurisdiction of this Court, essentially the Court is required to consider the averments and prayers made in the plaint. Considering the averments made in the plaint as well as considering the prayers in the plaint and the nature of the suit which is based on the basis of MoU and agreement between the parties, such suit, in our view, is maintainable and it cannot be said that it is a suit for land. Considering the aforesaid aspect of the matter, we are not in a position to agree with the view of the learned single Judge that since there is a prayer for possession, the suit is not maintainable in view of clause 12 of the Letters Patent. Every case depends upon the facts of each case. It can never be said that in the instant suit the prayer for possession is a substantive prayer. It is only an incidental prayer.

13 In the case of Babu Lal (supra), the Apex Court dealt with section 22 of the said Act of 1963. Paragraphs 13 and 14 of the said decision read thus:

“13. The expression in sub-section (1) of Section 22 “in an appropriate case” is very significant. The plaintiff may ask for the relief of possession or partition or separate possession “in an appropriate case”. As pointed out earlier, in view of Order 2 Rule 2 of the Code of Civil Procedure, some doubt was entertained whether the relief for specific performance and partition and possession could be combined in one suit; one view being that the cause of action for claiming relief for partition and possession could accrue to the plaintiff only after he acquired title to the property on the execution of a sale deed in his favour and since the

relief for specific performance of the contract for sale was not based on the same cause of action as the relief for partition and possession, the two reliefs could not be combined in one suit. Similarly, a case may be visualised where after the contract between the plaintiff and the defendant the property passed in possession of a third person. A mere relief for specific performance of the contract of sale may not entitle the plaintiff to obtain possession as against the party in actual possession of the property. As against him, a decree for possession must be specifically claimed or such a person is not bound by the contract sought to be enforced. In a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale simpliciter, without specifically providing for delivery of possession, may give complete relief to the decree-holder. In order to satisfy the decree against him completely he is bound not only to execute the sale deed but also to put the property in possession of the decree-holder. This is in consonance with the provisions of Section 55(1) of the Transfer of Property Act which provides that the seller is bound to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits.

14. There may be circumstances in which a relief for possession cannot be effectively granted to the decree-holder without specifically claiming relief for possession viz. where the property agreed to be conveyed is jointly held by the defendant with other persons. In such a case the plaintiff in order to obtain complete and effective relief must claim partition of the property and possession over the share of the defendant. It is in such cases that a relief for possession must be specifically pleaded.”

14 In the light of the legal position as can be seen from the decisions interpreting clause XII, the issue in this appeal will have to be decided. However, before we do that, we must consider two decisions of the Apex Court as in the present case, the subsequent purchasers are parties. The first decision on the point is in the case of Durga Prasad

Vs. Deep Chand⁷. In paragraph 36, there is a reference to facts of the case. Paragraph 37 refers to practice adopted by different Courts of India. Thereafter, there is a reference to section 27 of the Specific Relief Act, 1827 which is *pari materia* with section 19 of the said Act of 1963. Ultimately, in paragraph 42, the Apex Court observed that proper form of Decree to be passed in such a case for specific performance is of directing the subsequent transferee to join in the Conveyance so as to pass on the title which vests in him to the plaintiff. In this context, we must also make a reference to the Apex Court in the case of Bharat Karsondas Thakkar Vs. Kiran Construction Co. Ltd and others⁸. The Apex Court held that a suit for specific performance cannot be enlarged to convert the said suit into title and possession and therefore, the third party or stranger to the contract could not be added so as to convert the suit of one character into another character. In the facts of the case of Bharat Karsondas Thakkar (*supra*), the Apex Court observed that under clause (a) of section 15 of the said Act of 1963 any party to the contract is entitled to seek specific performance of such contract and section 19 enables the Court to grant relief against the parties to the contract and persons claiming under the parties to the contract by a subsequent title.

15 Now coming to the averments made in the plaint

⁷ AIR 1954 SC 75

⁸ (2008) 13 SCC 658

and the relief sought thereunder, prayer (a) seeks relief of declaration that the said agreement is valid and subsisting. This prayer is made essentially because the plaintiff is seeking a specific performance of the said Agreement. Essentially, the prayer seeks a declaration that the defendants are bound to perform the obligation under the said agreement dated 2nd February 1990. This prayer does not seek any relief in respect of the land. Prayer(c) is for passing a Decree for specific performance of the said agreement dated 2nd February 1990. Prayer (d) is a prayer which is consequential to prayer (c). Prayer (e) seeks damages in addition to the claim for specific performance. Prayer (f) is a prayer made in the alternative to claim damages in case the specific performance is not granted. The prayers (a),(c),(d), (e) and (f) are the prayers which can be made in a suit for specific performance of an agreement for sale of the immoveable property. At this stage, we need not decide the questions whether all the defendants are bound by the said agreement as we are deciding the issue of the nature of the suit considering only the averments made in the plaint. If the plaint had only these prayers, the suit could not be termed as a "suit for land". The plaintiff has not made a prayer for decree for possession. Whether the suit is defective on account of the said omission is a question which will have to be decided at the time of final hearing of the suit.

16 The main difficulty is created by the prayer clause (b) which seeks a declaration that the Conveyance dated 1st March 2007 is invalid. Averments made in paragraph 11 show that the plaintiff is aware about the Deed of Family Arrangement dated 8th February 1999. In fact, in paragraph 11, there are specific assertions that on the basis of the said family arrangement it is claimed that the suit property is exclusively vested in the defendant Nos.5 to 10. In paragraph 14, it is contended that the Conveyance dated 1st March 2007 is merely an eye wash made with the intent of defeating the legitimate rights of the plaintiffs. It is pointed out in the plaint that Notice of Motion No.1836 of 1995 was taken out in Misc. Petition No.19 of 1995. In the Notice of Motion No.1896 of 1995 for interim relief, in the order dated 7th February 1996, a statement of Dr.Ceaser M.Fernandes has been recorded not to create third party rights or not to part with possession of the suit property. The defendant nos. 1 to 4 are his legal representatives. It is claimed that there is an order of injunction issued against the respondent Nos.2 and 4 in the said proceedings not to create third party rights and not to part with possession of the suit property. It was argued across the bar that the challenge to the said Conveyance in prayer clause (b) is on the ground that the execution of Conveyance Deed is in breach of interim order passed by the Court in Misc. Petition No.19 of 1995 and therefore, it is null and void. In fact, there is no such pleading in the

plaint. In paragraph 17 of the plaint, it is contended that the defendant Nos.11 to 14 have constructive notice of the rights in the suit property as in the Family Arrangement dated 8th February 1999 on the basis of which their predecessors (the defendant Nos.5 to 10) are claiming to be the owners of the suit property there is a clear mention of the rights claimed by the plaintiff. In paragraph 17, it is specifically alleged that defendant Nos.11 to 14 are not bonafide purchasers for value received and that the defendant Nos.11 to 14 have purchased the suit property subject to the rights of the plaintiff.

17 Thus, in short, the pleading is that the purchasers (defendant Nos.11 to 14) were aware about the rights of the plaintiff in the suit property under the said agreement and they are bound by the said agreement. But it is not a case where there is a declaration claimed that the vendors and purchasers under the Conveyance Deed dated 1st March 2007 are bound by the said agreement of which specific performance is sought. On the contrary, the prayer clause (b) seeks a substantive declaration that the Deed of Conveyance dated 1st March 2007 is null and void and hence, a relief is claimed in respect of the title claimed in respect of the suit property by the purchasers (the defendant nos.11 to 14). The suit property is situated outside the Ordinary Original Jurisdiction of this Court. Thus, the prayer (b) is essentially in respect of the

title claimed by the purchasers. The vendors under the said agreement are not the vendors under the said deed of conveyance. The vendors in the deed of conveyance subject matter of prayer (b) are claiming that the title vested in them independently on the basis of a family arrangement. Hence, the Court will have to go into the issue of the title of the vendors under the said conveyance and consequently, the title of the purchasers under the said conveyance. The Court will have to decide whether the vendors under the said conveyance have acquired a title by virtue of the Deed of Family Arrangement. Hence, in view of prayer (b), the suit becomes a "suit for land".

18 Therefore, applying the test which is laid down by the aforesaid decisions, we are of the view that the present suit is a "suit for land" within the meaning of Clause XII. The learned Single Judge has not considered the effect of prayer (b). Hence, a leave under clause XII could not have been granted.

19 We, however, make it clear that we have made no adjudication on the merits of the suit. In fact all the contentions of the parties to the suit are expressly kept open. We also make it clear that the view taken by this Judgment is based only on the averments made in the plaint.

20 Accordingly, the impugned order of the learned Single Judge is set aside and the Chamber Summons No.616 of 2014 is made absolute in terms of prayer

clause (a) thereof. The appeal is accordingly allowed. There will no order as to costs. Pending Notice of Motion does not survive and the same is disposed of. If any interim or ad-interim order in the suit or in this appeal is operative till today, it will continue for 8 weeks from today.

(M.S.SONAK,J.)

(A.S.OKA,J.)