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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 25th October, 2018

Date of decision : 7th February, 2019

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CS (OS) 1932/2014 & I.A. 11236/2016

M/S KULAR CONSTRUCTION LTD. Plaintiff

Through: Mr. Girish Aggarwal, Advocate.
(M:9810400291)

versus

GURNAM SINGH Defendant

Through: Mr. Ashok Mathur, Advocate.
(M:9810018800)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present case is a classic example of how litigation can be protracted by parties, only with a view to avoid payment of court fee. A case which ought to have been a simple suit for recovery has been designed as a declaratory suit leading to framing of a preliminary issue which is being decided by the present order. The preliminary issue framed in the suit is:

“Issue no.2 - Whether the present suit for declaration in respect of a recovery claim is maintainable in law?”

2. The reliefs prayed for in the suit are as under:

“a) That the Decree of Declaration may kindly be passed in favour of the plaintiff and against the defendant declaring that the defendant has no right, title or interest in 4475 sq feet and 5000 sq feet commercial area on 3rd and 4th floor of the K-Mall, Link Road, Near Bus Stand, Ludhiana, Punjab respectively in case the past, present and future maintenance charges are not paid to the plaintiff.

or in the alternative

A Decree of Declaration may kindly be passed declaring that the plaintiff is entitled to adjust the unpaid maintenance charges and take back the commercial area from the defendant in view of the Agreement dated 25.05.2000.

b) Costs of the present suit may kindly be awarded in favour of the plaintiff.

c) Such other and further orders as the Hon'ble Court may deem to be fit and proper under the circumstances of the present case may kindly be passed.”

3. The brief background of the litigation is that a family settlement was entered into between three brothers viz., Sh. Sadhu Singh, Sh. Bhajan Singh and Sh. Gurnam Singh, all of whom are sons of Late Sh. Bhagat Singh. The family had various properties in respect of which family settlement dated 25th May, 2000 was entered into. The settlement covered a large number of assets. Two of the assets are the company M/s Kular Construction Ltd. (*hereinafter `Kular`*) which is the Plaintiff in the present case and a hotel project at Ludhiana. The family settlement in respect of these two assets which reads as under:

*“1. KULAR CONSTRUCTIONS COMPANY LTD.
All the assets and liabilities of Kular Construction Ltd.
in respect of construction works excluding the hotel
project at Ludhiana will be transferred to Sadhu Singh
& Co. Pvt. Ltd. and this later Company will be owned
and managed exclusively by S. Sadhu Singh, party of
the Second Part and his nominees. Kular
Constructions Ltd. with only the hotel project will be
owned and managed exclusively by S. Bhajan Singh
party of the First Part. All the payments received from
the construction work, ongoing and executed viz. at
RSD Shahpurkandi Canal, Bhatinda TPS, Suratgarh*

TPS, SYL, Sawan Bhadon Dam, Mukerian Power House III, and all other works except Ropar Hydel Power House, Mukerian Restoration Works, Bisalpur Dam, Sewa Nagar and Chamera will be operated from a bank account at Pathankot and will be operated by Sh. Sadhu Singh or his nominee. No other person will be authorised to operate this account.

All the experience acquired regarding various type of constructions done by M/S Sadhu Singh & Co. & M/S Kular Constructions Ltd. will be taken as pre-qualification of M/S Sadhu Singh Co. Pvt. Ltd. and can be utilized wherever it is felt necessary. Kular Constructions Ltd. will provide any assistance that may be required/possible for prequalification of Sadhu Singh & Co (P) Ltd for works tenders.

2. HOTEL PROJECT AT LUDHIANA

- i) S. Sadhu Singh, party of the Second Part shall own 21% share in the assets & liability of the hotel project. S. Bhajan Singh, Party of the First Part shall own the remaining share in the assets and liabilities of the hotel project. S. Bhajan Singh party of the First Part will be solely responsible for the construction of Hotel at Ludhiana including arrangement of funds, material, etc.*
- ii) S. Gurnam Singh, Party of the Third Part shall own 4475 Sft. and 5000 Sft of commercial area on 3rd and 4th Floors respectively of the hotel which S. Bhajan Singh Party of the First Part guarantees to purchase from S. Gurnam Singh Party of the Third Part for Rs. 360 lacs (Rupees Three Hundred and Sixty lacs only) after 3-1/2 years of signing this agreement. S. Bhajan Singh Party of the First Part shall also have the first right to purchase this area in the hotel.*
- iii) This distribution/allocation is on the basis of as on date. It is further provided that any further investments by any of the two parties shall attract similar*

investments from the other party or else the percentage mentioned herein before will also change accordingly. S. Bhajan Singh Party of the First Part will retain full authority to the manner how to complete/commission or dispose off the property and 21% of the share will be given to S. Sadhu Singh Party of the Second Part from the proceeds so received.”

4. From the above agreement, it is clear that one of the brothers – Sh. Sadhu Singh came into exclusive control of M/s. Kular. Insofar as the hotel project in Ludhiana is concerned, Sh. Sadhu Singh was to own 21% of the assets and liabilities of the hotel. Shri Bhajan Singh became the owner of the remaining 79% and also had to manage the hotel. The Defendant – Sh. Gurnam Singh was recognized as the owner of 4475 sq. ft and 5000 sq. ft. of area in the 3rd and 4th Floors of the hotel (*hereinafter ‘Commercial Space’*). Sh. Bhajan Singh agreed to purchase this space from Sh. Gurnam Singh by paying Rs.3.6 crores within 3^{1/2} years of the signing of the agreement i.e. by the end of 2003. Sh. Bhajan Singh also had the right of first purchase. The purchase did not take place. Disputes arose between the parties and various proceedings came to be filed. CS(OS) 1409/2010 was filed by Sh. Gurnam Singh seeking a permanent injunction against M/s Kular and his other brothers from selling or alienating the said property. An application under Order VII Rule 11 CPC came to be filed in the said suit which was dismissed vide order dated 23rd September, 2013.

5. An application was also filed in the said suit seeking interim injunction (IA 9096 of 2010) and another application was also filed seeking dismissal of the suit as being barred by limitation (IA 10977 of 2010). Both the said applications were disposed of vide order dated 23rd September 2013 in the following terms:

“I.A. No. 10977/2010

This application has been moved by defendant No. 2 under Section 3 of the Limitation Act read with Sections, 16, 21 and 151 CPC. So far as the aspect of Section 16 CPC is concerned, the same stands taken care of while deciding I.A. No. 10995/2010 preferred by defendant Nos. 1, 3 and 4 under Order 7 Rule 11 CPC.

The submission of learned counsel for the defendant No.2 is that the suit is premised on the Agreement dated 25.05.2000, whereas, the present suit has been filed only in the year 2010 and consequently, according to the learned counsel, the present suit is barred by limitation.

I have heard learned counsel for the parties and I find no merit in this application.

The parties entered into an Agreement on 25.05.2000. Under this Agreement, defendant No. 2 undertook the obligation to complete the hotel project at Ludhiana whereafter the plaintiff was to be allotted/granted 4475 sq. ft. commercial area on the third floor and 5000 sq. ft. of commercial area on the fourth floor of the hotel building. The defendant No. 2. upon completion of the hotel project, sent a communication on 22.07.2006 informing that the commercial area on the hotel project on the third and fourth floor are ready. This shows that it became possible to make the allotment of the area on the third and fourth floor area of the hotel building to the plaintiff only in July, 2006. Though, there is no allotment letter as such, the conduct of defendant No. 2- the owner of the hotel project, thereafter suggests that the area was allotted to the plaintiff as per the agreement aforesaid, as defendant No. 1 started raising regular bills towards the maintenance charges for the said area. The first bill dated 20.11.2 has been signed by defendant No. 2 as Managing Director of defendant No.1. The bills, thereafter have been raised

on 02.07.2008, 01.09.2009, 03.05.2010 and 02.06.2010. This conveys that the plaintiff was treated as being in possession of the suit property. The suit itself has been filed in the year 2010 itself. The cause of action for filing the present suit for injunction could possibly arise when the rights of the plaintiff were threatened. The plaintiff claims that the defendant threatened to dispose of the entire hotel project, unmindful of the plaintiff's right therein as aforesaid. Therefore, it cannot be said that the present suit is barred by limitation.

The application is dismissed.

I.A. No.9096/2010

After hearing learned counsels for the parties, it is agreed that the application could be disposed of in the following terms:

- (i) The order of injunction dated 16.07.2010 is confirmed till the disposal of the suit;*
- (ii) The plaintiff shall deposit the maintenance charges for the area in question in this Court within four weeks of the bills being raised by the defendants therefor in future;*
- (iii) The defendant shall raise the bills in respect of the arrears within a week, and the plaintiff shall deposit the up-to-date arrears within eight weeks; and*
- (iv) The amount so deposited shall be placed in a fixed deposit initially for a period of 366 days to be renewed from time to time till further orders.*

The application stands disposed of.”

6. As per the above order, it is clear that Defendant No.2 in the suit, namely, Sh. Bhajan Singh had an obligation to complete the hotel project and allot the commercial space of 4475 sq. ft. and 5000 sq. ft. commercial area. The Court inferred that the raising of bills by M/s Kular on Sh. Gurnam Singh is sufficient evidence of the fact that the said space was allotted to Sh. Gurnam Singh and that he was treated as being in possession

of the property. By way of interim directions, Sh. Gurnam Singh was directed to deposit the maintenance charges in the schedule as fixed by the Court. Thereafter, another suit being CS(OS) 1553/2013 was filed amongst the brothers titled as ***Pal Singh v. Gurnam Singh & Ors.*** An execution petition being Ex. P. 40/2014 was filed by M/s Kular seeking execution of the interim order passed on 23rd September, 2013 in I.A.9096/2010. Vide order dated 23rd April, 2014, a Ld. Single Judge of this Court passed the following order:

“1. CS(OS) 1409/2010 has been filed only for the relief of injunction, to restrain the defendants no.1 to 4 therein from selling, transferring, alienating or parting with possession of undivided commercial area comprising of 4475 sq. ft. and 5000 sq. ft. on 3rd and 4th floors respectively of hotel-cum-commercial building known as Hotel Fortune Klassic and K Mall situated at Link Road, near bus stand, Ludhiana, Punjab.

2. On the application of the plaintiff for interim relief, vide consent order dated 23.09.2013, the ex parte order dated 16.07.2010 was confirmed and the defendants were restrained from creating third party rights or disposing of any portion of the aforesaid 4475 sq. ft. and 5000 sq. ft. of area but, on the condition of the plaintiff depositing maintenance charges of the said area as recorded therein in this Court.

3. The defendant no.1 in CS(OS) 1409/2010 has, on the failure of the plaintiff to pay the said maintenance charges, filed Ex.P.40/2014 for execution of the aforesaid order dated 23.09.2013, for recovery of maintenance charges of Rs.2 crores approximately from the plaintiff in CS(OS) 1409/2010.

4. The counsel for the defendants in CS(OS) 1409/2010 on 03.04.2014 stated that CS(OS) 1409/2010 can be disposed of by granting permanent injunction as claimed by the plaintiff in the said suit. He however

presses for the plaintiff to pay the maintenance charges in terms of order dated 23.09.2013.

5. The plaintiff in CS(OS) 1409/2010 has filed IA No.7453/2014 for modification of the order dated 23.09.2013 insofar as recording the consent of and / or directing the plaintiff to pay the said maintenance charges.

6. As far as the claim of the defendant no.1 in the said suit to maintenance charges is concerned, the same is not the subject matter of the suit. The defendant no.1 has not filed any counterclaim in this Court for recovery thereof. The question of payment of the same by the plaintiff to the defendant no.1 arises only by way of a condition for grant of interim injunction sought by the plaintiff.

7. The counsel for the defendants no.1 to 4 on enquiry states that the defendants no.1 to 4 else do not claim any right, title or interest in the aforesaid 4475 sq. ft. and 5000 sq. ft. of area, save by way of security for the maintenance charges claimed to be due to the defendant no.1 from the plaintiff qua the said area.

8. Now that a dispute has arisen qua the said maintenance charges and qua which neither any relief has been claimed nor have any pleadings been made. I am of the opinion that the said dispute cannot be adjudicated in these proceedings.

9. Though this Court in Order dated 23.09.2013 had issued directions qua maintenance charges, but only for deposit thereof in Court (obviously because even then the claim therefor was disputed) and not for payment thereof to defendant no.1. However since the dispute, whether any maintenance charges are payable and if so to whom and in what amount, does not fall for adjudication in the suit, no purpose would be served by having the same deposited in this Court.

10. It has therefore been proposed that the claim of the defendant no.1 for maintenance charges and which is to be adjudicated in an appropriate

proceeding, be secured by the aforesaid 4475 sq. ft. and 5000 sq. ft. area of the plaintiff instead of by deposit of maintenance charges in the Court.

11. The same is acceptable to the counsel for the plaintiff as well as to the counsel for the defendants no.1 to 4.

12. Accordingly, it is ordered that the claim of the defendant no.1 for Rs.2 crores approximately shall be a charge on the said 4475 sq. ft. and 5000 sq. ft. of area of which the plaintiff claims to be the owner and which is admitted by the defendants no.1 to 4. The plaintiff is accordingly restrained, for a period of six months from today, from selling or otherwise encumbering in any manner the said area / property. The plaintiff shall however be entitled to let out the same for a period not exceeding three years. The defendant no.1 shall be entitled to during the said six months institute appropriate proceedings for asserting the said claim for maintenance charges and to in the said proceedings also make a claim for attachment before judgment of the said area / property or require the plaintiff to furnish other security for satisfying the claim for maintenance charges if ultimately allowed. Needless to state that if no such attachment before judgment or injunction is issued in the said proceeding with respect to the said 4475 sq. ft. and 5000 sq. ft. of area, the same will, on the expiry of six months from today, cease to be a security for the claims aforesaid of the defendant no.1 and the restrain aforesaid against the plaintiff shall lapse.

13. Accordingly, CS(OS) 1409/2010 is disposed of by passing a decree for permanent injunction in favour of the plaintiff and against the defendants no.1 to 4, restraining the defendants no.1 to 4 from selling, transferring, alienating or otherwise dealing with the area of 4475 sq. ft. and 5000 sq. ft. on 3rd and 4th floors respectively of hotel-cum-commercial building known as Hotel Fortune Klassic and K Mall situated at

Link Road, near bus stand, Ludhiana, Punjab and on further terms as hereinabove recorded and leaving the parties to bear their own costs.

14. In view of the aforesaid, Crl. M.As No.13988/2010 &7736/2011 and IAs No.19359/2013 & 6479/2011 are also disposed of as no further action is deemed necessary thereon.

15. The Ex.P.40/2014 is also disposed of in terms of above, with liberty to the defendant no.1 / decree-holder to make a claim for the amount which was sought by way of execution.

16. As far as CS(OS) 1553/2013 is concerned, the same be listed before the Joint Registrar for admission / denial of documents on 6th May, 2014.

17. List CS(OS) 1553/2013 on 1st August, 2014 for framing of issues if any.”

7. A perusal of the above order shows that an execution petition was filed to recover maintenance charges of Rs.2 crores based on the interim order dated 23rd September 2013. However, the said petition was disposed of by holding that an “appropriate proceeding” would have to be instituted and six months’ time was granted for instituting such a proceeding. Until then, a charge was created on the commercial space to secure the maintenance charges. The execution petition was disposed of and suit no.1409/2010 was also disposed of by passing a decree of permanent injunction restraining M/s Kular Construction Ltd. from dealing with the commercial space. The liberty given in the above order led to the filing of the present suit.

8. It is clear from a reading of the plaint as also the orders passed in the earlier suits and proceedings, that the grievance of the Plaintiff herein is that the Defendant – Sh. Gurnam Singh is not paying the maintenance charges in respect of the commercial space in the hotel project which is owned by the Plaintiff - M/s Kular. However, instead of seeking a recovery of the

maintenance charges, M/s Kular has filed a declaratory suit seeking declarations to the effect that Sh. Gurnam Singh has no right, title and interest in the commercial space, if the maintenance charges are not paid or that M/s Kular is entitled to take back the commercial space in order to adjust the maintenance charges.

9. What M/s Kular is attempting to do clearly is to stake a claim of ownership in the commercial space in lieu of non-payment of maintenance charges. M/s Kular may be right in law that it is entitled to seek maintenance charges from the Defendant. However, what would be the correct proceeding wherein such a recovery can be ordered? Would it be a suit for declaration or a suit for recovery?

10. The present suit is valued in the following manner:

“13. That the value of the suit for purpose of jurisdiction is fixed at Rs.2,05,63,629/- and for the purpose of Court fees it is fixed at Rs.200/- for the relief of declaration as the present suit is for simplicior declaration without any consequential relief hence fixed Court fees has been paid in the plaint.”

11. Thus, though the property is valued for more than Rs.2 crores for the purpose of declaration, only fixed court fee has been paid. Can a recovery suit be filed couched as a declaratory suit? That is the question that arises in the present case. Ld. Counsel for the Plaintiff – Mr. Girish Aggarwal submits that there is no bar in such a declaration being granted as M/s Kular has a right to the property due to non-payment of maintenance charges. Mr. Aggarwal further submits that since Sh. Gurnam Singh has not paid the maintenance charges, he is not entitled to occupy the commercial space. It is further submitted that the agreement dated 25th May, 2000 is an admitted

document and since the Defendant clearly admits to be in possession since 2006 and has not paid the maintenance charges, he cannot retain the possession. Mr. Aggarwal further submits that since there is a charge created vide order dated 23rd April, 2014, so there is no need to file a suit for recovery. He relies on the following judgments:

- ***Srimati Sabitri Thakurain vs. Mrs. F.A. Savi and Ors. AIR 1933 Pat 306***
- ***Ramachandran vs. Angamuthu Ammal AIR 2004 NOC 469 (Mad)***
- ***Dhannalal vs. Kalawatibai and Ors. AIR 2002 SC 2572***
- ***Management Committee of Montfort Senior Secondary School vs. Vijay Kumar and Ors. AIR 2005 SC 3549***
- ***Razia Begum vs. Sahebzadi Anwar Begum and Ors. AIR 1958 AP 195***
- ***Banarsi Dass Durga Prashad vs. Panna Lal and Ors. AIR 1969 P&H 57***
- ***Halima Bivi v. Fatima Bivi AIR 1987 Mad 129***

12. It is further submitted that since the Defendant never denied liability, the declaration sought for is liable to be granted.

13. On the other hand, Mr. Ashok Mathur, Ld. Counsel appearing for the Defendant submits that the maintenance charges having not been adjudicated, a declaratory suit is not maintainable. According to Section 34 of the Specific Relief Act, no declaration can be granted in respect of a pecuniary liability. Since the real relief granted is a monetary claim, the suit is not maintainable. He relies on the following judgments:

- ***Mahabir Jute Mills v. Firm Kedar Nath AIR 1960 All. 254***
- ***Anil Kumar Handa v. Smt. Suma Bala AIR 1980 Delhi 103***

14. The Court has heard the counsel for the parties. The family settlement is an admitted document and as per the settlement, there is no doubt that the

Defendant is the owner of the commercial space. The property may have been constructed by M/s Kular but the ownership in the commercial space is in no doubt. The Defendant's ownership is further strengthened by the injunction granted by this Court in CS(OS) 1409/2010 restraining M/s Kular Construction Ltd. and the other brothers from selling the said commercial space.

15. The declaratory relief sought by the Plaintiff is in effect nothing but an attempt to seek vesting of ownership of the commercial space in M/s.Kular owing to the non-payment of maintenance charges by the Defendant.

16. The admitted obligation to pay the maintenance charges cannot by itself mean that if the maintenance charges are not paid, a declaration can be granted in the manner sought.

17. The attempt in seeking the declarations sought is only to recover the maintenance charges, which the Plaintiff has clearly not done. None of the orders dated 23rd September, 2013 and 23rd April, 2014 passed in the proceedings referred to above, adjudicated the amount of maintenance charges to be paid. The raising of the invoices for maintenance charges has been held to be an admission binding the Plaintiff that it admits to the commercial space being in possession of the Defendant. When the maintenance charges are themselves not adjudicated in an appropriate proceeding, the Plaintiff cannot presume that the bills for maintenance charges raised have to be paid and due to non-payment thereof, it can seek ownership of the commercial space. The suit though termed as a suit for declaration is nothing but a suit for recovery. The prayer is cleverly worded. However, unfortunately, such a prayer cannot be granted. The submission of

Mr. Mathur that a declaration cannot be filed for enforcing pecuniary liability is correct. Section 34 of the Specific Relief Act, 1963 is set out hereinbelow:

“34. Discretion of court as to declaration of status or right.-Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

18. In ***Mahabir Jute Mills v. Firm Kedar Nath Ram Bharose***, the Allahabad High Court was dealing with Section 42 of the Specific Relief Act of 1877 which is in *pari materia* to Section 34 of the Specific Relief Act, 1963. In the context of the said suit, the Court first framed the question as under:

“... Before a suit can be filed under the section, therefore, it must relate to the plaintiffs legal character or to his right to any property. The question is whether a declaration that the plaintiff has not incurred any pecuniary liability or that the defendant has incurred any such liability in favour of the plaintiff can be considered to be a declaration about “legal character or a right to property.”

19. The Court then reviewed various case laws including ***Tian Sahu v. Mulchand Sahu AIR 1922 Pat 432*** where it was held that if only pecuniary relief was in question, a suit for declaration is not maintainable. The relief portion reads as under:

“9. In Tian Sahu v. Mulchand Sahu AIR 1922 Pat 432 the plaintiff had claimed a declaration that he would be entitled to contribution from the defendant if and when occasion arose and it was held that such a suit was not maintainable. A similar view was taken in Sripat Rao v. Shankar Rao AIR 1930 Bom 331. Following these two later cases it was held in Nathuram v. Mula AIR 1937 Lah 25:

“A suit for a declaration that the defendant would be liable to contribute to do the plaintiff all moneys which the plaintiff as the defendant’s surety would be liable to pay does not come under Section 42 as it affects only the pecuniary relationship between the parties to the contract.”

The same view was reiterated in Firm Gopal Das Parmanand v. Mul Raj AIR 1937 Lah 389 where a declaration that certain sum deposited by the plaintiff with the defendant as margin money was accountable by the defendant to the plaintiff was refused on the ground that it could not be granted under Section 42 of the Specific Relief Act as it affected only the pecuniary relationship between the parties to the contract.”

20. The Court then concludes as under:

“12. The principle which emerges from these decisions is that Section 42 of the Specific Relief Act does not contemplate declaration about the pecuniary liability of persons as the same cannot be considered to be declarations about their legal character or any right to property. The learned Civil Judge was therefore quite justified in his view that the declaration claimed by the plaintiff could not be granted to him.”

21. In **Anil Kumar** (supra), while dealing with a decree of declaration filed against banks by a party who was claiming absolute rights in respect of the amounts lying in the said bank accounts, the Court held as under:

“...The present suit is a device to avoid payment of the Court-fees. A declaratory decree should not be made by a Court where the object of the suit is to evade payment of stamp duty or Court-fees and the Court in the exercise of its discretion should refuse relief in such cases. Another reason is that there is no denial by the defendant. The question is : What is the necessity of the declaratory decree when there is no denial by the defendant. The only purpose appears to be to evade payment of Court-fees and claim the various amounts lying in various banks on the basis of declaration. This would amount to giving relief to the plaintiff without making him liable to pay the Court-fees required to be paid by him under the Court-fees Act. Ordinarily the banks cannot make payment of the amounts lying to the credit of the deceased unless the right of the claimant is established before a Court of law. The plaintiff has adopted the present suit as the mode to get declaration in his favour and then to claim the amounts from the various banks.”

22. Some of the judgments cited by the Plaintiff on the other hand relate to the Plaintiff being *dominus litis* in a litigation, which is a proposition that is well established. The same however does not mean that the Plaintiff ought to be granted relief, irrespective of whether the relief is maintainable in law. Further in **Razia Begum (supra)**, the Andhra Pradesh High Court has held that obtaining a declaratory decree is not a matter of right. In **Dhannalal (supra)** the Supreme Court held that there is an inherent right in every person to bring a suit of a civil nature. However, the Supreme Court clarified therein that the same is subject the exception that the suit ought not to be barred by any statute. The observations of the Supreme Court are:

“22. As held in Smt. Ganga Bai v. Vijay Kumar and Ors. (1974) 3SCR 882 there is an inherent right in every person to bring a suit of a civil nature and unless

the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit."

By applying the above principle, it is clear that though the Plaintiff is not barred from bringing a civil suit for recovering the maintenance charges, the question is whether a declaratory suit is maintainable. A perusal of Section 34 and the law laid down thereunder clearly shows that a pecuniary liability cannot be fastened by seeking a declaration. The interim order passed directing payment of maintenance charges was not finally confirmed and only liberty was given to seek the maintenance charges in appropriate proceedings. Thus, the judgements cited by the Ld. Counsel for the Plaintiff do not assist the case of the Plaintiff.

23. The creation of a charge vide order dated 23rd April, 2014 in respect of the commercial space does not mean that the Plaintiff can seek ownership rights in the commercial space. In *Supreme Court on Words and Phrases*¹ a charge is defined as under:

"Under the general law relating to transfer of property, a charge does not give rise to a right in rem: the right is however more than a mere personal obligation, for it is a jus ad rem a right to payment out of property specified. A charge gives a right to payment out of a specific fund or property, and a right to prior payment; but it does not create a right in rem in the fund or the property. A charge therefore gives a rise to a right to receive payment out of a specified fund or property in preference over others. In the

¹ Surendra Malik & Sumeet Malik, *Supreme Court on Words and Phrases*, 3rd Edn. (Eastern Book Company), 2014 at p.328

absence of a clear indication to the contrary, it would be difficult to hold that the expression “charged” used in the context of financial matters of the State, has a different meaning. Madhav Rao Jivaji Rao Scindia v. Union of India (1971) 1 SCC 85: AIR 1971 SC 530.”

A perusal of the above clearly shows that a charge may give a right to be paid out of a particular property but cannot create a right of ownership in the property. What the Plaintiff seeks in the present case is exactly what a charge does not do. The Plaintiff seeks a declaration that the Defendant has no right, title or interest, without paying maintenance charges, in effect seeking a declaration of ownership on the commercial space. A charge is not to be construed in this manner. The Plaintiff at best may be entitled to an injunction against the Defendant from selling the said commercial space as a security for the maintenance charges. However, that is not what the Plaintiff seeks. The Plaintiff seeks a declaration of ownership. Further, the charge created vide order dated 23rd April, 2014 has already expired as it was only for a period of six months and no judgment or injunction has been granted in the present suit.

24. Thus, the Plaintiff is not entitled to maintain the present suit which is in fact a recovery suit couched as a declaratory suit. It is barred under Section 34 of the Specific Relief Act. Remedies of the Plaintiff, if available in law, for seeking recovery or any other reliefs, are left open.

25. The suit is accordingly dismissed. I.A. No. 11236 of 2016 seeking a decree under Order 12 Rule 6 CPC does not survive and is dismissed. There shall however be no orders as to costs.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 7, 2019/Rahul/Agastya