

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CIVIL REVISION APPLICATION NO. 72 OF 2023

Vasanta Jyotiram Devdhe and ors __ Vs. __ Kailash Bhikaji Shinde and ors

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr.O.A.Ghare, Advocate for applicant

CORAM : AVINASH G. GHAROTE, J.

DATE : 21/07/2023

1] Heard Mr. Ghare, learned counsel for the applicants.

2] The application raises a challenge to the order dated 31.03.2023 passed by the learned Trial Court rejecting the application under Order 7 Rule 11 (a) to (d) filed by the applicants/defendants.

3] Mr.Ghare, learned counsel for the applicants contends that a consolidation scheme was settled in the year 1983, which is sought to be reopened by the present suit and therefore, the bar under Section 36A of the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act would apply. It is also contended that there is no cause of action for filing of the suit, apart from which the claim would be barred by limitation.

4] A perusal of the averments in the plaint indicates that pure and simple decree for declaration has been sought, that the plaintiff is the owner of 1H 10.17 R

of the land of Survey No.44 on the basis of the sale deed dated 23.2.1983 executed and registered in his favour, on account of which the plea of applicability of section 36A of the Fragmentation Act has rightly not been entertained.

5] A further relief of removal of encroachment and possession after demarcation of the land is also sought. It is therefore indicated that though the plea of limitation is pressed into service, in regard to the relief of encroachment, since possession also is sought, the limitation would be 12 years, and therefore the suit having been filed on 27.1.2023, within a period of 4 to 5 years of the encroachment, prima facie at this stage it cannot be held that the same is barred by limitation, that being a mixed question of facts and law and therefore required to be decided on the basis of the evidence which may be laid.

6] Though reliance has been placed upon **K.Akbar Ali vrs. K. Umar Khan and ors, (2021) 14 SCC 51** to contend that by clever drafting creating the illusion of cause of action ought not to be entertained, however, a perusal of the averments in the plaint indicates that pure and simple decree for declaration has been sought, that the plaintiff is the owner of 1H 10.17 R of the land of Survey No.44 on the basis of the sale deed dated 23.2.1983 executed and registered in his favour. Thus a suit for declaration based upon title has been filed and a

threat to it would always constitute a good cause of action.

7] Reliance is also placed upon **Sree Surya Developers and Promoters vrs. N.Sailesh Prasad and others, (2022) 5 SCC 736** (para 11) to contend that there cannot be a challenge to the consolidation scheme before the Civil Court in view of the bar under Section 36A of the Fragmentation Act. The averments in the plaint do not indicate any challenge to the consolidation scheme. What has been claimed is a declaration of the title based upon the sale deed executed in favour of the plaintiff with the consequential relief of possession if upon the measurement, portion of the land is found to be encroached. Whether the land in question is covered by the consolidation scheme or not is a question, which is incapable of being decided on the basis of the plaint averments, as they do not indicate such a position to be extant and therefore is not a question which can be decided at the stage of Order 7 Rule 11 of the CPC at which stage only plaint averments can be taken into consideration. I therefore do not see any reason to interfere in the impugned order. The revision is dismissed. No costs.

JUDGE

Rvjalit

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VASANTRAO JALIT
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Signing Date:24.07.2023 12:23