

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1172 OF 2023

WITH

INTERIM APPLICATION NO. 622 OF 2023

Mr. Govind Ratan Mhatre	}	
Age-56 years, Occu:-Business, R/at: Om	}	
Bungalow, Ayre Road, Dombivli (East)	}	
– 421 301, Tal-Kalyan, District-Thane	}	Appellant (orig. Plaintiff)

V/s.

1.Ms. Prashant Builders through Mr.	}
S.K. Shetye, and H.V. Katre, Sukhjeevan	}
Society, Ram Nagar, Dombivli (East),	}
Tal. Kalyan, Dist-Thane.	}

2. Mr. S.V. Katre	}
Age-Adult, Occu-Business, Snehalankar	}
Society, Rajaji Path No. 3, Dombivli	}
(East), Tal-Kalyan, Dist-Thane.	}

3. M/s. Tirupati Developers	}
A partnership Firm registered under	}
The partnership Act, Lodha Heaven,	}
Kalyan Shil Road, Dombivli (East) Tal-	}
Kalyan, Dist-Thane.	}

4. Mr. Pravin Sakharam Patil	}
Age-Adult, Occu: Business.	}

5. Mr. Pramod Ratan Patil	}
Age-Adult, Occu: Businesss.	}

6. Mr. Harishchandra Tulshiram Joshi	}
Age-Adult, Occu: Business.	}
Respondent Nos. 4 to 6 having office at	}
Chandresh Oasis, Lodha Heaven,	}
Kalyan Shil Road, Dombivli (E), Tal-	}
Kalyan, Dist-Thane.	}

.... Respondents
(Orig. Defendants)

VARSHA
DEEPAK
GAIKWAD
Digitally signed by
VARSHA DEEPAK
GAIKWAD
Date: 2024.04.26
18:52:59 +0530

Mr. Sumedh S. Modak, for the appellant.

Mr. Yogesh Deshpande with Mr. Mahesh Karule I.by YKD & Associates,
for respondent nos. 1 and 2.

Mr. P.S. Abhyankar, for respondent nos. 3 to 6.

CORAM : KISHORE C. SANT, J.

RESERVED ON : 13th MARCH 2024.

PRONOUNCED ON : 26th APRIL 2024.

JUDGMENT: (PER KISHORE C. SANT, J)

1. Heard the learned advocate for the appellant and learned advocates for respondents.

2. The appellant original plaintiff has approached this Court being aggrieved and dissatisfied by the order dated 26/04/2022 passed by the learned Civil Judge Senior Division, Kalyan, dismissing the suit under Order VII Rule 11 of CPC.

3. For the sake of convenience, the parties are referred to as per their original status in the suit. The appellant is the plaintiff and the respondents are defendants in the said suit in the same chronological order. The plaintiff had filed a suit bearing Special Civil Suit No. 30 of 2022 for recovery of amount and for possession of a

commercial premises.

4. It is the case of the plaintiff that the plaintiff had entered into an agreement on 07/01/1987 with Gyaneshwar Math through its Managing Trustee Mr. Swami Mahamandalehwar being a charitable trust registered under the Public Trust Act and M/s. Prashant Builders registered as partnership firm represented by defendant nos. 1 and 2 for a joint venture in the named and styled of M/s. Prashant Builders and Developers. The agreement was for developing of property of Shri Gyaneshwar Math situated at Plot No. 11, 12, Survey o. 23/1 and 24/1 at Chittaranjan Das Road, Dombivli (E), Tal-Kalyan, District-Thane. The contract was given by Defendant No. 1 to the father of plaintiff Mr. Ratan Arjun Mhatre on 17/07/1989. Defendant nos. 1 and 2 were to pay the entire amount of expenses incurred by plaintiff's father for the construction of building after sanction of building plan. Thereafter, amount of expenses as commercial premises of Rs. 200 to 250 per sq. ft. to be paid to the father of plaintiff. The cost of construction also includes Rs.29,00,000/- for restoration of old Shankar Mandir. Rs. 5,00,000/- towards fees of the advocate. Rs. 16,00,000/- towards other incidental expenses etc., Thereafter, confirmation letter was issued in January 1987 by the defendants. Further contract was registered with

the office of Sub Registrar. In view of the same, plaintiff paid an amount of Rs.15,00,000/- to one Sanjeev Kale, the partner of Omkar Construction Company. In the said Sanjeev Kale and one Kishor Shah issued a promissory note dated 27/03/1995 to father of the plaintiff. This was towards costs of construction by the father. The said amount was given to M/s. Prashant Builder i.e. Defendant nos. 1 and 2. After construction of work Defendant Nos. 1 and 2 avoided and failed to pay the amount as per the agreement to the plaintiff's father.

5. Plaintiff on getting knowledge of development of building approached Defendant Nos. 1 and 2 for refund of invested amount in various transactions with father of the plaintiff. However, they did not pay any amount. The plaintiff therefore, issued notice dated 04/01/2021 to M/s. Prashant Builders through his partner. In spite of receiving notice the amount was not paid and on the contrary they refused the claim of the plaintiff by sending reply dated 23/01/2021. In view of the refusal to pay the amount, the plaintiff had filed a suit bearing Special Civil Suit No. 30/2022. The said suit was for recovery of Rs. 1,15,00,000/- and for handing over shop admeasuring 250 sq. ft carpet area. in favour of the plaintiff. Relief of injunction also was prayed.

6. The trial Court before issuing the summons called upon the plaintiff as to why plaint should not be rejected as per Order VII Rule 11 of CPC.

7. On hearing the plaintiff the learned Civil Judge Senior Division, Kalyan passed the order dismissing the suit.

8. Learned advocate for the plaintiff vehemently argued that the Court has passed the order which is totally illegal and contrary to law. The reasoning assigned by the Court is not correct. The suit cannot dismissed under Order VII Rule 11 of the CPC in the manner in which it is rejected. The observations that the plaintiff has not shown cause of action is not correct. The observations of the Court that the plaintiff has failed to show locus standi is also totally against the law. Further observations that the suit is manifestly vexatious is also totally against the pleadings of the plaintiff. While considering the application under Order VII Rule 11 of CPC. At this stage, the Court has only to see the averments in the plaint and not defenses available to the defendants. He thus prays for setting aside the impugned order and to allow the appeal.

9. He relied upon the judgment in the Civil Appeal No. 14697 of 2021 by the Apex Court in the case of ***“G. Nagaraj and Anr Vs. B.P***

Mruthunjayanna and Ors".¹and in the case of "*Geeta Krishna and Ors. Vs Nanjundaswamy & Ors*".² In the said case the plaintiff had filed a suit for partition and separate possession. Defendant filed application after four years of filing of the suit seeking rejection of the plaint under Order VII Rule 11 of CPC. The trial Court dismissed the application for non disclosure of cause of action. High Court allowed the application and rejected the plaint to the extent of Schedule-A properties. The Hon'ble Court held that at this stage the Court is not concerned with the correctness of the averments. It is for the plaintiff to prove his case and Court has proceed only to examine whether the plaint discloses cause of action and nothing further and set aside the order passed by the High Court.

10. Opposing the appeal learned advocate for the defendant nos. 1 and 2 submits that in fact it is duty of every Court to see the averments in plaint and to see whether the suit is maintainable and whether there is cause of action and locus-standi to avoid manifestly vexatious proceedings. In the present case the suit is barred by limitation. The said contract was terminated by the defendant nos. 1 and 2. The plaintiff has not mentioned the same document dated

¹ (2023) SCC Online SC 1270

² (2023) 6 Bom C.R. 788

27/03/1995. Defendant nos. 3 to 6 are in possession as owners of the suit property. The Court has rightly considered this document. The Court has power to suo motto consider Order VII Rule 11 of CPC.

11. He relied upon the judgment of the Apex Court in the case of *“Dahiben Vs. Arvinbhai Kalyanji Bhanusali (Gajra) Dead through legal representatives and Ors”*.³

12. Learned advocate for defendant nos. 3 to 6 also vehemently argued the case. It is submitted that the suit was filed in 2022 for performance of the agreement of 17/07/1989 without producing original document on record. The said original document is suppressed. The agreement was also cancelled by the parties. This fact is also suppressed. He submits that in this case judgment of *“Dahiben”* (supra) is clearly applicable. It is held that the Court has suo motu power to dismiss the suit under Order VII Rule 11 of CPC.

13. In the rejoinder the learned advocate for the plaintiff submits that non-production of the document at this stage is not vital and the document can be produced at a subsequent stage also under Order VII Rule 14 (3) of CPC. He submits that the document of 1995 is not at all relied by the plaintiff. Cause of action stated is only on the basis of the document of 1989.

3 (2020) 7 SCC 366

14. Having heard the parties the main question that falls for consideration is that, as to whether the Court has suo motu power to consider the suit under Order VII Rule 11 at this stage. Secondly, as to whether in the present case the Court has rightly exercised the powers looking to the facts of the present case.

15. The Court in this case before issuance of summons by considering the plaint decided to hear the plaintiff on the point of maintainability. Hearing was given to the plaintiff and order is passed. From the order it appears that on reading of the plaint Court was of the opinion that the suit is vexatious. There was no right to sue and Court may exercise power under Order VII Rule 11 of CPC. The Court also considered that pleading includes the document relied upon by the plaintiff. On the facts it is considered that the development agreement had taken place between the landlord owner and defendant nos. 1 and 2 by which defendants executed promissory note stating that invested amount be returned to the father of the plaintiff within a period of one year from construction started on the suit land. The defendant nos. 3 to 6 thereafter initiated development work, the defendant nos. 1 and 2 thereafter denied the rights of the plaintiff. The suit was thus filed for performance of promissory note.

16. The cause of action is stated to have arisen after issuance of notice dated 04/01/2021 by the plaintiff and when the defendant's replied the said notice on 23/02/2021. This reply stated to be false. In the reply to the notice it is stated that due to various hurdles, father of plaintiff decided to withdraw and in view of that the parties mutually terminated the said agreement by signing document dated 27/03/1995. It is this document which was noticed by the Court and on that basis the Court *prima facie* formed opinion that promissory note dated 17/07/1989 does not survive in view of termination of the agreement.

17. In the plaint there is no challenge to this termination, no relief is sought against the said document. Thereafter, the Court has considered that plaintiff has not pleaded as to when his father expired. Court formed opinion that the document of termination was executed during life time of the father and held that plaintiff has deliberately neglected to state the same. The plaintiff has challenged the document of termination, the court thus held that no cause of action survive. The Court further considered that the plaintiff has deliberately not disclosed the document of termination. Defendant nos. 3 to 6 are considered to be owners of the suit property. Plaintiff deliberately

pleaded that the development agreement is executed in favour of defendant nos. 3 to 6. There is also search report in the document, it disclosed that the defendant nos. 3 to 6 purchased the suit land from the land owners. The Court thus finally held that development rights of defendant nos. 1 to 2 had held ceased. Thus cause of action is created and not a real. Thus, the Court *suo motu* considered and after hearing has come to the conclusion that there is no cause of action. The plaintiff has no right to sue. It is clear that the Court has gone beyond averments of the plaint and considered the documents. The documents are required to be proved and exhibited by leading the evidence and that stage would come only after framing of issues. The Court till the time issues are framing the Court has to proceed only on the basis of averments in the pleadings.

18. Here what is material is that at this stage the Court has to see is only the averments in the plaint along with documents, the Court while passing the order however has considered the document minutely which was annexed the plaint wherein there is reference of termination of agreement of 1989. It is the Court's interpretation before taking the matter for trial that the agreement does not exit and thus there cannot be a cause of action on the basis of such agreement

which is cancelled to termination. The question there is for as to whether it is open for this Court to consider one of the document when there is no pleadings in respect of said document. The Court while looking cause of action may have seen the agreement of 1989.

19. In the case of '**Dahiben**' (supra) the Hon'ble Apex Court has considered the provisions of order VII Rule 11 of CPC. It is observed that, the power conferred on the court to terminate a civil action is drastic one, and the conditions enumerated in Order VII Rule 11 are required to be strictly adhered to. It is held that duty is cast on the Court to determine whether the plaint discloses a cause of action for the said purpose has to scrutinize the averments in the plaint with the documents relied upon. The documents are required to be considered for deciding under Order VII Rule 11 of CPC. A document referred to in the plaint, forms the basis of the plaint, it should be treated as a part of the plaint.

20. The reliance is also placed on the judgment in the case of "**G. Nagaraj and Anr.**" (supra), it is held that, dealing with an application under Rule 11 of Order VII of CPC, only the averments made in the plaint and the documents produced along with the plaint are required to be seen. The defence of the defendants cannot be even

looked into. In that case, the trial Court and the High Court had gone into the question of correctness of the averments made in the plaint. On findings some inconsistent plea made in the plaint and came to conclusion that the plaint does not disclose cause of action. The Hon'ble Apex Court in such case has held that, some inconsistent averments made in the plaint, was not sufficient to come to a conclusion that the cause of action was not disclosed in the plaint.

21. Learned advocate for the respondent relied upon the judgment in the case of ***"M/s. Patil Automation Private Limited and Ors. Vs. Rakheja Engineers Private Limited"***.⁴, in that case, the question was in respect of Section 12(A) of the Commercial Courts Act, 2003. It is held that Section 12(A) of the said Act is mandatory and held that any suit instituted violating the mandate of Section 12A must be visited with rejection of the plaint under Order VII Rule 11. This power can be exercised even *suo motu* by the court.

22. In the present case there is no question of considering the provisions of Commercial Court Act, 2003. The said act is different. Here the suit is merely on the basis of an agreement.

23. In this case, Court had considered reference made to a termination of contract. The document of termination of contract itself

4 Civil Appeal No. ----- OF 2022 (arising out of SLP (c) no. 14697 of 2021)

is not part of annexures. This Court finds that considering the documents itself is one thing and considering something from the document where only reference is made to some other documents is different. In the present case Court considered reply sent by the defendant wherein there is reference to termination. This termination letter is not annexed to the plaint. In the plaint there is averment that notice is falsely replied. When such was the averment it was necessary to allow the suit to proceed. This reference in reply could not have been considered by the Court as it would be a matter of defence to be raised by the defendant.

24. In the present case, this Court finds that the judgment is applicable in the present case as the Court has seen some documents has gone inferences on the basis of reference made to some other documents which is not part of the plaint and has rejected the suit.

25. The Court has gone into the something beyond the plaint and the documents and has considered the reference to some documents i.e. letter of termination of the agreement. Certain things need cannot be considered at this stage.

26. On these discussions, this Court finds that the order passed by the learned trial Court needs to be set aside.

27. The Appeal stands allowed. The judgment and order dated 24/04/2022 passed by the learned Civil Judge Senior Division, Kalyan is hereby quashed and set aside.

28. The suit be restored to its original status and dealt with in accordance with law.

29. The appeal is disposed of accordingly.

30. In view of disposal of appeal, nothing survives in the interim application, the same is also disposed of.

31. The appellant shall be entitled to the refund of Court fees as per the rules. After suit is restored, the same is expedited. The trial Court is expected to decide the suit as early as possible in any case within two years.

(KISHORE C. SANT, J)