

(2013) 07 BOM CK 0008

In the Bombay High Court

Case No : Appeal No. 144 of 2013 in Notice of Motion No. 1984 of 2010 in Suit No. 1357 of 1988 and Notice of Motion (L) No. 1211 of 2013

Manjula Bharat Kumar Banker and Others

APPELLANT

Vs

Kumari Salima Suleman Oomer and Another

RESPONDENT

Date of Decision : 29-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, Order 7 Rule 11(a)

Citation : (2013) 5 ABR 672 : (2013) 6 ALLMR 830 : (2014) 1 MhLj 896

Hon'ble Judges : S.C. Gupte, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Harvinder Toor instructed by Vigil Juris, Rafeeq Peermoideen instructed by Ms. Sapna Rachure /Intervener in NMA No. 1072 of 2013, for the Appellant; P.K. Samdani, Mr. Viraj Maniar, Ms. Jinal Gagri and Tushar Ingale instructed by y Maniar Srivastava Associates, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—Admit. Learned counsel for the Respondents waives service. The appeal is taken up for hearing and final disposal, by consent and on the request of the learned counsel. The appeal arises from a judgment of a learned Single Judge by which the plaint has been rejected under Order VII Rule 11(a) of the Code of Civil Procedure, 1908.

Order VII Rule 11, CPC:

2. Order VII Rule 11(a) provides that the plaint shall be returned where it does not disclose a cause of action. While determining as to whether a case has been made out within the meaning of Order VII Rule 11(a), the plaint has to be considered as a whole for the purpose of determining as to whether a cause of action has been made out. The cause of action constitutes a bundle of facts which the plaintiff must prove in order to obtain relief. When the Court exercises the power under Order VII Rule 11(a), the defence to the suit is not material and it is only on the basis of the averments contained in the plaint, as they stand,

without adding anything or detracting from those averments, that the Court must determine as to whether a cause of action has been made out. The sufficiency of evidence is, therefore, not a matter which comes up for determination at this stage since that is a matter of trial.

3. The underlying principles for the exercise of the jurisdiction under Order VII Rule 11(a) have been elucidated in several judgments of the Supreme Court. In *Mayar (H.K.) Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others*, , the principle was stated thus:

12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, willful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint....

The same principle has been enunciated in the following observations of the Supreme Court in *Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another*, :

151. In ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate enquiry into doubtful or complicated questions of law or fact. By the statute the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown.

The Supreme Court held in *Jogeshwari Devi and others Vs. Shatrughan Ram* (2007) 15 SCC 52, that there is a difference between the non-disclosure of a cause of action and a defective cause of action; while the former comes within the scope of Order 7 Rule 11, the latter is to be decided during trial of the suit. The Supreme Court held in *T. Arivandandam Vs. T.V. Satyapal and Another*, that while exercising the jurisdiction under Order VII Rule 11, the Court is duty bound to conduct "a meaningful-not formal-reading of the plaint" and if it is "manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at first hearing by examining the party searchingly under Order X, C.P.C. An activist Judge is the answer to

irresponsible law suits."

The averments in the plaint:

4. Now, consistent with the law which has been laid down by the Supreme Court, it will be necessary to scrutinize the averments made in the plaint. The plaint sets out that one Suleman Haji Oomer was the owner of land more particularly described in Exhibit-A to the plaint together with an immovable property and three garages (together described as the suit property). The immovable property consists of a building comprising of a ground floor, basement and two upper floors. By a registered indenture dated 28 April 1944, the lessor leased the land for 999 years to the father of the original Plaintiff and sold the bungalow together with the garages standing on the land for consideration. The indenture of lease provided that the father of the Plaintiff would be a lessee for a term of 999 years on a monthly rent. Clause-5(b) of the indenture provided as follows:

5(b) If after expiry of the period of 10 years from the date of these presents, the Lessor Suleman Haji Ahmed Oomar intends to sell or otherwise transfer either for a valuable consideration (except by way of mortgage) his freehold reversionary interest in the demised premises, he shall by notice in writing offer to the Lessee the said Chinubhai Bankar first option to purchase his entire freehold reversionary interest in the demised premises free from encumbrances for the sum of Rs. 55 000/- and the Lessee Chinubhai Bankar if he wishes to exercise the said option, shall be bound to exercise the option within one month from the receipt of such notice from the Lessor, time is the essence of the contract in that respect. In the event of the Lessee exercising the said option in the manner hereinbefore mentioned, the Lessor shall convey to the Lessee or his nominee the demised premises on the terms contained in sub-clause (a) of this clause, as if the Lessee had exercised the option to purchase the demised premises within the period of 10 years from the date hereof and thereto shall be completed within two months from the date of exercise of such option.

5. The lessor gifted the land to the First Defendant on 4 May 1962. The First Defendant filed a suit against the Plaintiff in the Small Causes Court for ejectment on the ground of arrears of rent. The suit was decreed on 24 July 1973 and the Trial Judge directed that the bungalow along with three garages should be removed within six months. The Plaintiff thereafter filed a suit in the City Civil Court for a declaration that the decree which was passed by the Small Causes Court was a nullity. The suit in the City Civil Court was dismissed on 3 August 1984. A motion which was taken out for setting aside the ex-parte dismissal of the suit was dismissed in default, though a writ petition before this Court was stated to be pending. The case of the Plaintiff is that the First Defendant by an indenture of sale dated 2 April 1982 purported to assign and transfer the right, title and interest in the suit property to the Second Defendant for consideration. In paragraph 15 of the plaint, the Plaintiff avers that the transfer by the First Defendant to the Second Defendant is in breach of the covenant contained in Clause-5(b) of the said indenture of lease. The cause of

action which has been set up in paragraph 15 is as follows:

15. The Plaintiff says and submits that, under clause 5(b) of the said Indenture, it is an obligation of the Defendant No. 1, in case the Defendant No. 1 intend to sell or otherwise transfer her interest to the suit property after the expiry of the period of 10 years from the date of the said Indenture i.e. 28.4.1944, to offer the transfer of the said land to the Chinubhai. The Plaintiff says and submits that, in breach of the said covenant, the Defendant No. 1, the successor-in-title of the original Suleman Haji Ahmed Oomer has sold the suit property to the Defendant No. 2. The Defendant No. 2 has knowingly purchased the suit property in breach of the rights of the Plaintiff under Indenture. The Plaintiff says and submits that he is entitled to enforce specifically the said covenant clause 5(b) of the said Indenture against the Defendant No. 1 and Defendant No. 2. The Plaintiff further says and submits that he is now and has always been ready and willing to carry out his obligation of paying price of Rs. 55,000/- to the 1st Defendant for purchasing all the rights of the 1st Defendant in the said land. The Defendant No. 1, in collusion and connivance with the Defendant No. 2 committed breach of clause 5(b) of the said Indenture by not informing and offering to and calling upon the Plaintiff to purchase the right of the Defendant No. 1 in the said land.

6. The Plaintiff contends that the decree of the Small Causes Court is a nullity and that the Defendants have by an act of fraud and collusion deprived the right of the Plaintiff to purchase the reversionary interest under Clause-5(b) of the indenture of lease.

7. On the basis of these averments the reliefs which have sought in the suit are as follows:

(a) That, the Defendants be decreed and ordered to transfer the suit property described more particularly in Exhibit "A" to the plaintiff by proper conveyance as per clause 5(b) of the Indenture dated 28-4-44 being Exhibit "B" hereto and to quit, vacate, deliver quiet, vacant, and peaceful possession of the suit property to the Plaintiff.

(b) The Defendants be decreed and ordered by permanent injunction from interfering with the possession and enjoyment of the suit property or recover any rent or compensation from any occupants of the suit property. Incapable of being valued the Plaintiff tentatively value the same at Rs. 300/- and has paid Court fees accordingly.

Prayer clause-(c) is for mesne profits.

8. The learned Single Judge has held that relief under the indenture of lease was available to the Plaintiff during the pendency of the lease. Once the lease stands determined and the termination was upheld, a decree of eviction was passed and the challenge had been negated, all the rights of the Plaintiff under the lease deed came to an end, following which no cause of action or a right to sue would survive.

Submissions:

9. The learned counsel for the Appellant submits that:

(i) For the purposes of Order VII Rule 11(a) of the Code, all the averments contained in the plaint must be accepted as they stand and that would include the averment that the decree passed by the Court of Small Causes is a nullity. The original lessee has under the indenture of lease acquired not only a leasehold interest in the land but the immovable property situated thereon. Hence, applying the well settled test under Order VII Rule 11(a), the suit could not have been dismissed for not disclosing a cause of action;

(ii) The learned Single Judge has erred in entering upon the merits of the claim in the suit and in observing that the decree passed by the City Civil Court would be res-judicata between the parties. Similarly, it has been submitted that the learned Single Judge was in error in coming to the conclusion that prayer (b) is consequential to the relief of injunction.

Analysis:

10. We have prefaced the judgment by adverting to the position in law as laid down by the Supreme Court to govern a determination under Order VII Rule 11(a) of the Code. For that purpose we have extracted the relevant averments and we must have regard to the plaint as a whole. The Plaintiff asserts a right under Clause-5(b) of the indenture of lease. Clause-5(b) which is extracted in the plaint stipulates that on the expiry of a period of ten years, in the event of the lessor intending to sell or transfer "his freehold reversionary interest in the demises premises", he shall, by notice in writing, offer to the lessee, the first option to purchase the entire freehold reversionary interest for a sum of Rs. 55,000/-. The plaint discloses that the lessor had filed a suit for ejectment in the Court of Small Causes in which a decree for eviction had been passed. The judgment of the Court of Small Causes which is annexed to the plaint adverts to the only contention which was urged before the Court in the following terms:

(7) The only contention in this taken by the defendant is that property was taken by Chinubhai Lalbhai as the Karta and Manager of the Hindu Undivided Family and therefore the suit is bad for non-joinder of necessary parties....

The Court of Small Causes negated the defence and then held as follows:

(8) In view of my decision on the above issues the plaintiff is entitled to get possession. The defendant has not disputed the standard rent. He has not also shown his readiness and willingness to pay all the arrears and therefore the plaintiff in my opinion is entitled to get possession. So I answer this issue in the affirmative.

The decree of the Court of Small Causes is that the plaintiff to these proceedings shall vacate and hand over vacant and peaceful possession of the suit plot after six months after removing the structure thereon. The Plaintiff, as the averments

in paragraph 15 of the plaint would indicate, seeks enforcement of the covenant contained in Clause-5(b) of the indenture of lease dated 28 April 1944. Prayer clause (a) of the suit seeks a decree for the transfer of the suit property in favour of the Plaintiff "as per Clause-5(b) of the indenture dated 28 April 1944" and a decree for handing over the possession of the suit property to the Plaintiff. Prayer clause (b) is a consequential prayer since it seeks an injunction restraining the Defendants from interfering with the possession and enjoyment of the property or from recovering any rent or compensation from the occupants of the suit property.

11. Once the lease stands terminated, as is clear on the face of the plaint as it stands, and the right of the Plaintiff as a lessee has come to an end upon a final adjudication by the Court of Small Causes in the suit for ejectment where a decree has been passed, the rights of the Plaintiff emanating from, and under the indenture of lease stand determined. Clause-5(b) of the indenture of lease contemplates a transfer of the freehold reversionary interest of the lessor to the lessee. This is based on the existence and continuance of the lease. Once the lease has been terminated and a decree for eviction has been passed, a freehold reversionary interest of the lessor itself would not survive and consequently the covenant conferring upon the lessee an option of demanding a transfer of the freehold reversionary interest would cease to exist. The lessor who held only a freehold reversionary interest during the term of the lease, would acquire the entirety of the freehold interest in consequence of its termination. Hence, with the termination of the lease, the option which has been granted under Clause-5(b) to the lessee would necessarily come to an end and would no longer subsist.

12. We do not find any merit in the contention that the decree passed by the Court of Small Causes is a nullity and that what was conferred upon the original Plaintiff under the indenture of the lease was not only the leasehold interest in the land but an absolute ownership of the suit property standing thereon. Once the lease was terminated and the termination has been upheld on the ground of arrears of rent by the Court of competent jurisdiction, the consequential direction of the Small Causes Court was for the removal of the structure situated thereon. Hence we hold that the learned Single Judge was justified in exercising jurisdiction under Order VII Rule 11(a) of the C.P.C. and in rejecting the plaint since no cause of action is disclosed in the plaint. The appeal is, therefore, liable to be dismissed on that basis.

Suppression:

13. During the course of the hearing, we may record that the learned senior counsel appearing on behalf of the Respondents has placed on the record a list of dates indicating that there was a serious suppression on the part of the Plaintiff of various developments which had taken place even prior to the institution of the suit. This included the fact that after the decree for eviction was passed by the Court of Small Causes, the appeal was dismissed in default on 14 July 1975.

The Appellant filed four applications for restoration which were also rejected. Thereafter the Appellant filed a writ petition Writ Petition No. 937 of 1979 challenging an order passed in one of the four restoration applications, which was dismissed in default. A civil application Civil Application No. 3607 of 1979 was filed before this Court for restoration in which on 17 January 1971, the Appellant was directed to deposit Rs. 21,500/- towards arrears of tax and Rs. 1,000/- towards costs for restoration on or before Writ Petition No. 3585 of 1980 March 1981, failing which the Civil Application would stand dismissed. The Appellant failed to comply with the order in consequence of which the Civil Application automatically stood dismissed and the writ petition also stood dismissed. Another writ petition⁷ was filed on 11 December 1980 to grant relief against forfeiture under clauses (a) and (b) of the indenture of lease and for setting aside the decree of the Court of Small Causes dated 24 July 1973. The petition was dismissed by this Court on 5 January 1981. The SLP Special Leave Petition (C) No. 1679 of 1981 challenging the order of this Court was dismissed on 24 February 1981 by the Supreme Court. The Appellant filed a third writ petition Writ Petition No.685 of 1981 before this Court on 15 March 1981 seeking relief to the effect that the decree of the Court of Small Causes may be quashed for want of jurisdiction. The writ petition was dismissed by a Division Bench of this Court on 20 March 1981. All these developments have taken place prior to the institution of the suit but were suppressed from the plaint. This material suppression of facts would independently furnish a basis for this Division Bench not to interfere with the judgment of the learned Single Judge in appeal. We, however, dealt with this aspect after having come to the conclusion that on the basis of the averments as contained in the plaint, no cause of action has been made out and the plaint has to be rejected under Order VII Rule 11(a) of the Code. In the circumstances, there is no merit in the appeal, which is accordingly dismissed. There shall be no order as to costs.