
(2014) 01 BOM CK 0039

In the Bombay High Court

Case No : Civil Revision Application No. 174 of 2013

Nahed Anjum

APPELLANT

Vs

Ravindra

RESPONDENT

Date of Decision : 21-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11(a), Order 7 Rule 11(d), Order 7 Rule 11(d)
Evidence Act, 1872 — Section 115

Citation : (2014) 01 BOM CK 0039

Hon'ble Judges : A.I.S. Cheema, J

Bench : Single Bench

Advocate : Rajendra S. Deshmukh, Advocate for the Appellant; Shrikant Y. Patil, Advocate and B.N. Patil, Advocate for the Respondent

Final Decision : Dismissed

Judgement

A.I.S. Cheema J.

1. Admit. Heard finally with consent of learned counsel for both sides.
2. The present Revision Application has been filed by original Defendant, against rejection of his application under Order VII Rule 11(a) and (d) of the Code of Civil Procedure, 1908 ("C.P.C." in brief) in Regular Civil Suit No.273 of 2011 by Second Joint Civil Judge, Junior Division, Ausa, Dist -Latur. The present Applicant (hereinafter referred as "Defendant") had moved application Exhibit 38 for rejecting the plaint on the grounds of limitation, non-joinder of necessary parties, res judicata and estoppel. The trial Court heard the parties and has rejected the application filed by the Defendant. Thus, the present Civil Revision Application has been filed. Respondents are the Plaintiffs in Trial Court. I will refer to parties, as arrayed in trial Court.
3. Heard learned counsel for both sides. Point for consideration is: -
"Whether while passing the impugned order Trial Court acted in the exercise of

jurisdiction illegally or with material irregularity? "

4. Order VII Rule 11(a and d) of the C.P.C. read as under:

"11. Rejection of plaint. - The plaint shall be rejected in the following cases: -

(a) where it does not disclose a cause of action;

(b)

(c)

(d) where the suit appears from the statement in the plaint to be barred by any law."

5. It is clear that the plaint can be rejected where "it does not disclose a cause of action" or where the suit appears from "the statement in the plaint" to be barred by any law. It is obvious that in both cases examining of the Plaint itself will have to be done. Learned counsel for the Applicant has thus, referred to the plaint as filed in the trial Court.

6. The copy of the plaint has been gone through. The Respondents (original Plaintiffs) have filed the suit which discloses (in brief) an earlier litigation regarding mortgage of part of the property of Survey No.117/B at AUSA with one Manikrao Deshpande. Portions relevant for present litigation appear from Para 8 onwards of the Plaint. It can be seen that it has been pleaded that Prakash, brother of deceased Vishnu (husband of Plaintiff No.4) filed suit for partition, having R.C.S. No.351 of 1988. During the pendency of that suit, it is claimed that the parties who were family members, came together for the advice of Advocate Mazharulla Hashmi (the husband of present Defendant). In order to raise money a nominal sale deed claimed to be executed for what was a transaction of mortgage. Under such transaction document, sale deed dated 11th March, 1993 came to be executed in the name of Defendant, the wife of the Advocate, for the Northern part of Survey No.117/B, which was 13 Acres and 11 Gunthas. The pleadings are that Southern portion of 4 Acre 1 Guntha came to be sold by Manikrao Deshpande (with whom there was the other litigation of R.C.S. No.351 of 1988), to one Suresh Narayan Hanchate, which portion was to the South of Survey No.117/B. Learned counsel for Applicant has tried to submit that these pleadings show that Article 61(b) of the Limitation Act would apply.

7. Learned counsel for the Plaintiffs has submitted that the present suit is for redemption of mortgage which was done by the present Defendant, on the basis of the facts as pleaded in Paragraph Nos. 8 to 10 of the Plaint and the cause of action has been clearly spelt out in Para 13 of the Plaint.

8. Going through the Plaint, it is quite clear that transaction on the basis of which claim is made as far as regards Defendant is concerned, is of 11th March, 1993 and cause of action is spelt out in Para 13 on the ground that redemption was sought but was declined, so the suit. Even if the time is calculated from 9th March 1993, it cannot be said that the suit is barred by limitation. Thus Article

61(a) of Limitation Act applies. It is not a case that the property which is alleged to have been mortgaged to the Defendant, has been transferred by the mortgagee, in order to attract Article 61(b) of Limitation Act.

9. Learned counsel for the Defendant - Applicant submitted that Prakash and his sisters were necessary parties, as the pleadings show that for the alleged mortgage (which he claims was out and out sale deed) Prakash and others were also party. If Para 9 of the Plaint is perused, what is pleaded is that in the meeting where Prakash and deceased Vishnu and others were present, it was agreed that whenever Vishnu returns the money, on that day the land would be transferred back to Vishnu. Present Plaintiffs are the heirs of Vishnu. Even otherwise, learned counsel for Plaintiffs submitted that if there are other necessary parties, the Plaintiffs can take the necessary steps even now.

10. Coming to the principle of estoppel raised u/s 115 of the Indian Evidence Act, the trial Court has observed that it is question of law and fact involved. The Plaintiffs are claiming that it is a transaction as mortgage, while Defendant is claiming that it is out and out sale. This would be matter to be decided when evidence is led. At present stage, it cannot be said that on the basis of principle of estoppel the suit should be thrown out.

11. Learned counsel for Applicant claimed that the suit was barred by principle of Res Judicata. The counsel for Plaintiff submitted that Defendant is trying to raise plea of Res Judicata on the basis of earlier suit bearing No. R.C.S. No.351 of 1988, which was suit for partition between Prakash and deceased Vishnu and their family members, while the present suit is for redemption of mortgage alleged to have been taken place with Defendant. Both the suits are different. It does not appear that Trial Court committed error in not applying the principles of Res Judicata.

12. For the reasons stated above, I do not find that the impugned order suffers from any irregularity or illegality. There is no substance in the Revision Application.

13. Civil Revision Application is rejected.