

(2009) 12 BOM CK 0044

In the Bombay High Court

Case No : Civil Revision Application No. 489 of 2008

Nilma S. Navalkar

APPELLANT

Vs

Nipun I. Thakkar

RESPONDENT

Date of Decision : 19-12-2009

Acts Referred:

Bombay Court Fees Act, 1959 — Article 7, 6
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Maharashtra Co-operative Societies Act, 1960 — Section 91

Citation : (2010) 2 BomCR 110

Hon'ble Judges : Mhatre Nishita, J

Bench : Single Bench

Advocate : Shishir Joshi, for the Appellant; V.A. Thorat, instructed by R.A. Thorat, for the Respondent

Final Decision : Allowed

Judgement

Mhatre Nishita, J.—Rule. By consent of the parties, Rule made returnable forthwith and heard finally.

2. The civil revision application arises from the order passed by the trial Court with respect to the proper valuation of the suit. This order has been passed on 2.8.2008 and the trial Court has answered the two preliminary issues which were framed in favour of the plaintiff i.e. the respondent herein. The two preliminary questions framed were (i) whether the plaintiff has properly valued the suit and if not whether the claim is beyond the pecuniary jurisdiction of the Court and (ii) whether the jurisdiction to try the suit by the Civil Court is barred u/s 91 of the Maharashtra Co-operative Societies Act (for short, hereinafter referred to as MCS Act).

3. The plaintiff has filed the present suit for a declaration that the defendant is not entitled to act contrary to the undertaking and consent dated 8.5.2007 given in favour of the plaintiff. Another prayer which was sought is for a permanent injunction restraining the defendant from dealing with, alienating, encumbering,

transferring or creating any third party rights and/or acting contrary to the undertaking and consent given to the plaintiff.

4. According to the defendant, the suit in fact has been filed for specific performance of a contract under the guise of a suit for an injunction. The plaintiff ought to have paid Court fees by valuing the suit accordingly. Instead the plaintiff has paid the Court fees in accordance with Section 6(iv)(j) of the Bombay Court Fees Act, by contending that the suit was not susceptible to monetary evaluation.

5. The trial Court has held that the amount mentioned in the undertaking would not be relevant while granting the decree as prayed. It has therefore held that the Court fees paid by the plaintiff are correct. As regards the other preliminary issue the Court has held that the transaction between the plaintiff and the defendant does not touch the business of the society and so it does not fall within the purview of Section 91 of the MCS Act.

6. Mr. Joshi appearing for the defendant submits that the trial Court has erred in concluding that the suit has been properly valued and that the Court fees paid by the plaintiff are correct. He submits that the declaration which has been sought by the respondent is that the applicant should not act contrary to the undertaking furnished by her on 8.5.2007 which is really a prayer seeking specific performance. He submits that the undertaking indicates the consideration of Rs. 35,50,000/- which would be payable to the applicant in return for her consent for permitting the respondent to develop her property. It is further submitted that merely because the respondent has sought relief under Order 2, Rule 2 to file a suit for specific performance separately it would not necessarily mean that the present suit was not one for specific performance. He submits that the reliefs sought in prayer (b) of the plaint are consequential reliefs in a suit for specific performance of contract. He points out that the same reliefs have, in the present case, been sought as consequential reliefs. According to the learned Advocate, the suit is capable of valuation and therefore the correct Court fees ought to have been paid.

7. The learned Advocate relies on the judgments of this Court in *Agricultural Produce Market Committee Vs. Shahnawaz Kasim Shaikh and Others*, , *Gilda Finance and Investment Ltd. Vs. Natenco Wind Power Pvt. Ltd.*, and in the case of *Vinod Vyankat Narsaiyya Gannu Vs. Sunil Poshettiwar and Others*, .

8. The learned Counsel appearing for the respondent on the other hand submits that the frame of the suit indicates that the plaintiff is only seeking a declaration and nothing more to the effect that the defendant will honour the undertaking submitted by her to the plaintiff, permitting him to redevelop her property. He submits that the prayer sought is an injunction restraining the defendant from transferring her rights in the property in any manner is only in aid of the final relief and to ensure that the defendant did not act contrary to the aforesaid undertaking. The learned Counsel submits that when a suit is filed it is the

valuation of the suit by the plaintiff which is ordinarily to be accepted. He places reliance on the judgment of the Supreme Court in the case of Tara Devi Vs. Sri Thakur Radha Krishna Maharaj, through Sebaitis Chandeshwar Prasad and Meshwar Prasad and Another, and on the judgment of this Court in the case of Art Commercial Advertising Pvt. Ltd., Bombay and Others Vs. Vicco Laboratories, Bombay and Another, .

9. It would be necessary first to advert to the undertaking which has been furnished by the respondent and for which the present suit has been filed. The undertaking mentions that the respondent is a member of the State Bank of India Staff "Vaibhav Co-operative Housing Society Ltd." As a member she was allotted bungalow No. 28 which was constructed by the society. A resolution was passed at the general body meeting of the society wherein it was agreed that the redevelopment proposal submitted by the respondent should be accepted. Thereafter, the applicant has stated in her undertaking that she was aware of the redevelopment proposal contained in the letter of the plaintiff dated 16.9.2006, 24.9.2006 and 27.3.2007 and that she had accepted the proposal for redevelopment. The undertaking further mentions that she was agreeable to the redevelopment in view of the fact that the respondent was ready and willing to pay Rs. 15 lacs, as part consideration of the total compensation payable which was fixed at Rs. 30 lacs, to each member on execution of the undertaking. The applicant has also acknowledged the receipt of the Rs. 20,50,000/-. Clause 8 of this undertaking mentions that in acknowledgment of the receipt of the aforesaid amount of Rs. 20,50,000/-, the applicant undertakes that she would participate in the general body meeting which was to be convened and undertakes to support and agree to the redevelopment proposal and urge the society to execute a Memorandum of Understanding, development agreement and other necessary documents. The next clause of the undertaking mentions that in the event the general body of the society not favouring the redevelopment proposal, the amount which has already been paid by the respondent would be refunded to him. Clause 12 indicates the final agreement on the redevelopment proposal. The area of the accommodation to be provided to the applicant has been mentioned. The compensation which would be paid to her for opting for the redevelopment scheme is also has also been mentioned. Besides this, it has also been stipulated that the respondent would provide an alternative accommodation to the appellant in a rented house with the rent payable at Rs. 15,000/- per month or a lumpsum amount. Thereafter, a notice was sent to the applicant by the Advocate for the respondent on 30.5.2008 calling upon her to execute the agreement and power of attorney in favour of the respondent. This letter was replied by the Advocate for the applicant in which it was stated that after the respondent's initial expression of interest and execution of the undertaking on 8.5.2007, the respondent had made no effort to ensure that the redevelopment scheme was executed. Besides it was mentioned that despite an assurance given by the respondent that he shall take steps to hold the elections within 45 days of the signing of the undertaking. The applicant then returned the amounts aid by the

respondent by various cheques along with her Advocate's letter. The suit has been filed immediately thereafter in June 2008.

10. In my opinion, the writing which is termed as a declaration is the acceptance by the applicant of an offer made by the respondent to redevelop the structure occupied by her on payment of certain amounts mentioned in the undertaking. The declaration which the plaintiff has sought and the consequential reliefs would obviously indicate that it is not a mere declaration that the plaintiff has sought. The suit has in fact been filed for specific performance of the contract under the guise that the relief sought is an injunction. Therefore, the suit should have been valued accordingly and not u/s 6(iv)(j).

11. It is true that the Supreme Court in the case of Tara Devi (supra), has held that the valuation of a suit by the plaintiff is ordinarily to be accepted. However, when the Court finds on a consideration of the facts and circumstances that the valuation is arbitrary, unreasonable and the plaint has been demonstratively been undervalued, the Court can examine the valuation and revise the same. In the case of Art Commercias (supra), this Court held that the frame of the suit in that case and the reliefs claimed and the subject matter of the suit were not susceptible to monetary evaluation and therefore the suit squarely failed u/s 6(iv)(j) of the Bombay Court Fees Act.

12. However, in the present case, in my opinion, it cannot be said that the suit was not susceptible to monetary evaluation. Under the guise of a declaration that the applicant should not act contrary to the undertaking furnished by her, the plaintiff has sought specific performance of the contract between the parties to redevelop the applicant's structure. In the case of Agricultural Produce Market Committee v. Shahnawaz Kasim Shaikh and Ors. (supra), it was held that since the attempt to seek a declaration and injunction against the petitioners would result in an order of restraining the APMC from collecting a fixed market fee and supervision charges the suit was susceptible to monetary evaluation and the suit therefore had been undervalued and the Court fees paid were less than appropriate as they were paid u/s 6(iv)(j) of the Bombay Court Fees Act. Similarly, in the case of Gilda Finance & Investments Ltd. v. Natenco Wind Power Pvt. Ltd. and Ors. (supra), the plaintiff instituted a suit wherein an injunction was sought against the defendant from enforcing the bank guarantee since the prevention of encashment of the amount involved in the MoU. This Court observed that it amounted to undervaluation of the suit and that the Court fees ought to have been paid accordingly and not u/s 6(iv)(j).

13. In the case of Vinod Vyankat Narsaiyya Gannu v. Sunil Diwakar Poshettiwar and Ors. (supra), this Court observed that the suit filed by the plaintiff for a declaration restraining the defendant from carrying on business until the accounts were settled and amounts paid to him in fact had been undervalued and that the Court fees liable to be paid was as per the Article 7 of Schedule I and not as per Section 6(iv)(j).

14. In the present case as well, the Respondent, under the pretext of a suit for declaration, has sought to prevent the applicant from redeveloping or transferring her rights in the suit property to a third person which is a relief which can be granted in a suit for specific performance. Besides the value payable to the defendant for accepting the redevelopment proposal has been mentioned in the undertaking and in fact she was paid that amount. However, after she returned the amount, the respondent filed the present suit. In my opinion, therefore, the suit has not been properly valued and the Court fees on the same are less than prescribed under the Bombay Court Fees Act, 1959. Had the suit been valued properly, the suit would not fall within the pecuniary jurisdiction of the City Civil Court.

15. Accordingly, the Civil Revision Application is allowed. Rule made absolute in terms of prayer Clause (a).