
(2002) 01 BOM CK 0098

In the Bombay High Court

Case No : Notice of Motion No. 2663 of 1997 in Suit No. 729 of 1995

Satyanarayan Malpani

APPELLANT

Vs

Sushiladevi S. Malpani and Others

RESPONDENT

Date of Decision : 24-01-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 151

Citation : (2002) 3 ALLMR 476 : (2002) 3 BomCR 587

Hon'ble Judges : Pratibha Upasani, J

Bench : Single Bench

Advocate : S.H. Doctor and J.M. Sidhwa, instructed by Mehta and Girdharilal, for the Appellant; M.U. Pandey, for defendant No. 1, Kevic Setalwad and Vimla Shah, instructed by Vimla and Co. for defendant No. 2, G.R. Kinkhabwale, instructed by Anil Desai and Co. for defendant No. 3, for the Respondent

Judgement

Pratibha Upasani, J.—This Notice of Motion is taken out by the defendant No. 2 praying that the operative part of the order passed by Mr. S.S. Nijjar, J. in the Notice of Motion No. 557 of 1995 be corrected so as to read and be applicable in respect of the land admeasuring 8022.23 square metres, bearing CTS No. 2-B part and 2-H of village Kandivli, Taluka Borivli, Bombay Sub-urban District instead of the land described in the schedule Exhibit A to the plaint.

2. The suit is filed by the father-in-law of defendant No. 1 and father of defendant Nos. 2 and 3. Defendant Nos. 1 and 2 are husband and wife. The suit is filed by the plaintiff praying inter alia that the Deed of Cancellation dated 25th January, 1985 (Exhibit "K" to the plaint) and the Deed of Confirmation dated 7th September, 1988 (Exhibit "L" to the plaint) are legal, valid and subsisting and binding on the parties thereto and that the agreement dated 6th February, 1980 (Exhibit "D" to the plaint) stands cancelled by the Deed of Cancellation dated 25th January, 1985 etc. The litigation is in order to get control/ownership of the suit property. The Notice of Motion was taken-out by the plaintiff praying for interlocutory relief of injunction in terms of prayer Clause (a) of the Notice of

Motion, and the same was granted by Mr. S.S. Nijjar, J. by a reasoned order dated 20th January, 1997. The said prayer Clause (a) reads as under :--

"(a) that sending the hearing and final disposal of the suit, the defendants be restrained by an order and injunction of this Hon"ble Court by themselves, their servants and/or agents from in any manner interfering with the plaintiff's possession of the said property described in Exhibit-A hereto and/or the development activity being carried out by the plaintiff thereon."

Thereafter, the proceedings reveal that on 6th August, 1997, the matter was kept for speaking to the Minutes. All the parties were present before Mr. S.S. Nijjar, J. An application was made by the Counsel for the plaintiff that the observations contained in the last sentence on Page No. 23 were not correct. Consequently, the sentence, "It is also agreed between the parties that in the event of the demise of the plaintiff, the property would devolve upon defendant Nos. 2 and 3" was deleted. The learned Judge therefore in the said order dated 6th August, 1997, directed that the necessary correction be made in his order dated 20th January, 1997, whereby the Notice of Motion was disposed of by him. The Counsel for defendant No. 2 thereafter stated that although the Notice of Motion was made absolute in terms of prayer Clause (a), the suit itself pertained to Exhibit "T, and that, mentioned in Exhibit T was at variance with the area mention in Exhibit A. The Counsel for defendant No. 2 therefore submitted before Mr. S.S. Nijjar, J. that the relief granted therefore, be modified, so that, Exhibit T was substituted for the words Exhibit A, occurring in prayer Clause (a) of the Notice of Motion.

Justice Mr. Nijjar, however, noted that the order on Notice of Motion was passed on 20th January, 1997, that no appeal was filed against the said order, and further observed that the request made by the Counsel for defendant No. 2 was not for correction of an error apparent on the face of the record, and consequently, found no justification for the grant of the said prayer. Observing this, he rejected the prayer of Counsel for defendant No. 2 for rectification of his order.

3. The present Notice of Motion, however, is taken out by defendant No. 2, once again, for the very same relief. On this ground, the plaintiff has vehemently opposed the relief sought by defendant No. 2 in the present Notice of Motion.

4. Having gone through the pleadings and the order passed by Mr. S.S. Nijjar, J. on 20th January, 1997, as modified on 6th August, 1997, and after considering the prayer in the present Notice of Motion taken out by defendant No. 2, it becomes evident that defendant No. 2 has once again prayed for the same relief, which was specifically and categorically rejected by Mr. S.S. Nijjar, J. in his order dated 6th August, 1997. In short, defendant No. 2 wants this Court to sit in appeal over the order passed by the learned Single Judge. This is not permissible. If defendant No. 2 was aggrieved by the order of Mr. S.S. Nijjar, J., he ought to have approached the superior forum by way of filing appeal against

the said order. This has not been done by him. Defendant No. 1 (wife of defendant No. 2) appears to have filed an appeal against the order dated 20th January, 1997. However, it appears that the said appeal was dismissed by the Division Bench, and the SLP filed against the said order was also dismissed by the Supreme Court. Thus, the order of Mr. S.S. Nijjar, J. has become final. Now, by way of this Notice of Motion, defendant No. 2 wants this Court to sit in appeal over the order passed by Mr. S.S. Nijjar, J. No doubt, orders which are of interlocutory nature, can be varied and amended, but this is not the order which is of such a nature. Advocate Mr. Setalwad, appearing for defendant No. 2 strenuously argued that this Court can rectify the mistake which has occurred in the order and relied upon certain authorities viz. Vallabhaneni Vimalamba Vs. Ghanta Ratnamma and Another, Aziz Ullah Khan and Others Vs. Court of Wards, . These authorities, however, are of no use to defendant No. 2 because what they observe is that the Court can correct mistakes committed by parties u/s 151 of the CPC and also highlight the powers of the Court u/s 151 of the CPC to correct mistakes. Albeit as far as the legal proposition laid down by these authorities is concerned, there cannot be any quarrel.

5. However, in the present case at hand, first of all, the learned Single Judge has already given a finding that there is no such mistake in the order, when defendant No. 2 averred that the mistake be rectified with respect to the area of the suit property and the alleged discrepancy in the area mentioned at Exhibit T and the area mentioned at Exhibit A.

6. The plaintiff's contention in the present case is that he is entitled for X area, while defendant No. 2's contention is that, he is entitled for Y area, and the contention of the plaintiff that he is entitled for X area is erroneous. Now if this be so, the point has to be adjudicated upon by framing an issue accordingly, and evidence has to be led by parties on that issue. Defendants have raised exactly this issue in their written statement, and accordingly, evidence can be led at the time of hearing of the suit. But no order can be passed in the present Notice of Motion on the background of the previous orders passed by Mr. S.S. Nijjar, J. against which, no appeal has been filed by defendant No. 2, and who by his clarificatory order dated 6th August, 1997 has specifically rejected the prayer of defendant No. 2. Defendant No. 2 has adopted a circuitous route by taking out this Notice of Motion when once the prima facie finding is given by the learned Single Judge on the very same issue.

It also has to be mentioned that in the detailed affidavit-in-reply filed by defendant No. 2 in the earlier Notice of Motion (which was disposed of by Mr. S.S. Nijjar, J. by his detailed order dated 20th January, 1997), no mention is made by defendant No. 2 about the alleged discrepancy in the area claimed by the plaintiff and about the alleged discrepancy between Exhibit A and Exhibit T annexed to the plaint. Under these circumstances. Defendant No. 2's prayer cannot be granted and the Notice of Motion taken out by him has to be dismissed. Hence, the following order :

Notice of Motion dismissed.