

(1999) 07 BOM CK 0042

In the Bombay High Court

Case No : Chamber Summons No. 717 of 1999 in Suit No. 1244 of 1998

Vishram Prabat-H.U.F. by the Karta and Manager Shankar
Vishram Patil

APPELLANT

Vs

M/s. Shruti Builders and others

RESPONDENT

Date of Decision : 22-07-1999

Acts Referred:

Civil Procedure Code, 1859 — Section 5
Civil Procedure Code, 1908 (CPC) — Section 9

Citation : (2000) 1 BomCR 209

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : Ravi Kadam, Jai Chinoy and Deepak Chitnis Vaithy and Co, for the Appellant; P.K. Samdani, Mrs. Popat instructed by Wadia Gandhi and Pankaj Kowli instructed by Miss U.M. Jhaveri, for the Respondent

Judgement

F.I. REBELLO, J.—The applicant-defendant No. 1 has moved this Court to revoke the leave granted to the plaintiff under Clause 12 of the Letters Patent. There is a Notice of Motion for interim relief pending in the suit. In that light of the matter, and in view of the order dated 17th June 1999 of the Appellate Bench of this Court passed in Appeal No. 336 of 1999 in Chamber Summons No. 1167 of 1998 in Suit No. 4060 of 1998, the revocation of leave is being decided as a preliminary issue as to the jurisdiction of this Court to hear and decide the suit. The application for leave to revoke has been moved on the ground that the suit is a suit for land and no part of the cause of action has arisen within the jurisdiction of this Court as the land is situated outside the territorial jurisdiction of this Court and consequently, no leave could have been granted under Clause 12 of the Letters Patent. Parties are agreed that the said issue be decided as a preliminary issue by virtue of section 9-A of the CPC as introduced in this State. Parties have further agreed that no evidence need be led in the matter and that the issue can be decided on the pleadings as they exist. Against that background, the preliminary issue as to jurisdiction of this Court to hear and decide this suit can

now be decided.

2. At the outset, I can only paraphrase the words of Patanjali Sastri, J., in *Moolji Jaitha & Co. v. K.S. & W. Mills Co.*, AIR 1950(37) 83. The learned Judge while giving a separate judgment, concurring with the majority observed as under:

"The numerous cases in the books on the construction of that Clause reveal what a prodigious amount of judicial time has been expended on endless debate as to its meaning and application. Section 5, Civil P.C. of 1859, which also used the ambiguous expression "suits for land" in defining the jurisdiction of the mofussil courts, has been amplified in the subsequent Codes by enumerating certain specific categories of suits and thus removing the ambiguity, but no amendment has been made in Cl. 12, Letters Patent. It is to be hoped that the appropriate legislative authority will turn its attention to the need for its clarification on similar lines".

After expressing my lament that nothing has happened since then, I proceed to decide the said issue.

3. In order to enable this Court to decide the issue, it will be essential to find out what are the reliefs prayed for. The main relief is prayer Clause (c), which reads as under:

"that the defendants No. 2 and 3 be ordered and decreed to partition or subdivide the sub-plots No. 1 to 7 more particularly described in Exhibit "A" annexed and hereto in accordance with the stipulation as set out under Assignment dated 11th December, 74 the Indenture-cum-Understanding dated December 31, 1988, under the Deed of Partition dated December 26, 1991 and under the Deed of Rectification dated June 18, 1992".

Thus, it is clear that the plaintiff has filed the suit on the basis that he has certain rights in the land based on the agreement and that defendants 2 and 3 be ordered and decreed to partition or sub-divide the plots therein described. Prayer Clause (a) is for cancellation of agreement for sale dated 16th July 1994 made between defendant No. 1 and defendant No. 2 as being illegal, null and void. Prayer Clause (b) is that defendants No. 1 and 2 be ordered and decreed to deliver the said agreement for cancellation. Prayer Clause (d) is to direct defendants No. 2 and 3 to hand over to the plaintiff, quiet, vacant and peaceful possession of sub plot No. 1 and two-thirds out of 66% undivided rights in sub-plot No. 2 as also internal roads. Prayer clauses (e), (f) and (g) are in the nature of mandatory injunctions to refrain the defendants from executing any further documents etc. and from using the FSI and TDR in respect of other sub plots other than sub plots No. 1 and 7 until the sub division of sub plot is determined and to hand over the title deeds and deposit them in the Court as set out in Exhibit O-18. These, therefore, are the prayers that have been prayed for in the suit. Therefore, the plaintiff has approached this Court on the ground that he has title in the land based on documents as referred to and is seeking cancellation of the agreement between defendant No. 1 on the one hand and defendants No. 2

and 3 on the other based on his right and title in the land. He further seeks sub division/ partition in respect of the land, which has been described in the agreement and recovery of possession from defendants No. 2 and 3. This recovery from defendants No. 2 and 3 is based on the agreement entered into between defendants No. 1, 2 and 3 whereby defendants No. 2 and 3 had agreed to hand over possession of property to defendant No. 1 in terms of Clause 29 of the said agreement and to convey title in terms of Clause 31 of the agreement.

4. The question, therefore, is whether the suit is a suit for land as is contended on behalf of the defendants or whether the suit, in fact, is a suit to enforce rights arising from a contract as set out in prayer Clause (c) and as such for reliefs in personam, as is contended on behalf of the plaintiff. Defendants 2 and 3 support the plaintiff on this legal proposition. It may also be pointed out that various agreements including the assignment dated 11th December 1974, the indenture cum understanding dated 31st December 1978, the deed of partition dated 26th December 1991 and the deed of rectification dated 18th June 1992 have been executed in Bombay. Similarly an agreement of sale which is sought to be cancelled dated 16th July 1994 is executed in Bombay. The plaintiff has described defendant No. 1 apart from having his office at Thane as having his office also at Masjid Bunder, Mumbai. Defendants No. 2 and 3 are shown as residents of Bombay and defendant No. 4 as having his office at Thane.

5. This Court in a number of judgments has held that in so far as Clause 12 of the Letters Patent is concerned, the suit for land must be substantially for land. However, what is substantially for land is again a question which will have to be answered. For that purpose, I need refer firstly to the judgment of this Court in the case of *The Khandesh Spinning and Weaving Mills Co. Ltd. v. Moolji Jaitha & Co.*, AIR 1948(35) Bom. 272. The definition of a suit substantially for land is based upon the distinction as to the nature of relief which is sought, Bhagwati, J., in a concurring judgment quoted the observations of Parkar, J., in 1908(1) ch. 856. I may reproduce that part of the observation, which is relevant :

"In my opinion the general rule is that the Court will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction. There are no doubt exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the Immovable property".

One may also advert to the observations of Chagla, C.J., in *Khandesh Spinning and Weaving Mills Company Ltd.* in para 20 of the judgment, which read as under :

"Therefore, the learned Chief Justice makes it perfectly clear that if the claim in

the suit had been based on any contract, trust or fraud or any circumstance giving rise to privity between the parties, the suit would not have been a suit for land and the Court would have exercised jurisdiction which the Chancery Courts exercised in England. Far from discarding the ratio decidendi in 14 Bom. 353 to my mind this decision emphasises and reiterates it."

Thereafter, useful reference may be made to the judgment in Moolji Jaitha & Co. (supra) wherein C.J., Kania, quoted from Halsbury's Laws of England (Hailsham Edition) Vol. VI, part IV. The observations pertaining to jurisdiction in personam are as under :

"The English courts have power to exercise the jurisdiction in personam in respect of foreign immovables against persons locally within their jurisdiction in cases where there is an equity between the parties arising from contract, fraud or trust provided that the decision of title be not directly involved. But such an equity must be of a personal nature, i.e., there must be either a fiduciary relationship or privity of some other kind between the parties, for the courts will not exercise their jurisdiction in order to enforce English principles of equity against third persons who acquired a good title by the local law, nor in the absence of privity between the parties, to impose on a foreign immovable a burden other than the local law requires it to bear".

6. Therefore, in deciding whether an action is a local action or an action in rem or an action in personam, one has to see what is the leading purpose of the suit. If the leading purpose of the suit is to obtain a declaration of title to foreign land, it is a suit for land. If the leading purpose of the suit is the exercise of the equitable jurisdiction in personam, it is an action in personam or a transitory action and it is not converted into a local action merely because questions of title to foreign land incidentally arise in the exercise of that jurisdiction in personam.

Numerous judgments have been cited at the bar in support of the respective contentions. However, to my mind, it would be sufficient to consider only the judgment of the Apex Court in M/s. Moolji Jaitha & Co. (supra) and another of the Division Bench of this Court in Shiv Bhagwan Moti Ram Saraoji Vs. Onkarmal Ishar Dass and Others, . In M/s. Moolji Jaitha and Co. (supra) the Judges of the Federal Court constituting the Bench wrote five separate judgments. To my mind, the observations in the five judgments as to what is the suit for land will be sufficient to dispose of the present issue. It may be pointed out that the Federal Court was deciding an appeal preferred against the judgment of this Court in the Khandesh Spinning and Weaving Mills Co. Ltd. It may also be relevant to note that in the said suit the plaintiffs proceeded on the footing that they were in possession and there was no relief for possession sought by the plaintiffs from the defendants.

7. In dealing with the issue as to what is a suit for land Kania, C.J., observed as under :

"The view of a large majority of Judges thus appears to be that the expression

"suit for land" should not be narrowly confined and limited to suits for the recovery of possession of land or to obtain a declaration of title to land only. The wider meaning of the expression, so as to cover all suits relating to land, i.e., which has anything to do with land, does not appear to be accepted by anyone. That leaves the question wherein between the line of demarcation should be drawn. The courts have differed in the matter of drawing this line under different circumstances, and the same Court has taken divergent views on the point. No judicial decision has attempted to give an exhaustive enumeration of the suits covered by the expression "suit for land" and I do not propose to do so. It is sufficient to say that taking the suit as a whole, one has to consider whether it is for the purpose of obtaining a direction for possession or a decision on title to land, or the object of the suit is something different but involves the consideration of the question of title to land indirectly".

8. Fazl Ali, J., in his separate concurring judgment proceeded on the footing that the appeal before the Apex Court was itself not maintainable and went on to observe as under :

"I would have agreed with the line of cases in which it has been held that, broadly speaking, the expression "suit for land" covers the following three classes of suits; (1) suits for the determination of title to land; (2) suits for possession of land; and (3) other suits in which the reliefs claimed, if granted, would directly affect title to or possession of land".

9. Patanjali Sastri, J., in his judgment has made a distinction as to the actions in rem and actions in personam and observed as under :

"As pointed out by Mr. Dicey (Conflict of Laws, 6th Edn., p. 205) the only strict action in rem now existing under the English law is the action which can properly be brought in the Admiralty Division of the High Court against a ship or other res such as cargo of freight: all other actions being only proceedings in personam."

It may also be noted that apart from Admiralty Jurisdiction actions in respect of status are also held to be actions in rem.

As to what is a suit for land, the learned Judge observed as under :

"Without, however, attempting a definition which will cover all and no more than all the suits that may properly be held to come within that description, it seems reasonable to say, as "suit" means the process by which a party seeks to obtain a judicial determination of his rights and "for" means, in its most natural sense in this context, "in order to get or obtain" that the words in question, besides obviously covering claims for recovery of possession or control of land, are apt to connote also suits which primarily and substantially seek an adjudication upon title to immovable property or a determination of any right or interest therein."

10. Mahajan, J., dissenting from the majority in so far as the view taken by a Division Bench of this Court, nonetheless also described what is a suit for land. The learned Judge observed as under :

"The subject matter of a suit would be land or immovable property where on the pleadings the controversy raised is such that the Court is called Upon to adjudicate as to title to land or immovable property or is asked to pass a decree or order which would affect directly the proprietary or possessory title to land or immovable property".

The learned Judge, thereafter, further proceeded to observe:

"I, therefore, content myself by saying that where the nature of the suit is such that in substance it involves a controversy about land or immovable property and the Court is called upon to decide conflicting claims to such property and a decree or order is prayed for which will bring about a change in the title to it, that suit can be said to be in respect of land or immovable property; but where incidentally in a suit, the main purpose of which or the primary object of which is quite different, some relief has to be given about land, the title to it not being in dispute in the real sense of the term, then such a suit cannot fall within the four corners of this expression."

11. B.K. Mukherjee, J., in his judgment observed as under :

"It has been pointed out by more than one jurist and publicist that jurisdiction in case of actions relating to immovable property is determined by the principle of effectiveness. A Judge has no right to pronounce a judgment if he cannot enforce it within his territory, vide Cheshire's Private International Law, p. 139; 145. Hence if the decision of the Court is intended to embrace the disposition of the property itself or the determination of a right or title to it which might affect other persons, it is essential that the property must be within the jurisdiction of the Court. On this principle, the English Judges have always refused to adjudicate upon title to or the right of possession in foreign lands".

Useful reference may also be made to the following observations :

"Bearing in mind the principles stated above, it seems to me fairly clear that the expression "suit for land occurring in Cl. 12, Letters Patent, means a suit which is instituted with the object of establishing claims regarding title to the property or possession of it. Whether or not possession is claimed, if title to any immovable property is to be directly affected by the result of the decision, the suit would be a suit for land. The limits of jurisdiction, as I have said already, in case of landed property are to be determined by applying the test of effectiveness."

The learned Judge then proceeded to observe as under :

"Having regard to the scope and object of Cl. 12, Letters Patent, it seems to me that the proper interpretation to be put upon the words "suits for land" would be to take them to mean a suit for establishing title to land or any interest in the same or for possession or control thereof; and the decree sought for must be intended proprio vigore to be enforceable against and binding on the land itself."

12. It is thus clear from all the observations that the earlier concepts of

distinguishing causes of action based on an action in rem or in personam is no longer determinative or effective, as in modern times actions in rem are restricted to admiralty jurisdiction and status. Therefore, the test is as to what is the relief sought. Do the reliefs require determination of title to the land? Do they seek recovery of possession of the land or partition and if so, whether these reliefs are incidental or substantial whilst deciding the issue in question.

Useful reference may also be made to the judgment of the Division Bench of this Court in *Shiv Bhagwan Moti Ram Saraoji v. Onkarmal Ishar Dass* (supra) more specifically to para 6 of the judgment wherein Chagla, C.J., observed as under :

"It is well settled that a suit for partition of immovable properties is a suit for land. And under Cl. 12 of the Letters Patent, the Court would have jurisdiction in the case of suits for land or other immovable property if such land or property is situated within jurisdiction. The construction of Cl. 12 has been responsible for more judicial decisions than perhaps any other clause in the Letters Patent, and many learned Judges have pointed out the various possible constructions to which the language of Cl. 12 lends itself."

In para 22 of the same judgment Bhagwati, J., as he then was observed as under :

"A suit for partition of immovable property is a suit for land and this Court had therefore no jurisdiction to entertain the suit for such partition because no part of the land was situated within jurisdiction. The case would, however, be different in regard to the movable properties, and this Court would have jurisdiction to entertain the suit for partition of movable properties if by reason of the suits or location of some of the movables within jurisdiction it could be said that a part of the cause of action had arisen within jurisdiction. In that event with leave under Cl. 12 of the Letters Patent being granted this Court would have jurisdiction to entertain the suit for partition of all the movable properties which were the subject-matter of the suit."

I refrain from adding for the sake of adding. To my mind the observations culled out, by themselves, should be the beacon for understanding Clause 12.

13. Applying the aforesaid tests to the reliefs as sought for in the suit, can it be said that the suit is basically for enforcing the agreement as sought in prayer Clause (c) and all other reliefs are merely consequential to relief in prayer Clause (c). The plaintiff is seeking a declaration for cancellation of documents, namely prayer Clauses (a) and (b) against defendant No. 1 based on his title to the land along with defendants No. 2 and 3. Plaintiff will, therefore, have to establish his title to the land against defendant No. 1 to get the reliefs in prayer Clauses (a) and (b). These are not incidental questions to be decided or reliefs to be granted to hold that the action is in personam. To my mind if the tests applied by the learned Judges of the Federal Court as also of this Court are applied, the suit involves the following:

(a) determination of the Plaintiff's title to the land as without such determination the reliefs as prayed for in prayer Clauses (a) and (b) cannot be granted;

(b) partition of land or sub division of sub plots as prayed for in prayer Clause (c);

(c) recovery of possession as has been prayed for in prayer Clause (d).

14. Therefore, to my mind the suit is a suit substantially for land and as the land situate outside the jurisdiction of this Court, this Court has no jurisdiction to hear and decide the present suit.

15. In the light of that, I answer the issue of jurisdiction in favour of defendant No. 1 and accordingly, direct the plaint to be returned to the plaintiff for presentation before the proper Court.

16. Order accordingly.

17. In the circumstances, there shall be no order as to costs.

18. Order accordingly.