

(2010) 09 BOM CK 0079

In the Bombay High Court

Case No : Writ Petition No. 3569 of 2010

Yashwanta Dhapodkar and Others

APPELLANT

Vs

Mahadeo Gorle (Dead) and Others

RESPONDENT

Date of Decision : 22-09-2010

Acts Referred:

Bombay Court Fees Act, 1959 — Section 6
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 27
Specific Relief Act, 1963 — Section 19
Transfer of Property Act, 1882 — Section 52

Citation : (2011) 1 ALLMR 134 : (2011) 1 BomCR 146 : (2011) 1 MhLj 569

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : M.B. Naidu, for the Appellant; M.D. Chikhale, for the respondents
Nos. 2 to 15, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—The challenge in this writ petition filed under Article 227 of the Constitution of India is to order dated 19.04.2010 passed below Ex. 69 in RCS No. 163/2009 by the Court of Civil Judge, Junior Division, Parseoni, District - Nagpur, rejecting the objection to court fee and valuation of suit for declaration of title on the basis of its perfecting by adverse possession. This Court has issued notice for final disposal. Considering the nature of controversy, I have heard both learned Counsel finally by issuing Rule and making it returnable forthwith.

2. After coming to know that defendants Nos. 1 to 5 against whom the suit was filed have on 08.09.2009 sold the disputed property to defendant No. 6, plaintiffs (respondents before me) amended their plaint and added that purchase as defendant 6. They also added a relief that said sale deed should be declared as null, void and be cancelled. After said amendment, the defendants moved application at Exh. 69 contending that as sale consideration was Rs. 2,37,500/-,

the suit needed to be valued in accordance with Section 6(iv)(ha) and Section 6(iv)(d-iii) proviso of the Bombay Court Fees Act. They urged that ad valorem court fee in full was accordingly had become payable. The Trial Court rejected that objection by impugned order.

3. Point raised is whether in a Suit filed for declaration of ownership because of the adverse possession, upon amendment to declare a lis-pendence sale-deed executed by the defendant therein bad and not binding on him, the plaintiff has to pay court fee u/s 6(iv)(ha) of the Bombay Court Fees Act, 1959, (hereinafter referred to as the Act). Further as he is claiming restoration of possession, he has to pay full ad valorem fees calculated on sale consideration of Rs. 2,37,500/ -

4. Advocate Naidu for the petitioners - defendants including subsequent purchaser argues that in the light of an express stipulation contained in Section 6(iv)(ha), the view of the Trial Court in impugned order that no separate court fee is payable on such reliefs is unsustainable. According to him, the judgment of this Court *Khanderao Bhujangrao Babar v. Bharatbai Shrimant Gomsale* reported at 2009 (3) ALL MR 568 overlooks this express arrangement in statute and does not lay down correct position. Trial Court has not considered the provisions of Section 6(iv)(d)(iii) at all.

5. Learned Advocate Chikhale for respondents Nos. 2 to 15 - plaintiffs states that the suit is for declaration that petitioner has ceased to be the owner and title stands vested in plaintiff due to adverse possession. As suit is a title suit, the transfer of suit property during its pendency is not binding on plaintiff and also he is not party to that transaction. The sale deed therefore need not have been challenged also. The relief that sale is not binding on plaintiff is subordinate to main relief in the Suit as filed. As suit is valued correctly and proper court fee is paid on main relief, no separate court fee is payable on secondary relief and cause. He further states that court fee as paid is sufficient to cover court fee even on relief of possession subsequently added. The judgment of this Court *Khanderao Bhujangrao Babar v. Bharatbai Shrimant Gomsale* (supra) is pressed into service by him.

6. This Court in judgment in *Khanderao Bhujangrao Babar v. Bharatbai Shrimant Gomsale* (supra) had an occasion to consider the relevant provisions in the light of the precedents. In that matter, Respondent No. 1 in High Court i.e. original plaintiff instituted the suit claiming specific performance of agreement and recovery of possession. Plaintiff in the suit also claimed relief to the effect that the registered sale-deeds bearing Nos. 1508 and 1509 executed on 15.09.1997 be adjudged as ineffective and inoperative against the plaintiff. She stated in the plaint that the property in dispute has been subsequently transferred by original defendant No. 1 in favour of other defendants. Being a lady, as per the policy of the State Government in respect of remittance of court fees by a lady litigant, prevailing at the relevant time, that plaintiff was not required to pay court fees. However, after proper contest the suit presented by the plaintiff came to be dismissed. She then filed Regular Civil Appeal No. 20/2004 before the Court of

Additional District Judge, and in it original defendant No. 2 presented an application and raised objection about payment of court fees by the original plaintiff. He contended that by virtue of subsequent notification dated 23.03.2000, the plaintiff was liable to pay the court fees along with appeal as the dispute in question did not relate to matrimonial matters. Another application was presented by the plaintiff claiming exemption in respect of payment of court fees. Application presented by defendant No. 2 / petitioner in High Court therein was allowed and the application tendered by original plaintiff came to be dismissed. Plaintiff, then, presented an application contending that her suit was essentially for specific performance of agreement as well as for recovery of possession. Therefore, the court fees would be computed in accordance with the provisions of Section 6(j) and not as per provisions of Section 6(ha). When the issue came before this Court, this Court found that it cannot be said that the subject matter in dispute was not susceptible of monetary evaluation and as such, the provisions of Section 6(j) of the Act would not apply. The contention of the petitioner/ original defendant No. 2 was that as the suit was in respect of declaration of sale transaction being void, the plaintiff had to pay half of the ad valorem fees leviable on the valuation of property. This Court noted that the main relief claimed in the plaint was in respect of specific performance of agreement and essentially a claim between the vendor and vendee and the subsequent transferee was impleaded only for the purpose of issuing direction to him to join the vendor in executing the registered document. It was not necessary for the plaintiff to claim declaration in respect of subsequent transactions in a suit for specific performance of agreement. This Court noted that Section 19(a) of the Specific Relief Act provided that the specific performance of the contract may be enforced against either party thereto whereas u/s 19(b) relief can be sought against any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. Taking into consideration the ratio laid down by Hon''ble Apex Court and this Court in the matters cited, this Court found that joining of co-defendant / subsequent purchaser to the suit was merely for securing relief of specific performance as contemplated by Section 19(b) of the Specific Relief Act. The declaratory relief was claimed against the subsequent purchasers the said claim was superficial and no court fees was required to be paid in that regard. Neither the provisions of Section 6(ha) nor provisions of Section (j) of the Bombay Court Fees Act were found attracted and therefore, no court fees has been held payable in respect of declaratory relief sought for by the plaintiff. Thus, the statutory provisions of Section 19(b) of the Specific Relief Act and its purpose have lead this Court to take particular view. Dilip Bastimal Jain v. Baban Bhanudas Kamble and Ors. 2001 (3) Mah. L.J. 730, again shows the same approach with reason that in suit for specific performance, it is not necessary for plaintiff to obtain any declaration about invalidity of subsequent sale-deeds. Because of this statutory scheme, the Courts have ignored the actual prayers for such declaration though made and hence, no court fee is found payable on it as substantive prayer and

suit was found to be for specific performance on which due court fee was already paid.

7. In present matter, respondent plaintiff's Suit is not for specific performance. On the contrary, he is claiming acquisition of title by perfecting it because of his so called adverse possession. While amending the plaint, he has accepted that his prayer for temporary injunction has been rejected. He also claimed forcible dispossession thereafter. Sale deed dated 08.09.2009 is challenged in this background by very same amendment. He has also added purchaser form original defendants as party. In Krishnamurthy S. Setlur Dead by LRs. Vs. O.V. Narasimha Setty and Others, , Hon"ble Apex Court states that Section 27 of the Limitation Act, 1963, operates to extinguish the right to property of a person who does not sue for its possession within the time allowed by law. The right extinguished is the right which the lawful owner has and against whom a claim for adverse possession is made, therefore, the plaintiff who makes a claim for adverse possession has to plead and prove the date on and from which he claims to be in exclusive, continuous and undisturbed possession. The question whether possession is adverse or not is often one of simple fact but it may also be a conclusion of law or a mixed question of law and fact. The facts found must be accepted, but the conclusion drawn from them, namely, ouster or adverse possession is a question of law and has to be considered by the court. It is clear that at this stage, the plaint allegations only need to be accepted without going into any factual or legal aspects of the claim as lodged. Section 52 of the Transfer of Property Act stipulates that immovable property title to which is in dispute in a pending contested suit, can not be transferred or otherwise dealt with by any party to it to prejudice the rights of other party under a decree sought therein. It therefore follows that in present matter title of petitioner's vendor was already in dispute and during pendency, he transferred that property to present petitioner. The observation of Hon"ble Apex Court in AIR 2004 SCW 470 Raj. C.P. Sen v. Sardari Lal, shows that the doctrine of "lis pendense" expressed in the maxim "utlite pendente nihil innoventur" (during a litigation nothing new should be introduced) has been statutorily incorporated in Section 52 of the Transfer of Property Act, 1882. A defendant cannot, by alienating property during the pendency of litigation, venture into depriving the successful plaintiff of the fruits of the decree. The transferee pendente lite is in the eye of law a representative-in-interest of the judgment-debtor and held bound by the decree passed against the judgment-debtor though neither the defendant has chosen to bring the transferee on record by apprising his opponent and the Court of the transfer made by him, nor the transferee has chosen to come on record by taking recourse to Order 22, Rule 10 of the CPC. In the case of an assignment, creation or devolution of any interest during the pendency of any suit, Order 22, Rule 10 of the CPC confers a discretion on the Court hearing the suit to grant leave for the person in or upon whom such interest has come to vest or devolve to be brought on record. Bringing of a lis pendense transferee on record is not as of right but in the discretion of the Court. Though not brought on record the lis

pendense transferee remains bound by the decree. It is to be noted that story in plaint only is being looked into at present to find out the correct approach in the matter of valuation and this does not mean that this Court has accepted that S.52 of T.P. Act is applicable. That question can be resolved by Trial Court at appropriate stage as and when or if it arises.

8. Thus this discussion shows that in a title suit valued appropriately initially, the challenge to lis pendense transfers is not essential. The party who indulges in such prohibited act can not thereby require the aggrieved party to alter the otherwise valid valuation already made and pay more court fee due to such acts. Above logic applied in relation to suits for specific performance can also very well be extended to title suits of present nature where the decree may show total absence of right in defendant vendor to deal with the immovable property. Moreover, here in suit as filed originally there was no prayer for possession as plaintiff then claimed to be in possession. However, in amended plaint he has pleaded forcible dispossession on 14.07.2009 and has added a prayer for decree for recovery thereof. He has also claimed that court fee for relief of restoration of possession on the basis of land revenue is already paid. This is not found incorrect or wrong by the Trial Court. It is apparent that in present matter, there is no question of plaintiffs paying any court fee for that relief on sale consideration paid by added defendant No. 6 on 08.09.2009. Hence, even said objection of petitioners is misconceived.

9. In view of this, I do not find any jurisdictional error or perversity in the approach of learned Trial Court. Writ petition is, therefore, dismissed. Rule discharged. However, in the facts and circumstances of the case, there shall be no order as to costs.