

Merit Magnum Constructions Vs. Nand Kumar Anant Vaity and Others

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Court : Mumbai

Decided On : Oct-15-2013

Judge : The Honourable Dr. Justice D.Y. Chandrachud & M.S. Sonak

Appeal No. : Appeal No.443 of 2013 In Notice of Motion No.1716 of 2010 In Notice of Motion No.3679 of 2007 In Suit No.2715 of 2007

Appellant : Merit Magnum Constructions

Respondent : Nand Kumar Anant Vaity and Others

Judgement :

M.S. Sonak, J.

1. Admit. With the consent of the learned Counsel, the appeal is taken up for hearing and final disposal.
2. This Appeal is directed against a judgment and order dated 10 June 2013 as modified by an order dated 17 June 2013 (Notice of Motion No.1716 of 2010 in Suit No.2715 of 2007), rejecting the plaint under Order 7 Rule 11 (d) of the Civil Procedure Code in respect of one of two properties involved in the suit.
3. The Appellant is the original Plaintiff. Respondent Nos.1 to 41 are the original Defendants. Accordingly, the parties shall be referred to by their respective position in the plaint.

4. The Plaintiff instituted Suit No.2715 of 2007, inter alia against Defendant Nos.1 to 39 (hereinafter referred to as Vaity's'), M/s. Shree Anjaneya Estates-Defendant No.40, which is a Partnership Firm represented by four partners, Defendant Nos.40A, 40B, 40C and 40D and Deonar Industrial Premises Cooperative Housing Society Limited, Defendant No.41, seeking inter alia following reliefs:

(a) Declaration that Defendant Nos.1 to 39 are owners in respect of the first property ;

(b) Declaration that Defendant No.41 has no right, title or interest in the first property ;

(c) Perpetual injunction against Defendant Nos.40A to 40D and Defendant No.41 from alienating or taking over possession of the first property ;

(d) Declaration that agreement dated 27 November 2003 in respect of the first and second property is valid, subsisting and binding upon Defendant Nos.1 to 40;

(e) For a decree directing Defendant Nos.1 to 40 to specifically perform agreement dated 27 November 2003;

5. Besides aforesaid, the suit seeks reliefs in respect of second property described under Exhibit-A-2, as also relief of damages in the alternative.

6. The subject matter of the plaint is two properties described in Exhibit-A-1 and Exhibit-A-2 to the plaint. Since the plaint has been rejected in respect of the property described in Exhibit-A-1 (the first property), reference is made to the gist of the pleadings concerning the said property:

(a) By agreements dated 29 April 1979 and 24 October 1981, members of the Vaity family (some of whom were then minors) agreed to sell the first property to 17 persons who were promoters of Defendant No.41 which is a Society, which was eventually incorporated in the year 1987;

(b) The Vaity's (including minors) issued a Power of Attorney in favour of three promoters of the Society on 24 October 1981;

(c) Acting on the basis of the Power of Attorney dated 24 October 1981, the three constituted attorneys executed a Deed of Conveyance dated 18 August 1989 purporting to convey the first property to Defendant No.41-Society ;

(d) The two agreements of 1979 and 1981 stipulated that the vendors shall obtain the sanction from the High Court with regard to the sale of the shares of the minors. However, no such sanction was obtained;

(e) On the date of the execution of the Conveyance namely 18 August 1989, vendor Nos.22,24,25 and 41 (Vaitys) had expired and consequently the Power of Attorney dated 24 October 1981 stood revoked. On the basis of such a Power of Attorney, no conveyance could have executed;

(f) The Vaitys by a Declaration-cum-Deed of Cancellation dated 18 December 1995 duly registered with the Sub-Registrar, declared the Conveyance dated 18 August 1989 as cancelled or avoided the same as being 'nonest';

(g) On 4 October 2002, the Vaitys entered into an agreement for development of the first property with Defendant No.40 and executed a Power of Attorney in favour of the partners of Defendant No.40;

(h) By an agreement dated 27 November 2003, Defendant No.40 assigned rights in respect of the first property in favour of the Plaintiff. In pursuance of the agreement, the Plaintiff entered into possession of the first property, made investments to the extent of Rs.7.40 Crores, constructed a sample flat and issued letters of allotment to 84 purchaser (which allotments have subsequently been recalled on account of disputes);

(i) The factum of Plaintiff's possession is recorded by the Receiver in his report dated 8 December 2003 appointed in a liquidation proceeding concerning Defendant No.41- Society;

(j) On 27 June 2007, one of the partners of Defendant No.40 made demands for consideration in excess of the agreed amount and upon refusal made attempts to interfere with the Plaintiff's possession of the suit property ;

(k) Taking advantage of the situation, there is an apprehension that Defendant No.41 may create third party rights in the first property or attempt to take possession of the same; and

(l) Hence, the suit and reliefs as aforesaid in respect of the first property.

7. By an order dated 9 June 2008, the plaintiff has been granted interim relief for protection of its possession in respect of the first property.

8. Defendant No.41 took out a Notice of Motion No.1716 of 2010 in the suit, inter alia seeking the following reliefs:

(a) The order dated 9 June 2008, by which interim reliefs had been granted to the Plaintiff be varied under Order 39 Rule 4 of the CPC.;

(b) A preliminary issue under Section 9A of the CPC, be framed and decided in relation to the jurisdiction of the Court and the maintainability of the suit; and

(c) That plaint, as filed, be rejected under the provisions of Order 7 Rule 11 (d) of the CPC.

9. By a judgment and order dated 10 June 2013, (as corrected by an order dated 17 June 2013) the learned Single Judge rejected the plaint insofar as the first property is concerned, but directed Defendant No.41 to file a written statement with regard to the other issues raised in the plaint. In view of the order of rejection, the learned Single Judge did not consider the other reliefs sought in the Notice of Motion.

10. In the impugned judgment and order, the learned Single Judge has held as follows:

(a) By a registered Conveyance dated 18 August 1989, the Vaitys sold, and conveyed the first property to Defendant No.41 -Society;

(b) The Deed of Declaration-cum-Cancellation dated 18 December 1995 executed by the Vaitys being unilateral, cannot affect the title of Defendant No.41;

(c) As the declaration dated 18 December 1995 makes a specific reference to the Conveyance dated 18 August 1989, the Vaitys' cannot claim ignorance about the Conveyance dated 18 August 1989, by which their title to the first property stood divested;

(d) The agreement of 2002 between the Vaitys and Defendant No.40 and the agreement of 2003 between Defendant No.40 and the plaintiff can create no rights in favour of either of them, as by then, the Vaitys had ceased to have any rights in respect of the first property;

(e) The limitation to seek any relief in respect of the Conveyance dated 18 August 1989 in terms of Article 59 of the Limitation Act expired either in the year 1992 or at least 1998, since in terms of the Declaration dated 18 December 1995, Vaitys had knowledge about the Conveyance dated 18 August 1989 by the said date; and

(f) Accordingly, the plaint deserves to be rejected in respect of the first property, since it is barred by the law of limitation.

11. Ms. Prachi, Learned Counsel appearing for the Appellant has questioned the impugned judgment and order on the following grounds:

(a) It is impermissible to reject a part of the plaint under Order 7 Rule 11 of the CPC;

(b) For the purpose of deciding an application under Order 7 Rule 11 of CPC, only the averments in the plaint are relevant and germane. Pleas taken in defence are wholly irrelevant at that stage. For exercise of powers under Order 7 Rule 11 (d) of CPC, the suit must be demonstrated to be barred upon the statements in the plaint;

(c) Assuming that the 'bar of limitation' is law for purposes of deciding an application under Order 7 Rule 11(d) of CPC, where the issue of limitation is a mixed question of law and fact as in the present case, the plaint cannot be rejected under Order 7 Rule 11 (d) of the CPC; and

(d) In passing the impugned judgment and order, the learned Single Judge has virtually delved into the merits of the defence pleas raised by Defendant No.41 and proceeded to return findings thereon. This is impermissible at the stage of deciding an application under Order 7 Rule 11 of CPC;

Upon the aforesaid grounds and based on precedents to which a reference shall be made hereafter, Learned Counsel contended that the impugned judgment and order is liable to be interfered with in appeal.

12. On the other hand, Mr. Ponvel Nadarajan, Secretary of Defendant No.41, who appeared in person defended the impugned judgment and order by submitting :

(a) Defendant No.41 is only concerned with the first property described in Exhibit-A-1 and the rejection of the plaint qua the said property, virtually amounts to a rejection of the plaint qua Defendant No.1, which is permissible under Order 7 Rule 11 of the CPC.; and

(b) The findings returned by the learned Single Judge are based upon averments in the plaint and the documents annexed thereto. The Declaration dated 18 December 1995 being unilateral neither cancels the Conveyance dated 18 August 1989 nor in any manner affects the title of Defendant No.41 to the first property. The minors were represented by their natural guardians and the Conveyance at the highest was voidable at the instance of the minors. The minors, however, upon attaining majority have not taken out any proceedings to avoid the Conveyance and the period of limitation for such purpose has also expired. The period of limitation to question the Deed of Conveyance dated 18 August 1989 or to lay any claim to the first property has expired. This is evident from reading the plaint and the documents accompanying the same.

13. Mr. Ponvel Nandarajan, Secretary of Defendant No.41, placed reliance upon the decision of the Supreme Court in the case of Church of Christ Charitable Trust and Educational Charitable Society V. Ponnamman Education Trust (2012) 8 Supreme Court Cases 706) and K.S. Dhondy vs. Her Majesty the Queen of Netherlands and anr. (2013(3) ALL MR 506) to contend that rejection of a plaint against one of the Defendants in the suit is permissible under Order 7 Rule 11 of

CPC.

14. For appreciating the rival contentions, a reference should be made to some of the precedents dealing with the scope of the enquiry at the stage of deciding an application under Order 7 Rule 11 of CPC.

15. In *RoopLal Sathi Vs. Nachhattar Singh Gill* (1982) 3 Supreme Court Cases 487), the Supreme Court held that where the plaint discloses no cause of action, it is obligatory upon the Court to reject the plaint as a whole under Order 7 Rule 11 (a) of the Code, but the rule does not justify the rejection of any particular portion of the plaint. In *D. Ramachandran Vs. R.V. Janakiraman* (1999) 3 Supreme Court Cases 267), the Supreme Court held that Rule 11 of Order 7 enjoins the Court to reject the plaint where it does not disclose a cause of action. However, there is no question of striking out any portion of the pleading under this Rule. Further, that it was held to be elementary that under Order 7 Rule 11(a), the court cannot dissect the pleading into several parts and consider whether each one of them discloses a cause of action. Under the Rule, there cannot be a partial rejection of the plaint. Again in *SopanSukhdeo Sable Vs. Assistant Charity Commissioner* (2004) 3 Supreme Court Cases 137), the Supreme Court held that Order 7 Rule 11 does not justify the rejection of any particular portion of the plaint. It is trite law that it is not any particular plea which has to be considered, and the whole plaint has to be read. There cannot be any compartmentalisation, dissection, segregation and inversion of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleadings have to be construed as they stand without addition or subtraction of words or a change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of its pleadings taken as a whole. At the same time it should be borne in mind that pedantic approach should not be adopted to defeat justice on hair-splitting technicalities.

16. In *SaleemBhai v. State of Maharashtra* (2003) 1 SCC 557), it was held that the averments in the plaint need to be looked into for deciding an application under Order 7 Rule 11 of CPC. It is well settled that at the stage of deciding an application under Order 7 Rule 11 of CPC, the pleadings have to be construed as they stand without the addition or subtraction of words or by changing their apparent grammatical sense. In *I.T.C. Ltd. Vs. Debts Recovery Appellate Tribunal* (1998) 2 SCC 70), and *T. Arivandandam v. T.V. Satyapal* (1977) 4 SCC 467), the Supreme Court held that the trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code.

17. In view of these settled principles, it is clear that there can be no rejection of only a part of the plaint as has been done in the present case. The impugned judgment and order rejects the plaint only insofar as the first property is concerned, and directs Defendant No.41 to file a written statement in respect of the other claims and issues raised in the suit. This is, in our view is impermissible under Order 7 Rule 11 of CPC.

18. In *Church of Christ Charitable Trust and Educational Charitable Society* (supra), upon which considerable reliance was placed by Mr. Ponvel Nandarajan, the Supreme Court has held that the plaint can, in a given case, be rejected against one of the Defendants and proceeded with, as against the other Defendants. The Supreme Court was concerned with a case where no cause of action was disclosed against one of the Defendants. Similarly, in *K.S.Dhondy*(supra) this Court rejected the plaint as against the Queen of Netherlands, as no consent of the Central Government had been obtained under Section 86(1) of CPC prior to institution of the suit. However, the suit was permitted to be continued against the Union of India, as on basis of the statements in the plaint, it could not be concluded that the suit was barred by the law of limitation. Therefore, the principle which was laid down in the two decisions is that

in a given case, rejection of a plaint as a whole against any one of the Defendants may be permissible. However, from that it does not follow that there can be rejection of only a part of a plaint or rejection qua one of the properties, which may be the subject matter of the suit. Such an exercise is not contemplated under Order 7 Rule 11 of CPC. The impugned judgment and order, inasmuch as it rejects the plaint in relation to the first property, is therefore, erroneous and warrants interference.

19. The Supreme Court in *Balasaria Construction (P) Ltd Vs. Hanuman Seva Trust and others* (2006) 5 Supreme Court Cases 658, noticed the conflict of opinion on the issue whether the plaint can be rejected under Order 7 Rule 11 (d) of CPC on the ground of the 'law of limitation' and in view of importance of the issue, made a reference to a Bench of three Learned Judges. Before the three-Judge Bench (Civil Appeal No.4539 of 2003 decided on 19 October 2005), the reference was held as being academic insofar as the case was concerned with the following observations:

Both sides very fairly state that it is not the case of either side that as an absolute proposition an application under Order VII Rule 11(d) can never be based on the law of limitation. Both sides state that the impugned Judgment is based on the facts of this particular case and the question whether or not an application under Order VII Rule 11 (d) could be based on law of limitation was not raised and has not been dealt with. Both sides further state that the decision in this case will depend upon the facts of this case.

20. From the aforesaid observations of the Supreme Court, it is clear that there is no absolute proposition that a plaint can never be rejected under Order 7 Rule 11 on the basis of the bar of limitation. This will depend upon the facts and circumstances of each case. Where the issue of limitation is a mixed question of law and fact or where a conclusion is not discernible from the statements in the plaint that the suit is barred by limitation, the plaint cannot be rejected by resort to Order 7 Rule 11 (d) of CPC.

21. In the present case upon a careful perusal of the plaint, we find that on the basis of the statements/averments therein, it cannot be concluded that the suit is

barred by the law of limitation. The issue of limitation in the present case, is a mixed question of law and fact necessitating evidence for effective adjudication. In such a situation, the plaint could not have been rejected by resort to the provisions of Order 7 Rule 11 (d) of CPC.

22. In the plaint, the Plaintiff has asserted that the Power of Attorney dated 24 October 1981 was not issued for consideration; the conveyance dated 18 August 1989 was executed on behalf of some minors and no sanction from the High Court was obtained despite a specific stipulation in that regard; the conveyance dated 18 August 1989 was executed by the promoters of Defendant No.41 on the basis of the Power of Attorney dated 24 October 1981, despite the fact that on 18 August 1989, at least four of the Vendors had expired and the Power of Attorney consequently stood revoked. On the basis of such assertions/averments as well as others, the Plaintiff has pleaded that the Conveyance dated 18 August 1989 is void and/or void ab initio and that on the basis of such conveyance Vaitys were never divested of their title to the first property, which continues to vest in them. The Plaintiff has also pleaded possession in pursuance of the agreements of 2002 and 2003 and an apprehension of dispossession. Reference has also been made in the plaint to the report of the Receiver with regard to the possession in respect of the first property.

23. In the light of such averments in the plaint, which shall have to be accepted as correct only for the purposes of deciding the application under Order 7 Rule 11 of CPC, this was not a fit case to reject the plaint as being barred by the law of limitation by resort to Order 7 Rule 11 (d) of CPC. The merits and de-merits of the defence pleas could not have been gone into at the stage of deciding an application under Order 7 Rule 11 of CPC. The issue of limitation at the highest was an arguable one. The issue, however, raises mixed questions of law and fact.

24. In PremSingh and others Vs. Birbal and others (2006) 5 Supreme Court Cases 353), the Supreme Court observed that when a document is void abinitio, a decree for setting aside the same would not be necessary as the same is non est in the eyes of law, as it would be a nullity. In the same judgment, it is held that Article 59 of the Limitation Act would apply where a document is prima-facie valid and it

would not apply to documents which are presumptively invalid. Clearly, therefore, the issue of limitation in the present case was a mixed question of law and fact. This is not a case where from the statements in the plaint, it could be said that the suit is ex-facie barred by the law of limitation. In paragraphs 24 and 24A of the plaint, the Plaintiff has pleaded that it is in physical possession of the first property and it is only in view of the order dated 8 May 2007 passed by the Cooperative Court that there arose an apprehension that the Plaintiff's possession may be interfered with, by Defendant No.41. In such a situation, the plaint could not have been rejected by resort to Order 7 Rule 11 of C.P.C. The learned Single Judge has delved into the merits of the matter and gone to the extent of returning findings, which may have been permissible only after the parties have gone to trial.

25. In the circumstances, the impugned judgment and order is liable to be set aside and the same is hereby set aside.

26. However, Defendant No.41 in Notice of Motion No.1716 of 2010 had applied for reliefs in prayer clauses (a) and (b) with regard to variation of the injunction order dated 9 June 2008 and for framing of preliminary issues, which were not adjudicated upon by the learned Single Judge. In the circumstances, Notice of Motion No.1716 of 2010 is restored to the file of the learned Single Judge for adjudication with regard to the said prayer clauses and matters connected therewith.

27. We clarify that we have not expressed any view on the merits of the issue as to whether the suit is barred by limitation. The observations are for the limited purpose of deciding whether such aspects could have been gone into at the stage of consideration of an application under Order 7 Rule 11 (d) of CPC.

28. The Appeal is accordingly allowed to the aforesaid extent. There shall be no order as to costs.

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