Balkrishna Vs. Azmat Khan

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Court : Mumbai Aurangabad

Decided On : Sep-27-2016

Judge : Sangitrao S. Patil

Appeal No. : Civil Revision Application No. 109 of 2012

Appellant : Balkrishna

Respondent : Azmat Khan

Judgement :

1. Original defendant No. 1 in Special Civil Suit No. 21 of 2011 has taken exception to the common order dated 5th March, 2012, passed below applications Exh-51 and Exh-55 by the learned Civil Judge, Senior Division (Corporation Court), Aurangabad, whereby he rejected the said applications.

2. The applicant is the owner of plot No. 12, C.T.S. No. 18151, situate in Friends Cooperative Society, Kokanwadi, Aurangabad, which has been purchased by him from one Narayan T. Jape. To the west of that plot, there is plot No. 13, C.T.S. No. 18152 in the same Cooperative Housing Society, which is owned by respondent No. 1 (the original plaintiff). Plot No.13 has been purchased by respondent No. 1 from one Vimalbai Kulkarni.

3. The case of the applicant, as disclosed from the application (Exh.51), is that Vimalbai Kulkarni had filed Dispute No. 367 of 2000 before the Co-operative Court, Aurangabad against the Friends Cooperative Society and Narayan T. Jape,

claiming possession of 110 square meters of land alleged to have been encroached upon by Narayan T. Jape out of plot No.13. She unconditionally withdrew the said Dispute on 17th January, 2003. Respondent No.1, who is the successor-in-title of Vimalbai Kulkarni in respect of plot No.13, filed the above numbered suit seeking possession of 97.99 square meters of land from the applicant on the allegations that the said land has been encroached upon by him. According to the applicant, since the Dispute filed before the Cooperative Court has been unconditionally withdrawn by Vimalbai Kulkarni on 17th January, 2003, the above numbered suit filed by respondent No. 1 seeking the same relief in respect of the property subject matter of that Dispute, is not maintainable and as such, the plaint is liable to be rejected under Order-VII Rule 11 of the Code of Civil Procedure (for short, the Code).

4. In the application (Exh-55), dated 9th December, 2011, the applicant alleged that plot No. 13 was measured by the surveyor on 31st October, 1998 and in that measurement, it was transpired that Narayan T. Jape, the predecessor-in-title of the applicant had encroached upon plot No. 13 to the extent of 110 square meters. Narayan T. Jape had obtained permission to construct a building over the land which was in his possession in the year 1987. He completed his construction, including the compound wall in the year 1987-88. Therefore, the above numbered suit being barred by the law of limitation, the plaint liable to be rejected under Order-VII Rule 11 (d) of the Code.

5. Respondent No. 1 filed common reply to the applications Exh-51 and Exh-55 on 20th December, 2011 and strongly opposed the same. It is stated that the plaint contains the events which were prevailing at the time of withdrawal of the Dispute before the Cooperative Court and also those took place subsequent thereto. Respondent No. 1 has pleaded necessary facts in the plaint to show as to how the cause of action arose for institution thereof and how it is within limitation. According to him, the suit is perfectly maintainable in all respects. It is not barred by the law of limitation. The plaint is not liable to be rejected under Order-VII Rule 11 of the Code. He, therefore, prayed for rejection of the applications.

6. The learned Trial Judge considered the pleadings of the parties and rejected the applications Exh-51 and Exh-55 as per the impugned order.

7. The learned Advocate for the applicant submits that after withdrawal of Dispute No. 367 of 2000 from the Cooperative Court, Aurangabad by the predecessor-in-title of respondent No. 1, the above numbered suit is not at all maintainable in respect of the same subject matter and for the same relief. He submits that the plaint has been ingeniously drafted to make a show that a fresh cause of action has arisen, which is not factually correct. The suit is ex-facie vexatious and meritless. Therefore, the learned Trial Judge ought to have rejected the plaint under Order-VII Rule 11 of the Code. In support of this contention, he relied on the case of **T. Arivandandam Vs. T.V. Satyapal and another AIR 1977 S.C. 2421,** wherein it has been observed that if the allegations are vexatious and meritless and not disclosing a clear right or materials to sue, it is the duty of the trial Judge to exercise his power under Order VII, Rule 11 of the Code. He further cited the case of **The Church of Christ Charitable Trust and Educational Charitable Society Vs. M/s Ponniamman Educational Trust AIR 2012 S.C. 3912**, wherein it has been observed that if clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing.

8. The learned Advocate for the applicant further submits that the facts on record clearly indicate that the alleged encroachment on plot No. 13 was noticed in the year 1998 itself when it was measured by the Surveyor on 31st October, 1998. The construction of the building of the applicant, including the compound wall was completed in the year 1987-88. Therefore, the suit for recovery of possession of the alleged encroached portion of land, filed in the year 2011 is ex-facie barred by limitation. The dispute in respect of the same subject-matter filed before the predecessor-in-title of respondent no.1 has been unconditionally withdrawn by her. Therefore, the present suit was not at all maintainable. He submits that the learned Trial Judge ought to have considered these aspects of the matter and in view of the above cited judgments, should have rejected the plaint, exercising his powers under Order-VII Rule 11 of the Code. He, therefore, prays that the impugned order may be set aside and the plaint may be ordered to be rejected.

9. As against this, the learned Advocate for respondent No.1 submits that the pleadings of respondent No.1 would make it clear that the cause of action for filing the above numbered suit for recovery of possession of the alleged encroached portion of land arose in the year 2011. Relying on the judgments in the cases of **C. Natrajan Vs. Ashim Bai and another 2007 ALL SCR 2663** and **Merit Magnum Constructions Vs. Nand Kumar Anant Vaity and others 2014 (7) ALL MR 252**, he submits that at the stage of deciding the application under Order-VII Rule 11 of the Code, the pleadings have to be construed as they stand without addition or subtraction of any words or by changing their apparent grammatical sense. The averments made in the plaint only are relevant and the defence cannot be gone into at the stage of deciding such application. He further cited the case of **Western Coalfields Ltd. and others Vs. Shri Chandraprakash s/o Krishnalal Khare 2010 (2) ALL MR 713**, wherein it has been held that where a plea of limitation is raised, the Court cannot reject the plaint but may dismiss it on framing a preliminary issue. According to the learned Advocate for respondent No. 1, the issue of limitation is a mixed question of law and facts, requiring evidence of effective adjudication thereof. Therefore, in the absence of such evidence, the plaint cannot be rejected on the ground of limitation by resorting to the provisions of Order-VII Rule 11 (d) of the Code. He further submits that the above numbered suit has been instituted in respect of the cause of action that arose on 20th August, 2011. The said cause of action arose after withdrawal of the Dispute from the Cooperative Court by the predecessor-in-title of respondent No. 1. This being a fresh cause of action, the withdrawal of the Dispute by her would not come in the way of respondent No. 1 in prosecuting the present suit. He supports the impugned order and prays that the Revision Application may be rejected.

10. The copy of the plaint of the above numbered suit has been produced on record. In paragraph No. 3 of the plaint, there is a reference of Dispute bearing No. 367 of 2000 that was filed by the predecessor-in-title of respondent No.1 before the Cooperative Court at Aurangabad. It is averred that the predecessor-in-title of the applicant delivered possession of the encroached portion of the land out of plot No. 13 to the predecessor-in-title of respondent No. 1 and therefore, in view of that amicable settlement, the said Dispute came to be withdrawn. It is further averred in paragraph No. 4 that the applicant again encroached upon plot No. 13. When

the applicant started construction, he complained against the applicant to the Municipal Authorities on 21st June, 2011, 27th February, 2011, 4th July, 2011, 21st July, 2011 and 26th July, 2011, alleging that the applicant had encroached upon plot No. 13. However, no cognizance was taken by the municipal authorities. The applicant continued the construction of his building and ultimately, encroached upon 97.99 square meters of land out of plot No. 13. In paragraph No. 6 of the plaint, respondent No. 1 specifically mentioned that the cause of action finally arose on 20th August, 2011. In view of the judgments cited on behalf of respondent No.1, for the purpose of deciding application under Order-VII Rule 11 of the Code, the averments made in the plaint only would be relevant. The above referred averments made in the plaint prima facie show that the cause of action for filing the above numbered suit arose much after withdrawal of the Dispute by the predecessor-in-title of respondent No. 1 from the Cooperative Court at Aurangabad. The averments made in the plaint prima facie do not show that they are vexatious or meritless. The averments made in the plaint show the existence of contentious issues which would be required to be decided after recording the evidence of the parties.

11. Since the cause of action is stated to have arisen on 20th August, 2011, the above numbered suit prima facie would be within the period of limitation. The issue of limitation is a mixed question of law and facts. It cannot be decided at the threshold as held in the judgments cited on behalf of respondent No. 1. The said ground of objection would be available for the applicant for being agitated before the Trial Court at the appropriate stage. In the above facts and circumstances, the judgments in the cases of **T. Arivandandam** (supra) and **The Church of Christ Charitable Trust and Educational Charitable Society** (supra) would be of no assistance to the applicant to seek rejection of the plaint under Order-VII Rule 11 of the code.

12. The learned Trial Judge has rightly considered the facts of the case and rightly rejected the applications Exh-51 and Exh-55. I do not find any reason to interfere in the impugned order. Hence, the order:

ORDER

(i) The Civil Revision Application is rejected.

(ii) The parties shall bear their own costs.

(iii) The Rule stands discharged accordingly.