

COMMON ORDER BELOW EXH. 11 AND 13

(Dated : 17/12/2018)

- 1) The defendant has filed application Exh.11, under order 7, rule 10 of Civil Procedure Code for return of plaint.
- 2) It is submitted by the applicant/defendant that, plaintiff has filed the present suit for a declaration and for permanent injunction. It is submitted in the application that, the plaintiff is seeking a declaration that, he is the owner of Saw Mill and that, the defendant holds no right, title or interest in respect of the said Saw Mill. The plaintiff has mentioned in the plaint that, the said Saw Mill is situated on the immovable property as described in plaint. The plaintiff has not valued suit properly for declaration. As per the market value of the immovable property is more than Rs. 1 crore. Thus, plaintiff has not paid the necessary Court fee; therefore, applicant/defendant prayed for return of plaint.
- 3) The plaintiff has filed his reply vide Exh. 12 alongwith application for amendment of the plaint under Order 6, Rule 17 vide Exh. 13. On perusal of the say Exh. 12 and amendment Exh. 13 combinly, the plaintiff has contended that, he has filed the amendment application alongwith the say. In the amendment application (Exh. 13), the plaintiff averred that, while preparing the plaint, the plaintiff sought declaration regarding the ownership of the suit property. However, thereafter plaintiff found that, he is the owner of suit property. Hence, he should not seek such a declaration.

Therefore, he has wrongly typed the prayer of declaration. Now, by way of amendment he wants to delete the words, **“he is the owner of Saw Mill and”**. It is further submitted by him that, he do not want the relief of declaration; therefore, the amendment is necessary for the proper adjudication of the matter and early hearing of temporary injunction application.

4) Heard the learned advocates of both the parties. Perused the record, the following points arise for my determination and I have given the finding and the reasons thereon are as under -

Sr.N	POINTS	FINDINGS
1	Whether the proposed amendment is necessary for the purpose for the purpose of determining the real question in the controversy between the parties ?	Affirmative
2	Whether the relief claimed is under valued ?	Negative
3	What is final order ?	Exh. 11 rejected and Exh. 13 allowed.

As to Point no. 1 and 2

5) Both points are interlinked with each other, therefore I have discussed them together to avoid repetition. On perusal of the record and considering the argument advanced by the learned advocates, it is necessary to read in brief the fact of the plaintiff's case. The plaintiff has filed the suit for declaration and permanent

injunction in respect of the suit property i.e. the Saw Mill under name and style as “Ahamad Saw Mill” bearing Nazul Sheet No. 8, plot No. 4, layout plot No. 3, ad measuring area 1011.68 sq.mtrs. (10890 sq.ft.). Both the defendants are sons of younger brother of plaintiff. Before one month of filling of the suit the plaintiff was ill and he could not present at his Saw Mill. Both the defendants has taken the disadvantage of the ill health of plaintiff and started collecting money from the business of Saw Mill. On 11/10/2018, plaintiff has caught them red handed while receiving amounts of his business. The plaintiff demanded them the said amount but, the defendants had not returned and threatened the plaintiff to take over forceful possession of the Saw Mill. Therefore, the plaintiff constrained to file the present suit.

6) It is argued by ld. Advocate for the defendant that, the plaintiff sought the relief of declaration in respect of the suit property. The market value of the suit property is more than Rs. One crore. Therefore, as per section 6(iv)(d) of the Maharashtra Court Fees Act , in suit for declaration in respect of ownership one -fourth of *ad-vulnerable* fee leviable. The plaintiff has filed reply along with the amendment application (Exh. 13). It is argued by the ld. Advocate for the plaintiff that, at the time of filing of the suit he thinks that it would be proper to claim relief of declaration in respect of the suit property, hence, he has prepared the plaint accordingly but thereafter he found that, he is owner of the suit property. Hence, he has deleted it but the said relief is wrongly typed in the prayer

clause. Therefore, it need to be corrected. The defendant filed his reply on the backside of the amendment. It is contended by him that, application Ex.11 is yet to be decided and is required to be decide first. The amendment application can not be entertained at this stated and liable to be rejected. While replying to the amendment application , the ld advocate for the defendant argued that, the plaintiff is trying filling the lacuna by way amendment.

7) As per Order 6 rule 17 , the amendment application can be filed at any stage. So far as the suit is concern , the plaintiff is the maker of his suit and he has full choice and right as what relief to be sought and what relief to be withdraw. In the instance case, now the plaintiff want to withdraw the relief of declaration of ownership in respect of the suit property. Therefore, if his application is allowed then it will cause no prejudice to the defendant. So far as the application Exh. 11 is concerned it is prayed therein for return of plaint. Thought if said plaint is retuned no purpose will serve because if the plaintiff himself want to withdraw his claim of declaration then the question of paying the $\frac{1}{4}$ Court fee stamp of the market value of the suit property automatically get resolve. On the contrary, if the application for return of plaint is allowed , it will cause great hardship for the plaintiff. Therefore, if the application for the amendment is allowed then no question of paying stamp duty as prescribed under section 6(iv)D will arise. Moreover, when the plaintiff him self is withdrawing the claim then there is no one can compel him. In fact procedural law are hand made and on that

aspect the litigant should not be denied the justice. In the present suit the plaintiff has also interim relief by way of filing the temporary injunction application. Thus, it is necessary to allow the application Exh. 13 for amendment of plaint rather than allowing the application Exh 11 which is for return of plaint. Moreover, it is always desirable to decide the matter on merit rather than deciding it on the procedural aspect and also without determining the right of parties on merit. Hence, I pass the following order -

OPERATIVE ORDER

- i] The application Exh. 11 (For return of plaint) is rejected .
- ii] The application Exh. 13 (For amendment of plaint)is allowed.
- iii] Applicant/plaintiff is directed to amend the plaint within two weeks from the date of this order.
- iv] Cost of the application be calculated at the final stage.

Date 17/12/2018

(P. K. Kapade)
II Jt. C.J.J.D., Akot