

ORDER BELOW APPLICATION EXH. NO.81 IN R.C.S

NO.74/2019

(Passed on this **29th Day of December, 2020**)

(CNR NO.MHRG0907842019)

01] This is an application made by defendant to reject plaint Under Order VII Rule 11 of Civil Procedure Code, 1908 (Act No. V of 1908) (For short “CPC”) in a Suit for removal of encroachment and perpetual injunction.

02] It is the contention of defendants that, the plaintiff instituted suit for removal of encroachment and perpetual injunction. The plaint does not disclose cause of action. The plaint is undervalued. The plaintiff has to properly value the plaint and to pay court fees as per Sec.6 (V) of The Bombay Court-Fees Act, 1959. As per ready reckoner the market value of the area of alleged encroachment of suit property is Rs. 2,06,243/-. Plaintiff in support of suit does not produce certified map. Further suit is affected by non-joinder of necessary party. Hence, he prayed reject the plaint on aforesaid grounds and penalty of Rs.1,00,000/- be imposed on plaintiff.

03] The plaintiff strongly objected the application by filing his say at Exh.83. It is contended that, application is illegal and made with intent to delay the matter. The plaintiff has properly valued the plaint. The grounds

mentioned in para. 02 to 07 of this application do not fall within the ambit of Order VII Rule 11 of CPC. Prayer of penalty is not supported by any provision of the CPC. Hence, he prayed to reject the application.

04] Heard, Ld. Adv. Shri. R.B. Sawant for the plaintiff and Ld. Adv. for defendants Shri. H. G. Dharmadhikari. Ld. Adv. Shri. R.B. Sawant for the plaintiff and Ld. Adv. for defendants submitted written argument at Exh.90 and Exh.86 respectively. Ld. Advocate for the plaintiff relied upon ratio laid down by Hon'ble Bombay High Court in:- Indian Oil Corporation Ltd. Vs. Rames s/o Wasanji Kariya & Ors. (2017(3) ALL MR 544), Nanaji Sunderji Sejpal Vs. Vithuram Shivilal Lahoti Denagi Trust and Ors. (2019(3) ALL MR 502) and Shamrao Moreshwar Kulkarni Vs. Vijay Jasraj Rahatekar Archibelle (2019(12)CPMH 122).

05] Per-contra Ld. Advocate for defendants relied upon ratio laid down by Hon'ble Supreme Court and Hon'ble High Courts in Saleem Bhai & ors Vs. State of Maharashtra & Ors. ((CDJ) 2003 SC 107), State Bank of India Vs. Somnath Sahoo (1999 AIHC 3493, 3495 Odisha High Court), Narne Estate Pvt. Ltd. Vs. Gomedha Estate Pvt. Ltd. (LAWS (TLNG)-2020-1-45), Dahiben Vs. Arvindhbai Kalyanji Bhanushali (CDJ 2020 SC 606), Abdul Ghani Vs.

Vishunath (CDJ 1956 ALL HC 190), Husensab Vs. Basayya (LAWS (KAR) 2020-9-548), T. Arvindandam Vs. T. V. Satyapal & Ors (CDJ 1977 SC 013), Raj Narain Sarin (Dead) through LRS Vs. Laxmi Devi (LAWS (SC)-2000-7-88), Raghvendra Sharan Singh Vs. Ram Prassana Singh (Dead) by LRS. (LAWS (SC)-2019-3-94), Kusum Devi Tiberwal Vs. Vikas Poddar (LAWS (GJH)-2020-6-1008)

06] Ld. Advocate for defendants submitted, that decision on the application under Order VII Rule 11 of CPC goes to the root of matter and such application can be made at any stage till the conclusion of trial. In support of said contention he relied upon ratio laid down by Hon'ble Supreme Court and Hon'ble High Courts in Saleem Bhai & ors Vs. State of Maharashtra & Ors. ((CDJ) 2003 SC 107), State Bank of India Vs. Somnath Sahoo (1999 AIHC 3493, 3495 Odisa High Court), Narne Estate Pvt. Ltd. Vs. Gomedha Estate Pvt. Ltd. (LAWS (TLNG)-2020-1-45), Dahiben Vs. Arvindbhai Kalyanji Bhanushali (CDJ 2020 SC 606). The aforesaid settled position and ratio is not disputed by the plaintiff. Hence, application under Order VII Rule 11 of CPC can be made at stage till the conclusion of trial.

07] Ld. Advocate for defendants submitted that, the plaintiff have no cause of action to institute the suit. Plaintiff does disclose cause of action. He further submitted that,

the plaintiff has showed common map of the suit property. Till boundaries are not fixed, issue about the encroachment will not arise. The plaintiff has not mentioned actual area of suit property which is in his possession. Taluka Inspector of Land Record, Roha (For Short TILR) as per order dated 26/09/2019 divided survey no.659 into parts. The plaintiff has deliberately suppressed this fact from the court. The plaintiff has instituted false, vexatious and premature suit which does not disclose cause of action. Hence, he prayed to reject the plaint and penalty of Rs.1,00,000/- be imposed on the plaintiff. In support of aforesaid contention Ld. Adv. for defendants relied upon T. Arvindandam Vs. T. V. Satyapal & Ors (CDJ 1977 SC 013), Raj Narain Sarin (Dead) through LRS Vs. Laxmi Devi (LAWS (SC)-2000-7-88), Dahiben Vs. Arvinbhai Kalyanji Bhanushali (CDJ 2020 SC 606), Raghvendra Sharan Singh Vs. Ram Prassana Singh (Dead) by LRS. (LAWS (SC)-2019-3-94), Kusum Devi Tiberwal Vs. Vikas Poddar (LAWS (GJH)-2020-6-1008), State Bank of India Vs. Somnath Sahoo (1999 AIHC 3493, 3495 Odisha High Court), Narne Estate Pvt. Ltd. Vs. Gomedha Estate Pvt. Ltd. (LAWS (TLNG)-2020-1-45).

08] Learned advocate for plaintiff submitted that, plaintiff clearly pleaded cause of action. He submitted that 'no cause of action to institute the suit' & 'plaint does not disclose cause of action' are two different terms. He further

submitted that as per terms and condition mentioned in consent decree in Regular Civil Suit No.17/1982 surveyor has measured suit property survey no. 659. However, till he has not obtained map. Meanwhile defendant no. 20 started construction hence he has instituted the suit. While determining cause of action plaint must be read as a whole and only averments in the plaint are required to be considered. There is no provision under CPC to impose penalty. At the stage of deciding such application it is not the question whether cause of action pleaded would fructify into the decree. In support of said contention he relied upon ratio laid down by Hon'ble Bombay High Court (Nagpur Bench) in Indian Oil Corporation Ltd. Vs. Rames s/o Wasanji Kariya & Ors. (2017(3) ALL MR 544), Nanaji Sunderji Sejpal Vs. Vithuram Shivilal Lahoti Denagi Trust and Ors (2019(3) ALL MR 502) and Shamrao Moreshwar Kulkarni Vs. Vijay Jasraj Rahatekar Archibelle (2019(12)CPMH 122).

09] ORDER VII RULE 11 of CPC provides for rejection of plaint: Rejection of plaint:- The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

10] On perusal of plaint, the plaintiff has mentioned that, as per consent decree in Regular Civil Suit no.

17/1982 surveyor has measured suit property on 30/07/2019 but till he has not obtained map. Defendant no.20 started construction over suit property on 14/08/2019. On that day he has obstructed defendant no.20 and requested not to continue the construction work till the measurement of suit property. Thereafter, the plaintiff pleaded that, before measurement of suit property defendant no.20 have obtained commencement certificate from Municipal Council Roha on 03/06/2019. This shows that plaint discloses cause of action. At the stage of deciding application under Order VII Rule 11 of CPC, it is not the question whether cause of action pleaded would fructify into the decree. The plaint discloses cause of action to institute the suit. Hence, in light of the ratio laid down by Hon'ble Bombay High Court in Indian Oil Corporation Ltd. Vs. Rames s/o Wasanji Kariya & Ors. (2017(3) ALL MR 544) I, am of the opinion that the plaint discloses cause of action.

11] I, have studied the ratio laid down by Hon'ble Bombay High Court in T.Nanaji Sunderji Sejpal Vs. Vithuram Shivilal Lahoti Denagi Trust and Ors (2019(3) ALL MR 502) wherein Hon'ble court observed that whether averments made in the plaint in support of cause of action are true or not is a matter which will have to be decided after the conclusion of trial. Such matter cannot be gone into at the stage of deciding application under Order VII

Rule 11 of the CPC. In the present application the contentions raised by defendant in para. 02 to 07 do not falls within the ambit of Order VII Rule 11 of the CPC. Hence, these grounds can be decided at the conclusion of trial.

12] I, have studied the ratio laid down by Hon'ble Bombay High Court in Shamrao Moreshwar Kulkarni Vs. Vijay Jasraj Rahatekar Archibelle (2019(12)CPMH 122) wherein Hon'ble Court observed that, the maintainability of suit depends on suit proceeding, not on the rival party's defence. In the case in hand the contention raised by the defendant in para no.02 to 07 are the matters of merit and are based on the evidence to be laid. Even they do not fall within the ambit of Order VII Rule 11 of the CPC.

13] I, have studied the ratio laid down by Hon'ble Apex Court in T. Arvindandam Vs. T. V. Satyapal & Ors (CDJ 1977 SC 013) and Raj Narain Sarin (Dead) through LRS Vs. Laxmi Devi (LAWS (SC)-2000-7-88) wherein Hon'ble Apex Court held that, on meaningful reading of plaint if it appear that it is manifestly vexatious, merit less and does not discloses clear right to sue power under Order VII Rule 11 shall be used. In a case in hand the plaint discloses the cause of action. Facts of these cases and case in

hand are different. Hence, with utmost respect to the ratio laid down by Hon'ble Apex court in aforesaid case laws the same is not applicable to the case in hand.

14] I, have studied the ratio laid down by Hon'ble Apex Court in Dahiben Vs. Arvindbhai Kalyanji Bhanushali (CDJ 2020 SC 606) and Raghvendra Sharan Singh Vs. Ram Prassana Singh (Dead) by LRS. (LAWS (SC)-2019-3-94 wherein plaint is challenged under Order VII Rule 11(d) of CPC on the ground that it is barred by Law of Limitation. In the case in hand, defendant have not raised issue about the limitation or it is barred by other law. The plaintiff has clearly mentioned cause of action without creating any illusion. Hence, with utmost respect to the ratio laid down by Hon'ble Apex court in aforesaid case law it is not applicable to the case in hand.

15] I, have studied the ratio laid down by Hon'ble Gujarat High Court in Kusum Devi Tiberwal Vs. Vikas Poddar (LAWS (GJH)-2020-6-1008) wherein the issue about jurisdiction is raised on the ground that, the suit is not maintainable as per section 430 of the Companies Act. In the case in hand defendant have not raised issue about the jurisdiction or it is barred by other law. Hence, with utmost respect to the ratio laid down by Hon'ble Gujrat High court in aforesaid case law it is not applicable to the case in hand.

16] Ld. Advocate for defendants further submitted, the plaintiff in para. no.04 of the plaint alleged that defendant has caused 300 Sq. feet encroachment over the suit property. Hence, he has to correct the valuation i.e. Rs. 2,06,243 and pay court fee as per rule. In support of said contention he relied upon ratio laid down by Hon'ble respective High Courts in Abdul Ghani Vs. Vishunath (CDJ 1956 ALL HC 190) and Husensab Vs. Basayya (LAWS (KAR) 2020-9-548). Per-contra Ld. Advocate for the plaintiff submitted that, he has properly valued the plaint and paid court fees as per rule. Ld. Advocate submitted that as per the ratio laid down in Indian Oil Corporation Ltd. Vs. Rames s/o Wasanji Kariya & Ors. (2017(3) ALL MR 544) the averment relating to court fee in the plaint are assumed to be true and correct.

17] I, have studied the ratio laid down by the Hon'ble Allahabad High Court in Abdul Ghani Vs. Vishunath (CDJ 1956 ALL HC 190). In this case Hon'ble High court observed that, the plaintiff can be ordered to pay additional Court-fee after he has increased valuation. Passing of composite order requiring correction of the valuation & payment of additional court-fee is erroneous. The case law is related to the direction given to the lower courts that not to pass composite order. Hence, with utmost respect the

ratio laid down by Hon'ble Allahabad High Court it is not applicable in the present case.

18] I, have studied the ratio laid down by the Hon'ble Karnataka High Court in Husensab Vs. Basayya (LAWS (KAR) 2020-9-548). In this case the suit is over valued and filed in wrong forum. This case is relating to the Karnataka Court Fees & Valuation Act. Hence, the facts of this case and case in hand are different. Hence, with utmost respect to the ratio laid down by Hon'ble Hon'ble Karnataka High Court it is not applicable in the present case.

19] The plaintiff in para no. 12 of the plaint shows mentioned that how he has valued the suit. As per para.04 of the plaint it is alleged that, defendant have encroached 300 Sq. Feet over suit property Survey no. 659.

Section 6 of the Bombay Court-fees Act, 1959

provide that;

The amount of fee payable under this Act in the suits next be hereinafter mentioned shall be computed as follows:--

(v) for possession of lands, houses and gardens.--

In suits for the possession of land, houses and gardens--according to the value of the subject-matter; and such value shall be deemed to be, where the subject matter is a house or garden--according to the market-value of the house or garden and where the subject-matter is land, and

- (a) where the land is held on settlement for a period not exceeding thirty years and pays the full assessment to Government--a sum equal to 11 [forty times] the survey assessment;
- (b) where the land is held on a permanent settlement, or on a settlement for any period exceeding thirty years, and pays the full assessment to Government a sum equal to 12 [eighty times] the survey assessment;
- (c) where the whole or any part of the annual survey assessment is remitted a sum computed under sub paragraph(a) or sub-paragraph (b) as the case may be, in addition to 12 [eighty times]the assessment or, the portion of assessment, so remitted:

20] The plaintiff claimed possession of encroached area of suit property Survey no. 659 ad-measuring 300 Sq. Feet. Defendants vide list Exh.84 produced on record certified copy of ready reckoner. On perusal of copy of ready reckoner it appear that total market-value of 300 Sq. is Rs. 2,06,243. Hence, in view of clear provision the Bombay Court Fees Act the plaintiff have to correct valuation and pay Court fees as per the market value of the suit property. I, have studied the ratio laid down in Indian Oil Corporation Ltd. Vs. Rames s/o Wasanji Kariya & Ors. (2017(3) ALL MR 544) wherein Hon'ble Bombay High Court held that, while deciding application under Order VII Rule 11 (a) it is only averments in the plaint are required to be taken in to consideration. Hon'ble Court does not held that, averments in the plaint relating to valuation of plaint and court fee are

assumed to be true and correct. Hence, the ratio laid down by Hon'ble Bombay high Court in aforesaid case law is not applicable in the present case.

21] It is further contended that, as per averments in the plaint that defendant has obtained illegal permission from Municipal Council, Roha. But Municipal Council, Roha has not made party to the suit. Hence, suit suffers from non-joinder of necessary party. It is settled position that while considering the application under Order VII Rule 11 of CPC, it is not required to take into consideration the defence set up by the defendant or other documents. The application under Order VII Rule 11 of CPC shall be made on the grounds which are mentioned in the said provision. The plaintiff have not prayed any relief against Municipal Council, Roha. Hence, plaint cannot be rejected on this ground. Further there is no provision under the CPC to impose penalty on the parties.

22] In view of aforesaid discussion the plaintiff claimed the possession of encroached area of suit property Survey no. 659 ad-measuring 300 Sq. Feet and as per ready recknor the market value of alleged area of encroachment is Rs. 2,06,243. The plaintiff valued the suit for Rs.10,000/-. Hence, he has to correct the valuation and to pay Court fee as per rule. Hence, application needs to be allowed partly.

Upon reading of Order VII Rule 11 of CPC, 1908 it is clear that, if plaintiff despite order of Court to correct valuation fails to correct it within time then only plaint needs to be rejected. Hence, suit cannot be dismissed at once in view of Order VII Rule 11 of the CPC. Therefore, I pass following order.

ORDER

1. Application **Exh.No.81** stands allowed partly as below.
 - a] Plaintiff is directed to correct valuation of suit and pay Court fee as per rule on or before next date.
2. Prayer to dismiss suit stands rejected.

Place- Roha.
Date : 29.12.2020

(C. U. Shipkue)
Civil Judge, Junior Division, Roha.
District Raigad.