

Serial no. 54
Supplementary list

**HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

**RFA No. 12/2020
CM no. 1535/2020**

Ajaz Ahmad Bhat

....Appellant..

Through: Mr G. A. Lone, Advocate

vs.

Reyaz Ahmad Kukloo & Ors

Through: Mr B. A. Bashir, Sr. Advocate

Reserved on 19.03.2020
Pronounced on 13.05.2020.

CORAM

Hon'ble Mr Justice Ali Mohammad Magrey, Judge

ORDER

1/- This Civil Appeal is directed against the judgment dated 28th January, 2020, for short impugned judgment, passed by the court of the learned Additional District Judge, Srinagar, for short 'trial court' in a suit titled Aijaz Ahmad Bhat v. Reyaz Ahmad Kukloo and others by virtue of which the civil suit has been dismissed in terms of Order VII Rule 11 of the Code of Civil Procedure, for short as CPC.

2/- Precisely the matter in controversy is that the appellant/plaintiff filed a suit for grant of decree of preemption and injunction before the trial court against respondents/ defendants 1 to 6 seeking preemption against the property measuring 10 marlas of land with an old residential house constructed thereupon falling under khasra no. 243, for short suit property, to any other person except to the appellant/ plaintiff as the house of the appellant/ plaintiff and the suit property fall under same khasra number and the properties have a common boundary wall, besides the property of the appellant/ plaintiff is a dominant and the one that is sought to be pre-

empted is a servient property, therefore, the appellant/ plaintiff has a right of prior purchase in terms of Section 15 of the Right of Prior Purchase Act, 1993, for short Act.

3/- Prior to the filing of the said suit, the appellant/ plaintiff had also filed a suit with a prayer that the respondents/ defendants 1 to 5 be restrained from selling the suit property to any other person except to the appellant/ plaintiff, which was dismissed, later on, upon having become infructuous as during the pendency of the said suit, the suit property was sold to respondent/ defendant no. 6 by way of a sale deed dated 15th March, 2018, constraining the appellant/ plaintiff to file the suit seeking pre-emption against the suit property in terms of Section 15 of the Act. The respondents/ defendants 1 to 5 filed the written statement upon having been put to notice and raised a preliminary objection as regards the maintainability of the suit being barred under section 5 of the Act; therefore, dismissal of the suit was sought in terms of Order VII Rule 11 of the CPC. The relief prayed for in the suit was also resisted and pleaded to be not available on the count that the suit property is a commercial property; therefore, the provisions of Order XXXIX Rule 2A of the CPC get attracted.

4/- The trial court, taking note of the preliminary objection raised by the respondents/ defendants 1 to 5, went through the pleadings and heard the learned counsel for the parties for final disposal of the suit and decided the same, in terms of impugned judgment, against the appellant/ plaintiff by holding that since the suit property has no common entrance and the parties to the dispute do not share the suit property as co-sharers, therefore, Section 5 of the Act is not attracted in the case.

5/- Aggrieved of the impugned judgment the appellant/ plaintiff has filed the instant appeal to seek reversal of the judgment and prays that the trial court be asked to frame the issues and decide the case on merits.

6/- The challenge to the impugned judgment is made *inter alia* on the ground that while deciding the suit in terms of Order VII Rule 11 of the CPC, the court had to confine itself only to the averments of the plaint and

not to look at the defence, therefore, the trial court has erred in law in taking into consideration the written statement of the respondents/defendants while deciding the suit in terms of Order VII Rule 11 of the CPC; the trial court has ignored the contents of the plaint and has thus disregarded the claim of the appellant/ plaintiff vis-à-vis the sold property being a servient property; the trial court has further erred in law in holding that the parties are not co-sharers and property is not undivided; the trial court has scuttled the trial on technical ground rather than allowing it to proceed and support its findings with proof during trial; the trial court has further erred in law in holding that the suit property is commercial in nature as on spot the residential house exists and as per the Srinagar Master Plan the area in question is described as residential area; etcetera.

7/- The respondents/ defendants 1 to 5 were on caveat, and on their behalf Mr B. A. Bashir, learned senior counsel appeared to oppose the appeal.

8/- With the consensus of the learned counsel for the parties, the matter has been heard finally at its threshold.

9/- I have heard learned counsel for the parties and perused the entire material made available.

10/- Mr G. A. Lone, learned counsel for the appellant/ plaintiff submitted that the appellant has a right of prior purchase of the property in question for twin reasons; one, that he is a co-sharer of the suit property and two, that the suit property is a servient property to appellant's/ plaintiff's property.

11/- He further submitted that it is a beaten law of the land that if at all the court, before which the question of right of prior purchase of a particular property is required to be determined, finds it legally imperative to decide the suit in application of Order VII Rule 11 of the CPC, then the court can, by no stretch of imagination, look beyond what is pleaded in the plaint and that having not been done, the impugned judgment cannot withstand the test of law.

12/- The learned counsel further submitted that the positive case of the appellant/ plaintiff before the trial court was that the suit property belongs to his ancestors and the same is undivided and in that view of the matter the appellant/ plaintiff, being a co-sharer, enjoys the right of prior purchase which ordinarily should not been taken away from him on so technically.

13/- He further submitted that although there exists a common boundary wall between the suit property and the property of the appellant/ plaintiff, but the same, being part of the property left behind by his ancestors, is not divided in meats and bounds, therefore, the suit property continues to be undivided as on date also and the appellant/ plaintiff continues to be the co-sharer of the property.

14/- Further he argued that the appellant/ plaintiff also enjoys the right of prior purchase as his property which is situated alongside the suit property is a dominant property and the suit property is a servient property.

15/- The learned counsel further submitted that the appellant/plaintiff raised all these pleas before the trial court and the trial court ought to have proceeded with the trial and allow the parties to prove their versions, but the trial court precipitated the trial and scuttled the proceedings by resorting to a provision of law in a wrong way. Therefore, he prayed that the impugned judgment be set-aside and the trial court be directed to frame the issues and decide the matter on merits.

16/- On the other hand Mr B. A. Bashir, learned senior counsel, submitted that the impugned judgment is quite reasoned and needs no interference as the trial court has rightly appreciated the controversy and decided the same in accordance with law.

17/- He submitted that the trial court took note of the fact that the suit property has exchanged many hands as the sale in respect of the land in question is third since 1969, therefore, the suit property cannot be said to be undivided.

18/- He further submitted that on the earlier occasions when the ancestors of the appellant/ plaintiff were alive and the suit property was put to sale no restraint or pre-emption was sought by anybody and the appellant/ plaintiff now at this time has no locus to question the sale.

19/- Further he submitted that firstly the appellant filed a suit and sought restraint on the sale of the suit property on the ground of being a co-sharer and when that did not materialize he filed yet another suit and sought right of prior purchase on the ground of 'dominant-servient property'.

20/- He submitted that the trial court did not find anything coming out of the plaint that would suggest appellant/ plaintiff to have a right of prior purchase either on the ground of being a co-sharer or suit property being a servient property to the appellant/plaintiff's dominant property. He, therefore, sought dismissal of the appeal at this stage only.

21/- While exercising the right of rebuttal Mr G. A. Lone, learned counsel for the appellant/ plaintiff submitted that merely because the suit property has earlier been sold and his ancestors did not object to such sale, the appellant/ plaintiff is not estopped in law to raise such objection now and seek a right of prior purchase on the ground of being a co-sharer. He submitted that it is a settled principle of law that as long as the property is not divided in meats and bounds it continues to be a undivided property and there is no hard and fast rule for determining such right.

22/- I have considered the submissions made at the Bar by the learned counsel for the parties.

23/- The admitted position of the case is that 1) the appellant/ plaintiff, prior to the sale of the suit property, has approached the respondents/defendants 1 to 5 and expressed his desire to purchase the suit property; 2) the suit property was owned by the ancestors of the appellant/ plaintiff; 3) there is a common boundary wall between appellant/plaintiff's house and the suit property falling on same khasra number; 4) the suit property has been sold to respondent/ defendant no. 6.

24/- The dispute before the trial court, therefore, had remained confined to three issues i.e. a) As to whether the appellant/ plaintiff is a co-sharer

of the suit property? b) As to whether the appellant/ plaintiff's property is dominant and the suit property a servient property? c) As to whether the suit property is a commercial property?

25/- The applicability of the provision of law would, thus, be subject to the determination of the above three issues, as, the right of prior purchase of the suit property would come only if the appellant/ plaintiff is proved to be either a co-sharer of the suit property; is owning a property alongside the suit property that is dominant or the suit property is not a commercial property.

26/- The trial court has recorded in the impugned judgment that there is not even a whisper made in the plaint to show as to how the property of the plaintiff is a dominant property and that the suit property is a servient property. It further records that there is only one line incorporated in the plaint that says that there is a common boundary wall. While so recording the trial court rejected dominant-servient property plea of the appellant/ plaintiff holding that the photographs on the file would show that the two properties are separated by a tin sheeted boundary wall.

27/- The trial court has rejected the co-sharership claim of the appellant/ plaintiff by holding that the properties appear to be partitioned as it has changed hands to three different buyers.

28/- In the very first instance, it would be profitable to reproduce Rule 11 of Order VII of the CPC herein:-

“11. Rejection of plaint.__The plaint shall be rejected in the following cases:-

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to

supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law.”

29/- The trial court appears to have dealt and proceeded with to dismiss the suit either in terms of clause (a) or (d) of the Rule 11 as the other two clauses do not get attracted at all as it talks of valuation of the plaint. In both the cases i.e. in either situation of taking recourse to clause (a) or (d) of the Rule, the dismissal must have been based only on the plaint failing to make out a cause of action or appearing to be barred by any law. None of the two provide for taking into consideration the opposite version in the form of written statement, therefore, there was no occasion for the trial court to look beyond what is contained in the plaint and since it did not do so, therefore, the trial court appears to have erred in law in dismissing the suit while taking recourse to the Rule *supra* in disregard to its mandate.

Nature of the suit property:

30/- In order to see that the suit property is a commercial one or otherwise, primarily what is to be seen is, as to where the suit property is situated and what it is being used for. I am afraid that these factors can be determined during trial.

31/- The appellant/ plaintiff has very sufficiently indicated that his residential house exists on spot and that the area is not described as a commercial property in the Srinagar Master Plan. In such a situation it becomes all the more imperative to see that the trial is conducted and this aspect is sufficiently gone into and proved for facilitating a balanced and a definite conclusion.

32/- The trial court has *prima facie* erred in law in holding, without trial, that the property appears to be a commercial property. It cannot be left to the guess work of trial court to determine this issue. Such an issue needs to be proved during trial and parties must be given a chance to prove their respective stand.

Co-Sharership of the suit property:

33/- There are no documents on record to disclose that the suit property is divided in meats and bounds and that the parties to the suit are holding and or are in possession of their respective shares exclusively and shares have delineated. Although the respondents/ defendants have taken a ground that property is divided and they are exclusively in possession of their shares, but they cannot be allowed to change the nature of property and user of the same to the disadvantage of the appellant/ plaintiff till the rights are determined during trial.

The finding recorded by the trial court on this aspect that the properties are separated by a common tin sheeted boundary wall and by separate entrance gates is insufficient inasmuch as this very finding is recorded on the basis of photographs made available to the court. This is a feeble finding and cannot be allowed to be made basis for determining an issue of such a crucial nature.

34/- For all what has been stated hereinbefore, I am of the considered view that the trial court has not correctly followed the law in deciding the suit, therefore, the appeal is allowed and the impugned judgment is set-aside. The file is remanded to the trial court for conducting trial and for deciding the matter on merits. In order to preserve the rights of the parties to the dispute, *status-quo* in respect of the suit property be maintained. The trial court is expected to expedite decision in the matter without getting influenced by any of the observations made in this order.

35/- Registry to send a copy of this order to the trial court forthwith. Parties shall be summoned by the trial court once the normal court work resumes during or after the nationwide lockdown enforced on account of Covid-19.

36/- Disposed of on the above lines.

(Ali Mohammad Magrey)
Judge

Srinagar
13.05.2020
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