

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.243/2015

Amolkumar Navinchand Patni
and others.

...Petitioners..

Versus

Shankar Dashrath Navpute

...Respondent...

.....

Shri S.S. Patil, Advocate for petitioners.

Shri Amol S. Gandhi, Advocate for respondent no.1.

.....

CORAM: T.V. NALAWADE, J.

DATE: 21.11.2015

ORDER :

- 1] Heard learned counsel appearing for the parties.
- 2] The proceeding is filed to challenge the order dated 28.4.2015 made by the learned Civil Judge, Junior Division, Aurangabad, on Exhibit 10 filed in Regular Civil Suit No.189/2014. In the suit filed for the relief of removal of encroachment and possession of encroached portion against the plaintiff, the defendant filed application at Exhibit 10 under Order VII Rule 11 of the

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Code of Civil Procedure, 1908, in which he prayed for rejection of the plaint.

3] The defendant has prayed for rejection of the plaint on following grounds:-

a] There are other owners in land Gut No.261 and they ought to have come to the Court either as plaintiff or defendant and the suit is bad for non-joinder of necessary parties.

b] The plaintiff has shown false cause of action dated 8.2.2014 when the measurement was taken in the year 2004 itself and the date of measurement and the date on which encroachment was noticed, need to be treated as cause of action.

c] The relief of declaration is not claimed when the plaintiff is claiming possession.

d] The point of limitation ought to have been considered in relation to the cause of action and that ought to have been treated as a preliminary issue.

4] In the plaint, it is the case of the plaintiff that 40 Aares land from Gut No.261 has come to him from his father and it is his ancestral property. Some

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portion is in his possession, which is on the west side of the river and the disputed portion is on the east side of the river. It is the case of the plaintiff that he suspected that there was encroachment and so he applied for measurement of the land in the year 2004. It is contended that after the measurement, which was done in the year 2004, it revealed that encroachment was made by the defendant on 25 Aares portion of Gut No.261. He contended that he tried to convince the defendant to handover the encroached portion by involving some villagers, but the defendant refused to do so and this attempt was lastly made on 8.2.2014.

5] The aforesaid contentions show that the plaintiff has some portion in land Gut No.261. Whether he is entitled to 40 Aares portion or not cannot be a dispute between the plaintiff and the defendant as the other persons from land Gut No.261 can have say in that regard and the record can be produced and the witnesses like the other owners can be examined on that point. Further, the encroachment, if any, made on the portion of land Gut No.261 needs to be proved and for that, the dispute is between the plaintiff and the defendant and it

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is not between the plaintiff and other co-sharers of land Gut No.261. In view of these circumstances, it cannot be said that the suit is bad for non-joinder of necessary parties.

6] Though the plaintiff has tried to show that the cause of action had arisen on 8.2.2014, when he made last attempt to convince the defendant to handover the encroached portion, the measurement was made in the year 2004 and it can be said that if any cause of action arose, that had arisen in the year 2004. The suit came to be filed in February, 2014 and thus within 12 years. In any case, such a suit falls under article 65 of the Limitation Act, 1963, and not under Article 64 of the Limitation Act and so for this reason also, it cannot be said that the suit is not within limitation and the discrepancy regarding cause of action is sufficient to reject the plaint.

7] In view of the aforesaid circumstances, this Court holds that the trial Court has not committed any error in rejecting the application. The learned counsel for the petitioner placed reliance on the case *N.V. Srinivasa Murthy v. Mariyamma (dead) by proposed L.Rs.* reported at

2005 AIR (SC) 2897. The facts of this cited case were altogether different. There was dispute about the nature of transaction and the Apex Court held that the relief of declaration with regard to the nature of transaction ought to have been claimed and that relief was probably time barred. Thus, the facts of that case were different.

8] In the result, the revision petition stands dismissed.

9] The observations made in this order are for the purpose of proceeding filed under Order VII Rule 11 (d) of the Code of Civil Procedure, 1908.

(T.V. NALAWADE, J.)