

Sequeira

*IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION*

FIRST APPEAL NO. 18 OF 2014.

In

SPECIAL CIVIL SUIT NO. 55 OF 2010

Mrs.Geeta Patkar of Mumbai,
Indian Inhabitant, residing at Firuz-Ara
Ground Floor, Opp. Cooperage Bandstand
Maharshi Karve Road, Mumbai-400021

.. Appellant

Vs.

1. Chandrakant Kantilal Shah of Mumbai,
Indian Inhabitant, residing at 303, Vijay
Apartment, Ben Nivas Compound,
Warden Road, Mumbai-400026.
2. Jayraj Kantilal Sonawala of Mumbai,
Indian Inhabitant, residing at B/408
Poonam Apartment, Dr.Annie Besant Road
Worli, Mumbai-400018.
3. Nitin Kantilal Sonawala of Mumbai,
Indian Inhabitant, residing at Plot No.26
4th Floor, Everest Building, Padam Tukdi
Peddar Road, Mumbai-400026.
4. Madhukar Kantilal Sonawala of Mumbai,
Indian Inhabitant, residing at
A/2 Plot No.76, Gold Coin Building,
Tardeo, Mumbai-400034
5. Induben Murarilal of Mumbai
Indian Inhabitant, having her address at
303, Vijay Apartment, Ben Nivas Compound,
Warden Road, Mumbai-400026.

6. Vrinda alias Rekha Bharkumar Malbari of Mumbai, Indian Inhabitant, having her address at 303, Vijay Apartment, Ben Nivas Compound, Warden Road, Mumbai-400026.
7. Bharati Philipkumar Shah of Mumbai Indian Inhabitant, 303, Vijay Apartment, Ben Nivas Compound, Warden Road, Mumbai-400026.
8. Anita Virendra Sonawala of Mumbai Indian Inhabitant, residing at 303, Vijay Apartment, Ben Nivas Compound, Warden Road, Mumbai-400026.
9. Alok Virendra Sonawala of Mumbai Indian Inhabitant, residing at 303, Vijay Apartment, Ben Nivas Compound, Warden Road, Mumbai-400026.
10. Karishma Ajay Agarwal of Mumbai Indian Inhabitant, residing at 303, Vijay Apartment, Ben Nivas Compound, Warden Road, Mumbai-400026.
11. M.P. Shah of Mumbai, Indian Inhabitant residing at 26-D, Navnit Nagar, 2nd floor Ghatkopar (East), Mumbai-400077.
12. Kailash P.Shah of Mumbai Indian Inhabitant, residing at Krupa Nagar CI-Block-4, Irla Andheri, Mumbai-400056.
13. Mr.Arvind K.Shah residing at 55, Tanhee Heights, Petit Hall 56, Nepean Sea Road, Mumbai-400006.

14. Mr.Anupam K. Shah
At – Manhar Villa, 4th Floor, Derasar Lane
Santacruz (East), Mumbai.
15. Sailesh Balubhai Kapadia of Mumbai
Indian Inhabitant, residing at Shanti
Nagar 17th, 187/188-98, Nepean Sea Road
Mumbai-40006.
16. Yogesh Balubhai Kapadia of Mumbai
Indian Inhabitant, residing at Shanti
Nagar 17th, 187/188-98, Nepean Sea Road
Mumbai-40006.
17. Mr.Dilip Mahasukhlal Shah
18. Mr.Haresh Mahasukhlal Shah
19. Mrs.Bharati Dilip Shah
20. Mr Ashok Mahasukhlal Shah
all residing at 15-A, Grand Paradi
Apartment, August Kranti Marg,
Mumbai-400036.
21. Mr.Dilip Jasubai Patel
22. Mr.Ashwin Jasubai Patel
both residing at Subhadra Mansion,
2nd Floor, 74/76, Walkeshwar Road
Mumbai-400006.
23. Sonawala Brothers having its office
at B/408, Poonam Apartment,
Dr.Annie Besant Road, Worli, Mumbai-400018.
24. Marathon Group having its office at
Marathon House, Devidayal Road
Mulund (West), Mumbai-400080.

25. M/s.Cornell Housing and Infrastructure Private Limited a Company incorporated under the Companies Act, 1956, having its registered office at 101, Marathon House Devidayal Road, Mulund (West) Mumbai-400080.

.. Respondents

Mr.S.U.Kamdar, Senior counsel, Mr.Rubin Vakil, Mr.Sameer Singh i/b Mr. T. V. Louis, for the appellant.

Mr.Pravin Samdani, Senior advocate, Mr.Karl Tamboly, Mr.Kunal Vajani, Mr.Pranaya Goyal, Mr.Rashan Gupta i/b M/s Wadia Ghandy & Co., for the respondent No.25.

Mr.Y.S.Jagirdar, Senior advocate, Mr.P.S.Dani, Senior advocate, Mrs.Jyoti Shah, Ms Jesal Shah i/b M/s Daru Shah & Co., for the respondent Nos.1 to 4.

Dr.Veerendra V. Tulzapurkar, Senior advocate, Mr.P.S.Dani, Senior advocate, Ms.Nandini Joshi i/b M/s Harish Joshi & Co., for respondent Nos.8 to 10.

***CORAM: Smt. Vasanti A. Naik &
Shri C.V.Bhadang JJ.
Thursday 26 February, 2015.***

Judgment : *(Per - Smt.Vasanti A. Naik J.)*

Admit. Heard finally with consent after receipt of the Record and Proceedings.

2. By this first appeal the appellant challenges the order of the Civil Judge, Senior Division Thane, dated 10 December 2013

deciding the preliminary issue against the appellant and holding that the suit filed by the appellant was barred by the law of Limitation.

3. The appellant is the original plaintiff. A suit was instituted by the plaintiff for a declaration that the Writing dated 07/10/1965 is valid, subsisting and binding on the defendant Nos.1 to 18. A further declaration that the plaintiff became an owner of the suit property in view of the Writing dated 07/10/1965 was also sought. Certain other ancillary prayers including the prayer for permanent injunction restraining the defendants from transferring, alienating or encumbering, the suit property were also made.

4. The suit property is a part of the land purchased by one Kantilal Manilal Sonawala in village Khari, district Thane from Dayalal Chaganlal by a registered Sale Deed dated 05/10/1965. It is the case of the plaintiff that the purchase price for the said land was Rs.6,04,180/- and the purchase price was contributed by seven persons including the plaintiff in different proportions. According to the plaintiff, the plaintiff had contributed 3.12 per cent of the purchase price. It is pleaded that the seven contributors, including the plaintiff had come together to form a joint venture and the land purchased in the name of Kantilal formed the asset of the same. The understanding in regard to the joint venture, was recorded in Writing in the document dated 07/10/1965. According to the document dated 07/10/1965, the land purchased by Kantilal was considered as the asset of the joint venture and the persons

mentioned in the document, dated 07/10/1965 were provided with a share that was equal to the contribution in the payment of the sale consideration. On 28th June 1967, the deed styled as a Deed of Cancellation was executed between Kantilal and Dayalal and by this document the area of the land mentioned in the Sale Deed dated 05/10/1965 was somewhat reduced. On 11/06/1969 Kantilal expired and the names of his legal heirs were mutated in the Revenue Records. It is pleaded by the plaintiff that after the death of Kantilal the defendant Nos.1 to 4, i.e., his legal heirs continued to attend the suit land and the plaintiff was updated on the status of the property and was assured that her rights were safeguarded. Land Acquisition proceedings were initiated in respect of a part of the land purchased in the name of Kantilal and the Awards under Section 11 of the Land Acquisition Act, were passed. It is not in dispute that the compensation towards the acquisition of the land was received by the respondent Nos.1 to 4, i.e., the legal heirs of Kantilal. In September 2004, the defendant Nos.15 and 16, i.e., the heirs of one of the co-owners – contributors namely Balubhai Bhogilal Palejwala entered into an agreement with the respondent No.25 and under the said agreement a consideration of Rs.10 lakhs was paid to them. A public notice was issued by the defendant Nos.1 to 4 and 8 on 12/02/2009, claiming to be the absolute owners of the suit land, and informing the public about their intention to develop the same. After reading the public notice, the plaintiff issued a legal notice to the defendant Nos.1 to 4 and 8, on 13/04/2009 asserting therein, her rights as a co-owner

of the suit land and objecting to the public notice and the contents thereof. The advocate for the defendant No.2 made some queries in regard to the transaction dated 07/10/1965. The plaintiff gave an inspection of the document dated 07/10/1965 to the advocate of the defendant No.2. As the defendants failed to act upon the notice of the plaintiff, the plaintiff instituted the suit on 19.1.2010 seeking the aforesaid declaration. The plaintiff based her claim on the Writing dated 07/10/1965.

5. The defendant Nos.1 to 4 and 8 filed the Written statement and denied the claim of the plaintiff. The defendant No.25-developer raised the plea of limitation in his written statement. The trial Court framed the preliminary issue of limitation under Section 9-A of the Code of Civil Procedure and decided the same against the plaintiff by holding that the suit filed by the plaintiff was barred by the law of limitation.

6. Shri Kamdar, the learned Senior counsel, for the plaintiff submitted that the trial Court was not justified in answering the preliminary issue against the plaintiff. It is stated that in view of the provisions of Article 58 of the Limitation Act 1963, a plaintiff is entitled to bring a suit within a period of three years from the date of accrual of the cause of action, to file the same. It is stated that the trial Court has committed an error in holding that the cause of action to file the suit accrued when the Modification / Cancellation Deed was executed between Kantilal and Dayalal on 28/06/1967 and also when the defendant Nos.1 to 4 received the entire

compensation in terms of the Award in the Land Acquisition proceedings. It is stated that the plaintiff has claimed to be one of the co-owners of the suit property and the plaintiff had no reason to object to the Modification / Cancellation Deed dated 28/06/1967 as she was ready to accept the same. It is stated that the plaintiff has based her claim only to the properties mentioned in the Modification / Cancellation Deed dated 28/06/1967 and it cannot be said that the execution of the said document was the first unequivocal act on the part of Kantilal, denying the right of the plaintiff. It is stated that compensation is always paid to the person whose name finds place in the mutation record and hence the Award was passed in the Land Acquisition proceedings in the names of the legal heirs of Kantilal and compensation was also paid to them. It is stated that the legal heirs of Kantilal submitted the accounts of the money to the plaintiff, as pleaded and stated in the evidence of the plaintiff. It is stated that only when the public notice was issued on 12/02/2009, the right to sue 'first' accrued to the plaintiff. It is stated that by the public notice dated 12/02/2009, it was known to the plaintiff for the first time that the defendant Nos.1 to 4 and 8 were intending to sell and develop the land without acknowledging the right of the plaintiff, in the same. It is stated that the observation made by the trial Court that the plaintiff became aware about the lease deed executed by the defendant Nos.1 to 4 in favour of defendant No.25 M/s Cornell Housing and Infrastructure Private Limited in the year 2004 is clearly erroneous as the plaintiff had stated in her evidence that she

became aware, about the lease deed of the year 2004 at the time of tendering of the evidence. It is stated that the legal heirs of Kantilal had proceeded against the tenants of the agricultural lands as the co-owners of the property and there was no reason for the plaintiff to institute a suit at that time. It is stated that an act of one co-owner to institute proceedings for eviction against the tenants is an act on behalf of the other co-owners. The learned Senior counsel relied on the Judgments reported in **(1980) 4 Supreme Court Cases 396 - Karbalai Begum Vs Mohd. Sayeed and another**; **(2010) 11 Supreme Court Cases 476 – Budh Ram and others Vs Bansilal and others** and **(2003) 5 Supreme Court Cases 150 – T. Lakshminipathi and others Vs P. Nithyananda Reddy and others**, in this regard. It is stated, by relying on the aforesaid judgments that one of the co-owners could be in exclusive possession of the property for and on behalf of the other co-owners and the mere non-participation in the rents and profits of the land by a co-sharer would not amount to ouster, so as to give a title to the other co-sharer in possession. The judgment reported in **(1997) 6 Supreme Court Cases 207 - W.B.Housing Board and others Vs Brijendra Prasad Gupta and others**, is relied on to submit that a Collector under the Land Acquisition Act, is not obliged to make a roving enquiry about the ownership of the land. The judgments reported in **(2013) 3 Supreme Court Cases 182 – Board of Trustees of Port of Kandla Vs Hargovind Jasraj and another**; **(1962) 1 SCR 67** and **(2010) 2 Supreme Court Cases 194 – Daya Singh and another Vs Gurdev Singh (Dead) by LRs. And others**, are

relied on to substantiate the submission that the right to sue would not accrue unless there is a clear and unequivocal threat to infringe the right, by the defendant against whom the suit is instituted. It is stated that there was no reason for the plaintiff to file the suit either in the year 1967, when the Cancellation / Modification Deed was executed or when the amount of compensation was paid to the legal heirs of Kantilal as canvassed on behalf of the defendants or as held by the trial Court as by the aforesaid facts there was no threat to infringe the right of the plaintiff, much less a clear and unequivocal threat. It is stated that the trial Court erroneously proceeded to decide the issue of limitation on a mistaken belief that the document dated 07/10/1965 on which the plaintiff had based her claim was not legal and valid. It is stated that the evidence of the plaintiff in her cross-examination is referred to and considered by the trial Court, though the same is not necessary for deciding the issue of limitation. It is stated that the trial Court has committed a serious error in deciding the issue of limitation against the plaintiff by ignoring the fundamental principles of law.

7 Shri Dani, the learned Senior counsel for the defendant Nos.1 to 4 and 8 to 10 supported the order of the trial Court and submitted that the suit filed by the plaintiff was barred by the law of limitation. It is submitted that the right to sue first accrued to the plaintiff on 28/06/1967 when the Deed of Cancellation / Modification was executed between Kantilal and Dayalal thereby reducing the extent of the land transferred to Kantilal by the registered Sale Deed dated 05/10/1965. It is stated that the first

unequivocal interference or threat to infringe the right of the plaintiff was caused on 28/06/1967. It is stated that right from the inception i.e. from the date of execution of the Sale Deed dated 5/10/1965, in favour of Kantilal, the entries in the Revenue Record stood in the name of Kantilal and after his death in the name of his legal heirs. It is stated that the plaintiff never applied to the Revenue authorities for the correction of the Revenue entries. According to the learned Senior counsel, though the land acquisition proceedings continued from the year 1977 to 1985 and though the compensation in terms of the Awards passed by the Special Land Acquisition Officer was received and utilised by the defendant Nos.1 to 4, the plaintiff never made a grievance in that regard. It is stated that the plaintiff never asserted her right to receive the compensation despite the clause in the document dated 07/10/1965, that the sale proceeds of the property of the joint venture would be divided between the plaintiff and the other signatories to the document. It is stated that the receipt and utilisation of the compensation by the defendant Nos.1 to 4 infringed the right of the plaintiff. It is submitted that the cause of action to file the suit first accrued on 28/06/1967 and if not then, the same surely accrued when the defendant Nos.1 to 4 received the entire compensation towards the acquisition of the land. The learned counsel relied on the judgments reported in **(2011) 9 Supreme Court Cases 126 – *Khatris Hotels Private Limited and another Vs Union of India and another*; (1991) 4 Supreme Court Cases 1 – *State of Punjab and Ors. Vs Gurdev Singh* and 2004(1)**

Mh.L.J. 1093 - *Satyabhamabai w/o Wasudeo Dhanjode and others Vs Chhatrapati s/o Zibal Dhanjode and others*, to substantiate his submission that the starting point of limitation would be the date on which the cause of action would “first” accrue to the plaintiff. It is stated by placing reliance on the aforesaid judgments that the word 'first' as used in Article 58 of the Limitation Act, would mean that if a suit is based on multiple causes of action the period of limitation would begin to run from the date when the right to sue first accrues.

8. Shri Samdhani, the learned senior counsel for the respondent No.25 – developer, submitted that the lease deed was executed by the defendant Nos.1 to 4 and 8 in favour of the developer i.e. defendant No.25 in the year 2004 and a public notice in regard to the same was published in the year 2006. It is stated that the lease deed was registered in the year 2006 and the right to sue accrued to the plaintiff atleast in the year when the lease deed was registered. It is stated, that the plaintiff, in any case, ought to have filed the suit within a period of three years from the execution of the lease deed in favour of the defendant No.25 and /or the registration of the same in the year 2006. The learned Senior counsel also relied on the judgments on which the learned Senior counsel for the original defendant Nos.1 to 4 and 8 to 10 had relied, to seek the dismissal of the First appeal.

9. On hearing the learned counsel for the parties and on a perusal of the original record and proceedings, we frame the points

of determination as under :-

POINTS

1. Whether the suit of the plaintiff is barred by the law of limitation?
2. What order?

10 To answer the aforesaid points for determination, it would be necessary to first refer to the provisions of Article 58 of the Limitation Act, on which both the parties have relied, while making their submissions on the issue of limitation. Article 58 of the Limitation Act provides that the period of limitation for filing a suit to obtain a declaration is three years from the date when the right to sue first accrues. It is the case of the defendants that the right to sue first accrued to the plaintiff on 28/06/1967, whereas according to the plaintiff the right to sue first accrued to her on 12/02/2009 when a public notice was issued by the defendant Nos.1 to 4 and 8 claiming to be the absolute owners of the suit property and expressing their intention to alienate and develop the same.

11 The trial Court has answered the issue of limitation against the plaintiff and in favour of the defendants without mentioning the date on which the right to sue first accrued to the plaintiff. It is generally observed by the trial Court in the order that is appealed against, that the right to sue accrued to the plaintiff, when the mutation entries were recorded in the name of Kantilal and then

his legal heirs, when the Cancellation deed was executed in 1967 and when the defendant Nos.1 to 4 and 8, executed the lease deed in favour of the developer – defendant No.25 in the year 2004. It appears from the order of the trial Court that the trial Court has not actually applied its mind to the question as to when the right to sue 'first accrued' to the plaintiff, whether it accrued from day one, as the mutation entry stood in the name of Kantilal, after the execution of the sale deed in his favour on 05/10/1965 or in the year 1967 when the Deed of Cancellation / Modification was executed. The trial Court has proceeded to decide the issue of limitation, as rightly submitted on behalf of the plaintiff, on a mistaken belief that the document dated 07/10/1965, on which the plaintiff based his claim or prayers in the suit was not legal and valid. Several admissions in the cross-examination of the plaintiff in regard to the document or Writing, dated 07/10/1965 are referred to and considered by the trial Court while deciding the issue of limitation when those admissions could have been relevant only for deciding the issue in regard to the legality of the document or the existence thereof. The trial Court has observed that the right to sue had accrued to the plaintiff on 28/06/1967 when the Deed of Cancellation / Modification was executed between Kantilal and Dayalal. We do not find that by the execution of the said document dated 28/06/1967, the right of the plaintiff in the suit property was threatened in any manner. It prima facie appears that by the document dated 28/06/1967 the schedule of the properties to the sale deed was modified in view of the orders in

the consolidation proceedings. It prima facie appears that the deed merely corrected the area of the land mentioned in the original Sale deed dated 05/10/1965. We are using the phrase '*prima facie*' while considering the said document as we intend to reverse the order of the trial Court and hold that the suit filed by the plaintiff is not barred by limitation. It would not be proper for this Court to make any observations touching the merits of this case, while deciding the preliminary issue, when the suit is required to be decided on merits. Be that as it may, there is nothing in the document dated 28/06/1967, that threatens to infringe the right of the plaintiff.

12. Much has been said on behalf of the defendants about the existence of the mutation entries in the name of Kantilal and after his death, in the name of his legal heirs. It is well-settled that entries in the revenue record are not by themselves referable to the title to the immovable property. So also, such entries would not be a threat to infringe the right of the plaintiff, as claimed, on the basis of the document dated 07/10/1965. It is possible that since the property was purchased solely in the name of Kantilal, the mutation entries were recorded in the name of Kantilal after the purchase of the property and after his death, the names of his legal heirs were entered in the Revenue Record. The submission on behalf of the defendants that the mutation entries also gave rise to a cause of action to the plaintiff to institute the suit is incorrect, *moreso*, when the entries remained in the name of Kantilal from

the date of the purchase of the property on 05/10/1965 and thereafter there was no change in the entries in the name of third parties. In any case, the submission made on the basis of the mutation entries cannot be considered for holding that the suit was barred by limitation, especially when the defendants have sought the dismissal of the suit by relying on the words 'first accrues'. If the mutation entries remained in the name of Kantilal right from day one i.e. the date of the purchase of the property by the Sale Deed, dated 05/10/1965, there is no question of applicability of the words 'first accrues' especially when the document on which the plaintiff based her claim was executed subsequently on 07/10/1965.

13. We also do not find any merit in the submission made on behalf of the defendants that the plaintiff's right in the property was unequivocally threatened by the receipt of the compensation by the defendant Nos.1 to 4 and 8. Though it is admitted by the plaintiff that the plaintiff had not claimed compensation towards the acquisition of the land and the same was received by the defendant Nos.1 to 4 and 8, it is categorically stated by the plaintiff in her evidence that the legal heirs of Kantilal showed the plaintiff, how the amounts were utilized. It is also to be prima facie noted that as per clause 5 of the document dated 07/10/1965, the parties had agreed that the sale proceeds of the property of the joint venture would be divided in the proportions mentioned in the said document and it appears that for the first time the defendant Nos.1 to 4 and 8 made it known to the plaintiff by the public notice dated

12/02/2009 that they claimed to be the absolute owners of the suit property and were intending to sell and develop the same. In our considered view, the right to sue first accrued to the plaintiff only after the plaintiff became aware of the public notice dated 12/02/2009, whereby the concerned defendants claiming to be the absolute owners of the property expressed their intention to sell and develop the same. The judgments relied on by the counsel for the parties clearly lay down that the right to sue under Article 58 of the Limitation Act, accrues to the plaintiff when the defendant gives a clear and unequivocal threat to infringe the right asserted by the plaintiff, in the suit. It is worthwhile to consider the observations of the Hon'ble Supreme Court in the Judgment reported in **AIR 1960 SC page 335 - Mst.Rukhmabai Vs Lala Laxminarayan & others**, that every threat by a party to such a right, however ineffective it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. The Hon'ble Supreme Court observed that whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively refuses or jeopardises the said right. In our view, none of the facts relied on by the defendants and observed by the trial Court clearly and unequivocally threaten to infringe the right of the plaintiff, so as to file the suit for the relief claimed. We find that the execution of the document dated 28/06/1967 is not a threat at all, much less a clear and unequivocal threat. The receipt of the compensation by the defendant Nos.1 to 4 and 8 towards the compulsory acquisition of

the land under the Land Acquisition Act, even if assumed to be a threat, falls within the category of an ineffective and innocuous threat, moreso, when the plaintiff had clearly stated in her evidence that after the receipt of the compensation by the defendant Nos.1 to 4 and 8, they had given the accounts of the money to the plaintiff. The document dated 07/10/1965 on which the plaintiff has based her claim mentions that the parties had agreed that the sale proceeds from the property shall be divided between the signatories to the said document and for the first time by the public notice dated 12/02/2009, the defendant Nos.1 to 4 and 8 made it known to the plaintiff that they claim to be the absolute owners of the suit property and were intending to sell and develop the same. The cause of action to file the suit accrued to the plaintiff for the first time after the issuance of the notice dated 12/02/2009 and since the suit is instituted by the plaintiff on 19/01/2010, it cannot be said that the same is barred by the law of limitation. We find that neither the trial Court nor the defendants could have relied on the lease deed executed by the defendant Nos.1 to 4 and 8 in favour of the defendant No.25 in the year 2004 to hold that the cause of action arose in 2004, especially, when the plaintiff had stated in her evidence that she became aware of the lease deed only at the time of tendering of the evidence.

14 In view of the aforesaid discussion, we answer the first point of determination in the negative and in favour of the plaintiff and allow the First Appeal by setting aside the order of the Civil Judge, Senior Division Thane, dated 10th December 2013. The trial Court

should decide the suit in accordance with law, as expeditiously as possible and positively within a period of one year from the date of the appearance of the parties before the trial Court. The parties undertake to appear before the trial Court on 16th March 2015. The Record and Proceedings should be remitted to the trial Court at the earliest. In the circumstances of the case there would be no order as to costs.

(C.V.Bhadang J.)

(Vasanti A.Naik J.)