

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

CIVIL REVISION APPLICATION NO. 683 OF 2014

Shri Sharad Ramchandra
Mohokar and Ors

Applicants

Vs

Smt. Prabha Shrikrishna Ghiya

.. Respondent

Mr. Narendra V. Bandiwadekar a/w Mr. Mandar Bagkar, Advocate
for Applicants.

Ms. Jui Nerurkar, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 12/08/2015

PC:

1. Heard Mr. Narendra Bandiwadekar, learned counsel for the applicants and Ms. Jui Nerurkar, learned counsel for the respondent at length.
2. Rule. Ms. Nerurkar waives service for the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and Application is taken up for final hearing.
3. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), original defendants have challenged the Judgment and order dated 10.12.2013 passed by the learned Civil Judge, Jr. Dn., Panvel below Exhibit -16 in R.C.S. No.170 of 2011. By that order, the learned trial Judge rejected the application taken out by the defendants under Order VII, Rule 11 (b) and (d) of C.P.C.

4. In support of this application, Mr. Bandiwadekar submitted that the respondent, hereinafter referred to as 'plaintiff', has instituted suit for specific performance of Agreement of Sale dated 15.5.1982. Suit is instituted on 7.3.2011. He submitted that the defendants had issued notice dated 9.2.1994 to the plaintiff cancelling the agreement of sale. The said notice is replied by the plaintiff on 9.3.1994. However, the plaintiff suppressed this fact in the Plaint. In paragraph 1(B) of the application, the defendants specifically asserted that agreement of sale dated 15.5.1982 was cancelled by issuing notice dated 9.2.1994. The said notice was replied by the plaintiff on 9.3.1994. The plaintiff, therefore, had to institute suit within three years from revocation of the Agreement of sale. The suit is instituted on 7.3.2011 which is hopelessly barred by limitation. He further submitted that the learned trial Judge, though has referred this contention in paragraph 3 of the impugned order, thereafter, has not dealt with at all. He relied upon the decision of the Apex Court in the case of T. Arivandandam V. T. V. Satyapal, (1977) 4 SCC 467.

5. On the other hand, Ms. Nerurkar supported the impugned order. She submitted that admittedly the defendants have filed application under Order VII, Rule 11(b) and (d) of C.P.C. While considering such application, the Court has to only consider the averments made in the Plaint. If from the statements made in the

Plaint, it appears that suit is barred by law, then alone plaintiff can be rejected. While considering application under Order VII, Rule 11, the Court cannot consider the defence. She further submitted that in paragraph 7 of the impugned order, the learned trial Judge considered the decision of the Apex Court in the case of Ramesh B. Desai Vs. Bipin Vadilal Mehta, 2006 (6) ALL MR 56 (SC), wherein it is observed that in order to examine whether plaintiff is barred by any law, the averments made in the plaintiff alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or any piece of evidence. She also relied upon the decision in the case of M/s Gurukripa Developers Vs. Empathy Foundation, 2015 SCC Online Bom. 669.

6. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the defendants filed application dated 22.3.2011 at Exh. 16. In paragraph 1B, the defendants contended that they have terminated the agreement by notice dated 9.2.1994. The plaintiff replied that notice on 9.3.1994. The plaintiff filed reply dated 7.4.2011 at Exh.21. In paragraph 10 thereof, the plaintiff admitted receipt of notice and also that he had replied that notice albeit he also gave other explanation. In paragraph 3 of the impugned order, the learned trial Judge also dealt with this contention. However, the learned

trial judge thereafter did not advert to this aspect at all. It is not the case of the plaintiff that he did not receive the notice dated 9.2.1994. On the other hand, notice was replied by the plaintiff on 9.3.1994. Prima facie, this amounts to suppression of material facts by the plaintiff. The learned trial Judge has not dealt with this aspect at all in the impugned order. In view thereof, the impugned order is liable to be set aside on this count alone and the application-Exhibit-16 is required to be restored for deciding it afresh. Hence, the following order.

- (i) Impugned order dated 10.12.2013 is set aside and the the application Exhibit-16 is restored to the file of the trial Court.
- (ii) The learned trial Judge will deal with the contentions recorded herein as also other contentions that may be advanced before it in accordance with law uninfluenced by the observations made herein.
- (iii) Parties agree that they will appear before the trial Court on 1.9.2015 and for that purpose fresh notice need not be issued to them. The learned trial Judge is requested to decide the application within three months from the date of appearance of the parties. All contentions of the parties on merits are expressly kept open. Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)