

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2386 OF 2015

City Corporation Limited and another ... Petitioners
Vs.
Gayabai Bajirao Shinde and others ... Respondents

Mr. Pramod J. Pawar for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : 15TH JUNE, 2015

P.C. :

Heard Mr. Pawar, learned Counsel for petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, the original defendants No.3 and 3A have challenged the judgment and order dated 27.01.2015 passed by the learned Civil Judge Senior Division, Pune below Exhibit-29 in Special Civil Suit No.996 of 2012. By that order, the learned trial Judge rejected the application made by defendants No.3 and 3A for rejecting the plaint under Order VII, Rule 11(d) of the Code of Civil Procedure, 1908 (for short 'C.P.C.').

3. In support of this Petition, Mr. Pawar strenuously contended that respondents No.1 to 5 instituted Suit for specific performance of agreement of sale dated 11.10.2000 as also challenging the Will dated 22.12.2004 and the sale deed dated 29.12.2006 executed in favour of the petitioner No.1 (defendant No.3). He submitted that the Suit is clearly barred by limitation as it was not instituted within 3 years from the date on which the respondents-plaintiffs had noticed that the performance is refused. He submitted that in the plaint itself, it was asserted that cause of action firstly arose in the year 2001 when the Appeal was decided by the District Court on 04.09.2001. Even thereafter within 3 years,

respondent No.1 to 5 did not institute the Suit. He submitted that the Suit is however instituted in the year 2012, which is clearly barred by limitation. He, therefore, submitted that the learned trial Judge committed error in rejecting the application under Order VII, Rule 11(d) C.P.C. He further submitted that in the application at exhibit-29, petitioners specifically asserted that on 04.03.2005, Anjanabai Dinkar Dhamdhere had expired. This fact is set out by respondents No.1 to 5 in paragraph 10 of the plaint. Prior to that, she had executed Will on 20.07.2004 confirming the transaction held by and between herself and the plaintiffs namely agreement of sale dated 11.10.2000. Perusal of further assertions in paragraph 10 would show that that the said Anjanabai did not confirm the agreement of sale dated 11.10.2000. This aspect is however not considered in the impugned order. He, therefore, submitted that the Petition requires consideration.

4. I have considered the submissions advanced by Mr. Pawar. I have also perused the material on record. Petitioners filed application under Order VII, Rule 11(d) C.P.C. contending inter alia that the Suit is barred by limitation. The learned trial Judge considered Article 54 of the Limitation Act, 1963, which provides that the Suit for specific performance has to be filed within 3 years from the date on which plaintiff has noticed that the performance is refused. Perusal of the clause 2 of the agreement of sale shows that the remaining consideration of Rs.11 lacs was to be paid after the decision of the appeal pending in the District Court, Pune and after obtaining the requisite permissions for selling the land. It is no doubt true that the Appeal was decided by the District Court on 04.09.2001. The learned trial Judge has considered this aspect in paragraph 5 and it was noted that the Second Appeal is preferred against the decision of the District Court and the same is pending in the High Court. The learned trial Judge further observed that

the expression “till the appeal is decided by the District Court” would mean that the rights of the parties should be decided finally. It is intended to include the decision of the Suit in Appeal by the Appellate Court. The learned trial Judge further recorded that the Appeal being in continuation of the Suit and since the Second Appeal is pending in the High Court, plaintiffs did not get cause of action to sue the defendants. As far as the averments in the plaint are concerned, plaintiffs got knowledge about refusal in the month of October 2011 and since the Suit is instituted in the year 2012, it cannot be said that it is barred by limitation.

5. Mr. Pawar made grievance that the learned trial Judge did not consider the contentions raised by the petitioners, as more particularly set out in paragraph 3 of the application at exhibit-29. In my opinion, these assertions are not relevant for deciding whether the Suit is barred by limitation as the learned trial Judge has specifically recorded that while considering the application under Order VII, Rule 11(d) C.P.C., the Court has to consider the assertions in the plaint and not in the defence. Understanding this, the learned trial Judge specifically recorded a finding that the cause of action arose in October 2011 when respondents No.1 to 5 got knowledge about execution of the sale deed dated 29.12.2006 executed by legal representatives of Anjanabai in favour of the petitioner No.1 (defendant No.3).

6. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the application. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)