

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3222 OF 2015

Damu Govind Kashikar
(since deceased through his
Lrs. Dnyaneshwar D. Kashikar
and ors.)

.. Petitioners

vs.

Laxman Narayan Balkawade and ors.

.. Respondents

Mr. A.B. Patil for the Petitioners.

CORAM : M. S. SONAK, J.

DATE : 15 April, 2015.

P.C. :-

1] This petition challenges the order dated 21 January 2015 made by the Civil Judge, Senior Division, Pune dismissing the petitioners' application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (CPC), urging rejection of the plaint on the ground that the same was barred by law of limitation.

2] The suit instituted seeks for specific performance of an agreement dated 4 July 2006 as supplemented by an agreement dated 27 July 2010. The supplementary agreement dated 27 July 2010 makes reference to initial avoidance by the petitioners to comply with the terms, conditions and covenants of the agreement dated 4 July 2006. Both the agreements dated 4 July 2006 and 27 July 2010 do not fix any period within which the parties were required to complete the transactions in respect of the suit property. In the aforesaid circumstances, the learned Civil Judge has held that the issue of limitation would be a mixed question of law and fact

and therefore, it would not be appropriate to reject the plaint by resort to the provisions contained in Order 7 Rule 11 of the CPC.

3] Mr. Patil, learned counsel for the petitioners, however, submitted that since the supplementary agreement dated 27 July 2010 itself refers to refusal on the part of the petitioners to complete the transaction, the cause of action, if at all, can be said to have accrued to the plaintiffs in the year 2010 itself. Further, the learned counsel pointed out that mere reference to the date of 16 August 2012 or 7 February 2013 in paragraph 15 of the plaint, does not mean and imply that cause of action has accrued upon the said dates. In the present case, according to the learned counsel, the cause of action, if at all, has accrued in the year 2010 and the suit which instituted in the year 2014 is barred by law of limitation. Reliance was placed upon the decisions of the Calcutta High Court in case of *Manick Lal Seal and another vs. K.P. Chowdhury*¹ and *Md. Akhtar Hossain vs. Suresh Singh and ors*².

4] Having heard the learned counsel for the petitioners, perused the record as well as the impugned order, in my judgment, no case is made out for interference. In this case, admittedly, the agreements did not prescribe any time limit for completion of the transactions. Accordingly, the period of limitation had to be computed as per Article 54 of the Schedule to the Limitation Act, 1963. This Article requires that the suit for specific performance is required to be instituted within a period of three years from the date fixed in the agreement for performance or in case no date is fixed, then three

1 AIR 1976 Calcutta 115

2 AIR 2004 Calcutta 99

years from the date on which the plaintiff has notice that the performance is refused.

5] In this case, it cannot be said that the cause of action has accrued in the year 2010. This is because even though the supplementary agreement dated 27 July 2010 makes reference to avoidance on the part of petitioners, nevertheless, the supplementary agreement dated 27 July 2010, once again reiterates the position arising out of the agreement on the part of the petitioners to sell the suit property to the respondents-plaintiffs. The supplementary agreement also does not prescribe any time limit within which the transaction has to be completed. The averments in the plaint, though by no means conclusive, cannot be ignored at least, at the stage of deciding the application under Order 7 Rule 11 of the CPC. The averments in paragraph 15 of the plaint indicate two dates, upon which cause of action said to have accrued in favour of the respondents-plaintiffs. The provisions of Order 7 Rule 11 (d) of CPC provide for rejection of a plaint, where the suit appears from the statement in the plaint to be barred by law. At this stage, therefore, necessary credence shall have to be given to the statement in the plaint, even though such statements may not be conclusive.

6] The decision in case of *Manick Lal Seal (supra)* was not rendered at the stage of deciding an application under Order 7 Rule 11 of the CPC. The judgment in any case discusses the meaning of the 'notice' as appearing in Article 113 of the Earlier Limitation Act, which corresponds to the Article 54 of the present Limitation Act. This is really not the stage of deciding such an issue, because whilst

considering the application under Order 7 Rule 11 of the CPC, it is not permissible to take into consideration the defence of the petitioners in the matter.

7] The decision in case of *Md. Akhtar Hossain (supra)* also cannot be said to be attracted to the facts and circumstances of the present case. The supplementary agreement dated 27 July 2010 does not prescribe any period within which the transaction has to be completed. In these circumstances the plaintiffs have made reference to the two dates after 14 July 2010, on which the cause of action allegedly accrued to the plaintiff. There is no scope to consider whether the dates have mentioned are correct or not, at least, at this stage. Such consideration shall have to await the trial in the suit.

8] Accordingly, there is neither any jurisdictional error nor it can be said that the learned Civil Judge, in exercise of his jurisdiction has acted with material irregularity.

9] In a case where the application under Order 7 Rule 11 of CPC stands rejected, the appropriate remedy would be to institute a Revision Application under Section 115 of the CPC. However, this petition, is not being rejected on the ground of availability of alternate remedy alone.

10] There is no reason to entertain the present petition. Accordingly, petition is dismissed. There shall be however, no order as to costs.

(M. S. SONAK, J.)