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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 367 OF 2015

Shri Chandmal Nathmal Lodha … Applicant

Vs.

Shri Pravin Ganpat Sutar and others … Respondents

Mr.J.Shekhar i/b J.Shekhar & Co., Advocate for the Applicant.
Mr.Avinash V. Joshi, Advocate for Respondents No. 1 & 2.

CORAM : R.G.KETKAR, J.
DATE : 14th DECEMBER, 2015

P.C. :

. Not on board. At the request of Mr.Jagtap, taken up for admission.

2. Heard Mr.Shekhar Jagtap, learned Counsel for the applicant and Mr. Avinash V. Joshi, learned Counsel for the respondents No. 1 & 2 at length.

3. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), original defendant No.1 has challenged the judgment and order dated 30/03/2015 passed by the learned Civil Judge, Junior Division, (P.M.C. Court), Pune below Exhibit 23 in Regular Civil Suit No. 1654 of 2013. By that order, the learned trial Judge rejected the application made by defendant No.1 under Order 7 Rule 11(d) of C.P.C. for rejecting the plaint on two

grounds namely i) the Suit is barred by limitation and ii) that plaintiffs have not issued notice under Section 487 of the Maharashtra Municipal Corporations Act, (for short 'Act') to respondent No.3 (defendant No.5) before instituting the Suit.

4. Mr.Jagtap strenuously contended that respondents No.1 & 2, hereinafter referred to as plaintiffs, have instituted Suit inter alia for declaration that respondent No.3, hereinafter referred to defendant No.5, is under statutory obligation and responsibility to initiate and commence appropriate proceedings under the provisions of the Act for demolishing the illegal construction made on the suit premises described in Schedule 'A'; directing the original defendants No. 1 to 5 to demolish the construction made on the suit property described in Schedule 'A'; restraining defendants No. 1 to 4 from showing the property described in Schedule 'B' i.e. survey No. 132 Hissa No. 13C admeasuring about 1R as an access road to the suit property and using the same for ingress and egress and for perpetual injunction restraining them from giving any effect to the agreement dated 29/01/2002 in any government record including revenue record; for declaration that the construction plan sanctioned in respect of the suit property described in Schedule 'A' vide commencement certificate bearing no. 5202 dated 10/06/1996 is illegal, null and void and non est. In so far as the prayer clause (b) is concerned, in substance, the plaintiffs have challenged the

agreement dated 29/01/2002. The Suit is instituted on or before 31/01/2015. In view of Article 58 of the Limitation Act, the Suit ought to have been instituted within 3 years from the date of the agreement i.e. to say on or before 28/01/2005. The Suit is instituted on or about 31/01/2015. On the face of it, the Suit is clearly barred by limitation.

5. In prayer clause (f), plaintiffs have challenged the commencement certificate dated 10/06/1996. The plaintiffs have not issued notice under Section 487 of the Act to defendant No. 5. On this count also, plaint is liable to be rejected.

6. On the other hand, Mr.Joshi supported the impugned order. He submitted that in paragraph 6 of the plaint, it is specifically asserted that defendant No.1 has acquired the rights pertaining to C.T.S. No. 752 and not pertaining to C.T.S. No. 754. It was revealed that defendant No.1 obtained the right of way by agreement dated 29/01/2002 in respect of C.T.S. No. 752. The said fact was revealed to the plaintiffs only when defendant No.1 made application to Revenue Authorities in the month of January 2011. He further submitted that in paragraph 15, plaintiffs asserted that defendant No.1 has committed fraud on revenue officer by making forgery in the document dated 29/01/2002 and tampered with the document by over righting i.e. by replacing C.T.S. No. 752 with C.T.S. No. 754 and when this fact was realised, plaintiffs specifically raised

objection by filing application to that effect on 10/02/2011. In other words, he submitted that cause of action accrued to the plaintiffs in the year 2011 when they acquired knowledge about forgery in the document dated 29/01/2002.

7. As far as notice under Section 487 of the Act is concerned, he submitted that defendant No. 5 - Corporation has not raised this objection and having regard to the assertions made in paragraph 15, the learned trial judge rightly over ruled the objection based on Section 487 of the Act.

8. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. While deciding the application under Order 7 Rule 11 of C.P.C., only the averments made in the plaint are germane and not defence taken by the defendants. It was further held that plaintiffs have not challenged the document dated 29/01/2002. They have not sought any declaration about that document. Even assuming for the sake of argument in favour of defendant No.1 that plaintiffs have challenged document dated 29/01/2002, it is not in dispute that they are not party to that document. That apart, for the reasons stated in paragraphs 6 & 15, prima facie, it cannot be said that Suit is instituted beyond the period of limitation. In paragraph 15, the plaintiffs have specifically asserted that defendant No.1 has committed fraud and that they acquired knowledge in January 2011.

I, therefore, do not find that the learned trial Judge committed any error while overruling the objection raised by defendant No.1 that Suit is barred by limitation.

9. As far as contention based on Section 487 of the Act is concerned, the learned trial Judge has dealt with this aspect in paragraph 6 of the impugned order. He has noted that defendant no. 5 – Corporation has not raised that objection. The case of the plaintiffs herein is that the impugned notice is illegal, null and void and plaintiffs will have to prove that case. At this stage, it cannot be concluded that Suit is not maintainable for want of notice under Section 487 of the Act.

10. After considering the material on record, I do not find that the learned trial Judge committed any error in rejecting the application. No case is made out for invocation of powers under Section 115 of C.P.C. Hence, Application fails and the same is dismissed.

(R.G.KETKAR, J.)