

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.548 OF 2009

Mukesh Keshavlal Shah.] ... Applicant

Versus

Krishna Madhav Wankhede and Ors.] ... Respondents

Mr. Rahul Nerlekar for Applicant.
Mr. Y. V. Divekar for Respondent No.1.

CORAM :- M. S. SONAK, J.
DATE :- APRIL 30, 2015

P. C. :-

1. This Revision Application challenges orders dated 12/03/2009 and 13/04/2009 made by the Civil Judge, Senior Division, Kalyan.

2. By the order dated 12/03/2009, the Applicant's application under Order 7 Rule 11 of the CPC for rejection of plaint and for framing a preliminary issue that the suit is barred under Order 2 Rule 2 of the CPC came to be dismissed. However, by the same order, it was directed that issue as to limitation be framed as a preliminary issue. By the order dated 13/04/2009, it was held that the suit is not barred under the law of limitation.

3. Mr. Nerlekar, learned Counsel for Applicant, submitted that the suit, in the present case, has been styled as one for specific performance of contract and cancellation of agreements and power of attorney dated 14/07/2005 and 21/02/2008. Although, prayer clauses are ambiguous, in effect, the Plaintiff seeks specific performance of agreement dated 22/04/1991. The suit came to be instituted on 19/07/2008 or in any case on 21/07/2008. In such circumstances, the suit was *ex facie* barred by the law of limitation.

4. Mr. Nerlekar further submitted that the agreement dated 14/07/2005 in respect of which relief has been claimed in prayer clause (b) of the plaint, is a registered document. Relying upon the decision of the Hon'ble Supreme Court in the case of ***Dilboo (Smt) (Dead) By LRs and Others Vs. Dhanraji (Smt) (Dead) and Others***¹, Mr. Nerlekar submitted that registration of a document, itself operates as a constructive notice. In this case, Mr. Nerlekar submitted that there are no averments to the effect that the Plaintiff, despite due diligence, was unable to obtain actual knowledge. For this reason as well, the preliminary issue of limitation was required to be answered against the Plaintiff.

5. Having heard the learned Counsel for Applicant and perused the record, in my judgment, there is no case made out to interfere with the impugned order. The first order dated 12/03/2009 merely holds that no case has been made out to reject the plaint,

¹ (2000) 7 Supreme Court Cases 702

because merely on the basis of the statements in the plaint, it is not evident that the suit was barred by law of limitation. The application at Ex.48 upon which the impugned order dated 12/03/2009 came to be made was not itself clear as to the manner in which the provisions contained in Order 2 Rule 2 of the CPC were attracted. Accordingly, it cannot be said that there was any jurisdictional error in the making of order dated 12/03/2009.

6. Insofar as order dated 13/04/2009 is concerned, it needs to be noted that neither party led any evidence with regard to the preliminary issue of limitation. The issue of limitation, in the present case, was at the highest, a mixed question of law and facts. In absence of any evidence having been led by the Petitioner, there is no option but to proceed on the basis of the material on record, in the form of plaint and the averments therein. Merely because the agreement in question is dated 22/04/1991 and the same came to be instituted on 21/07/2008, it cannot be said that the suit is barred by limitation.

7. In matter of specific performance, the period of limitation would be 3 years from the date which the party may have specified for performance of the agreement. In absence of any such specified date, the period of limitation would be 3 years from the date on which the performance is refused by the party to the agreement. The avements in the plaint indicate that in consequence of agreement dated 22/04/1991, the Power of Attorney was executed by the original

vendor in favour of the Plaintiff. On basis of such Power of Attorney, the plaint recites various acts allegedly undertaken by the Plaintiff. The plaint further recites that on 02/03/2006, the Power of Attorney was revoked and further, the Defendant No.1, through his lawyer's notice, informed the Plaintiff against dealing with the suit property. If 02/03/2006 is regarded as the date of refusal of performance by the Defendant No.1, then it cannot be said that the suit is barred by limitation.

8. In para 4 of the plaint, there is a vague reference to Plaintiff obtaining knowledge on 14/07/2005 of Defendant Nos.1 to 4 entering into development agreement in respect of a portion of the suit property. However, upon meaningful reading of the plaint, what it conveys is that agreement was registered on 14/07/2005. In the case of *Dilboo* (*supra*), there is indeed an observation that where transfer is by registered document, the date of registration becomes the date of deemed knowledge and therefore, if the suit is filed beyond the apparently fixed period of limitation, it is for the Plaintiff to aver and then prove that the same, in reality, is within the prescribed period of limitation.

9. In the present case, the averments in the plaint indicate that on 02/03/2006, the Defendant No.1, by notice, not only revoked the Power of Attorney but also made it clear to the Plaintiff that the Plaintiff should not deal with the suit property. It indicates that knowledge with regard to the transaction contained in the agreement

dated 14/07/2005 was at least, *prima facie*, obtained post 02/03/2006.

10. Therefore, looking to the totality of the circumstances, it cannot be said that the impugned orders are in excess of jurisdiction or that the learned Civil Judge, in exercise of her jurisdiction, has acted with material irregularity.

11. Revision Application is consequently rejected. There shall be no order as to costs.

(M. S. SONAK, J.)