

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.41 OF 2016

Dilip Pandurang Khandge and others ... Applicants
Vs.
Nutan Kishor Pawar and others ... Respondents

Mr. N. P. Mule for Applicants.
Mr. Himanshu Kode for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 01, 2016

P.C. :

Heard Mr. Mule, learned Counsel for applicants and Mr. Kode, learned Counsel for respondent No.1 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants, hereinafter referred to as defendants No.1, 2 and 5 to 7 have challenged the judgment and order dated 23.09.2015 passed by the learned Civil Judge, Senior Division, Pune below exhibit-18 in Special Civil Suit No.1392 of 2012. By that order, the learned trial Judge rejected the application made by the defendants under Order VII, Rule 11(a) and (d) of C.P.C. on the ground that the claim does not disclose the cause of action and the Suit is barred by limitation.

3. Mr. Mule strenuously contended that respondent No.1, hereinafter referred to as plaintiff, has instituted Suit for partition and separate possession of her 1/4th undivided share; for declaration that her mother Mangala had no right to bequeath Survey No.690/A/1/2B, Survey No.692/A/6 and Survey No.690/B by Will dated 31.05.1999; for declaration that the Will dated 31.05.1999 executed by her mother

Mangala in favour of defendants No.1 and 2 is not binding on her 1/4th undivided share; for declaration that plaintiff's father Pandurang had no right to execute Will dated 10.01.2000 bequeathing property in favour of defendants No.2, 4 and 5 and that the said Will is not binding on her 1/4th undivided share. He submitted that plaintiff's father expired on 20.03.2000. He submitted that in paragraph 18 of the impugned order, the learned trial has recorded that even plaintiff moved application for her name as legal heir and had objected for incorporation of the name of the defendant on the basis of Will in the revenue record in the year 2001. In other words, in the year 2001, plaintiff acquired knowledge about recording the names of defendants and still, she did not institute challenging the Will within 3 years as per Article 58 of the Limitation Act, 1963 (for short 'Act'). He submitted that on the face of it, the Suit is barred by limitation as right to sue accrued to her in the year 2001 and plaintiff ought to have instituted the Suit within 3 years from 2001. The Suit is instituted in the year 2012, which is hopelessly barred by limitation.

4. Mr. Mule submitted that as far as rejection of plaint under Order VII, Rule 11(a) is concerned, he is not pressing that challenge as plaint discloses cause of action. He however submitted that the learned trial Judge ought to have rejected the plaint under Order VII, Rule 11(d) of C.P.C. on the ground of limitation.

5. On the other hand, Mr. Kode supported the impugned order.

6. Perusal of the impugned order and in particular paragraphs 18 to 20 shows that the learned trial Judge has rejected the application mainly on the ground that plaintiff has claimed her undivided share in the suit property. It is her specific contention that the suit properties are

ancestral properties wherein she has $\frac{1}{4}^{\text{th}}$ share. Defendants have neither refused nor denied. The objection as to revenue entry on the basis of Will will not amount to exclusion from the suit properties. In other words, plaintiff is not excluded from a joint family property. Article 110 of the Act provides limitation of 12 years for filing Suit when the exclusion becomes known to the plaintiff. In the present case, the learned trial Judge has specifically recorded a finding that objection to revenue entry on the basis of Will does not amount to exclusion from the suit properties. In view thereof, it cannot be said that the Suit instituted by the plaintiff is barred by limitation.

7. Mr. Mule submitted that the learned trial Judge may be directed to frame issue of limitation along with the other issues and the same may be tried while deciding the Suit.

8. In view thereof, no case is made out for invocation of powers under Section 115 of C.P.C. Civil Revision Application fails and the same is dismissed. While framing the issues, the learned trial Judge will frame issue as regards whether the Suit is barred by limitation and try that issue along with the other issues while deciding the Suit. Order accordingly.

(R. G. KETKAR, J.)

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