

IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.630 OF 2014

Jaisingh R. Nageshkar ... Petitioner

Vs.

Dilip Kamlakar Parulkar and others ... Respondents

WITH

WRIT PETITION NO.631 OF 2014

Jaisingh R. Nageshkar ... Petitioner

Vs.

Saroj Krushnakumar Tokal and others ... Respondents

WITH

WRIT PETITION NO.632 OF 2014

Jaisingh R. Nageshkar ... Petitioner

Vs.

Ujwal Shankarrao Nageshkar and others ... Respondents

WITH

WRIT PETITION NO.633 OF 2014

Jaisingh R. Nageshkar ... Petitioner

Vs.

Parth Ujwal Nageshkar and others ... Respondents

WITH

WRIT PETITION NO.10889 OF 2013

Jaisingh R. Nageshkar ... Petitioner

Vs.

Indrajeet S. Nageshkar and others ... Respondents

Mr. Venkatesh Dhond, Senior Advocate a/w. Mr. Harshad V. Shingnapurkar i/b. Mr. Amit Borkar for Petitioner.

Mr. Tejesh Dande with Mr. Bharat Gadhavi a/w. Mr. Akshay Tapkir i/b. Haresh Mehta & Co. for Respondents.

CORAM : R. G. KETKAR, J.

Reserved on : APRIL 16, 2016

Pronounced on : MAY 6, 2016

P.C. :

Heard Mr. Dhond, learned Senior Counsel for petitioner and Mr. Dande, learned Counsel for respondents in all the Petitions at length.

2. By these Petitions under Article 227 of the Constitution of India,

petitioner in each Petition has challenged the orders passed by the learned 4th Joint Civil Judge, Senior Division, Kolhapur. Petitioner is defendant No.1 in all the Suits instituted by respondent No.1, hereinafter referred to as plaintiff. Defendant No.1 filed applications for framing issue of limitation as a preliminary issue. The learned trial Judge accordingly framed issue of limitation as a preliminary issue. Defendant No.1 thereafter filed applications for directing the plaintiff to lead evidence on the point of limitation or to give Purshis that plaintiff does not wish to lead any evidence on that point. The learned trial Judge rejected the applications. Aggrieved by these orders, defendant No.1 filed applications under Order 47 read with Section 151 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for reviewing those orders. The learned trial Judge rejected these applications. It is against these orders, defendant No.1 has instituted these Petitions.

3. Writ Petition No.630 of 2014 takes exception to order dated 10.06.2013 below exhibit-30 as also order dated 20.08.2013 below exhibit-33 in Special Civil Suit No.91 of 2012 passed by the learned trial Judge. By order dated 10.06.2013, the learned trial Judge rejected the application exhibit-30 filed by the defendant No.1 and held that defendant No.1 has to begin his evidence, if any, on the preliminary issue. By order dated 20.08.2013 below exhibit-33, the learned trial Judge rejected the application filed by the defendant No.1 under Order 47 read with Section 151 of C.P.C.

4. Writ Petition No.631 of 2014 takes exception to order dated 10.06.2013 below exhibit-30 as also order dated 20.08.2013 below exhibit-33 in Special Civil Suit No.92 of 2012 passed by the learned trial Judge. By order dated 10.06.2013, the learned trial Judge rejected the application exhibit-30 filed by the defendant No.1 and held that

defendant No.1 has to begin his evidence, if any, on the preliminary issue. By order dated 20.08.2013 below exhibit-33, the learned trial Judge rejected the application filed by the defendant No.1 under Order 47 read with Section 151 of C.P.C.

5. Writ Petition No.632 of 2014 takes exception to order dated 10.06.2013 below exhibit-50 as also order dated 20.08.2013 below exhibit-55 in Special Civil Suit No.425 of 2011 passed by the learned trial Judge. By order dated 10.06.2013, the learned trial Judge rejected the application exhibit-50 filed by the defendant No.1 and held that defendant No.1 has to begin his evidence, if any, on the preliminary issue. By order dated 20.08.2013 below exhibit-55, the learned trial Judge rejected the application filed by the defendant No.1 under Order 47 read with Section 151 of C.P.C.

6. Writ Petition No.633 of 2014 takes exception to order dated 10.06.2013 below exhibit-32 as also order dated 20.08.2013 below exhibit-37 in Special Civil Suit No.90 of 2012 passed by the learned trial Judge. By order dated 10.06.2013, the learned trial Judge rejected the application exhibit-32 filed by the defendant No.1 and held that defendant No.1 has to begin his evidence, if any, on the preliminary issue. By order dated 20.08.2013 below exhibit-37, the learned trial Judge rejected the application filed by the defendant No.1 under Order 47 read with Section 151 of C.P.C.

7. Writ Petition No.10889 of 2013 takes exception to order dated 10.06.2013 below exhibit-30 as also order dated 20.08.2013 below exhibit-36 in Special Civil Suit No.89 of 2012 passed by the learned trial Judge. By order dated 10.06.2013, the learned trial Judge rejected the application exhibit-30 filed by the defendant No.1 and held that

defendant No.1 has to begin his evidence, if any, on the preliminary issue. By order dated 20.08.2013 below exhibit-36, the learned trial Judge rejected the application filed by the defendant No.1 under Order 47 read with Section 151 of C.P.C.

8. The short question that arises for consideration is as to who should lead evidence first on the preliminary issue of limitation. Defendant No.1 contended that plaintiff asserts that the Suit is within limitation. The burden is upon the plaintiff to establish that Suit is within limitation by leading evidence first. As defendant No.1 is disputing that the Suit is within limitation, it is for the plaintiff to establish that the Suit is within limitation by leading evidence first. As against this, plaintiff contended that it is settled position of law that the burden of proof lies on a person who asserts it. Defendant No.1 has specifically asserted that the Court has no jurisdiction to entertain and try the Suit as the Suit is not within limitation. It is for the defendant No.1 to show that Suit is not within limitation. Since common questions of law and fact arise in these Petitions, the same can conveniently be disposed of by this common order. For appreciating the controversy between the parties, the facts from Writ Petition No.630 of 2013 are taken into consideration.

9. Plaintiff has instituted Suit against the defendants inter alia for partition, declaration, possession and for recovery of Rs.1,68,68,488/- together with interest @ 15% p.a. from 01.03.2012 till realization. Plaintiff has inter alia contended that Govindrao Nageshkar died leaving behind - Ramrao (son), Lakshmanrao (son), Hirabai (daughter), Krushnat (son), Vishwanath (son), Ratinath (son) and Meghnath (son). Hirabai died leaving behind - Nalini (daughter), Anandrao (son) and Snehalata (daughter). Snehalata married to Kamalakar Parulkar. Plaintiff

is their son. Ratinath, one of the sons of Govindrao, died leaving behind - Govind (son), Jaysing (defendant No.1), Amrut (son), Rajani (daughter), Nirmala (daughter), Pushpa (daughter) and Vrinda (daughter).

10. Vishwanath G. Nageshkar had settled in Germany. He married Edna. Vishwanath and Edna did not have any issue. They executed joint Will on 13.04.1994. As per the German laws, the said Will was duly registered. As per that Will, plaintiff was given 10% share in the estate of Vishwanath and Edna. Vishwanath was a very famous artist (painter) and was recognized as such in Europe. During his lifetime, he made several paintings. Some of the paintings were damaged / lost during the Second World War. The Union of India compensated Vishwanath for loss sustained by him. In the year 1992, from the amount of compensation received by Vishwanath, he had purchased bonds worth Rs.10 lakhs with 9% tax saving relief. Plaintiff was gifted 10% relief bond. On 18.03.2001, Vishwanath died. At the time of his death, he was possessing nearly 600 paintings. Said paintings were acquired by Edna by succession. In the year 2001, Edna suffered from Alzheimer disease and was admitted in the hospital. She was not mentally and physically fit to take any decision. In view thereof, one Dilesh Oto was appointed as a caretaker by the German Court. Taking undue advantage of this position, in the year 2003, defendant No.1 imported nearly 600 paintings in India. Out of these 600 paintings, defendant No.1 sold 537 paintings behind the back of plaintiff and other Nageshkar family members. Defendant No.1 was not having any authority to dispose of the paintings and retain the amount realized therefrom. From the amount realized from the sale of paintings, defendant No.1 and defendant No.2 (defendant No.1's son) acquired the property described in paragraph 1-A of the plaint. Plaintiff has 10% share in these paintings

as also in the property described in paragraph 1-A of the plaint. Plaintiff's brother Rajendra instituted Suit No.158 of 2009 against the defendant No.1 for recovery of money. After institution of that Suit, in order to deprive the plaintiff of his share, defendant No.1 executed Gift Deed to the extent of half share in the suit property in favour of defendants No.3 and 4. Edna died on 17.03.2005. Defendant No.1 was appointed as executor by German Court. Plaintiff has referred to various correspondence as also Special Civil Suit No.369 of 2009 instituted by the defendant No.1 against the plaintiff for recovery of certain amounts. Plaintiff has, therefore, instituted the Suit for the aforesaid reliefs. In paragraph 21, plaintiff asserted that Vishwanath Nageshkar died on 18.03.2001 and Edna died on 17.03.2005. After her death, the German Government transmitted the amount to defendant No.1 and intimated that fact to the plaintiff to collect the amount from defendant No.1. Plaintiff demanded the amount from defendant No.1 on 06.07.2010. Cause of action accrued to the plaintiff as defendant No.1 has not paid the amount despite the demand as also defendant No.1 intends to create third party interest in respect of the property described in paragraph 1-A of the plaint. Plaintiff, therefore, instituted Suit on or about 12.03.2012 for the aforesaid reliefs.

11. Defendant No.1 filed application dated 03.04.2012 at exhibit-14 for framing preliminary issue of Suit being barred by limitation. Plaintiff resisted the application by filing reply dated 03.04.2012. By order dated 11.06.2012, the learned trial Judge framed the issue as to whether the Court has jurisdiction to try and entertain the Suit and gave liberty to the parties to adduce their respective evidence, if any, on this preliminary issue. Plaintiff was at liberty to press for interim relief. Defendant No.1 thereafter filed application dated 14.03.2013 at exhibit-30 for directing the plaintiff to lead evidence on the point of limitation or to give Purshis

that plaintiff does not wish to lead on that point. On 10.06.2013, plaintiff opposed that application contending that application is filed to prolong the matter. By order dated 10.06.2013, the learned trial Judge rejected the application on the ground that as defendant No.1 has contended that the Suit is not within limitation and therefore, the Court has no jurisdiction to entertain and try the Suit, burden is on him to show that the Suit is not within limitation.

12. Defendant No.1 filed application dated 02.07.2013 at exhibit-33 under Order 47 read with Section 151 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for review of the order dated 10.06.2013. By order dated 20.08.2013, the learned trial Judge rejected the application. It is against the orders dated 10.06.2013 below exhibit-30 and 20.08.2013 below exhibit-33, defendant No.1 has instituted the present Petition.

13. In support of these Petitions, Mr. Dhond submitted that paragraph 21 of the plaint deals with cause of action. Plaintiff has asserted that after the death of Vishwanath on 18.03.2001 and death of Edna on 17.03.2005, the German Government transmitted the amount to the defendant No.1 and the German Government, in turn, informed the plaintiff to collect the amount from defendant No.1. Plaintiff called upon defendant No.1 to pay Rs.32,29,621/-. On 06.07.2010, plaintiff demanded the amount from defendant No.1. As defendant No.1 intends to create third party interest in the property described in paragraph 1-A of the plaint, cause of action has accrued at that time and till date, and accrues from time to time.

14. Mr. Dhond submitted that as the plaintiff has asserted that the Suit is within limitation, he has to lead evidence first. He has taken me

through the application dated 03.04.2012 at exhibit-14 as also application dated 14.03.2013 at exhibit-30. Defendant No.1 disputes that the Suit instituted by the plaintiff is within limitation and seeks dismissal on that ground. It is, therefore, necessary for the plaintiffs to establish that the Suit is within limitation. He further submitted that the claims made by the plaintiff are time barred. Issue of jurisdiction in the interlocutory application is a decision in a Suit itself. In support of his submissions, he relied upon the following decisions:

a. ***K. S. Nanji and Company Vs. Jatashankar Dossa***, AIR 1961 SC 1474;

b. ***ITC Ltd. Vs. Shri Sukhkarta Finance & Leasing Pvt. Ltd.***, Suit No.764 of 2002 decided by this Court (Coram : S. J. Kathawalla, J.) on 14.02.2012;

c. ***Mukund Limited Vs. Mumbai International Airport***, 2011 (5) Bom.C.R. 456, and in particular paragraphs 13 to 15 thereof.

15. On the other hand, Mr. Dande supported the impugned orders. He submitted that it is settled principle of law that the burden of proof lies on the person, who asserts it. By application vide exhibit-14, defendant No.1 has specifically contended that as the Suit is not within limitation, the Court has no jurisdiction to entertain and try the Suit. By order dated 11.06.2012, the learned trial Judge framed the preliminary issue and gave liberty to the parties to adduce their respective evidence, if any on the preliminary issue. Instead of leading evidence, defendant No.1 filed application exhibit-30 for direction to the plaintiff to lead evidence on the point of limitation first or give Purshis that he does not wish to lead evidence on that point. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India. In support of his submissions, he relied upon the decision of this Court in the case of ***Sandip Sankarlal Kedia Vs. Pooja Sandip***

Kedia, 2014 (2) Bom.C.R. 210, and in particular paragraphs 26, 31, 32 and 37 thereof.

16. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is no doubt true that the issue of jurisdiction in an interim application is a decision in the Suit itself. The moot question is whether in the facts and circumstances of the case who should lead evidence first for deciding preliminary issue, namely, whether the Suit is within limitation.

17. Mr. Dhond relied upon the decision of the Apex Court in the case of **K. S. Nanji and Company** (*supra*). In that case, plaintiffs came with the case that on the basis of a letter written by the Inspector of Mines on 18.08.1941, they made enquiries and came to know that defendants had encroached upon their coal mines on the northern side and removed coal from the encroached portion and had rendered the remaining coal of the encroached portion unworkable. Plaintiffs inter alia prayed for ascertaining and fixing the intermediate boundary line between the plaintiffs' coal-land and the defendants' coal-land; for ascertaining the area encroached upon by the defendants and directing them to vacate the same; for perpetual injunction restraining the defendants from encroaching upon the plaintiffs' coal-land and cutting and removing coal therefrom and for damages.

18. Defendants denied that they had encroached upon the plaintiffs' coal-land and contended that the Suit was barred by limitation. It was common case between the parties that Article 48 of the Limitation Act, 1908 governed the period of limitation in respect of the Suit. After extracting Article 48 in paragraph 12 of the report, in paragraph 13, the

Apex Court held that considering the language employed in that Article, obviously, where a person has a right to sue within three years from the date of his coming to know of a certain fact, it is for him to prove that he had the knowledge of the said fact on a particular date; for the said fact would be within his peculiar knowledge. It is the duty of the plaintiff to establish that the Suit is within limitation.

19. In the case of **ITC Limited** (*supra*), plaintiffs had instituted Suit as representatives of the Trustees in Bankruptcy of the Chitalias. The plaintiffs claimed that the Suit was instituted pursuant to six orders dated 08.03.2000, 12.02.2002 and 13.02.2002 (exhibits-G, H, M, N, O and P to the plaint) allowing the plaintiffs to recover on behalf of the estate, the assets of the Chitalias located overseas. Plaintiffs contended that Article 101 of the Limitation Act, 1963 which applies to the suit, prescribes the period of limitation as three years from the date of a foreign judgment or recognizance. The Suit instituted on 07.03.2002 was well within 3 years period as prescribed by Article 101 of the Limitation Act, 1963.

20. As against this, in the written statement, defendants disputed the genuineness and veracity of the U.S. Bankruptcy Court Orders and the correctness of their contents. They also contended that the Suit is liable to be dismissed as it is barred by limitation. In paragraph 58 of the plaint, plaintiff categorically asserted that the Suit is being filed pursuant to the orders dated 08.03.2000, 12.02.2002 and 13.02.2002 of the Bankruptcy Court and the Suit is filed within limitation. In paragraph 3N(2), defendants did not admit that the orders dated 08.03.2000, 12.02.2002 and 13.02.2002 were passed by the Bankruptcy Court authorizing the plaintiffs to file the Suit on behalf of the Trustees in Bankruptcy. Mr. Dhond relied upon paragraph 20 of this decision. The

learned Single Judge of this Court dealt with Section 86 of the Indian Evidence Act, 1872. In paragraph 28, it was observed that the moment the defendants disputed these orders having been passed by the U.S. Bankruptcy Court as alleged and also their genuineness, plaintiffs have to first prove and establish before the Court that the said six orders were indeed passed as alleged by them.

21. In the present case, as noted earlier, in paragraph 21 of the plaint, plaintiff asserted that Vishwanath Nageshkar died on 18.03.2001 and Edna died on 17.03.2005. After her death, the German Government transmitted the amount to defendant No.1 and intimated to the plaintiff to collect the amount from defendant No.1. On 06.07.2010, the plaintiff demanded the amount from defendant No.1. Cause of action accrued to the plaintiff as defendant No.1 has not paid the amount despite the demand as also intends to create third party interest in respect of the property described in paragraph 1-A of the plaint. Plaintiff, therefore, instituted Suit on or about 12.03.2012. As against this, defendant No.1 came with the case that the Suit is barred by limitation. In my opinion, the facts in the case of **K. S. Nanji and Company** (*supra*) and **ITC Limited** (*supra*) and the facts of the present case are materially different. In my opinion, the decisions rendered therein are not applicable to the facts of the present case.

22. As noted earlier, the plaintiff has instituted Suit on 12.03.2012 inter alia for partition, declaration, possession and for recovery of Rs.1,68,68,488/- together with interest @15% p.a. from 01.03.2012 till realization. After reading the plaint in its entirety as also the application exhibits-14 and 30 made by the defendant No.1, as the defendant No.1 has specifically asserted that the Suit is barred by limitation, it is for the defendant No.1 to lead the evidence first. In view thereof, I do not find

that the learned trial Judge has committed any error in passing the impugned orders. Hence, Petitions fail and the same are dismissed.

23. At this stage, Mr. Borkar orally applies for continuation of the ad-interim order dated 22.01.2014 for the period of 8 weeks from today. He assures that petitioner will not apply for further extension of the ad-interim order.

24. In view thereof, notwithstanding dismissal of the Petition, ad-interim order granted on 22.01.2014 shall remain in force for the period of 8 weeks from today with clear understanding that no application for further extension of ad-interim order shall be entertained.

(R. G. KETKAR, J.)

Minal Parab