

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 138 OF 2015

Durgeshwar Real Estate
Developers Private Limited

..Applicant

Vs

Sonabai Waghu Vashiwale and
Ors

.. Respondents

Mr. Nachiket V. Khaladkar, Advocate for Applicant.

Mr.Hitesh P. Vyas, Advocate for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 16/11/2016

PC:

1. Heard Mr. Nichiket Khaladkar, learned counsel for the applicant and Mr. Hitesh Vyas, learned counsel for the respondents at length.

2. By this application under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicant, hereinafter referred to as defendant no.5, has challenged the Judgment and order dated 12.11.2014 passed by the learned Civil Judge, Senior Division, Pune below Exhibits-1 and 29 in Spl. Civil Suit No. 770 of 2012. By that order, the learned trial Judge rejected the application Exhibit -29 made by defendant no. 5 under Order VII, Rule 11 (a) and (d) of C.P.C.

3. Respondent no.1, hereinafter referred to as 'plaintiff', has instituted the suit, inter alia, praying for partition and separate

possession of her 1/7th share; for cancellation of sale deeds dated 4.2.1982, 4.11.1993, 27.12.2002 and 19.8.2006; for perpetual injunction restraining the defendants from causing obstruction to her possession as also from challenging the nature of the suit properties by carrying out any further development as also from creating any third party interest. Defendant no.5 filed written statement as also reply to application for temporary injunction on 6.4.2013 resisting the suit. During the pendency of the suit as also application for interim relief, defendant no.5 took out application at Exh.-29 under Order VII, Rule 11 of C.P.C. on 18.1.2013. On 12.11.2014, the learned trial Judge framed preliminary issue of limitation as per Section 9A of C.P.C. The learned trial Judge thereafter, on the same day, dismissed application-Exhibit-29. It is against this order, defendant no.5 has instituted the above Civil Revision Application.

4. In support of this application, Mr. Khaladkar submitted that defendant no.5 filed application only under Order VII, Rule 11(a) and (b) and not under Section 9A. The learned trial Judge on his own framed preliminary issue of limitation as per section 9A on 12.11.2014. The learned trial Judge, however, did not give any opportunity to the parties to lead evidence on the preliminary issue of limitation and proceeded to decide the application Exh.29 on the same day. Mr Khaladkar has taken me through the application at Exhibit-29 and in particular paragraphs 1 (A) and

1(B) to contend that plaint is liable to be rejected under Order VII, Rule 11(a) as it does not disclose any cause of action and is also liable to be rejected under Order VII, Rule 11(d) as suit is barred by limitation. He submitted that while considering the application under Order VII, Rule 11, the Court has to consider documents annexed with the plaint which forms part of the plaint.

5. On the other hand, Mr.Vyas supported the impugned order. He submitted that in the plaint, the plaintiff specifically asserted that she is in possession of the suit properties. In paragraph 3(a) of written statement, defendant no.5 has asserted that Gunaji Sadu Jambhulkar died intestate on 15.1.1977 leaving behind two sons,viz. Tukaram and Bhaguji and four married daughters. Name of Tukaram was recorded in the revenue record as Karta and Manager of HUF. Tukaram in the capacity of Karta and Manager of HUF had sold the suit lands to defendants no.1 and 2 by two separate sale deeds dated 4.5.1982. The sale deeds were executed by Tukaram along with other members but excluding plaintiff, in favour of defendant no.1. In other words, he submitted that the plaintiff is not party to the sale deeds executed by Tukaram.

6. Mr. Vyas further submitted that though the learned trial Judge has framed preliminary issue of limitation as per section 9A of C.P.C., except in first paragraph of the impugned order, the

entire discussion is made considering Order VII, Rule 11 of C.P.C. He submitted that as the suit is instituted for partition and separate possession of her 1/7th share, plaint cannot be rejected in its entirety even assuming for the sake of argument that some of the prayers are barred by limitation.

7. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, suit is essentially for partition and separate possession as also for cancellation of sale deeds and for perpetual injunction. Perusal of the application Exhibit-29 and in particular paragraphs 1(A) and 1(B) shows that defendant no.5 has contended that prayer clauses (d) and (e) of the suit are barred by limitation. Perusal of the application Exh.29 does not even remotely indicate that defendant no.5 has contended that suit for partition and separate possession is barred by limitation. In the case of *Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner*, (2004) 3 SCC 137, in paragraph 13 the Apex Court has observed thus:

“13. It is trite law that not any particular plea has to be considered, and the whole plaint has to be read. As was observed by this Court in *Roop Lal Sathi Vs Nachhattar Singh Gill* (1982) 3 SCC 487 only a part of the plaint cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected.”

while rejecting the application, the learned trial Judge has noted that the plaintiff is not a party to any of the sale deeds. After

considering the assertions made in the plaint, the learned trial Judge observed that the plaint discloses the cause of action and cannot be rejected under Order VII, Rule 11 (a) of C.P.C. The learned trial Judge also held that the suit is not barred by limitation. Having regard to the fact that one of the prayers in the suit is for partition and separate possession, the suit for partition is to be instituted by person excluded from the joint family property to enforce his/her right to share within 12 years when exclusion becomes known to the plaintiff. It is settled principles of law that while considering the application under Order VII, Rule 11, the Court has to only consider averments made in the plaint and not the defence set up by the defendants.

8. In the light of this position, it cannot be said that the learned trial Judge has committed any error in holding that the suit is not barred by limitation. Hence, Application fails and the same is dismissed. Needless to mention that while framing the issues, the learned trial Judge will frame issue of limitation and decide the same along with other issues while finally deciding the suit.

9. At this stage, Mr. Khaladkar submits that defendant no.5 will file application under Section 9A and will lead evidence, if so advised. Mr. Vyas submits that in case such liberty is granted, all contentions of the plaintiff may be kept open and the plaintiff will also lead evidence, if so advised. In view thereof, liberty is

reserved to defendant no.5 to file application under Section 9A. If such application is filed, all contentions of the plaintiff are expressly kept open and the learned trial Judge will decide the said application uninfluenced by the observations made in the impugned order and in this order. Order accordingly.

(R.G.KETKAR, J.)