

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

CIVIL REVISION APPLICATION NO. 904 OF 2014

Shri Mukund Bhavan Trust and
Ors.

..Applicants

Vs

1. Shrimant Chhatrapati Udayan
Raje Pratapsinh Maharaj Bhonsle
and Anr

.. Respondents

Mr. Prasad S. Dani, Senior Advocate a/w Mr. D.V.Deokar, Mr
Pinakin Modi, Mr Subodh Joshi i/b M/s Parimal K Shroof & Co.,
Advocate for Applicants.

Mr. Vishwanath S. Kapse a/w S.D.Chavan, Advocate for
Respondent no.1.

Mr. Rajan S. Pawar, A.G.P for respondent no.2.

**CORAM : R.G.KETKAR,J.
DATE : 26/04/2016**

PC:

1. Heard Mr. Prasad Dani, learned senior counsel for the
applicants, Mr. Vishwanath Kapse, learned counsel for respondent
no1 and Mr. Rajan Pawar, learned A.G.P for respondent no.2 at
length.

2. By this Petition under section 115 of the Code of Civil
Procedure, 1908 (for short, C.P.C.), the applicants have
challenged the Judgment and order dated 29.4.2014 passed by
the learned 7th Jt. Civil Judge, Sr. Dn, Pune below Exhibit 21 in Spl.
Civil Suit No.133 of 2009. By that order, the learned trial Judge

dismissed the application taken out by the applicants, hereinafter referred to as 'defendant no.1', under Order VII, Rule 11 (d) of C.P.C for rejecting the plaint on the ground that the suit is not within limitation under Articles 58, 59 and 65 of the Limitation Act, 1963.

3. Respondent no.1, hereinafter referred to as 'plaintiff', has instituted suit, inter alia, praying for declaration that he is an absolute owner of the suit lands as more particularly described in Schedule of the plaint; for declaration that other than the plaintiff, no other person is entitled to deal with, alienate or create any third party interest in respect of suit lands; for perpetual injunction restraining the defendants permanently from in any manner holding themselves as owners or representing themselves as owners of the suit lands; for declaration that the compromise decrees passed in Spl. Civil Suits No.152 of 1951 and 1622 of 1988 and Civil Appeal No.787 of 2001 are void ab-initio, null and void and be set aside; for direction to the defendants to vacate and hand over possession of the suit lands to the plaintiff.

4. During pendency of the suit, defendant no.1 took out application Exhibit 21 under Order VII, Rule 11(d) of C.P.C, inter alia, contending that suit is barred by limitation. After considering the contents of Exh.21 and reply filed by the plaintiff,

the learned trial Judge framed preliminary issue, namely, whether the suit is within limitation. By order dated 12.10.2009, the learned trial Judge rejected the application. Aggrieved by that order, the defendants preferred C.R.A. No. 713 of 2009. By consent, trial Court set aside that order on 28.3.2011 and the trial Court was directed to reconsider the application Exh.21. After remand, the learned trial Judge has rejected the application by the impugned order. It is against this order, defendant no.1 has instituted the present application.

5. In support of this application, Mr. Dani strenuously contended that defendant no.1 had purchased $\frac{3}{4}^{\text{th}}$ share of the suit lands mentioned in Schedule in an auction sale conducted by the Civil Court, Pune from 1938 onwards from previous Inamdar Gosavis. The sale deeds are duly registered. Defendant no.1 had purchased remaining $\frac{1}{4}^{\text{th}}$ share in the suit lands in the year 1952 by registered sale deeds. He submitted that Section 3 of the Transfer of Properties Act, 1882 (for short, 'Act') deals with notice of a fact as also constructive notice. Relying upon Section 3 of the Act, he submitted that the plaintiff had knowledge of execution of the sale deeds of the suit lands registered during the period 1938 to 1952. The period of limitation prescribed under Article 59 is 3 years from the date of registration. The suit is, therefore, clearly barred by limitation. He submitted that in order

to get over this difficulty, the plaintiff did not pray for cancellation of the sale deeds and has prayed for declaration of ownership in terms of prayers clause (a) and (b).

6. He further submitted that between 1938 and 1952, possession of the suit lands was with the Government of Maharashtra. The plaintiff has sought possession of the suit lands. As per Article 65 of the Limitation Act, suit has to be instituted within 12 years when the possession of the defendant becomes adverse to the plaintiff. Relief of possession is also hopelessly barred by limitation. He submitted that the learned trial Judge has not dealt with this aspect in the impugned order.

7. He has taken me through the plaint and submitted that the learned trial Judge ought to have rejected the plaint on the ground that the suit is barred by limitation.

8. On the other hand, Mr. Kapse supported the impugned order. He submitted that basically the case of the plaintiff is that the defendants have played a systematic fraud on various courts and without any judicial pronouncement have usurped the lands under suspicious compromise arrived before the Court. He submitted that Gosavis have no rights, title and interest in the suit lands. As they have no right, they cannot create third party right. Gosavis family was entitled to revenue grant only. In the proceedings between the first defendant and others, the plaintiff

was not made party and he had no knowledge about the proceedings in the suit and passing of the consent decree. He submitted that the learned trial Judge rejected the application on the ground that issue of limitation is a mixed question of law and fact and for which evidence is required. He submitted that though compromise was entered into between the defendants, Defendant no.2 - State Government was in possession of the suit lands till 1989. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. The plaintiff has instituted the suit for the following reliefs:

- (a) This Hon'ble Court be pleased to declare that the plaintiff is the absolute owner of the suit lands more particularly described in schedule of the plaint.
- (b) The Hon'ble Court be pleased to declare that other than the plaintiff, no other person is entitled to deal with, alienate and create any third party interest in respect of suit lands.
- (c) This Hon'ble court be pleased to restrain the defendants permanently, from in any manner holding themselves as owners or representing themselves as owners of the said suit lands.
- (d) This Hon'ble Court be pleased to declare that the compromise decrees passed in Spl. Civil Suit Nos 152/1951 and 1622/1988 and Civil Appeal No.787/2001, Pune are void ab-initio, null and void and be pleased to set aside the same.

(e) The Hon'ble Court be pleased to direct the defendants to vacate and hand over the possession of the suit lands to the plaintiff."

10. It is the case of defendant no.1 that it had purchased 3/4th share of the suit lands from defendant no.1 in an auction sale conducted by Civil Court, Pune from 1938 onwards from previous Inamdar Gosavis. Sale deeds are registered in favour of defendant no.1. Defendant no.1 had purchased remaining 1/4th share in the suit lands in the year 1942 by registered sale deeds. It is settled position in law that while considering the application under Order VII, Rule 11, the Court has to consider the averments made in the plaint and not the defence set up by the defendant. Perusal of the assertions made in the plaint shows that the plaintiff has specifically asserted that Gosavis family had no authority to create third party right. Gosavis family was entitled to revenue grant only. The plaintiff has further challenged the consent decree passed in the suit instituted between the defendants and for declaration of his ownership. Whether the plaintiff is entitled to declaration in terms of prayers clause (a) and (b) in view of the sale deeds executed in favour of defendant no.1 is a matter of trial and that cannot be gone into at the stage of deciding the application under Order VII, Rule 11(d).

11. Apart from that, the plaintiff has averred in paragraph 39 that the defendants have played a systematic fraud on various

courts and without any judicial pronouncement have usurped the lands under suspicious compromise arrived before the Court. In view thereof, it cannot be said that the suit is liable to be rejected at the threshold. The learned trial Judge rightly came to the conclusion that issue of limitation is a mixed question of law and fact for which parties will have to lead evidence. In view thereof, I do not find that any case is made out for invocation of powers under Section 115 of C.P.C. Application fails and the same is dismissed.

12. Needless to observe that while deciding the suit including the question of limitation, the learned trial Judge will consider the evidence on record and will decide the suit in accordance with law uninfluenced by the observations made in the impugned order and in this order. Order accordingly.

13. Parties are at liberty to apply for expeditious disposal of the suit. If such application is made, the learned trial Judge will pass appropriate order thereon.

(R.G.KETKAR, J.)