

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.1082 OF 2014

MUKTABAI MAHADEV JUNAVANE	...Applicant
<i>Versus</i>	
DEEPAK KUNDALIK KALATE AND ORS.	...Respondents

WITH
CIVIL APPLICATION NO.387 OF 2015
IN
CIVIL REVISION APPLICATION NO.1082 OF 2014

....
Mr. G.H. Keluskar, Advocate for the Applicant.
Mr. R.N. Sanghavi, Advocate for Respondent Nos.1 to 4.
Mr. Amit B. Borkar, Advocate for Respondent No.7.

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CORAM : R. G. KETKAR, J.

DATE : 2nd FEBRUARY, 2016

P.C.

1. Heard Mr. G. H. Keluskar, learned Counsel for the applicant, Mr. Sanghvi, learned Counsel for respondent Nos.1 to 4 and Mr. Borkar, learned Counsel for respondent No.7, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'CPC'), the applicant, hereinafter referred as 'defendant No.1', has challenged the judgment and order dated 27.8.2014 passed by the learned Civil Judge, Junior

Division at Pimpri, Pune below Exhibit-18 in RCS No.134/2013. By that order, learned trial Judge rejected the application made by the applicant under Order VII Rule 11(d) of CPC for rejecting the plaint on the ground that the suit is barred by law of limitation.

3. Mr. Keluskar submitted that the respondent Nos.1 to 4, hereinafter referred to as the 'plaintiffs' have instituted the Suit inter alia praying for declaration that the sale deed dated 12.8.1982 is a forged and fabricated document and the same is executed without paying any consideration and that it is not binding on the plaintiffs; the sale deed dated 24.9.2010 executed by defendant Nos.1 to 3 in favour of defendant No.4 is also fabricated, illegal and void sale deed and not binding on them; for perpetual injunction restraining defendant No.4 from carrying out any construction in the suit property.

4. He submitted that on 21.8.1982 the predecessor-in-title of the plaintiffs and their brother sold the suit property to defendant No.1. On 22.8.1982 mutation entry was made in pursuance thereof. On 24.9.2010 defendant No.1 in turn sold the property to defendant No.4. Father of plaintiff Nos.1 to 3 and husband of plaintiff No.4 Kundlik died on 30.4.2013.

During the lifetime of Kundlik, he did not challenge these transactions. It is only after the death, the plaintiffs instituted the suit on 10.6.2013. On the face of it, the suit is barred by limitation.

5. Defendant No.1 filed application under Order VII Rule 11(d) of CPC for rejecting the suit on the ground that the suit is barred by limitation. Learned trial Judge rejected the application mainly on the ground that the question of limitation is a mixed question of law and fact and, therefore, it requires evidence to be led by the parties. Said issue can be decided at the time of final hearing and it cannot be decided as a preliminary issue. Mr. Keluskar submitted that the reasons given by learned trial Judge in para-8 are perverse and cannot be sustained. From the averments made in the plaint, it is evident that the suit is barred by limitation. The learned trial Judge ought to have allowed the application.

6. Mr. Keluskar relied upon the decision of Apex Court in the case of ***N.V. Srinivasa Murthy and others vs. Mariyamma (Dead) by proposed L.Rs and others, (2005) 5 SCC 548*** and in particular para-15 thereof.

7. Mr. Borkar appearing on behalf of defendant No.4, supported the application. He submitted that the plaintiffs are claiming through Kundlik. Kundlik died on 30.4.2013. Kundlik had executed sale deed in favour of defendant No.1 on 12.8.1982. On 21.9.2010 defendant No.1 has sold it to defendant No.4. Even during the lifetime of Kundlik he could not have instituted the suit after expiry of a period of three years challenging the sale deed dated 12.8.1982. If Kundlik could not have challenged the sale deed dated 12.8.1982, surely the plaintiffs who are claiming through him could not have challenged the said transaction by filing suit in the year 2013. On the face of it, the suit is barred by limitation.

8. On the other hand, Mr. Sanghavi supported the impugned order. He invited my attention to the assertions made in paras-7 to 9 as also para-11 and prayers in para-12 of the plaint. He submitted that basically the contention of the plaintiff is that transactions dated 12.8.1982 and 21.9.2010 are both void, forged and fabricated documents. Since the plaintiffs are claiming declaration that these transactions are void, no period of limitation is prescribed for such prayer. In fact even in collateral proceedings these transactions can be challenged on

the ground that they are void. He submitted that in para-8, learned trial Judge rightly held that the issue of limitation cannot be tried as a preliminary issue. He submitted that learned trial Judge may be directed to frame the issue as to whether the suit is barred by limitation as one of the issues to be decided along with other issues.

9. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record.

10. As noted earlier, defendant No.1 has filed application under Order VII Rule 11(d) of CPC for rejecting suit on the ground that the suit is barred by limitation. While deciding the application made under Order VII Rule 11(d) of CPC, the averments made in the plaint are germane and not the defence set up by the defendants. Perusal of paras-7 to 9 and para-11 read with prayers (a) and (b) leaves no room for doubt that the plaintiffs have challenged the sale deeds dated 12.8.1982 and 24.9.2010 on the ground that they are forged, fabricated and are void. Mr. Keluskar and Mr. Borkar submitted that the suit is barred by limitation.

11. It is not possible to accept these submissions. Once

the plaintiffs have alleged that these transactions are forged, fabricated and void, the same will have to be decided by leading evidence. It cannot be decided while considering the application under Order VII Rule 11(d) of CPC. The plaintiffs may succeed in establishing their case or may fail, but, that cannot be judged while considering the application under Order VII Rule 11(d) of CPC and it is a matter of evidence.

12. In view thereof, I do not find that learned trial Judge committed error in holding that this issue cannot be decided as a preliminary issue. In my opinion, learned trial Judge shall frame the issue as to whether the suit is barred by limitation along with other issues and should have tried this issue along with other issues and decide the Suit in accordance with law.

13. Mr. Keluskar relied upon the decision of the Apex Court in the case of **N.V. Srinivasa Murthy (supra)** and in particular para-15 thereof. In that case, Civil Suit No.557 of 1990 was pending between the parties. During pendency of the suit, another suit was filed inter alia praying for declaration that the sale deed dated 5.5.1953 is not really a sale deed but a loan transaction. In other words, in that case the question whether the transaction dated 5.5.1953 was void or not was not under

consideration and the nature of the transaction contained under document dated 5.5.1953 was under consideration. It is in that context the Apex Court observed that the plaint is liable to be rejected on the ground that from the averments in the plaint, the suit is apparently barred by law within the meaning of clause (d) of Order 7 Rule 11 of CPC. In view thereof, I do not find that this decision advances the case of the defendant No.1. In the result, application fails and the same is dismissed. Rule is discharged with no order as to costs. However, learned trial Judge will frame issue as to whether the suit is barred by limitation and shall try this issue along with other issues while deciding the suit. In view of dismissal of the application, Civil Application No.387/2015 for injunction does not survive and the same is disposed of accordingly. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)