IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.559 OF 2014
IN
SUIT NO.675 OF 2013

Ms. Archana Rajendra Sakhare. .. Appellant
Vs
Sohail Engineering Works,
a Partnership Firm, and Others. .. Respondents
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Shri Ram Upadhyay along with Shri S.K. Dube i/b Law Competere Consultus for the Appellant.
Shri Jitesh Nishad i/b Shri Mathews Nedumpara for the Respondent No.3.
Shri P.K. Dhakephalkar, Senior Counsel along with Shri S.R.Ganbavale for the Respondent No.5.
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CORAM : A.S. OKA & A.A.SAYED, JJ
DATED : 18TH AUGUST 2016

ORAL JUDGMENT : (PER A.S.OKA, J)

1. By the impugned judgment and order, the learned Single Judge has answered the Preliminary Issue of bar of limitation against the Appellant/Original Plaintiff. Therefore, the present Appellant/Original Plaintiff is in Appeal.

2. The Original Plaintiff claims to be the co-owner of the suit property more particularly described in the Plaint. According to her case, the suit property was originally owned by her grand-father

Shivling Sakhare. The allegation in the Plaint is that the first to third Defendants forged and fabricated a Deed of Conveyance dated 22nd November 1982 by which the suit property was purportedly sold in favour of the first Defendant. The Plaintiff claims to be the daughter of late Shri Rajendra Shivling Sakhare. It is alleged that Shri Shivling Narayan Sakhare (for short "the said Shivling") was the original owner of the said property. In the Plaint, it is alleged that the fact of the alleged Conveyance Deed had come to light from the letter dated 9th January 2013 written by the Defendant No.4- Indian Bank which is Exhibit-B to the Plaint. In the Plaint, there are allegations that the Defendant No.4 Indian Bank had lent money based on the mortgage of the suit property which is the subject matter of Sale Deed dated 22nd November 1982. The Defendant No.5 is the Auction Purchaser who purchased the suit property from the Defendant No.4 Bank. According to the Appellant/Plaintiff, her actual knowledge as regards the said Sale Deed in respect of the suit property is of 26th January 2013. In Paragraph 18 of the Plaint, it is claimed that the fraud of the Defendants came to the knowledge of the Appellant/Plaintiff only on 26th January 2013 and hence, the suit has been filed in April 2013. The documents annexed to the Plaint show that the said Shivling died on 25th August 1996. A copy of the Original Application filed by the Defendant No.4 Bank before the Debt Recovery Tribunal II at Mumbai being Original Application No.2449 of 1999 has been annexed to the Plaint. The said

Application was filed by the Defendant No.4 against the Defendant Nos.1 to 3. A declaration was claimed in the said Application that the Defendant No.4 Bank has a charge on the suit property by way of mortgage. On 20th June 2003, the said Application was allowed by the Presiding Officer of the Debt Recovery Tribunal-II. The only substantive prayer in the suit is for a declaration that the Plaintiff is the co-owner of the suit property.

3. The Notice of Motion for interim relief taken out by the Appellant/Plaintiff was opposed by the Defendants by raising a contention of bar of limitation. The contention of the Defendants is that the father of the Defendant No.3 purchased the suit property under a Deed of Conveyance dated 8th January 1961, a Deed of Confirmation dated 8th August 1961 and a Deed of Re-conveyance dated 17th September 1972 to which the said Shivling was a party. Both the parties did not lead any oral evidence on the preliminary issue of bar of limitation.

4. The learned counsel appearing for the Appellant/Plaintiff urged that the preliminary issue of bar of limitation could not have been framed. He submitted that the Defendants have not adduced any evidence to prove the so called bar of limitation. He submitted that the issue could not have been decided only on the basis of the pleadings.

His submission is that the case of the Appellant was based on fraud. Reliance was placed on the decision of the Apex Court in the case of ***Gunwantbhai Mulchand Shah and Others v. Anton Elis Farel and Others***[1]. Reliance is placed on another decision of the Apex Court in the case of ***Commissioner of Customs v. Candid Enterprises***[2]. The contention is that the principle incorporated in Section 17 of the Limitation Act, 1963 is that the fraud nullifies everything. The submission of the learned counsel appearing for the Appellant/Plaintiff is that in view of the plea of fraud specifically pleaded, the suit could not have been dismissed on the ground that it is barred by limitation.

5. We have considered the submissions. The law is well settled. The Apex Court held that the issue of limitation is also a issue of jurisdiction and when such issue is raised at the time of hearing of an Application for injunction, the same is required to be framed as a preliminary issue in accordance with Section 9A of the Code of Civil Procedure, 1908.

6. It will be necessary to consider the averments made in the Plaint. According to the case of the Plaintiff, the Original Owner Shivling died on 25th September 2006 which the specific averment made in Paragraph 1 of the Plaint. However, the death certificate shows

1 Civil Application No.1492 of 2006 decided on 6th March 2006.
2 2001(5) Supreme 307

the date of death of Shivling as 26th August 1996. It is not the case of the Plaintiff that any action was taken by the deceased Shivling during his life time till the year 1996. According to the case of the Plaintiff, her father Rajendra Shivling Sakhare expired on 16th September 1995. However, Exhibit-G to the Plaint shows that the Plaintiff's mother Ramabai is very much there who is also claiming to be the legal representative of Shivling. It is pertinent to note that in the Plaint, even genealogy of the deceased is not mentioned. The Property Register Card of the suit property annexed to the Plaint shows that the entry of the name of Dharamsinh Harnam Singh Sohal has been made as holder on 22nd March 1973. The entries of the names of the Defendant Nos.2 and 3 who are the sons of the said Dharamsinh Harnam Singh along with the entry of the name of their mother Gurubachan has been made on 10th March 2003. The entry dated 22nd January 1973 shows that the entry of the name of Dharamsinh Harnam Singh Sohal has been made on the basis of the Sale Deed dated 8th January 1961 and Re-conveyance Deed dated 17th September 1970. A copy of the Property Register Card annexed to the Plaint shows that it was received on 28th September 2010. Thus, from 22nd January 1973, only occupant shown in the City Survey record in respect of the suit property is one Dharamsinh Harnam Singh Sohal who was the father of the Defendant Nos.2 and 3.

7. In normal course, Article 58 of the Schedule to the Limitation Act, 1963 dealing with a suit for declaration will apply to the facts of the case. Perusal of the Plaint clearly shows that the Plaintiff is not in possession. The first prayer is for a declaration that she is co-owner of the suit property. The second prayer is for injunction restraining the Defendants from withdrawing the amount lying with the Debt Recovery Tribunal-II. In fact, the said prayer is by way of an interim relief. We find that the suit itself is not maintainable for a mere declaration in absence of a prayer for possession in view of the principles incorporated in Clause (h) of Section 41 of the Specific Reliefs Act. It is very difficult to accept that there was a fraud practised by the Defendants even by taking the averments made in the Plaint as correct. The plea of so called fraud is very vague. Section 17 of the Limitation Act, 1963 can apply provided the Plaintiff establishes that there is a fraud.

8. There is an affidavit-in-reply filed by the Defendant No.4 Bank showing that on the basis of the order dated 20th June 2003 passed by the Debt Recovery Tribunal-II, a recovery certificate was issued. Under the order dated 6th July 2004 of the Recovery Officer, the suit property which was mortgaged with the Defendant No.4 Bank was ordered to be sold. The public notices were published in Time of India, Economic Times, Maharashtra Times and Navbharat Times on 14th/15th

May 2008. A certificate of sale was issued in favour of the Defendant No.5. On 5th August 2008, possession of the suit property was delivered to the Defendant No.5. The sale proceeds were invested in a fixed deposit. The fixed deposit was encashed in June 2008 by the Defendant No.4 Bank. The present suit was filed on 6th April 2013. As disclosed in the Plaint, during his liftime, the said Shivling never challenged the title of the Defendant No.3 or his father. In absence of proper plea of fraud, the benefit of Section 17 of the Limitation Act, 1963 will not be available to the Plaintiff.

9. Therefore, we concur with the conclusion drawn by the learned Single Judge that the suit was hopelessly barred by law of limitation.

10. Hence, we pass the following order.

ORDER :

(a) The Appeal is dismissed;

(b) Notice of Motion (L) No.824 of 2014 does not survive and the same is disposed of.

(A.A. SAYED, J) (A.S. OKA, J)