

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11514 OF 2017

Nitin Keshavlal Shah,
Age-54 years, Occu-Business,
R/o Tilak Nagar, Latur.

– PETITIONER

VERSUS

1. Pratima Nayankumar Shah,
Age-62 years, Occu-Household,
R/o Pant Nagar, Ghatkoppar,
Mumbai (E), A/P C/o Pritam Shah,
1/11, 1st floor, Ghanshyam Nagar,
Opp.Nakhwa High School,
Kopri, Thane (East) 400 603

2. Nilima d/o Keshavlal Shah,
Age-60 years, Occu-Household,
R/o Latur, A/P, F-1, Sai Nagar
Co.op. Housing Society,
Near Nagarwala High School,
Kalyan Nagar, Pune – 411006.

3. Dr.Pradipkumar s/o Keshavlal Shah,
Age-58 years, Occu-Medical
Practitioner, R/o Ganraj Apartment,
Tilak Nagar, Latur, Dist.Latur

– RESPONDENTS

Mr.A.N.Sabnis h/f Mr.V.D.Gunale, Advocate for the petitioner.
Mr.R.S.Deshmukh h/f Mr.A.R.Joshi, Advocate for respondent Nos. 1
to 3.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 10/10/2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the

consent of the parties.

2. The petitioner is aggrieved by the order dated 05/07/2017 by which the application Exh.59 dated 20/06/2017 praying for framing of proper issues and grant of leave to the plaintiffs to adduce evidence, has been rejected.

3. By the Civil Application No.12547/2017, the petitioner has prayed for leave to amend the prayer clause and challenge the order dated 06/04/2017 passed below Exh.19 and 20. Consequentially, the petitioner desires to add prayer clause C-1.

4. While hearing this petition extensively, I have permitted the petitioner to proceed with the matter even as against the order which is sought to be assailed by the proposed prayer clause C-1.

5. The petitioner has preferred Spl.C.S.No.7/2017 before the Trial Court praying for partition and separate possession to the extent of 1/4th share from the suit property. Defendant Nos.1 and 2 are the elder sisters of the petitioner/plaintiff and defendant No.3 is the elder brother of the plaintiff.

6. The petitioner has contended that his father Keshavlal has died intestate living behind the plaintiff and all the defendants. Keshavlal died on 15/01/2004 and the mother of the litigating sides passed away on 23/07/2005.

7. In paragraph No.6 of the plaint, the petitioner has contended that the defendants have prepared a forged and fabricated Will Deed dated 21/01/2000 in collusion with each other and purportedly without the knowledge and information of the deceased father by taking undue advantage of his ill health and mental condition. It is specifically contended in paragraph No.6 that the Will Deed in favour of defendant Nos. 2 and 3 is absolutely illegal, void and has got no value in the eyes of law as the same is a forged document.

8. In paragraph No.7 of the plaint, it is specifically contended that the said defendant Nos. 2 and 3, by taking undue advantage of an illegal will deed, have got their names mutated in the revenue records of the municipal Corporation, which is followed by an illegal sale deed dated 09/01/2017 bearing Day Book No.61/2017 registered before the Sub Registrar No.2 of Latur. A false consideration amount of Rs.15,00,000/- is said to have been paid by defendant No.3 to defendant No.2. The said sale deed is also bogus.

9. In paragraph No.8 of the plaint, it is specifically contended that though the plaintiff has got his undivided 1/4th share in the suit property and he should be granted separate and *Khas* possession of 1/4th share out of the suit property.

10. It is in the above backdrop that the Trial Court has passed an order dated 06/04/2017, keeping in view that the suit has been lodged by the petitioner on 13/02/2017 and has framed a preliminary issue regarding limitation as under :-

"Whether the suit is within limitation ?"

By the order dated 06/04/2017, the Trial Court has permitted the parties to lead evidence on the preliminary issue.

11. Grievance of the petitioner is that once the jurisdiction issue appears to be a mixed question of facts and law, the Trial Court cannot deal with the said issue peremptorily without an order being passed under Order 14 Rule 2 of the CPC or without taking cognizance of the objections of the defendants u/s 9-A of the CPC. It is, therefore, canvassed that the impugned order dated 06/04/2017 is illegal.

12. The petitioner has further contended in Exh.49 which is an application filed on 20/06/2017, once again reiterating the contents of paragraph No.7 of the plaint and that the Will Deed is false, illegal and void and hence the sale deed dated 09/01/2017 based on an illegal Will-Deed deserves to be set aside. It is, therefore, prayed in Exhibit 59 that proper issues be cast and the plaintiff be permitted to lead evidence.

13. Reliance is placed by the petitioner on the following judgments :-

[a] Hareendran and others Vs.Sukumaran and others [2017 SCC (SC) 685],

[b] Kamlakar Eknath Salunkhe [(2015) 7 SCC 321],

[c] Ramesh B.Desai and others Vs. Bipin Vadilal Mehta and others [(2006) 5 SCC 638]

14. Mr.Deshmukh, learned Advocate appearing on behalf of all the respondents contends that the entire thrust of the petitioner's case is on the purported illegality of the Will Deed which was executed about 17 years ago. The limitation period for challenging the Will Deed is 3 years and any suit filed thereafter, raising a challenge to the Will Deed, would be barred by limitation.

15. He further submits that paragraph Nos. 6 to 8 of the plaint as

well as the opening paragraph of Exh.59 would indicate that the plaintiff is solely and wholly banking on the legality of the Will-Deed and unless the Will-Deed is held to be a forged and fabricated document, he would not stand to gain any relief in the said suit. He, therefore, contends that though the plaintiff has shrewdly drafted the plaint in order to create a make-believe picture that he has not put forth any prayer against the Will-Deed, it is purely a camouflage and without denting the Will Deed, the sale deed dated 09/01/2017 cannot be set aside. Only if the will deed dated 27/01/2000 suffers an adjudicatory process and is declared to be a forged document, the sale deed would not suffer any consequences.

16. He submits that it is in this backdrop that the order below Exh.19 and 20 was delivered by the Trial Court framing a preliminary issue with regard to whether the suit would be barred by the law of limitation. He hastens to add that as the plaintiff has been granted an ex-parte ad-interim relief thereby preventing defendant No.3 from constructing his hospital, the plaintiff is moving different applications before the Trial Court so as to prolong the suit and practically strangle the 3rd defendant with the hope that the matter could be settled in some way.

17. He relies upon the judgment of the Hon'ble Apex Court in the matter of Hardesh Ores Pvt.Ltd., Vs. Hede and Co. [2007(5) SCC 614] and Foreshore Cooperative Housing Society Limited Vs. Praveen D.Desai (Dead), through legal heirs and others, [(2015) 6 SCC 412] to support his contention that when the limitation issue as regards the maintainability of the suit is to be gone into, there cannot be a temporary injunction cannot be granted against the defendants.

18. After considering the extensive submissions of the learned Advocates for the respective sides and upon perusing paragraph Nos. 6, 7 and 8 of the plaint and the entire contents of Exh. 59, it is obvious that the thrust of the plaintiff's case is solely upon the Will-Deed dated 27/01/2000. If that be so, then the suit would appear to be barred by limitation. Considering the effect of paragraph Nos. 6, 7 and 8, though the petitioner contends that he has not challenged the sale deed, the said contention is a camouflage as the whole claim of the petitioner is based on the contention that a false, forged and fabricated Will-Deed was prepared on 27/01/2000.

19. The petitioner has relied upon the observations of the Hon'ble Apex Court in paragraph No.13 in the Ramesh Desai case (supra) wherein the Hon'ble Apex Court, relied upon its earlier judgment in

the matter of Major S.S.Khanna Vs. Brig. F.J. Dillon [AIR 1964 SC 497] and concluded that normally all the issues in a suit should be tried together and especially when the decision on the issues even on law depend upon the decision on the issues on facts. Trial of the suit in bits and pieces or phasewise would result in a lopsided trial.

20. I do not find that the view taken by the Apex Court would assist the plaintiff for reasons more than one. Firstly, that the plaintiff has shrewdly attempted to camouflage his challenge to the Will-Deed by not putting forth any prayer seeking a declaration that the Will Deed is void or is a fabricated document and hence not binding on the parties. Secondly, the pleadings clearly indicate that the entire attack of the plaintiff is as against the will deed. If the Will Deed is declared to be a fabricated document, the right created in favour of defendant No.2 is likely to be extinguished and consequentially defendant No.2 would then be precluded from creating third party interest in the suit property even in favour of her real brother / defendant No.3.

21. There is no explanation forth coming from the plaintiff as to why has he chosen to assail the Will Deed indirectly rather than putting forth a challenge directly. It is obvious as to why the plaintiff

is stupefied on this count and that is because the moment he challenges the sale deed expressly, the suit would suffer the bar of limitation. So also, what cannot be challenged directly, cannot be permitted to be challenged indirectly. If the plaintiff does not desire any relief of the nature of declaring the Will-Deed bad in law for any reason whatsoever, the Trial Court would not be obliged to deal with the legality of the Will Deed. The petitioner, however, has not given up his indirect challenge to the Will-Deed.

22. The Hon'ble Apex Court has crystallized the law in catena of judgments, lastly in Foreshore Co-operative Housing Society (supra) that if the jurisdiction issue u/s 9-A or Order 14 Rule 2 of the CPC is to be dealt with, there cannot be grant of interim injunction. It is trite that if the issue of jurisdiction and maintainability of a claim is to be gone into, granting interim relief first and then scrutinizing whether the Court had jurisdiction to entertain a claim, would amount to put the cart in front of the horse.

23. Keeping the fact situation as above in focus, I do not find that the Trial Court has committed any error in passing the impugned order dated 06/04/2017 framing an issue with regard to the maintainability of the suit on the count of limitation.

24. An element of shrewdness also appears in Exh.59. The plaintiff has attempted to create a picture that unless proper issues are not framed, the Trial Court cannot proceed with the matter. It is also prayed that the plaintiff be permitted to lead evidence. While doing so, in the skeletal pleadings in Exh.59, the plaintiff neither has proposed any issues nor has he averred that all the issues be framed and such issues be considered together by finally adjudicating upon the suit.

25. Considering the averments in Exh.59, the plaintiff appears to suggest to the Trial Court that it should frame an issue with regard to the legality of the Will Deed. Even before this Court, the plaintiff contends, on the one hand, that he does not desire to touch the Will-Deed and on the other hand, cannot justify the averments in Exh.59 as to why the entire thrust of the plaintiff is on the purported fabrication of the Will Deed. It, therefore, appears that Exh.59 was filed only with the intention of delaying the proceedings while enjoying the order of *status-quo*.

26. Considering the above, this petition being misconceived and devoid of merit, is therefore, dismissed. Needless to state, the petitioner has been granted the liberty to lead evidence on the

preliminary issue. The Trial Court shall therefore proceed with recording of evidence on the preliminary issue expeditiously and keeping in view that the ex-parte status-quo order is in operation since February 2017, the Trial Court shall endeavour to decide the preliminary issue as expeditiously as possible and preferably on or before 31/01/2018.

27. The ex-parte ad-interim order passed by the Trial Court would be co-terminus with the decision on the preliminary issue or till 31/01/2018, whichever is earlier. It goes without saying that if the Trial Court concludes that the suit is maintainable even on the point of limitation, it shall proceed to decide application Exh.5 pending under Order 39 Rule 1 and 2 of the CPC.

28. Rule is discharged.

29. The prayer in the pending civil application, having been considered, does not survive and stands disposed of.

(Ravindra V.Ghuge, J.)