

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.251 OF 2016

Dawood Rahim Saheb Gulbar and others ... Applicants
Vs.
Abdul Qadir Amirmiya Surme and another ... Respondents

Mr. R. S. Apte, Senior Advocate i/b. Mr. Saurabh Oka for Applicants.
Mr. S. V. Chougule i/b. Mr. S. S. Deshmukh for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 20, 2017

P.C. :

Heard Mr. Apte, learned Senior Counsel for applicants and
Mr. Chougule, learned Counsel for respondent No.1 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants, hereinafter referred to as 'defendants', have challenged the judgment and order dated 01.03.2016 passed by the learned 4th Joint Civil Judge, Senior Division, Thane in Special Civil Suit No.162 of 2015. By that order, the learned trial Judge held that the Suit is not barred by limitation and is within limitation.

3. In support of this Application, Mr. Apte submitted that respondents, hereinafter referred to as 'plaintiffs', have instituted Suit inter alia for declaration, partition, perpetual injunction as also cancellation of registered sale deed dated 06.03.2010. The Suit is instituted on 02.03.2015. He submitted that in view of Section 3 of the Transfer of Property Act, 1882 (for short 'Act'), plaintiffs had constructive notice of execution of the sale deed on 06.03.2010. The Suit instituted on 02.03.2015 is clearly barred by limitation. He relied upon Article 59 of the Limitation Act, 1963. He invited my attention to

the averments made in the plaint as also the avements made in the written statement. In particular, in paragraph 4 of the written statement, defendants have specifically contended that the property was in exclusive possession of the defendant No.1. After the demise of Rahim Saheb, name of defendant No.1, being son of Rahim Saheb, was recorded. He submitted that defendant No.1 was in exclusive possession and was cultivating the suit property. Name of Hajirabi, mother of plaintiffs and daughter of Rahim Saheb, was never recorded in the record of rights pertaining to the suit property. He invited my attention to the cause of action set out in the plaint. In paragraph 14, plaintiffs have averred that cause of action arose somewhere in the month of February 2014 when plaintiff No.1 went to the Talathi office and obtained 7 x 12 extracts and came to know that vide mutation entry No.1969, name of defendant No.7 was entered on the basis of the sale deed dated 06.03.2010. He submitted that on the face of it, the Suit is barred by limitation. The learned trial Judge has not considered these aspects.

4. On the other hand, Mr. Chougule supported the impugned order. He submitted that plaintiffs are the children of Hajirabi, who is the daughter of Rahim Saheb, and defendant No.1 is the son of Rahim Saheb Shaikh. After the death of Rahim Saheb Shaikh, names of Hajirabi and defendant No.1 were entered in the revenue record vide mutation entry No.991 certified on 30.12.1980. Hajirabai died on 06.09.1986. Behind their back, defendant No.1 clandestinely and in collusion with the concerned revenue authorities got certified mutation entry No.1243 on 02.01.1988 without issuing any notice to the plaintiffs before certification of the said mutation entry. He submitted that plaintiffs are in joint possession of the suit property with defendant No.1. Plaintiffs acquired knowledge only when plaintiff No.1 visited the office of Talathi and obtained 7 x 12 extracts in February 2014. He

further submitted that in the written statement, defendants have neither denied right of Hajirabi nor claimed exclusion as contemplated by Article 110 of the Limitation Act. He, therefore, submitted that the Suit cannot be said to be barred by limitation.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the plaintiffs have instituted Suit for partition, declaration and for cancellation of the sale deed dated 06.03.2010. It is the case of the plaintiffs that they are in joint possession with defendant No.1. Perusal of the written statement prima facie does not indicate that defendant No.1 has denied right of Hajirabi as also pleaded ouster. The learned trial Judge while passing the impugned order has observed that the prayer for partition is independent of the prayer for cancellation of the sale deed dated 06.03.2010. The learned trial Judge has further held that defendant No.1 being the son, under Mohammedan Law, is entitled to a share twice of the daughter. Hajirabi, mother of the plaintiffs, would get 1/3rd share and defendant No.1. will get 2/3rd share in the suit property. Mutation entry No.1243 will not make him owner of the entire suit property. Plaintiffs have sought declaration that the sale deed dated 06.03.2010 executed by defendants No.1 to 6 in favour of the defendant No.7 is not binding to the extent of plaintiffs' share.

6. In view thereof, I do not find 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.

(R. G. KETKAR, J.)