

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8336 OF 2016

Indumati Bhimashankar Survase ... Petitioner
Vs.
Vithal Pirappa Aarvat and another ... Respondents

Mr. I. M. Khairdi for Petitioner.
Mr. Samir Kumbhakoni for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 24, 2017

P.C. :

Heard Mr. Khairdi, learned Counsel for petitioner and Mr. Kumbhakoni, learned Counsel for respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant', has challenged the judgment and order dated 02.01.2016 passed by the learned Ad-hoc District Judge-1, Solapur below exhibit-25 in Regular Civil Appeal No.113 of 2014. By that order, the learned District Judge rejected the application made by the defendant under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the written statement so as to incorporate paragraphs 10VIII, 10A, 10B, 11A(1) and 11A(2) so as to claim relief of specific performance.

3. Respondents, hereinafter referred to as 'plaintiffs', had instituted Suit against the defendant for recovery of possession of property more particularly described in paragraphs 1 and 2 of the plaint. Defendant filed written statement at exhibit-13 resisting the Suit and also set up counter-claim. By the counter-claim, defendant sought perpetual injunction restraining plaintiffs from creating third party interest without her written permission. Plaintiffs filed written statement to the counter-

claim. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. Parties led evidence. By order dated 02.04.2014, the learned trial Judge partly decreed the Suit and directed the defendant to handover vacant possession of the suit property to the plaintiffs. The counter-claim of the defendant was dismissed. Aggrieved by this decision, defendant preferred appeal. Pending the appeal, application exhibit-25 was made for amending the written statement, which is rejected by the impugned order. It is against this order, defendant has instituted the present Petition.

4. In support of this Petition, Mr. Khairdi submitted that plaintiffs entered into agreement of sale with defendant on 25.11.2002. Defendant was put in possession of the suit property. It was agreed that defendant will repay the loan amount. On 15.09.2008, defendant issued notice to the plaintiffs which was replied by the plaintiffs on 13.10.2008. M/s. A. V. Pandhe executed registered sale deed in favour of the plaintiffs on 17.11.2009. Plaintiffs issued notice on 16.07.2010 calling upon the defendant to handover possession, which was replied on 23.07.2010. Suit was instituted on 25.08.2010.

5. Mr. Khairdi submitted that the learned District Judge rejected the application on the ground that cause of action accrued to the defendant for claiming relief of specific performance on 13.10.2008 when plaintiffs by a reply dated 13.10.2008 denied specific performance of agreement. Though plaintiffs instituted Suit on 25.08.2010, defendant in the written statement and counter-claim filed on 24.12.2010 did not claim relief of specific performance. The relief of specific performance is, therefore, barred by limitation. Mr. Khairdi relied upon the decisions of this Court in -

(i) ***Vijay Vs. Harinarayan*, 2013 (4) Mh.L.J.298** to contend that

application for amendment being an interlocutory application is not subject to any period of limitation unless otherwise specifically provided by law. Article 137 of the Limitation Act is not applicable. He further submitted that the learned District Judge was not justified in rejecting the application on the ground of limitation, if the other side can be compensated by an order of costs;

(ii) ***Ramniwas B. Lakhotiya Vs. Sunil P. Agrawal, 2015 (7) Bom.C.R. 236*** to contend that plaintiffs can be compensated with costs. He further submitted that the learned District Judge could have kept the question of limitation open;

(iii) ***G.M., B.S.N.L. Vs. R.I.S.A. Pvt. Ltd., 2014 (2) Mh.L.J. 715*** to contend that defendant can raise inconsistent pleas in the written statement. He submitted that the Court has to adopt different approach while dealing with the application for amendment of plaint and application for amendment of the written statement. The Court has to adopt liberal approach while considering the application for amendment of the written statement.

6. On the other hand, Mr. Kumbhakoni supported the impugned order. He has invited my attention to the issues framed by the learned trial Judge, and in particular, issues No.4, 7 and 8. Though defendant did not claim relief of specific performance, the learned trial Judge framed issue No.4 to the effect, whether defendant proves that she is ready and willing to perform her part of contract and answered in the negative. The learned trial Judge framed issue No.7 to the effect, whether defendant is entitled to specific performance of contract and that was also answered in the negative. He further submitted that plaintiffs have denied specific performance on 13.10.2008. As per Article 54 of the Limitation Act, defendant ought to have claimed relief of specific performance within 3 years from 13.10.2008. Written

statement and counter-claim was filed on 24.12.2010 wherein relief of specific performance was not claimed. The amendment application is made on 25.08.2015. By the proposed amendment, defendant wants to claim relief, which is time barred. He, therefore, submitted that no case is made out for interfering with the impugned order.

7. 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 plaintiffs have sought possession of the suit property. Defendant filed written statement and also set up counter-claim. In the counter-claim, defendant only prayed for perpetual injunction restraining the plaintiffs from creating third party interest without her written permission. In other words, defendant did not seek relief of specific performance. As noted earlier, the learned trial Judge framed issues No.4, 7 and 8 and held that defendant did not prove that she is ready and willing to perform her part of contract and that she is not entitled to specific performance of contract. Aggrieved by this decision, defendant preferred appeal in 2014 and pending that appeal, she took out application on 25.08.2015. Though the plaintiffs have denied specific performance of contract as far as back on 13.10.2008, defendant did not claim relief of specific performance within 3 years from 13.10.2008. While rejecting the application, in paragraph 14, the learned District Judge specifically recorded a finding that cause of action accrued to the defendant on 13.10.2008 when specific performance was refused.

8. Mr. Khairdi relied upon the decisions in **Vijay** (*supra*), **Ramniwas B. Lakhotiya** (*supra*) and **G.M., B.S.N.L.** (*supra*). As I have already held that basically the relief of specific performance is time barred, the decisions relied by Mr. Khairdi do not advance the case of

the defendant.

9. For the reasons recorded in paragraphs 14, 15 and 25 of the impugned order, I do not find any error is committed by the learned District Judge. Hence, Petition fails and the same is dismissed. The learned District Judge will decide the appeal on its own merits, uninfluenced by the observations made in this order.

10. It is also made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proceedings as contemplated by Section 105(1) of C.P.C. Order accordingly.

(R. G. KETKAR, J.)

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