

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION No. 372 OF 2003

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| 1. | Smt. Prabhavati Shantilal Porwal (Decd.) | |
| 2. | Ramanlal Shantilal Porwal | ... Petitioners |
| | Vs. | |
| 1. | Smt. Kalpana Dilip Porwal | |
| 2. | Kum. Kavita Dilip Porwal | |
| 3. | Kum. Namrata Dilip Porwal | |
| 4. | Kiran Shantilal Porwal | |
| 5. | Sou. Pushpa Lomesh Shah | ... Respondents |

Mr. Drupad S. Patil, Advocate for the Petitioner.

Mr. Anil V. Anturkar, Senior Advocate a/w. Mr. Tanaji Mhatugade, Mr. Abhay A. Anturkar i/b. K.D. Bhosale for respondent nos. 1, 2 and 3.

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 8th June, 2017.

JUDGEMENT:

In this Civil Revision Application, the order dated 29th January, 2002 passed in Exhibits 1 and 39 holding that the plaintiff's suit is within the prescribed period of limitation is under challenge.

2. The applicants are the original defendant nos. 1 and 2. The petitioner no. 1/mother has expired and therefore her son/original defendant no. 2, being her legal heir, is prosecuting the matter. Respondent nos. 2 and 3 are the legal heirs of the original plaintiff. The original plaintiff-Dilip Shantilal Prowal and respondent no. 4 are the brothers of the petitioner no. 1 and respondent no. 5. The

original plaintiff has filed Special Civil Suit No. 554 of 1997 in the Court of Civil Judge Senior Division, Pune (which was subsequently numbered as Regular Civil Suit No. 4038 of 2000) for partition, injunction and declaration in respect of cancellation of Release deed dated 13th April, 1987 bearing register no. 4610 of 1987 and a Deed of Partition dated 9th August, 1983 bearing register no. 5336 of 1983 are illegal and void and not binding on the plaintiff. The plaintiff has filed the suit on 20th March, 1997 and therefore, Application Exhibit 39 was moved by the defendant requesting the Court to frame preliminary issue on the ground that the suit is barred under the law of limitation. The trial Court accordingly framed the issue of limitation as a preliminary issue. Both the parties led evidence on the point of limitation and the learned trial Judge gave finding in favour of the plaintiff that the suit is within the prescribed period of limitation. Hence, this Writ Petition.

3. Before recording the submissions of the learned counsel for the petitioner, some facts are to be stated. The plaintiff earlier filed the Regular Civil Suit No. 1981 of 1995 against the petitioners praying that the registered Release Deed dated 13th April, 1987 was obtained under threats and pressure and is illegal and void ab initio and also prayed for injunction restraining the petitioners/original defendant nos

1 and 2 from ousting the plaintiff and also from transferring the entire property in the name of the third party. The said suit was withdrawn on 18th March, 1997 on obtaining the liberty to file a fresh suit and thereafter Special Civil Suit No. 554 of 1997 was filed. Original defendant no. 3/respondent no. 4, who is one of the brothers, has left the house and his whereabouts were not known for a considerable period of time and therefore, original defendant no. 1/mother has filed the Suit No. 1292 of 1993 for declaration of civil death of respondent no. 4. The said suit was dismissed by the Civil Court on 13th September, 1995. The said order was not challenged before the Higher Court. It is the case of the plaintiff that in the year 1980, he was sent to Mumbai for education and to be expertise in the business. However, he unfortunately got addicted to liquor and thereafter he was sent back to Pune. He was found a completely addicted person. It is his case that petitioners/defendant nos. 1 and 2 got executed Deed of Partition on 9th August, 1983 and Release deed on 13th April, 1987 under the coercion and threat and he was not aware of the same. He was sent to de-addiction centre, namely, Muktangan. He stayed for one month in Muktangan and with efforts, some how he got out of his addiction in the year 1994-95. It is his contention that in the year 1995, when he wanted to change the

name on the electricity meter of his residence, which is comprising of two rooms in the family house, he realized that instead of his name, name of defendant no.1/mother and defendant no. 2/brother, i.e., petitioners were substituted. Similarly, he had received the notice of the suit of 1993 filed by his mother for declaration of civil death of his brother and he had filed the reply to the subject matter also. However, he had knowledge in the year 1995 and petitioners/defendant nos. 1 and 2 have got these two documents Exhibited under coercion and he is having lawful share in the ancestral property. Therefore, he filed the suit for challenging this and also for partition.

4. The learned counsel for the petitioner has submitted that the suit is hopelessly time barred. He read over the pleadings in the Suit No. 1981 of 1995 and also compared with the pleadings in the present suit and has argued that the original plaintiff himself has contended that he had knowledge of the registered Partition Deed and the Release deed in the year when they were executed. He further submitted that from his pleadings, it can be gathered that he did not have the knowledge of the Partition deed from 1989. The learned counsel further submitted that the learned Judge has failed to appreciate these pleadings and admissions given by the plaintiff

about the registered deeds in the plaint itself. He submitted that the plaintiff has taken contradictory stand in respect of deriving knowledge of this Deed of Partition and Release Deed. The learned counsel pointed out that by this Deed of Partition in 1983, the residential premises admeasuring 320 sq.ft. and one shop has fallen to the share of original plaintiff. He further submitted that the plaintiff has in fact by authorizing his father-in-law to sell the shop acted upon the Deed of Partition in 1983, as he was running the shop and sale proceeds were exclusively acquired by the plaintiff. The learned counsel has argued that the learned trial Judge has lost the sight of these pleadings and the fact that the plaintiff had full knowledge of these deeds latest by 1989 and the first suit was filed in the year 1995 and by virtue of Article 59 of the Limitation Act, the prayer for annulment of these two registered deeds, which ought to have been filed within three years under Article 59, is barred by law of limitation. The finding given by the learned trial Judge that the plaintiff is seeking substantial relief of partition and the prayer of declaration is an ancillary relief is erroneous. The learned counsel has submitted that unless these two deeds are cancelled and declared as null and void and not binding on the original plaintiff, the issue of partition cannot be decided and thus, the relief of declaration is the main relief

and the relief of partition is the secondary or ancillary relief. The learned counsel has further argued that by clever wordings and crafty drafting of the plaint cannot bring the suit within limitation. In support of his submissions, the learned counsel relied on the ratio laid down by the Hon'ble Supreme Court in the case of **N.V. Srinivasa Murthy & Ors. vs. Mariamma (Dead) by proposed LRs & Ors., reported in (2005) 5 SCC 548**. The learned has also relied on the evidence of Kalpana Dilip Porwal, wife of the original plaintiff and she has stated that her husband has executed the Deed of Partition on 9th August, 1983.

5. The learned senior counsel for the respondents, while supporting the order of the trial Judge, has submitted that the defendants/petitioners have in fact suppressed the contents of the Deed of Partition and the Release Deed from the original plaintiff. He had no knowledge of the Release Deed and the Deed of Partition. The learned senior counsel has pointed out that the original plaintiff was served summons in Suit No. 1292 of 1993 filed by defendant no. 1/mother for declaration of civil death of respondent no. 4 and the said suit filed on the ground that specific details were not disclosed by the defendants in respect of the properties about which the

declaration of civil death of respondent no. 4/Kiran Shantilal Popat was sought. The learned senior counsel further submitted that in the said matter, the original plaintiff has filed the written statement without prejudice to his rights in the property. It is significant to note that in Suit No. 1292 of 1993, the defendants/petitioners have deliberately not disclosed anything about these two registered deeds. Thus, the plaintiff had no knowledge till 1995 when he went to transfer his name from the electricity meter of his residence and at that time, he realized that the said premise was transferred in the name of defendants/petitioners. He further pointed out that in the plaint, he has stated that the defendants deliberately have not made the mutation entry as per the shares in the property card in order to hide this fact from the plaintiff. The plaintiff thereafter through his wife made application to obtain certified copy of the registered Deed of Partition on 3rd January, 1997 and then he realized that he got a share of only 320 sq.ft. out of total property of 330 sq.mtr. The major portion of the share is taken by the defendants and the said partition is bogus. Thereafter the original plaintiff was constrained to file a suit. He further submitted that Article 59 speaks about the knowledge of the documents. The learned senior counsel also relied on the Deed of Partition and the Release Deed in order to point out

that how the share was unequally divided, as the plaintiff was addicted to liquor during that period. He also relied on the evidence of wife of original plaintiff and of Dr. Anil Trimbak Awchat on the point of de addiction of the plaintiff.

6. Read the documents and the impugned orders. It is a settled position that to fix the limitation, the Court has to take into account the pleadings and averments in the plaint. On the preliminary issue, the parties have tendered evidence. The learned trial Court has passed a detailed order and has considered the relevant portion of the evidence of the parties. It shows from the record that original plaintiff was completely addicted and used to be under influence of liquor. The evidence of witness Dr. Anil Trimbak Awchat shows that since 1980 onwards, the plaintiff used to remain under the influence of liquor. He also produced the documentary evidence of his treatment. The learned trial Court has taken note of it and recorded that the original plaintiff was mentally imbalance. It appears from the overall averments of the original plaintiff that though the plaintiff has executed the documents, i.e., Deed of Partition and Release Deed and those documents were registered, it appears that he was not in a position to understand the contents and its consequence at the

relevant time. This can be fortified after going through the said Release Deed and so also the Deed of Partition. Thus, the submissions of learned senior counsel for the respondents that though the plaintiff had executed Deed of Partition and Release Deed, he had no knowledge of the contents and about the division of disproportionate share in the year 1995. The submissions of learned counsel for the petitioner that unless the Deed of Partition and Release Deed are declared as void, the issue of partition cannot be answered is true, however, it appears that the reasoning given by the learned Judge in respect of knowledge of the contents of Deed of Partition and Release Deed is also legal and correct. It is to be presumed that when the document is executed by the person, the knowledge of the contents of the documents is attached to the date of the execution. However, if the evidence is brought on record, then this presumption is rebuttable.

7. In the case of **N.V. Srinivasa Murthy** (*supra*), the suit was filed for declaration that the plaintiffs were absolute owners and also for injunction. While dismissing the said Appeal, the Hon'ble Supreme Court held that the claimants have not asked for annulment of the sale deed and without claiming the said relief, no relief of declaration

of absolute title can be granted in favour of the plaintiff and, therefore, the Hon'ble Supreme Court has observed that the plaint was drafted cleverly but it was hopelessly time barred where the annulment of the registered sale deed was not asked for. The facts of the said case are distinguishable to the facts and evidence of the present case.

8. In the present case, a strong documentary as well as oral evidence is brought on record from the plaintiff's side that the original plaintiff used to remain under the influence of liquor and was not mentally stable for many years. Therefore, the order passed by the learned Judge cannot be faulted with. The observations made in this order are restricted to the issue only.

9. Civil Revision Application is dismissed.

10. I am informed that the suit of 1997 is still pending. It is the old suit. The trial Court to expedite the hearing and suit is to be tried and decided within one year. Parties to cooperate the learned Judge.

(MRIDULA BHATKAR, J.)