

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.428 OF 2016

Vishal Dattatraya Dhumal and others ... Applicants
Vs.
Gopichand Dattraya Pathare and others ... Respondents

Mr. P. S. Dani, Senior Advocate a/w. Mr. Kuldeep Nikam i/b. Mr. Chetan R. Nagare for Applicants.

Mr. S. V. Sadavarte for Respondent No.1.

Mr. Swapnil Patil for Respondents No.2 to 6.

Mr. Ameya Kulkarni for Respondents No.7 and 8.

CORAM : R. G. KETKAR, J.

DATE : MARCH 22, 2017

P.C. :

Heard Mr. Dani, learned Senior Counsel for applicants, Mr. Sadavarte, learned Counsel for respondent No.1, Mr. Patil, learned Counsel for respondents No.2 to 6 and Mr. Kulkarni, learned Counsel for respondents No.7 and 8 at length. Rule. Having regard to the narrow controversy raised in this Application as also at the request and by consent of the parties, Rule is made returnable forthwith and the Application is taken up for final hearing.

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 No.8 to 11', have challenged the judgment and order dated 01.07.2016 passed by the learned 6th Joint Civil Judge, Senior Division, Pune below exhibit-35 in Special Civil Suit No.364 of 2016. By that order, the learned trial Judge rejected the application made by defendants No.8 to 11 under Order VII, Rule 11(a) and (d) of C.P.C. inter alia contending that plaint is liable to be rejected for want of cause of action and is also barred by the law of limitation.

3. Respondent No.1, hereinafter referred to as 'plaintiff', has instituted Suit inter alia for declaration that the sale deed dated 20.05.2003 executed by defendants No.1 to 5 in favour of defendants No.6 and 7 is nominal, illegal and void and the same is not binding on the plaintiff's undivided share as also for cancellation of the consent deed dated 28.07.2003. Plaintiff has also prayed for cancellation of the sale deed dated 05.11.2015 executed by defendants No.6 and 7 in favour of defendants No.8 to 11 on the ground that it is nominal and not binding on the plaintiff.

4. In support of this Application, Mr. Dani submitted that the suit properties were owned by Damu Vishnu Zende. He died leaving behind defendants No.1 and 2 (sons) and daughter Savitra. Savitra died leaving behind plaintiff and his sister. He submitted that during his lifetime, Damu had executed sale deed on 08.01.1991 in favour of S/Sh. Uttam Ramchandra Hole and Pradeep Bhanudas Kadam. They in turn sold the suit property in favour Pandit Chandrakant Zende on 17.05.2001. Pandit Zende in turn executed sale deed in favour of S/Sh. Balasaheb Narayan Bhangire and Dattatraya Madhukar Bhangire (defendants No.6 and 7). Defendant No.1 Chandrakant was consenting party to the said sale deed. He submitted that on 28.07.2003, Damu Zende and his sons Macchindra Anil and Sunil executed consent deed in favour of S/Sh. Balasaheb Bhangire and Dattatraya Bhangire. Plaintiff is witness to the consent deed. He submitted that Damu died on 19.08.2006. During his lifetime, Damu did not challenge the sale deed executed on 08.01.1991. Once Damu executed sale deed on 08.01.1991, he was divested of his right, title and interest in the suit property. Consequently, plaintiff cannot maintain the Suit. That apart, plaintiff is also witness to the consent deed dated 28.07.2003. The present Suit is instituted in the year 2016 challenging the consent deed as also sale deed dated 20.05.2003, which

is hopelessly barred by limitation. He submitted that though in the impugned order, the learned trial Judge has reproduced the contentions advanced on behalf of defendants No.8 to 11, more particularly in paragraphs 6, 7 and 15, the learned trial Judge did not deal with these contentions at all. Defendants No.8 to 11 also relied upon the decision of the Apex Court in ***T. Arivandandam Vs. T. V. Satyapal*, AIR 1977 SC 2421**. Even this ruling was not considered by the learned trial Judge. He submitted that the contention that the Suit is barred by limitation was specifically agitated before the learned trial Judge. However, the learned trial Judge overruled that objection by observing that the issue of limitation is a mixed question of law and fact. He submitted that basically, plaintiff has no locus to maintain the Suit.

5. On the other hand, Mr. Sadavarte supported the impugned order. He submitted that the contention of defendants No.8 to 11 based upon the sale deed dated 08.01.1991 was dealt with by the learned trial Judge in paragraph 17. Plaintiff came with the case that Damu Zende had never executed any sale deed of the suit property. He further submitted that while considering the application under Order VII, Rule 11, the Court has to consider only the averments in the plaint. In support of this submission, he relied upon the decision of this Court in the case of ***P. V. Guru Raj Reddy Vs. P. Neeradha Reddy*, 2015 (2) ALL MR 986** as also ***Merit Magnum Constructions Vs. Nand Kumar Anant Vaity*, 2014 (7) ALL MR 252**.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. A perusal of the material on record prima facie indicates that Damu Zende had executed the sale deed on 08.01.1991 in favour of S/Sh. Uttam Ramchandra Hole and Pradeep Bhanudas Kadam. Damu

died on 19.08.2006. During his lifetime, he did not challenge the sale deed. A perusal of the plaint undoubtedly shows that plaintiff has not disclosed execution of the sale deed dated 08.01.1991 by Damu in favour of S/Sh. Uttam Ramchandra Hole and Pradeep Bhanudas Kadam.

7. In the case of **T. Arivandandam** (*supra*), the Apex Court has held that the trial Court must remember that if on a meaningful not formal reading of the plaint, it is manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII Rule 11 of C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clever, drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X of C.P.C. The said decision was also referred by the Division Bench of this Court in **Merit Magnum Constructions** (*supra*). A perusal of the impugned order also shows that the learned trial Judge has not dealt with this contention though that is specifically reproduced in paragraphs 6, 7 and 15. In view thereof, the impugned order cannot be sustained and as such is liable to be set aside thereby restoring application exhibit-35 made by defendants No.8 to 11. Hence the following order:

- a. Impugned order is set aside and application exhibit-35 is restored to the file of the learned trial Judge;
- b. While deciding the application, the learned trial Judge will bear in mind the principle laid down by the Apex Court in the case of **T. Arivandandam** (*supra*);
- c. All contentions of the parties on merits are expressly kept open;
- d. Rule is made absolute in the aforesaid terms with no order as to costs;

(R. G. KETKAR, J.)