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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL No. 1281 OF 2014

WITH

CIVIL APPLICATION No. 3163 OF 2014

IN

FIRST APPEAL No. 1281 OF 2014

WITH

CIVIL APPLICATION No. 3603 OF 2016

IN

FIRST APPEAL No. 1281 OF 2014

WITH

WRIT PETITION No. 11401 OF 2015

Vinod Anand

....Appellant
(Original Plaintiff)

Vs.

Mr. Chandreshkhar Madhav Joglekar and Ors.

....Respondents
(Original Defendants)

Mr. Pravin Samdhani, Senior Counsel a/w. Rishikesh Soni a/w. Samit Shukla
a/w. Rishabh Jogani i/b. DSK Legal for the Appellant

Mr. Atul Damle, Senior Counsel i/b. Leena Patil for Respondent No.9

Mr. Roshan Tanna for Respondent No.1

Mr. Ram Apte, Senior Counsel a/w. Mr. N.R. Bubna for Respondent No.1 in WP
No. 11401 of 2015.

Mr. Chitan Shah i/b. Sandesh Patil for Respondent No.8

CORAM : V.M. KANADE &

C.V. BHADANG, JJ

DATE : APRIL 26, 2017

P.C. :

1. Heard Shri Samdhani, learned Senior Counsel appearing on behalf of the Appellant and learned counsel for Respondent No.1 and 8 and Shri Atul Damle, Senior Counsel appearing on behalf of Respondent No.9.

2. The Appellant is aggrieved by an order dated 30th July, 2014 passed by the Learned 6th Joint Civil Judge, Senior Division, Thane in an application filed by Defendant No.9 under Order 7 Rule 11 of the Code of Civil Procedure, 1908.

3. Brief facts which are relevant for the purpose of deciding this appeal are as under :

3.1 One Balwant during his lifetime conveyed the suit properties to the Appellant - Original Plaintiff by a Deed of Conveyance dated 20th September, 1990, The said Balwant died on 31.12.1993. He left behind an alleged Will dated 26.12.1982. By the said Will, the said Balwant bequeathed his all properties to his wife. According to the Appellant, since Balwant himself had conveyed the suit properties on 20th September, 1990 before he expired, they did not form part of his estate from 20th September, 1990.

3.2 Lilabai - wife of Balwant, died on 22.6.1998 and by her alleged Will

dated 5th February, 1993 she bequeathed her properties to Madhav Joglekar (father of Respondent No.1).

3.3 The Plaintiff filed a suit against Defendant Nos. 1, 2 and 3 and after the suit was filed, a search was taken in the office of the Registrar of Sub-assurances and one conveyance deed dated 18.7.2008 and two agreements for sale dated 26.3.2010 and 9.4.2013 were discovered.

3.4 An application was made for amendment to the plaint, which inter alia sought cancellation of the aforesaid conveyance and agreements and impleadment of respondent Nos. 4 to 9. The said application for amendment was allowed by the Learned 6th Joint Civil Judge, Senior Division, Thane.

3.5 Thereafter, on 3rd May, 2014, an application was filed by the Respondent No.9 (Original Defendant No.9) under Order 7 Rule 11 (d) of the CPC for rejection of the plaint on the ground that the suit is barred by limitation.

3.6 By the impugned order dated 30th July, 2014, the Learned 6th Joint Civil Judge, Senior Division, Thane came to a conclusion that the suit was barred by law of limitation and dismissed the suit under Order 7 Rule 11(d).

4. Shri Samdhani, learned Senior Counsel appearing on behalf of the Appellant submits that the impugned order could not have been passed in an application filed under Order 7 Rule 11 (d) of the Civil Procedure Code. He submitted that the plea of limitation, being a disputed question of fact and law, and could not be decided under Order 7 Rule 11(d). He submitted that perusal of the averments made in the plaint are not sufficient to arrive at the conclusion that the suit was barred by limitation. In support of the said submissions, he

relied on several judgments of the Apex Court. Firstly, he relied on the judgment of the Apex Court in the case of **Popat And Kotecha Property Vs. State Bank of India Staff Association [(2005) 7 Supreme Court Cases 510]**. He then relied on the judgment of the Apex Court in the case of **Ramesh B. Desai and Ors. Vs. Bipin Vadilal Mehta and Ors. [(2006) 5 Supreme Court Cases 638]**. He then relied on the judgment of the Apex Court in the case of **C. Natrajan Vs. Ashim Bai and Anr. [(2007) 14 Supreme Court Cases 183]** and lastly, he relied on the judgment of the Apex Court in the case of **Vaish Aggarwal Panchayat Vs. Inder Kumar and Ors. [2015 SCC Online SC 751]**. He submitted that the observations made by the Apex Court in the case of Popat And Kotecha Property (supra.) were followed right upto the last judgment which was reported in 2015 SCC Online 751 in the case of Vaish Aggarwal Panchayat Vs. Inder Kumar and Others.

5. On the other hand, Shri Damle, learned Senior Counsel appearing on behalf of Respondent No.9 has relied on the judgment of the Apex Court in the case of **Hardesh Ores (P) Ltd. Vs. Hede and Company[(2007) 5 Supreme Court Cases 614]**. He submitted that the Three Judges' Bench of the Apex Court has held that the question as to whether the application under Order VII Rule 11 (d) would be maintainable on the ground that the suit is barred by limitation, would depend on the facts of each case. Therefore, it could not be said that, as a matter of general principle, no application filed under Order 7 Rule 11 (d) of CPC is maintainable. He submitted that from the averments made in the plaint it could be seen that the suit was barred by limitation.

6. On the other hand, Shri Samdhani, learned Senior Counsel appearing on behalf of the Appellant -Original Plaintiff submits that from the averments

made in the plaint, it could not be said that the suit was barred by limitation.

7. Shri Damale, learned Senior Counsel appearing on behalf of Respondent No.9 also relied on the two judgments of this Court delivered by the Goa Bench of the Bombay High Court by one of us viz. Brother C.V. Bhadang, J. in the cases of (1) **Fortis Hospitals Ltd. And Ors. v. Antonieta Ribeiro e Souza & Ors.** [2017 (1) Bom. C.R. 436] and; (2) **Selwyn Agnelo Botelho vs. Mr.Norton D'Souza** [2016 SCC Online Bom 5017] . He submitted that in both these cases, after examining the ratio of judgment of the Apex Court, the Learned Single Judge has observed whether a suit is barred by limitation would depend on the facts of each case.

8. After hearing both the sides at length, we are of the view that in the case of the C. Natrajan (supra.), the Apex Court has in paragraphs 12 and 13 placed reliance on the ratio of the judgment of the Apex Court in the case of **Balasaria Construction (P) Ltd. v. Hanuman Seva Trust** [(2006) 5 SCC 648] and the same is reproduced as under:

“12. However, we may notice that another Division Bench of this Court, in *Balasaia Construction (P) Ltd. v. Hanuman Seva Trust*³ stated the law thus : (SCC p.661, para 8)

“8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the

3 (2006) 5 SCC 658

opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court touching upon the merits of the dispute are set aside but the conclusion arrived at by the High Court is affirmed. We agree with the view taken by the trial court that a plaint cannot be rejected under Order 7 Rule 11(d) of the Code of Civil Procedure.”

“13. In the said decision, it may be placed on record, on the question as to whether Order 7 Rule 11(d) can be applied when a suit was filed on the premise that a suit is barred by limitation, this Court noticed: (Balasaria Construction case³, SCC pp. 660-61, para 4)

“4. This case was argued at length on 30-8-2005. Counsel appearing for the appellant had relied upon a judgment of this Court in *N.V. Srinivasa Murthy v. Mariyamma*⁴ for the proposition that a plaint could be rejected if the suit is ex facie barred by limitation. As against this, counsel for the respondents relied upon a later judgment of this Court in *Popat and Kotecha Property v. SBI Staff Assn.* in respect of the proposition that Order 7 Rule 11(d) was not applicable in a case where a question has to be decided on the basis of fact that the suit was barred by

³ (2006) 5 SCC 658.

⁴ (2005) 5 SCC 548

limitation. The point as to whether the words 'barred by law' occurring in Order 7 Rule 11 (d) CPC would include the suit being 'barred by limitation' was not specifically dealt with in either of these two judgments, cited above. But this point has been specifically dealt with by the different High Courts in *Mohan Lal Sukhadia University v. Priya Soloman*⁵, *Khaja Quthubullah v. Govt. of A.P.*⁶, *Vedapalli Suryanarayana v. Poosarla Venkata Sanker Suryanarayana*⁷, *Arjan Singh v. Union of India*⁸ wherein it has been held that the plaint under Order 7 Rule 11(d) cannot be rejected on the ground that it is barred by limitation. According to these judgments the suit has to be barred by a provision of law to come within the meaning of Order 7 Rule 11 CPC. A contrary view has been taken in *Jugolinija Rajia Jugoslavija v. Fab Leathers Ltd.*⁹, *National Insurance Co. Ltd. v. Navrom Constantza*¹⁰, *J. Patel & Co. v. National Federation of Industrial Coop. Ltd.*¹¹ and *SBI Staff Assn. v. Popat & Kotecha Property*¹². The last judgment was the subject-matter of challenge in *Popat and Kotecha Property v. SBI Staff Assn.* This Court set aside the judgment and held in para 25 as under: (SCC p. 517).

“25. When the averments in the plaint are considered in the background of the principles set out in *Sopan Sukhdeo* case

5 AIR 1999 Raj 102

6 AIR 1995 AP 43

7 (1980) 1 An LT 488 : (1980) 1 APLJ 173 (HC)

8 AIR 1987 Del 165

9 AIR 1985 Cal 193

10 AIR 1988 Cal 155

11 AIR 1996 Cal 253

12

the inevitable conclusion is that the Division Bench was not right in holding that Order 7 Rule 11 CPC was applicable to the facts of the case. Diverse claims were made and the Division Bench was wrong in proceeding with the assumption that only the non-execution of lease deed was the basic issue. Even if it is accepted that the other claims were relatable to it they have independent existence. Whether the collection of amounts by the respondent was for a period beyond 51 years needs evidence to be adduced. It is not a case where the suit from statement in the plaint can be said to be barred by law. The statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11. This is not so in the present case.”

9. From these judgments, it appears that at one stage, the matter was referred to the Three Judges' Bench, since it was felt that whether there was a conflict between the judgments in the cases of **N.V. Srinivasa Murthy v. Mariyamma [(2005) 5 SCC 548]** and **Popat and Kotecha Property v. SBI Staff Association [(2005) 7 Supreme Court Cases 510]**. The Three Judges' Bench, however, came to the conclusion that there was no apparent conflict between the two judgments. From the aforesaid observations, it is apparent that the view taken by the Apex Court in the case of **Balasaria Construction (P) Ltd. (supra.)** is now upheld. The learned Single Judge of this Court also has taken the same view and has observed that if there is a disputed question of fact, then the suit cannot be dismissed under Order 7 Rule 11 (d).

10. In view of the law laid down by the Apex Court, therefore, it can be seen that whether a suit is barred by limitation would depend on the facts of each case.

11. Perusal of the plaint in our view, clearly reveals that it is not possible to come to the conclusion that there is no dispute on the question of limitation. Therefore, we are of the view that since question of limitation is a mixed question of law and fact, ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by limitation. We are, therefore, satisfied that the view taken by the Learned Single Judge of Trial Court cannot be sustainable. The impugned order, therefore is set aside. Parties are relegated to the Trial Court. It will be open for Defendant No.9 to raise any plea available to him under the law including the plea of limitation and maintainability of the suit. The appeal is allowed in the aforesaid terms and disposed of accordingly.

12. In view of this, Writ Petition No. 11401 of 2015 is de-tagged from the appeal and it be placed for direction on 8th June, 2017. In view of disposal of the appeal, nothing survives in the civil applications filed therein and they are accordingly disposed of.

12. Since the Appellant is a senior citizen, application filed under Exhibits '5' and '53' may be heard and disposed of expeditiously by the Trial Court. All the contentions of all the parties are kept open.

[C.V. BHADANG, J.]

[V.M. KANADE, J.]