

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.233 OF 2016
with
CAA/316/2016

Survin Development Corporation ... Appellant

Vs.

Ruchir Jain & Ors. ... Respondents

Mr.Dipesh Gaonkar for the Appellant
Mr.S.S. Joshi with Rajiv Sharma for Respondent Nos.1, 2 & 3
Mr.P.P. Prabhu for Resp. No.4

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **OCTOBER 6, 2017**

P.C.:

1. This Appeal from Order is directed against the order dated 4.9.2015 passed by the learned Adhoc Judge, City Civil Court, Mumbai in Suit No.8498 of 1992 and also against the order dated 14.10.2015 passed in Notice of Motion No.1518 of 2015 in the same suit.

2. The appellant is the original defendant No.1, a Developer, who by agreement dated 27.4.1988 had promised to sell a row house No.D38 in one Ashokvan complex to the plaintiffs. The suit was filed on 17.1.1992 for the specific performance. Defendant No.1 took out

a Notice of Motion praying that this suit be stayed as earlier Suit No.1537 of 1988 is filed by one Ms.Helen Paes i.e., the original defendant No.3 i.e., respondent No.5. It was contended that the issues involved in both the suits are substantially and directly same and the parties are also same in both the civil suits.

3. The learned Counsel for the appellant has submitted that the order passed by the learned Judge rejecting the Notice of Motion is erroneous. The learned Judge ought to have considered that all the ingredients under section 10 of the Civil Procedure Code are fulfilled.

4. The other order under challenge is in respect of the point of limitation. Defendant No.1 i.e., the appellant, has challenged that the suit is barred by law of limitation. The learned Counsel submitted that as the date of agreement is 24.7.1988 and time was the essence of contract, as mentioned in the contract, the suit ought to have been filed, at the most, on or before 26.4.1991. But the suit is filed on 17.1.1992 and hence, it is time barred. He has further submitted that the learned trial Judge has erred in appreciating that the issue of limitation especially when the averments in the affidavit of plaintiff Alka Jain disclose that an admission on her part that she had received a notice of the Suit No.1537 of 1988 filed by defendant No.3

in June, 1988. The learned Counsel submitted that when the notice of the other suit filed in respect of the same property was received by the plaintiff, therefore, even if it is assumed that the time started running from that day, yet, the limitation was over in June, 1991.

5. In support of his submissions, he relied on the judgment of the learned Single Judge of this Court in the case of **Abdul Dadamiya Shaikh vs. Jagannath Murlidhar Rathi**¹.

6. The learned Counsel appearing for the respondents/original plaintiffs has supported the order dated 4.10.2015 passed by the learned Judge. The learned Counsel further submitted that these two suits are filed by two different plaintiffs for the same suit property with different reliefs. The learned Counsel submitted that though the agreement is of 1988, the suit was within limitation as there was no termination of the said agreement by the appellant.

7. On perusal of the impugned order, it is found that the defendant i.e., the present appellant, has sold the same row house to two parties and, therefore, though the parties are the same, the issues involved are not directly and substantially one and the same as contemplated u/s 10 of the Code.

1 AIR 2002 Bombay 413

8. In the judgment in the case of **Abdul Dadamiya Shaikh vs. Jagannath Murlidhar Rathi** (supra), the suit was filed under Specific Relief Act, it is found that the issue of limitation was raised and while dealing with that issue, the learned Judge of this Court has held that the period of three years can be counted from the date of the knowledge of the purchaser that the successive vendor claimed ownership in the land and which is against the interest of the purchaser i.e., the plaintiff. This ratio is useful to the appellant in the present case because of the different set of facts. On a perusal, it is found that the defendants have issued a letter thereafter on 22.2.1990 by which they have offered alternate tenement in lieu of the suit row house. Thus, even though it is assumed that when the plaintiff Alka had knowledge that the other purchaser is claiming the ownership in the suit row house and which is against her interest, yet, the suit is filed within limitation because of the offer given by the defendants of alternate tenement in lieu of the suit row house. Thus, in fact, the limitation started from 22.2.1990 and the suit is filed on 17.1.1992.

9. Under such circumstances, I do not find any illegality in both the impugned orders passed by the learned Judge.

10. Hence, the appeal is dismissed. In view of the dismissal of the Appeal from Order, Civil Application also stands dismissed.

(MRIDULA BHATKAR, J.)