

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
REVIEW PETITION NO.112 OF 2017
IN
WRIT PETITION NO.3218 OF 2015

Haribhau Kerba Mangade and others
All through their common C.A.

Vitthal K. Mangade ... Petitioners

Vs.

Bhagwan Nathoba Mangade and another ... Respondents

Mr. A. V. Borwankar i/b. Mr. V. D. Borwankar for Petitioners.

Mr. Rajesh S. Jadhav for Respondents.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 04, 2017

P.C. :

Heard Mr. Borwankar, learned Counsel for the petitioners and
Mr. Jadhav, learned Counsel for respondents at length.

2. By this Petition under Section 114 read with Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), petitioners have sought review of the order dated 13.12.2016 passed by this Court in Writ Petition No.3218 of 2015. By that order, Petition instituted by the plaintiffs challenging the order dated 08.08.2014 passed by the learned 18th Joint Civil Judge, Junior Division, Pune below exhibit-142 in Regular Civil Suit No.2660 of 1988 was dismissed.

3. Mr. Borwankar submitted that Petition was instituted challenging order dated 18.06.2009 below exhibit-97 as also order dated 08.08.2014 passed below exhibit-142. The order under Review dealt with the order dated 08.08.2014 passed below exhibit-142. This Court did not deal with the challenge to the order dated 18.06.2009 below exhibit-97.

4. He further submitted that defendant No.1 had filed written statement as also raised counter-claim on 07.11.2008. Defendants No.2 and 3 filed written statement and also set up counter-claim on 05.12.2008 that is nearly after 19 years from instituting the Suit. The counter-claim is, therefore, clearly barred by law of limitation. He submitted that while passing the order on 13.12.2016, this Court did not deal with counter-claim set up by defendants No.2 and 3. He also relied upon the decision of this Court in ***Kanayalal Madhavji Thakkar Vs. Padmanabh Builders***, 2011 (1) Mh.L.J. 939, and in particular, paragraph 8 thereof.

5. I have considered the submissions advanced by Mr. Borwankar. I have also perused the material on record. A perusal of order dated 13.12.2016 shows that this Court considered challenge raised by the plaintiffs to the order dated 08.08.2014. In other words, the challenge raised to the order dated 18.06.2009 was not considered. In view thereof, I heard Mr. Borwankar as regards challenge to the order dated 18.06.2009 passed below exhibit-97. Application exhibit-97 was filed by the plaintiffs inter alia praying for not accepting the counter-claim set up by the defendant No.1 and defendants No.2 and 3. During the pendency of the proceedings, defendant No.1 expired. The challenge is, therefore, restricted to the counter-claim set up by the defendants No.2 and 3. The learned trial Judge, while rejecting the application on 18.06.2009 observed that the Suit is instituted by the plaintiffs in the year 1988. Consequently, the amendment of 2002 of C.P.C. is not applicable. The learned trial Judge, therefore, permitted defendants to submit written statement along with the counter-claim subject to costs. In view thereof, I do not find that the learned trial Judge has committed any error in passing the order on 18.06.2009.

6. This brings me to the order under review. As noted earlier,

application exhibit-142 for framing preliminary issue and for deciding the same, was filed by the plaintiffs under Order VII, Rule 11(a) and (d) of C.P.C.. Plaintiffs contended that the counter-claim set up by the defendants No.2 and 3 in the year 2008 is clearly barred by law of limitation. Mr. Borwankar submitted that defendants filed combined reply to application for interim relief on 08.03.1989. Thus, defendants No.2 and 3 were fully aware of filing of the Suit by the plaintiffs against them. However, they filed their written statement and set up counter-claim in the year 2008, which is nearly after 19 years. The learned trial Judge as also this Court committed error in holding that the question of limitation is a mixed question of law and fact. Mr. Borwankar relied upon paragraph 8 of the decision of this Court in **Kanayalal Madhavji Thakkar** (*supra*), which is to the following effect:

“8. The issue before the Court is as to whether the Plaintiff to the counter claim can by a clever act of draftsmanship escape from the consequence of the counter claim being barred by limitation by omitting to refer to the termination dated 27 February 2000. The answer to this is in the negative. Order 7 Rule 11(d) of the Code of Civil Procedure, 1908 provides for the rejection of the Plaint inter alia whether the suit appears from the statements in the Plaint to be barred by any law. Now, it is a well settled position in law that it is the statements in the Plaint which have to the suit is barred by any law. No amount of evidence can be let in for the purpose of making that determination. In this case, the Plaintiff to the counter claim has instituted the counter claim cognizant of the case of the Defendant who was the Plaintiff in the original suit and to the circumstance that it is the contention of the Defendant to the counter claim that the agreement of 1 October 1989 has been terminated on 7 February 2000. Both the letter dated 7 February 2000 as well as the very institution of the suit in this Court on 27 March 2000 constitute a notice of refusal to perform to the Defendant to the suit. A suit for a declaration had to be filed within a period of three years of the accrual of a right to sue while a suit for specific performance had to be filed within a period of three years of a notice of the refusal to perform. The suit has been filed beyond a period of three years. Hence, on the basis of the counter claim as it stands, and without adding or detracting anything from it, it is ex-facie clear that the claim is barred by limitation.”

7. Relying upon this paragraph, he submitted that as the defendants No.2 and 3 had notice of filing of the Suit, the counter-claim set up by them in the year 2008, on the face of it, is barred by limitation.

8. I do not find any merit in this submission. While rejecting the application, in paragraph 8, the learned trial Judge dealt with the written statement and the counter-claim filed by the defendant No.1. In paragraph 9, the learned trial Judge dealt with the written statement and the counter-claim filed by defendants No.2 and 3 on 05.12.2008. In paragraph 10, the learned trial Judge dealt with the objection raised by the plaintiffs on the ground that defendants are challenging the sale deeds executed in the year 1963 and 1978 and the counter claim is barred by law of limitation. The learned trial Judge observed that the objection of limitation is a mixed question of law and fact and such question needs to be answered after giving both the parties opportunity to lead their part of evidence. The learned trial Judge noted that plaintiffs are leading their evidence. The learned trial Judge accordingly kept the issue of limitation open. In other words, the learned trial Judge has not concluded on the issue of limitation either way. Mr. Borwankar states that as of today, plaintiffs have examined two witnesses.

9. In view thereof, I do not find that any case is made out for reviewing the order dated 13.12.2016. Hence, Review Petition fails and the same is dismissed. The learned trial Judge will decide the Suit on the basis of the evidence on record and in accordance with law, uninfluenced by the observations made in the impugned order as also order dated 13.12.2016 and this order. Order accordingly.

(R. G. KETKAR, J.)