

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 147 OF 2017

Kalyanrao s/o Tryambakrao Patil
& others

Applicants

Versus

Bapurao s/o Tryambakrao Patil
& others

Respondents

Mr. C.D. Biradar, advocate for applicants.

Mr. R.B. Deshmukh, advocate for respondent no.1.

CORAM : M.S. SONAK, J.

DATE : 10th JANUARY, 2018

ORDER :

1. Heard Mr. Biradar, learned counsel for applicants and, Mr. Deshmukh, learned counsel for respondent no. 1 (original plaintiff).

2. Challenge in this revision application is to the order dated 26.07.2017 by which, the learned trial Judge has dismissed applicants' application under Order VII Rule 11 of the Code of Civil Procedure for rejection of plaint on the ground that the suit is barred by law of limitation.

3. Learned counsel Mr. Biradar submits that one of the reliefs sought for in the plaint pertains to declaration of will no. 2315/2002, which was executed in the year 2002, as being a forged and fabricated. Mr. Biradar submits that the predecessors-in-title

of applicants had filed suit in relation to the suit property and therefore, the plaintiff had full knowledge as regards the claims and counter claims. He submits that, from this, it is quite clear that the suit is barred by limitation.

4. Mr. Biradar further submits that in the suit, as originally instituted in the year 2008, there was no relief as regards the will of 2002. However, the plaint was amended in the year 2015 and, this relief has been applied for. Mr. Biradar submits that the relief in respect of will of the year 2002 was ex facie barred by limitation in the year 2015.

5. Mr. Biradar further submits that the learned trial Judge has not considered the application under Order VII Rule 11 of the Code of Civil Procedure in its proper perspective and has rejected the same only on the ground that the suit has reached at an advanced stage where the plaintiff and his witnesses have already adduced their evidence. Mr. Biradar submits that it is settled position in law that an application under Order VII Rule 11 of the Code of Civil Procedure can be taken up at any stage of the proceeding and if, the parameters of the said legal provision are satisfied, then, the same cannot be rejected on the ground that it has been allegedly taken out belatedly. Mr. Biradar submits that this is a clear case of failure to exercise jurisdiction or in any case, exercise of jurisdiction with material irregularities. Therefore, Mr. Biradar submits that revisional jurisdiction may be exercised, the impugned order may be set aside, application under Order VII Rule 11 of the Code of Civil Procedure may be allowed and, the plaint be rejected.

6. Mr. Deshmukh, learned counsel for respondent no. 1 points out that there are several reliefs other than declaration with regard to alleged will of the year 2002. He points out that plaintiff's father, who allegedly executed the will in the year 2002, expired only in the year 2006. Until demise of plaintiff's father, there was no question for the will, which was allegedly executed in the year 2002, having any legal efficacy whatsoever. He points out that the suit was instituted in the year 2008. Plaintiff's mother has expired in the year 2012. He points out that the relief in regard to the will was introduced by way of amendment and, the amendment always relates to the date of institution of the suit. He submits that this is not a case where, on the basis of any statement in the plaint, it is clear that the suit is barred by law of limitation. In these circumstances, he submits that there is no case made out by applicants for invocation of provisions of Order VII Rule 11 of the Code of Civil Procedure.

7. On perusal of the plaint, it cannot be said that there is any statement therein on the basis of which, it can be clearly said that the suit in its entirety is barred by law of limitation. Apart from the relief with regard to the will of the year 2002, there are other reliefs applied for in the plaint. The relief, insofar as challenge to the will is concerned, does not relate to the year 2002 but, at the highest may relate to the year 2006 i.e. the date of demise of plaintiff's father, who is alleged to have made the will. Taking into consideration all these facts which, at the highest, may be said to be mixed issues of law and fact, it cannot be said that any case has been made out for exercise of powers under Order VII Rule 11 of the Code of Civil Procedure.

8. Normally, when amendment to the pleadings is permitted, the same relates to the date of institution of the suit. This is however, not an invariable rule and, it is open for the parties to contend and establish otherwise. Therefore, merely because the plaint was permitted to be amended in the year 2015, so as to include challenge to the will which was executed in the year 2002 or which became effective in the year 2006, that by itself does not make it absolutely clear that the suit in its entirety stands barred by law of limitation. At the highest, this is a debatable issue involving questions of law and fact. Unless on the basis of statement in the plaint, there is no doubt that the suit is barred by law of limitation, there arises no question of rejection of the plaint by invoking provisions of Order VII Rule 11 of the Code of Civil Procedure. At the stage of consideration of such application, the defence raised by defendants is quite irrelevant. The focus has to be entirely on the plaint and statements in the plaint. Thus, considering the scope of provisions of Order VII Rule 11 of the Code of Civil Procedure, it cannot be said that there is any jurisdictional error in the impugned order.

9. Learned counsel Mr. Biradar is however right in his submissions that the learned trial Judge could not have rejected the application under Order VII Rule 11 of the Code of Civil Procedure merely because, the suit was at an advanced stage and the evidence of plaintiff and his witnesses had already concluded. That part of the reasoning is therefore, not approved. However, upon due consideration of Mr. Biradar's contentions in support of application under Order VII Rule 11 of the Code of Civil Procedure, it is seen that this is really not a case where the plaint was

required to be rejected on the ground that the suit stands barred by limitation. No doubt, it is open to the applicants to raise the issue of limitation. Such time is required to be decided alongwith all other issues which arise in the suit. In case no such issue is framed, the learned trial Judge is requested to frame the same because even otherwise, it is the duty of the Court to go into the issue of limitation whether or not the parties may have raised it. If the parties choose to lead evidence on this issue, the learned trial court may permit them to do so.

10. Accordingly, Civil Revision Application is dismissed. It is however, made clear that the observations in the impugned order or those made in the present matter are restricted to decide whether application under Order VII Rule 11 of the Code of Civil Procedure was required to be allowed or not. Accordingly, such observations need not influence the learned trial Judge while deciding the suit on its own merit and in accordance with law.

11. Save and except, the direction for framing additional issue of limitation and further direction to permit the plaintiff or his witnesses to adduce evidence on this issue, the impugned order is not interfered with. Revision application is disposed of in aforesaid terms. There shall be no order as to costs.

12. All concerned to act on authenticated copy of this order.

(M.S. SONAK, J.)