

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 200 OF 2017

Shirish s/o Uddhavrao Yadav
Age 41 years, occup. Advocate,
R/o Office at Sudarshan Palace,
Shivaji Chowk, Latur, Dist.Latur .. Petitioner/
Ori.Deft. No.5

versus

1. Smt. Nirmalabai wd/o Shridhar
Kshirsagar, Age 60 years, Occup.
Household, R/o Baspur, Tq.Nilanga,
Dist. Latur, at present : R/o C/o
Birajdar Wada, Khadgaon Road,
Wale English School, Latur, .. Respondent/
Tq. & dist. Latur Ori. Plaintiff
2. Smt. Shantabai wd/o Dattatraya
Kshirsagar, Age : 78 years, occup:
Household, R/o Sinhgad Society,
Kaner Road, Latur, Tq. & dist. Latur
3. Shrirang Dattatray Kshirsagar,
Age : 43 years, occup. Agril.,
R/o As above
4. Kaveri w/o Shahuraj Shinde (Patil)
Age : 48 years, occup. : Household,
R/o C/o Nagnath Londhe, opp.
Chavanda Hospital, Barshi Road, Latur
5. Jamuna w/o Balaji Kirwale,
Age : 45 years, occup. Household,
R/o As above
6. Hema w/o Udhav More,
Age : 33 years, occup: Household, .. Respondents/Orig.
R/o Wadgaon Sheri, Pune, Defendants 1 to 4
At Present Terna Colony, Nilanga, & 6
Tq. Nilanga, Dist. Latur

Mr Shrikishan S. Shinde, Advocate for applicant
Mr N. D. Kendre, Advocate for respondents no. 1 and 6
Mr V. C. Solshe, Advocate for respondents no. 2 and 5

CORAM : SUNIL P. DESHMUKH, J.

DATE : 18th September, 2018

ORAL JUDGMENT :

1. Succinctly referred to, petitioner is before this court purporting to be aggrieved by order dated 01-08-2017 on his application Exhibit - 40 in regular civil suit bearing no. 405 of 2014. Petitioner is defendant no. 5 in said suit filed by present respondent no. 1 seeking possession of the properties referred to under prayer clause (A), partition of house properties and agricultural properties and declaration of sale deed dated 07-12-2009 executed in favour of present petitioner to be not binding on her and that heirship certificate standing in the names of deceased Dattatraya, Shantabai and defendant no. 1 dated 07-10-2008 be declared to be not binding on her.

2. It is the contention of the petitioner, while sale deed had been executed in his favour on 07-12-2009 in respect of property purchased by him bearing plot no. 47 in survey number 181 situated at Rajashree Nagar, Latur, present respondent no. 1 and respondent no. 6 had on 09-12-2009 filed special civil suit bearing number 223 of 2009 seeking declaration them being owners of the same and for injunction

putting restraint on present petitioner who had been defendant no. 3 in said suit along with his vendors who are present respondents no. 2 and 3 from causing obstruction to peaceful possession of present respondent no. 1 and 6.

3. Respondents no. 1 and 6 – plaintiffs in aforesaid special civil suit bearing no. 2230 of 2009 filed *pursis* seeking permission to withdraw said suit with permission to file fresh suit. The *pursis* had been read and recorded by the court. An order came to be passed on 30-11-2011, allowing withdrawal of said suit unconditionally and the suit had been disposed of. Present respondent no. 1 subsequently filed regular civil suit bearing no. 405 of 2014 referred to hereinbefore.

4. Petitioner had moved application Exhibit – 40 seeking rejection of plaint in aforesaid regular civil suit bearing no. 405 of 2014 pursuant to order VII, rule 11 of the Code of Civil Procedure, 1908.

5. It is being contended by learned counsel Mr. S. S. Shinde on behalf of the petitioner that while pursuant to order passed earlier, special civil suit bearing no. 223 of of 2009 had been allowed to be withdrawn unconditionally without permission to file fresh suit, present suit in respect of said

property would be hit by Order XXIII, rule 1(4) (b) of the Code and further that while the sale deed in favour of petitioner is of the year 2009, present suit has been instituted in 2014 and, as such, is barred by the law of limitation. It is contended on behalf of the petitioner that trial court under impugned order dated 01-08-2017 has rejected the request under application Exhibit – 40 for all erroneous reasons.

6. Learned counsel for the petitioner submits that, as a matter of fact, the court has in paragraph no. 10 of its judgment, has observed that suit seems to be barred by law of limitation which reads, thus :

" 10. As regard to the objection of limitation, the limitation is a question of mix facts and law it requires full trial. At this stage it can be said that the suit is not within limitation. Hence there is no merit in the submission made by defendant no. 5. "

7. Learned counsel refers to Order XXIII, rule 1(4) (b) of the Code which, according to him, provides that when the plaintiff abandons any suit or part of claim under sub-rule (1) or withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he is precluded from instituting fresh suit in respect of such subject matter or such part of the claim. He submits prohibition is on institution of

fresh suit and in present matter since earlier suit in respect of the property purchased by petitioner had been withdrawn by plaintiffs therein without any permission to file fresh suit, subsequent suit i.e. regular civil suit bearing no. 405 of 2014 by respondent no. 1 - plaintiff is hit by provisions under Order XXIII, 23 (1)(4) of the Code. He submits, having regard to this, application Exhibit-40 ought to have been granted.

8. On the other hand, learned counsel Mr N. D. Kendre on behalf of respondents no. 1 - plaintiff and respondent no. 6 - defendant no. 6 in aforesaid regular civil suit submits that present matter is a comprehensive suit for possession and partition including relief of declaration that the sale deed in favour of petitioner is not binding on plaintiffs' share. He submits that applications pursuant to Order VII, rule 11 of the Code are to be considered only with reference to the averments in plaint and no other material can be considered.

9. He submits that reading of plaint in fresh suit would spell out that all the necessary ingredients viz; cause of action, limitation have been properly taken care of and have been spelt out in the plaint. From the same, it cannot be said that the suit is barred by law of limitation. He further

contends that as a matter of fact while an order came to be passed on the *pursis*, either it ought to have been accepted in toto or ought to have been rejected in toto. As such, the order allowing withdrawal of suit without permission to file fresh suit is not proper and is non-est.

10. He submits, the court had properly considered application Exhibit – 40 and further that the observations in paragraph no. 10 upon which the arguments on behalf of the petitioner are based that the court has considered that the suit is not within limitation are upon a sentence printed wherein typographical error appears to have been crept in as after the word '*can*', the word '*not*' appears to be missing in said observations and thus, such a mistake would not form basis for application. Paragraph no. 10 from impugned order quoted above would indicate that arguments have been advanced outside the context in which the observations had been made.

11. Learned counsel Mr. V. C. Solshe on behalf of respondents no. 4 and 5 supports the petitioner, submitting that there had been earlier round of partition among family members and earlier suit had been based on the same.

12. During the course of his submissions, learned counsel Mr. Shinde on behalf of petitioner has referred to decisions in the cases of *State of H.P. v. Achhru Ram (dead) through Lrs*, reported in *AIR 2011 HP 19* and *Narayan Jethanand and others v. Asapuri Vijay Saw Mill*, reported in *AIR 1995 Gujarat 194*. The facts in those matters are widely apart from the ones involved in present case. Cited decisions were not the cases wherein situation as prevailing in present matter had been concerned. Thus, citations being relied on, on behalf of petitioner, would not be able to carry the purpose forward for which those are referred to and relied on.

13. Perusal of the plaint in regular civil suit bearing no. 405 of 2014 would show that it is for possession and partition of properties and declaration that the sale deed executed in in favour of the petitioner to be not binding on the plaintiff. Plaint further refers to that the period consumed in earlier suit will have to be omitted from being taken into account while limitation is considered. The plaint also refers to cause of action. The grounds on which it is being claimed by petitioner that suit is outside the limitation have been prima facie accounted for giving reasons in the plaint. The court has also considered that limitation is a mixed question of law and facts

and at this stage it could not be said that suit is not within limitation. The tenor of paragraph no. 10 of impugned order shows that trial court had refuted the contention on behalf of petitioner- defendant no. 5. The contention on behalf of plaintiff referred to that the word '*not*' is missing after the word '*can*' in paragraph no. 10 of the order and it is a typographical error carried lot of substance. Prohibition on institution of suit pursuant to Order XXIII, rule 1(4) (b) is a matter to be dealt with on facts and law and the same would not enure any benefit to petitioner for rejection of plaint sought under Exhibit – 40.

14. Aforesaid apart, the legal position obtaining is that a plaint cannot be rejected in part. In the circumstances, the request under writ petition is difficult to be acceded to.

15. Civil revision application as such fails and is dismissed.

SUNIL P. DESHMUKH
JUDGE

pnd/-