

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
CIVIL REVISION APPLICATION NO.205 OF 2017

Ramesh Baburao Malve,
age: 59 years, Occ: Agriculture,
R/o Block No.B-9/8,
State Bank of India,
Awakash Grah Holiday Home, N-7,
Near Ambedkar Nagar Chowk,
CIDCO, Aurangabad.

Revision Petitioner

Versus

1 Sow.Suman Gavanaji Mankape,
age: 53 years, Occ: Household &
Business, R/o 4, Deep Nagar,
Shahnoorwadi, Aurangabad.

2 Sou. Indu Dattatraya Naik,
age: 70 years, Occ: Household &
Pensioner, R/o Bhikamchand
Nagar, Jalgaon.

3 Kishor Dattatraya Naik,
age: 49 years, Occ: Business,
R/o Bhikamchand Nagar,
Jalgaon.

Respondents

Mr.S.V.Adwant, advocate for the petitioner.
Mr.S.R.Deshpande, advocate for Respondents.

CORAM : M.S.SONAK, J.
DATE : 08th January, 2018.

ORAL JUDGMENT :

1 Heard Mr.S.V.Adwant, advocate for the petitioner and
Mr.S.R.Deshpande, advocate for Respondents.

2 Mr.Deshpande has filed appearance on behalf of Respondent No.1 (caveator) on the previous occasion and states that he would also appear on behalf of Respondents No.2 and 3. He submits that since there was wedding in the family of respondents, he was not able to file *Vakalatnama* and that the *Vakalatnama* will be filed within one week from today. Statement is accepted and on the basis of this, matter is proceeded with.

3 Rule. Rule made returnable forthwith and heard finally by consent of learned Counsel for respective parties.

4 This Revision takes exception to the order dated 22.09.2017, made by the learned Trial Judge, dismissing petitioner's application for rejection of plaint by resorting to the provisions of Order VII Rule 11 of the Civil Procedure Code.

5 Mr.Adwant, learned Counsel for the petitioner, submits that though several contentions were raised, same have not at all been considered in the impugned order. He submits that from the averments in the plaint itself, it is apparent that the suit, seeking specific performance, was barred by law of limitation. He submits that there is virtually no reasoning in the impugned order. In the alternate, he submits that the only reason, stated in the impugned order, is that the plaintiffs had issued notice on 11.01.2016 and, therefore, the cause of action has accrued on the said date and the suit is within limitation. Mr.Adwant submits that such reasoning is vitiated by perversity and the same amounts to non application of mind. On these grounds, Mr.Adwant submits that the impugned order warrants interference.

6 Mr.Deshpande, learned Counsel for the respondents, submits that the learned Trial Judge has discussed facts as well as law and there is absolutely no jurisdictional error in making of the impugned order. He points out, from reading of the plaint, that it is quite clear that the suit is not at all barred by limitation. He points out that issuance of notice dated 11.01.2016 was only one of the instance. He submits that there was previous correspondence and from the same, it is quite evident that bar of limitation was not attracted. He submits that in the present case, at the highest, limitation is a mixed issue of law and fact and, therefore, this is not a proper case for exercise of powers under Order VII Rule 11 of the Code of Civil Procedure. Mr.Deshpande submits that the Revision Application may,therefore, be dismissed.

7 If the impugned order is perused, then it is clear that upto paragraph no.4, the learned Trial Judge has only noted rival contentions of the parties. In paragraph no.5, it is noted that the arguments of the advocates for the parties have been considered at length and entire record has been perused. In paragraphs no.6 to 10, again there is reference to arguments advanced by the advocates for the parties and there is reference to certain decisions which lay down the proposition that powers under Order VII Rule 11 of the CPC may not be exercised where the issue of limitation involves adjudication of mixed question of law and facts. Till this paragraph, therefore, there is no consideration of the application or the grounds on the basis of which application under Order VII Rule 11 of the CPC was made. It is one thing to state legal position and quite another to apply the same to the facts and

circumstances. Further, such an application should be evident from perusal or reading of the impugned order itself.

8 The only reasoning, so to say, is contained in paragraphs no.11 and 12 of the impugned order, which reads as follows:

11 That the plaintiffs have not denied the dates which are mentioned by the defendant in the application however submitted that on notice to the defendant dated 11.01.2016 calling upon defendant for specific performance of contract the cause of action arose to them and matter needs to be decided on merits.

12 That this suit is for specific performance. That the plaintiffs have contended that the cause of action arose to them on notice to the defendants dated 11.01.2016. Hence, considering the application, say of plaintiffs it creates doubt, so it is needless to mention here that in a circumstances the plaint cannot be rejected. On the other hand, it will be proper to consider that whether the suit is barred by limitation on merits.

From the aforesaid, it does appear that there is no serious consideration of the contentions raised on behalf of the petitioner.

9 The entire reasoning seems to be that since, notice was issued by the plaintiffs on 11.01.2016 calling upon the defendants to specifically perform the agreement, the cause of action has accrued from the said date and consequently, it cannot be said that the suit is *ex facie* barred by limitation. The

manner, in which the period of limitation is to be construed in the matters of suits for specific performance, is quite clear from the provisions of Limitation Act itself as also several decided cases on the issue. The application made by the petitioner under Order VII Rule 11 of the CPC had raised several facets, which do not appear to have been considered while passing the impugned order. Accordingly, it will be only appropriate if the impugned order is set aside and the learned Trial Judge is required to reconsider the application under Order VII Rule 11 of the CPC on its own merits and in accordance with law.

10 At this stage, since remand is proposed, this Court refrains from making any observations as regards rival contentions of the parties. The remand is necessary because the impugned order does not reflect any consideration of contentions raised by the parties. The impugned order, at the highest, records a conclusion but the manner, in which such conclusion is arrived at, is not at all reflected from the reasons.

11 For the aforesaid reasons, the impugned order is set aside. The learned Trial Judge is directed to reconsider petitioner's application under Order VII Rule 11 of the CPC and dispose of the same as expeditiously as possible and in any case, within a period of six weeks from the date of production of authenticated copy of this order. All contentions of all the parties are kept open. No observation, in this order, is intended to affect adjudication of the application under Order VII Rule 11 of the Code of Civil Procedure, on its own merits and in accordance with law.

12 Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

Parties to act upon authenticated copy of this order.

Parties to appear before the learned trial Court on 16.01.2018 at 02.45 pm and file an authenticated copy of this order.

M.S.SONAK
JUDGE

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