

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6165 OF 2018

United India Insurance Company Ltd

...Petitioner

Versus

Dr. Anita Bharat Shah

...Respondent

....

Mr. V.Y. Sanglikar, Advocate for the Petitioner.

Ms. Ranjana Parikh, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 19th OCTOBER, 2018

P.C.

1. Heard Mr.V.Y. Sanglikar, learned counsel for the petitioner and Ms.Ranjana Parikh, learned counsel for the respondent, at length.
2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the order dated 20th March, 2018 passed by learned Judge, Court Room No.8 of the Court of Small Causes at Mumbai below Exhibit 19 in R.A.D. Suit No.710 of 2017. By that order, the learned trial Judge rejected the application made by the defendant under Order VII, Rule 11 (a) of the Code of Civil Procedure, 1908 (for short 'C.P.C') for rejection of the plaint on the ground that it does not disclose cause of action and that the suit is barred by limitation as contemplated in Order VII Rule (11) (d) of C.P.C.

3. The matter was heard at length on 3.7.2018 and notice for final disposal was issued to the respondent. The parties were put to notice that subject to the time constraint and convenience of the Court, the Petition will be disposed of finally on that date. In view thereof, Rule. Ms. Parikh waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

4. In support of this Petition, Mr. Sanglikar invited my attention to paragraph-11 of the plaint instituted by the respondent being R.A.D. Suit No.710/2017. In paragraph-11, the plaintiff asserted that by notice dated 31.5.2005, the petitioners, who are defendants therein, have terminated the tenancy of plaintiff No.1 on the ground more particularly set out therein. It is asserted that the defendants have also sent notice to the heirs and legal representatives of Dr. J.K. Gajjar, calling upon plaintiff No.1 to hand over possession of the suit premises, failing which the action under the Public Premises (Eviction of Unuauthorized Occupation) Act, 1971 (for short, 'P.P. Act') will be initiated. Plaintiff No.1 by her Advocate's letter dated 30.7.2005 replied to it and denied the contentions raised in the said notice.

5. Mr. Sanglikar submitted that as the defendants have terminated the tenancy of the plaintiffs by notice dated 31.5.2005, the plaintiffs ought to have instituted the suit within a period prescribed under Article 58 of the Limitation Act, 1963 (for short, 'Limitation Act'). He submitted that Article 58 is the residuary Article in Part-III of the First Division. Article 58 lays down that to obtain any other declaration not covered by Articles 56 and 57, the period of limitation prescribed is three years when the right to sue first accrues. In the present case, the right to sue first accrued upon service of the termination notice dated 31.5.2005. Said notice was duly served upon the plaintiffs and in fact plaintiff No.1 has also given reply on 30.7.2005. Present suit is instituted for declaration of tenancy on 30.3.2017, which is hopelessly barred by limitation. The learned trial Judge, however, observed that insofar as the issue of limitation is concerned, according to the plaintiffs the period of limitation would start from the affidavit-in-reply filed by the defendants dated 27.7.2014 before the Estate Officer whereby the defendants have contested the plaintiffs claim. The learned trial Judge was, therefore, of the view that the limitation is a mixed question of law and facts. As the plaintiffs have specifically stated in the plaint that the suit is within limitation, it is not barred by law under Order VII Rule 11 of C.P.C. He submitted that the reasoning given by the learned trial

Judge is totally perverse and un-sustainable. He, therefore, submitted that the impugned order deserves to be set aside thereby dismissing the suit on the ground that it is barred by limitation.

6. On the other hand, Ms. Parikh supported the impugned order. In the first place, she submitted that the learned trial Judge rightly observed that the case of limitation is a mixed question of law and facts. Secondly, she submitted that the period of limitation will start from filing of the reply by the defendants dated 27.7.2014 before the Estate Officer where the defendants have contended that the plaintiffs are the unauthorized occupants and, therefore, the period of limitation will begin from the date of affidavit-in-reply dated 27.7.2014. The suit is instituted 30.3.2017, which is well within limitation.

7. Mr. Parikh also relied upon the decision of Apex Court in **Dr. Suhas H. Pophale Vs. Oriental Insurance Co. Ltd. and its Estate Officer, AIR 2014 SC 1509** and in particular paragraph-41 clause (2) (iii) and paragraph-48 thereof. Ms. Parikh submitted that in paragraph-41(2)(iii), the Apex Court has referred to the guidelines dated 8.6.2002 which were issued vide resolution No.21012/1/2000-Pol.1 dated 30.5.2002, published in the Gazette of India, Part I, Section 1, dated 8.6.2002. Clause (iii) thereof is to the following effect :

“(iii) A person in occupation of any premises should not be treated or declared to be an unauthorised occupant merely on service of notice of termination of tenancy, but the fact of unauthorized occupation shall be decided by following the due procedure of law. Further, the contractual agreement shall not be wound up by taking advantage of the provisions of the P.P.(E) Act, 1971. At the same time, it will be open to the public authority to secure periodic revision of rent in terms of the provisions of the Rent Control Act in each State or to move under genuine grounds under the Rent Control Act for resuming possession. In other words, the public authorities would have rights similar to private landlords under the Rent Control Act in dealing with genuine legal tenants.”

8. A perusal of Clause (iii), extracted hereinabove, shows that a person in occupation of any premises cannot be treated or declared to be an unauthorised occupant merely on service of notice of termination of tenancy, but the fact of unauthorized occupation can be decided by following the due procedure of law. Further, the contractual agreement cannot be wound up by taking advantage of the provisions of the P.P. Act. At the same time, it will be open to the public authority to secure periodic revision of rent in terms of the provisions of the Rent Control Act in each State or to move under genuine grounds under the Rent Control Act for resuming possession. In other words, the public authorities would have rights similar to private landlords under the Rent Control Act in dealing with genuine legal tenants. Relying upon

clause (iii), extracted hereinabove, she submitted that the plaintiffs are inducted prior to 1934 that is to say prior to the cut off date 16.9.1958. She submitted that as the plaintiffs are inducted in the year 1934 in the suit premises, the defendants cannot invoke the provisions of P.P. Act and have to invoke the grounds available for eviction under the Rent Control Act.

9. Relying upon paragraph-48 she submitted that the Apex Court also observed that it will be open for such occupants of these premises to seek declaration of their status, and other rights such as transmission of the tenancy to the legal heirs etc. under the Bombay Rent Act or its successor Maharashtra Rent Control Act, and also to seek protective reliefs in the nature of injunctions against unjustified actions or orders of eviction if so passed, by approaching the forum provided under the State Act which alone will have the jurisdiction to entertain such proceedings. In terms of the observations made in paragraph-48, the plaintiffs have instituted the present suit for declaration of their tenancy rights. She submitted that it may be clarified that in case the Estate Officer passes any order of eviction, it will be open to the plaintiffs to approach the forum provided under the State Act which alone will have the jurisdiction to entertain such proceedings.

10. I have considered the rival submissions advanced by the

learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the defendants have issued notice of termination to the plaintiffs on 31.5.2005. It is equally not in dispute that said notice is duly served on the plaintiffs and that on 30.7.2005 plaintiff No.1 gave reply to that notice. It is also not in dispute that the present suit is instituted on 30.3.2017. In paragraph-11 of the plaint the plaintiffs admit issuance of notice dated 31.5.2005 terminating their tenancy by the defendants. Plaintiff No.1 gave reply on 30.7.2005. The short question is whether the suit is filed within limitation. Article 58 of the Limitation Act reads thus :

PART III--SUITS RELATING TO DECLARATIONS

	<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
58.	To obtain any other declaration.	Three years	When the right to sue first accrues.

11. It is not in dispute and cannot be disputed that Articles 56 and 57 are not attracted in the facts of the present case and the case is squarely covered by Article 58 of the Limitation Act. A perusal of Article 58, extracted hereinabove, shows that for obtaining any other declaration not covered by Articles 56 and 57, the period of limitation is three years when the right to sue first accrues. A perusal of paragraph-4 of the plaint shows that the plaintiffs have specifically stated that in or

about 1934, the suit premises were rented out to one Dr. K.T. Gajjar i.e. father-in-law of plaintiff No.1. Dr. K.T. Gajjar was a well known Pathologist who started his practice from the suit premises. In 1951, plaintiff No.1 married to Dr. J.K. Gajjar i.e. son of Dr. K.T. Gajjar. Plaintiff NO.1 is also a Pathologist. After her marriage, she also joined her father-in-law in practice as a Pathologist. In 1953, plaintiff No.1's husband Dr. J.K. Gajjar also joined his father i.e. Dr. K.T. Gajjar and plaintiff No.1 in the practice in the suit premises. From 1951, plaintiff No.1 along with her father-in-law Dr. K.t. Gajjar and her husband Dr. J.K. Gajjar was doing their practice as Pathologists from the suit premises.

12. A perusal of the notice dated 31.5.2005 shows that it is addressed to Dr. Smt. L.J. Gajjar and the heirs and legal representatives of Dr. J.K. Gajjar. In paragraph-1 of the notice it is asserted that Dr. Smt. L.J. Gajjar and Dr. J.K. Gajjar were jointly let out the suit premises. Dr. J.K. Gajjar died some time ago and this notice is addressed to the heirs and legal representatives of Dr. J.K. Gajjar. In paragraph-5, the defendants have terminated the monthly tenancy and authority by the end of English calender month immediately following the month in which the notice is served on the notisee and calling upon them to quit, vacate and arrange to hand over vacant possession of the suit premises

on expiry of said period, failing which the defendants will initiate legal proceedings for eviction and damages under the provisions of the P.P. Act, without any further notice.

13. This notice was replied on 30.7.2005. The contentions raised in paragraphs-5 and 6 of the notice were denied. The present suit is instituted on 30.3.2017. The defendants took out application under Order VII Rule 11(d) read with Section 151 of C.P.C. for rejection of the plaint. In paragraph-3, reference is made to Case No.U-01 and U-01A of 2005 in 2005 filed against the plaintiffs under the provisions of the P.P. Act. It is further asserted that from June, 2005 the plaintiffs were aware that the defendants had terminated the tenancy rights and had even refused to accept the tenancy rights of the plaintiffs. It is asserted that denial of tenancy rights arose by the notice dated 31.5.2005. As the cause of action arose when plaintiff No.1 received the notice dated 31.5.2005 some time in June, 2005, the suit ought to have been instituted within a period of three years i.e. upto 30.6.2008.

14. The plaintiffs filed reply *inter alia* contending that the application is misconceived and not maintainable either on the facts of the case as also under the provisions of law. The plaintiffs denied that the suit is barred by limitation. In paragraph-7, it is contended that a plain reading of the plaint in its proper perspective completely falsifies

the statements made by the defendants in the application. In paragraph-14 of the plaint, it is contended that the defendants filed affidavit-in-reply on 27.7.2014 before the Estate Officer contesting the plaintiffs claim. It is further contended that as the father-in-law of plaintiff No.1 was inducted in the suit premises in the year 1934, their case is squarely covered by the decision of Apex Court in **Suhas** (supra) and the provisions of the P.P. Act are not applicable to the suit premises. It is further contended that the proceedings under the P.P. Act are without any authority of law and are void ab-initio. The plaintiffs have accordingly sought for declaration of the tenancy rights and for perpetual injunction restraining the defendants from dispossessing the plaintiffs from the suit premises except by due process of law and further restraining them from proceeding with the proceedings being Case No.01 and 01A of 2005 before the Estate Officer.

15. The learned trial Judge has rejected the application on the ground that the issue of limitation is mixed question of law and facts. On one hand, the plaintiffs are contending that the period of limitation will start from the date of filing of affidavit-in-reply dated 27.7.2014 before the Estate Officer and the defendants are contending that the period of limitation would start from 31.5.2005 when the notice was issued terminating the tenancy. In my opinion, in the facts and circumstances

of the present case, the issue of limitation cannot be said to be a mixed question of law and facts as the plaintiffs have admitted receipt of the notice of termination dated 31.5.2005. Plaintiff NO.1 gave reply on 30.7.2005. Admittedly the suit is instituted on 30.3.2017. I have already extracted Article 58 of the Limitation Act which prescribes the period of limitation of three years when the right to sue first accrues. In the instant case, right to sue accrued for the first time when the notice of termination was received by the plaintiffs in the year 2005 and the present suit instituted in the year 2017 is therefore clearly barred by limitation.

16. Ms. Parikh relied upon paragraph-41(iii), where the Apex Court has reproduced the guidelines issued by the defendants. In paragraph-48, the Apex Court has observed that it is open for the occupants to seek declaration of their status and other rights such as transmission of the tenancy to the legal heirs under the Bombay Rent Act or its successor Maharashtra Rent Control Act and also to seek protective reliefs in the nature of injunctions against unjustified actions or orders of eviction if so passed, by approaching the forum provided under the State Act which alone will have the jurisdiction to entertain such proceedings. There is no dispute that the relief of declaration of tenancy cannot be claimed before the Estate Officer appointed under the P.P. Act and it is

only the Court of Small Causes will have the jurisdiction to entertain the suits pertaining to the premises within the Greater Mumbai for declaration of tenancy rights. The issue is not about filing of suit for the relief of declaration. In the present case, the issue is whether the said suit is filed within the limitation. For the reasons, recorded earlier, it cannot be said that the suit is filed within the period of limitation.

17. Mr. Sanglikar relied upon the decision of this Court in **Rajesh Narwani** (supra), where this Court was considering the suit instituted for specific performance and whether it is barred in view of Article 54 of the Limitation Act. In paragraph-21, this Court noted that no specific date was fixed for the performance of the contract and choice was given to the appellant therein to exercise his option of purchase at any time during the subsistence of the tenancy. As per Article 54, the suit for specific performance of the contract is to be filed within three years fixed for performance and if no such date is fixed, when the performance is refused. In paragraph-23, it noted that in paragraph-14 of the plaint, the appellant himself stated that for the first time the cause of action arose when the notice dated 10.12.2003 sent to him by the respondent was refused. The suit was instituted on 14.7.2007 i.e. four years after the refusal of the notice dated 10.12.2003 and, therefore, it is barred by limitation.

18. In the present case, the plaintiffs have received the notice around June, 2005 and present suit is instituted in the year 2017. In view thereof, it has to be concluded that the suit instituted by the plaintiffs for declaration of tenancy rights is clearly barred by limitation.

19. Insofar as the relief of injunction is concerned, the defendants being a public body cannot evict the plaintiffs without following due process of law. They have already initiated the proceedings under the P.P. Act. In view thereof also I am of the opinion that the learned trial Judge was not justified in rejecting the application on the ground that the issue of limitation is mixed question of law and fact. Hence, the Petition succeeds. The impugned order is set aside. Application Exhibit-19 is allowed. R.A.D. Suit No.710/2017 instituted by the plaintiff is dismissed. Rule is made absolute in aforesaid terms with no order as to costs. All contentions of both parties before the Estate Officer are expressly kept open.

(R. G. KETKAR, J.)

Deshmane (PS)