

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.8836 OF 2017

Sunanda Prakash Apsunde ... Petitioner
Vs.
Dashrath Waman Lokhane and ors. ... Respondents

Ms.Smita R.Gaidhani for the Petitioner.
Mr.Rohan Sonawane for the Respondents.

**CORAM : M.S.SONAK, J.
DATE : APRIL 20, 2018.**

P.C. :

1. Heard learned counsel for the parties.
2. The challenge in this petition is to the order dated 24th March 2017, by which the learned Trial Judge has rejected the Petitioner's (original defendant's) application at Ex. 26 seeking for rejection of the plaint under Order VII Rule 11 (sub clause (d)) of the Code of Civil Procedure 1908, as well as seeking for framing of the preliminary issue.
3. Ms.Smita Gaidhani, learned counsel for the Petitioner submits in the present case, that the Petitioner purchased the suit property by means of the registered sale deed on 20th December

2011. The sale deed itself records that the Petitioner has been placed in possession of the suit property. The suit has been instituted sometimes in the year 2014. She submits that in terms of Article 97 of the Limitation Act, the limitation to institute a suit founded upon the claim of pre-emption is only one year. Since, the suit has been admittedly instituted beyond the period of one year, the same is expressly barred by the law of limitation and the impugned order by which, the learned Trial Judge has declined to reject the plaint or frame preliminary issue warrants interference.

4. Ms.Smita Gaidhani submits that the starting point for limitation is not any alleged knowledge as claimed by the Respondents, but the date of the registration of the sale deed. She relies on **Akkammagari Bheemamma Vs. Akkammagari Balamma & Ors.**¹ for the proposition that the starting point for computation of limitation is the date on which the possession of the property was taken and therefore, the suit filed after lapse of 11 years is barred by limitation.

5. Ms.Smita Gaidhani also submits that it is a case of the

1 AIR 2009 ANDHRA PRADESH 202

Petitioner that necessary intimation though oral, was in fact given to the Respondents. She points out that the petitioner is not only bonafide purchaser, but further is in cultivation of the suit property. For all these reasons, she submits that the impugned order warrant interference.

6. Mr.Rohan Sonawane, learned counsel for the Respondents (original plaintiffs) submits that the plaintiffs had neither any knowledge about the registration of the sale deed nor the knowledge about the factum of the Petitioner being placed in possession of the suit property. He submits such knowledge arrived only in 2014 when Respondents received notices in the matter of the mutation. He submits issue of knowledge is a disputed question which can be gone into only during trial. He submits that the Respondents have already filed affidavit of evidence and the trial has commenced. For all these reasons, he submits that this petition may be dismissed.

7. Rival contentions now fall for determination.

8. At the stage of deciding an application under Order VII Rule 11 of the Code of Civil Procedure, the court, is required to go by the averments in the plaint. At that stage, there is no question of

taking cognizance of the defence, if any, that may be raised by the defendant. Therefore, the contentions of the learned counsel for the Petitioner that some intimation have actually been given to the Respondents or that the Respondents were aware that the Petitioner has already been placed in possession of the suit property on the date of the registration of the sale deed can not be accepted at the stage of consideration of an application under Order VII Rule 11 of the code of Civil Procedure. These are all matters which will have to be determined in the course of trial.

9. Article 97 of the schedule to the Limitation Act states that the limitation period for a plaintiff to enforce the right of pre-emption begins to run when the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold. Thereafter, joined by the proposition “or” it is provided that where the subject matter of the sale does not admit of physical possession of the whole or part of the property, the time from which the period of limitation began to run, is from the date when the instrument of sale is registered.

10. This means that Article 97 is divided into two distinct parts for the purpose of determination of the time from which the

period of limitation begins to run to enforce a right of pre-emption. The first deals with a situation where the subject matter of sale admits of parting with the physical possession of the whole or part of the property sold. The second part deals with the situation where the subject matter of the same does not admit of the parting of physical possession of the whole or part of the property. In the second part, the period of limitation begins to run from the date when the instrument of sale is registered. However, in the first part the period of limitation begins to run from the date when the purchaser under the sale sought to be impeached, takes the physical possession of sale or part of the property sold.

11. Prima facie therefore, in the present case, we are not concerned with the second part of Article 97. This is because in the present case we are concerned with the sale of a immovable property which admits of taking physical possession of whole or part of the property sold. At least, prima facie, therefore, the date of registration of the sale deed is not very much relevant for determining the period from which limitation begins to run.

12. What is relevant in present case is the date when the

purchaser under the sale sought to be impeached, takes physical possession of whole or part of the property sold. Now this is a disputed question of fact. At least from the averments in the plaint it can not be said that there is any clarity on this aspect so as to hold that the suit is barred by limitation and to reject the plaint in the exercise of powers conferred under Order VII Rule 11 of the Code of Civil Procedure. As noted earlier, at the stage of deciding an application under Order VII Rule 11 of the Code of Civil Procedure, the court is only concerned with the averments in the plaint. At this stage, it is impermissible for the court to take cognizance of the defence that may have been raised by the defendant. It is also impermissible for the court to add or subtract any averments as found in the plaint.

13. In *Akkammagari Bheemamma* (supra) all that is stated is that under Article 97 of the Limitation Act, the starting point for computation of limitation is the date on which possession of the property was taken. Since, this is a disputed question of fact, these does not warrants any interference with the view taken by the learned Trial Judge. In fact, the learned Trial Judge has relied upon the decision of this court in case of **B.D.Pvt. Ltd.Vs.**

Comunidade of Bordam¹ in which, it is held that the question of limitation which would require examination of the facts would not be a question which can be gone into at the stage of deciding an application under Order VII Rule 11 of the Code of Civil Procedure. Thus construed, no case is made out to interfere with the impugned order. The Petition is therefore have to be dismissed.

14. It is clarified that the observation in the impugned order or for that matter the present order are restricted to the context of deciding an application under Order VII Rule 11 of the Code of Civil Procedure, therefore, all such observations need not influence the learned Trial Judge while deciding the suit on merits once the parties have gone to trial.

15. At this stage, the learned counsel for the Petitioner requests that the learned Trial Judge be directed to frame an issue as to whether the suit is barred by limitation. Learned counsel for the Respondents on instructions states that such an issue has already been framed. In any case, if such an issue has not been framed, the learned Trial court is directed to frame such issue and decide the

1 MHLJ 2016(1)874

same alongwith all other issues which are framed.

16. The Rule is disposed of in the aforesaid terms. There shall be no order as to costs.

(M.S.SONAK, J.)

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