

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.650 OF 2017

Vardhaman P Bardiya	 Petitioner
V/s.	
Ravikant P. Shevalkar and ors	 Respondents

Mr. Nikhil Manohar Pujari, for the Petitioner.

Mr. Vikram Sathaye i/by Yogita Deshmukh Chitnis, for the Respondent No.1.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 5TH FEBRUARY 2018.

P.C. :

1. Heard learned counsel for the petitioner and learned counsel for the respondents.
2. By this Revision Application filed under Section 115 of Code of Civil Procedure, the petitioner is challenging the order dated 24.7.2017, passed by 6th Joint Civil Judge Junior Division, Nashik below the Applications at Exh.40 and 49 in R.C.S. No.138 of 2011.
3. Application at Exh.40, was filed by the defendant No.6; for framing preliminary issue of limitation under Section 9A of Code of Civil Procedure; whereas application at Exh.49 was filed by defendant No.13 the present petitioner under Order VII Rule 11 CPC, for rejection of the plaint as the suit is barred by limitation. It was submitted that earlier

also plaintiff had filed R.C.S.N.813 of 1997 and the same was dismissed for default on 8.8.2002. The cause of action in the earlier suit and that of in the present suit was also similar. Hence, it is apparent that the present suit is barred by limitation.

4. The trial Court, has however, held that the issue of limitation is mixed question of law and facts and for which evidence is required. It was further held that from the averments made in the plaint, it cannot be said that apparently on the face of the record, suit is barred by limitation. Therefore, the trial Court has rejected both these applications and in my considered opinion, no fault can be found in the impugned order of the trial Court. Because at the time of deciding the application for rejection of the plaint filed under Order VII rule 11(d) CPC, the averments made in the plaint are to be looked into and according to those averments, respondent-plaintiff has stated that the cause of action to file this suit arose when the defendants tried to sell out the suit preemies to third person. Whether it is a real cause of action or it is a camouflage to the earlier cause of action will be decided at the time of final hearing of the suit. Hence, on this count, the impugned order passed by the trial Court, cannot be called as unsustainable in law.

5. Learned counsel for the petitioner submits that as the earlier suit was dismissed for default and the application filed for restoration of the same was also dismissed, present suit is barred under Order IX Rule 9 of CPC. However, the application filed by the petitioner before the trial

Court at Exh.49 is conspicuously silent about this contention. In such situation, this contention cannot be raised or decided; by this Court for the first time in revisional jurisdiction.

6. Learned counsel for the petitioner seeks liberty to file fresh application raising this particular plea of suit being barred under Order IX Rule 9 CPC. That liberty is always there and if such remedy is available to the party, this Court need not expressly state so.

7. The Revision Application accordingly stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]