

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1263 OF 2018

IN

SUIT NO. 2531 OF 2011

Raju Nandlal Thakur & Ors.

...Applicants
(Orig. Defendant Nos.1 to 3)

In the matter between

Pushpa Baldev Thakur & Ors.

...Plaintiffs

Versus

Raju Thakur & Ors.

..Defendants

Mr. Piyush Raheja a/w. Mr. Vishesh Malviya i/b. Federal & Rashmikanth for Plaintiffs.

Mr. Ashutosh Tripathi i/b. Legal Point for Applicants/Defendant Nos.1 to 3.

CORAM: S. J. KATHAWALLA J.

DATE : 20TH AUGUST 2018

P. C. :

1. The present Notice of Motion is filed by Applicants/Defendant Nos.1 to 3 abovenamed for rejection of Plaint under the provisions of Order VII Rule 11(a) and (d) of Code of Civil Procedure on the ground that the suit is barred by limitation and that the Plaint does not disclose any cause of action as none of the documents relied upon by the Plaintiffs prove that the Plaintiffs are co-owners of the suit premises alongwith Defendant No.1, as prayed for by them in the Suit.

2. The Plaintiffs have filed the present suit on 26th September 2011 *inter alia* seeking a declaration that they along with Defendant No.1 are the co-owners of the suit premises, each having 1/6th share in the suit premises.
3. Plaintiffs, apart from various correspondence including correspondence addressed by and to Late Nandlal Thakur (husband of Defendant No.1 and father of Defendant Nos.2 and 3) have relied upon the following documents to demonstrate that they are co-owners of the suit premises:
 - a. Agreement dated 27th May 1972;
 - b. Lease Agreement dated 1st July 1975;
 - c. Indenture/Conveyance dated 7th December 1979;
 - d. Lease Agreement dated 1st March 2001
 - e. Agreement dated 15th November 1991;
 - f. Copy of Consent Order and Consent Terms dated 29th April 2004;
 - g. Agreement dated 30th December 2004;
 - h. Lease Agreement dated 8th December 2006;
4. The Applicants/Defendant Nos.1 to 3 have claimed in the Affidavit in support of the above Notice of Motion that the present Suit is barred by limitation on the following grounds:
 - a. The share certificate issued in respect of the suit premises in October 1978 only mentions the name of Late Mr. Nandlal and no suit was filed by the Plaintiffs within the period of 3 years from October 1978 ;
 - b. Even otherwise, the suit is barred by limitation, in view of the fact that Late Mr. Nandlal passed away on 6th July 2002 and that by a letter dated 24th April 2005, Defendant No.1 had purportedly applied for transfer of share certificate in her name on the basis of a purported Will dated 24th April 2005.

5. The Ld. Counsel in response submits that it is settled law that an application under Order VII Rule 11 has to proceed on a demurrer and only the pleadings in the Plaint can be looked at for the same. He further submits that the issue of limitation as raised by the Defendant No. 1 to 3 is mixed question of law and fact and that the same can be adjudicated upon only at the stage of the trial, and cannot be a ground for dismissal of the Suit under Order 7 Rule 11.
6. He points out that the Plaintiffs' case in the Plaint is that the Late Nandlal i.e. husband of Defendant No.1 and even the Defendant No.1 always acknowledged the title of the Plaintiff to the suit premises including by executing documents for lease with the banks as well as by addressing correspondence to the bank which was the lessee of the suit premises. He submits that the Defendant No.1 first disputed the title of the Plaintiffs to the suit premises in the year 2010 and has drawn my attention to paragraph 4.21 of the Plaint, which refers to a Complaint filed by Defendant No.1 with Defendant No.6 on or about 30th August 2010, claiming that her husband was alone entitled to the ownership of the suit premises. A copy of the said Complaint is annexed to the Plaint at Exhibit 'U'. The Ld. Counsel for Plaintiffs submitted that the Plaintiffs learnt of the said letter only later, as the same was not marked to them. As such the cause of action emerged only in 2010, when the Plaintiffs' title was disputed by the Defendant No.1. The Suit was filed on 26th September 2011, well within the period of limitation prescribed. It is further submitted that the reliance on the Share Certificate and the date of death of late Mr. Nandlal is misconceived in as much it is

the Plaintiffs' case that as on 8th December 2006, Defendant No.1 had signed a Lease Agreement with Defendant No.5 Bank with Plaintiffs as co-owners of the suit premises. He further submits that though not relevant for the present Notice of Motion, Defendant No.1 in her Written Statement dated 6th January 2012 at paragraph 23 has admitted execution of the said Lease Deed, though she has sought to explain that she was made to execute the said Lease Deed and that she was not aware of facts. He submits that the said allegations are matter of trial and the same cannot be a basis for dismissal of the Suit under Order VII, Rule 11 of the Civil Procedure Code, 1908.

7. As far as relevance / proof of documents relied upon by the Plaintiffs is concerned, it is submitted by the Ld. Counsel for Plaintiffs that the same is a matter of trial and need not be gone into at this stage since the court would consider the admissibility of the documents at that stage. This does not amount to non-disclosure of any cause of action and does not bar the suit under any law to enable this Court to exercise its powers under Order VII, Rule 11 of the Civil Procedure Code, 1908.
8. The Ld. Counsel for Plaintiffs further submits that Defendant Nos.1 to 3 have filed their Written Statement in the matter. The issues in the Suit have been framed. Plaintiffs' witness no.1 has already filed her Affidavit of Evidence and Compilation of Documents. It is submitted that present Notice of Motion cannot be decided at this stage and that the same be dismissed with costs.

9. I have perused Plaintiff and documents annexed thereto. It is settled law that application under Order VII Rule 11 has to be decided on the basis of averments in the Plaintiff. Further, it is also settled law that the issue of limitation is a mixed question of law and fact. I have also perused the present Notice of Motion and Affidavit in support thereof. The Affidavit in support of Notice of Motion apart from containing statements which are mostly not coherent also refers to various documents produced by Defendant No.1 which itself demonstrates that a trial is necessary to determine the issues raised by the Defendant No. 1 in the present notice of motion.
10. I agree with the submissions of the Ld. Counsel appearing for Plaintiffs. On a perusal of the Plaintiff and narration of facts therein, it is the Plaintiff's case that Defendant No.1 only denied the co-ownership of Plaintiffs of the suit premises from August 2010 onwards. The suit was filed on 26th September 2011. Hence the Suit as framed is within the period of limitation. Further, the issues framed by Order of this Court dated 26th November 2015 also include issue as to whether the suit is barred by law of limitation. In view of the above, same would have to be finally decided at the stage of the trial and not at this stage.
11. The evidentiary value of the documents relied by the Plaintiffs shall be decided at the stage of trial. This Court cannot go into the admissibility veracity or correctness or authenticity of documents at this stage. In any event, the Suit is an advanced stage of hearing, with Plaintiffs' witness no.1 already having filed her Affidavit of Evidence and filing documents in support thereto.

12. In view of the above, present Notice of Motion is dismissed. There shall however be no order as to costs.

(S. J. KATHAWALLA, J.)