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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 134 OF 2018
IN
NOTICE OF MOTION (SUITS) NO. 583 OF 2016
IN
SUIT NO. 822 OF 2015**

Canara Bank	...Appellant
<i>Versus</i>	
Deepak Dhanraj Murpana & 4 Ors.	...Respondents

Mr. G.S. Godbole, with Ms. Radha Bhandari i/b. M/s. M.V. Kini & Co. for the Appellant.
Mr. D.D. Madon, Senior Counsel with Mr. Kunal Dwarkadas, Zain Mookhi, Ooil Panchal i/b. M/s. Mahimtura and Company for Respondent Nos. 1 and 2.

CORAM:	B.R. GAVAI & RIYAZ I. CHAGLA, JJ.
DATE:	06TH DECEMBER, 2018.

J U D G M E N T :- (Per Riyaz I. Chagla J.)

1. This Appeal challenges an order passed by the learned Single Judge of this Court on 24th August, 2017 ("the impugned order") by which the Notice of Motion taken out by the Respondent herein for rejection of Plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 has been allowed and the learned Judge has held that the Suit is expressly barred by law of limitation and has been dismissed.

2. The Appellant / Plaintiff had filed this Suit claiming that the Plaintiff had under an Indenture of Lease (hereinafter referred as “agreement”) dated 18th April, 1959 entered into with the original owner of the Suit property had a right of pre-emption to purchase the suit property under Clause 6 of the agreement. The Appellant has claimed that on the suit property a ground plus two floors structure was constructed by the Appellant. It appears that the original owner had expired and that Respondent No.4 claims to be the only legal heir of the original owner and Respondent No.3 claims to be the Power of Attorney holder of the deceased original owner as well as holder of all rights under a Development Agreement. Respondent No.5 is the executor under the Will of the deceased original owner in respect of which probate had been granted by this Court on 14th December, 2011. The legal heirs of the original owner appear to have sold the property to Respondent Nos. 1 and 2, pursuant to a Deed of Transfer of Reversionary Rights dated 16th November, 2011. Under the said Deed, the Respondent Nos. 1 and 2 were conferred the reversionary rights and transferred the suit property for a consideration of Rs.7 Crores, which was paid to Respondent No.3. The Respondents have taken out the Notice of Motion for rejection of Plaint under Order VII Rule 11 of the CPC claiming that the Suit is *ex facie*

barred by the Law of Limitation on the ground that in paragraph 53 of the Plaint it is mentioned by the Plaintiff that the cause of action had accrued in favour of the Plaintiff in or around 24th September, 2012 and that under Article 97 appended to the schedule to the Limitation Act, 1963. The limitation for filing the suit for enforcing a right of pre-emption is one year from the cause of action having arisen and since the Plaint having been lodged on 27th April, 2015, the Suit was *ex-facie* barred by limitation. The impugned order thus allowed the application of the Respondent. Being aggrieved by the impugned order, the Appellant has filed this Appeal.

3. Shri Girish Godbole, the learned counsel appearing for the Appellant has submitted that the learned Judge has erroneously held the Suit to be *ex-facie* barred by Law of Limitation by placing reliance upon Article 97 appended to the schedule to the Limitation Act. He has submitted that from a bare perusal of the prayers in the Plaint, the Appellant had sought a declaration that the agreement is valid and subsisting and binding upon the parties as well as sought the cancellation of the Deed of Transfer of Reversionary Rights dated 16th November, 2011 on the ground that the said Deed was illegal, null and void and *non est* and not binding on the Appellant / Plaintiff being in violation of right of pre-

emption of the Appellant. Further the Appellant had sought a permanent injunction to restrain the Respondents from creating any third party rights and / or encumbrances whatsoever in respect of the suit property. He has, therefore, submitted that Articles 58, 59 and 113 respectively of the Limitation Act would be attracted and under which limitation period prescribed is three years from the cause of action having arisen and accordingly, the Suit has been filed within limitation. He has submitted that the impugned order of the learned Single Judge is an *ex-parte* order passed in the absence of the Appellant and hence the Appellant had no opportunity to rely upon these Articles of the Limitation Act in order to submit that the Suit is not barred by the Law of Limitation and that the application for rejection of the Plaint under Order VII Rule 11 of the CPC has no merit. He has submitted that the impugned order is required to be set aside.

4. Mr. Madon, the learned Senior Counsel appearing for the Respondents has submitted that the Appellant has not come with clean hands and has made false statements in paragraph 7 of the Appeal, where it is stated that the Appellant's Advocate did not notice the listing of the matter on 10th August, 2017 as the downloaded cause list was not showing the said matter in the Advocates name. He has submitted that the printout of the board

itself shows that the Advocates name was clearly mentioned against the said matter on the cause list for 10th August, 2017 and hence this was a false statement. He has submitted that the Notice of Motion was heard on 10th August, 2017 and was kept part heard to give an opportunity for the Appellant to appear on the next date. He submits that despite the Notice of Motion being shown as part heard, the Advocate for the Appellant appeared after the order was dictated and pronounced and it appears that the Advocate was in another Court and could not be present, when the Notice of Motion was again taken up for hearing. He has submitted that the Appellant has shown scant regard for this Court, particularly when the matter was shown as part heard. Further, it is stated in paragraph 7 of the Appeal that the Appellant was busy in a bank matter and the Advocate had advised the Appellant that it was not necessary to remain present on 24th August, 2017 before this Court. He has submitted that a bare perusal of the Plaint would itself show that it was filed for enforcing the right of pre-emption under the agreement and that merely the seeking of declarations, cancellation of the said Deed and / or permanent injunction cannot overcome the limitation period prescribed for filing the Suit. He has therefore, submitted that limitation period prescribed under Article 97 clearly applies to the

present Suit. Further, it is admitted in the Plaint that the physical possession of the suit property is still with the Appellant. He has accordingly submitted that the learned Judge in the impugned order has correctly held the Suit to be *ex-facie* barred by the Law of Limitation and stands dismissed.

5. We have considered the submissions. We find from a reading of the Plaint that the Appellant had filed the Suit seeking enforcing of his rights of pre-emption under the agreement. In paragraph 53 of the Plaint it is stated that the cause of action had accrued in favour of the Plaintiff in or around 24th September, 2012, when the Plaintiff had received correspondence from Defendant Nos. 1 and 2, wherein they had alleged to have entered into a Deed of Transfer of Reversionary Rights with Defendant No.3 in respect of the Suit property and thereafter on and around 5th November, 2012, the Plaintiff received a copy of Deed of Transfer of Reversionary Rights dated 16th November, 2011 from the Defendant No.1. From a perusal of the prayers in the Plaint, it is clear that the Appellant has sought cancellation of the Deed of Transfer of Reversionary Rights as being void and *non est* and not binding on the Appellant as it is in violation of the rights of pre-emption of the Appellant under the agreement. The Appellant has accordingly sought the prayer of declaration that the

agreement is valid, subsisting and binding on the parties. Further, the Appellant has claimed permanent injunction restraining the Defendants from creating any third party rights and or encumbrances, whatsoever in respect of the Suit property. We are of the view that the learned Judge in the impugned order is correct in finding that from the Plaint it is clear that the Suit is filed for enforcement of the Plaintiff's right of pre-emption under the agreement.

6. We find that the Appellant had been given sufficient opportunity by the learned Judge to be heard in the matter and in fact on 10th August, 2017, the learned Judge has after hearing the Respondent kept the matter as part heard so as to to give an opportunity to the Appellant to be present on the next date. Despite this opportunity, on 24th August, 2017 when the impugned order was passed the Advocate for the Appellant only made an appearance after the order was dictated and pronounced. Hence, we do not accept the submissions made by the learned counsel appearing for the Appellant that the impugned order was passed *ex-parte* and /or without giving an opportunity to the Appellant to present its case. We also take note of the submission of the learned Senior Counsel for the Respondents that a false statement is made in paragraph 7 of the Appeal that the

Appellant's Advocates name was not shown in the downloaded cause list of the said matter on 10th August, 2017. However, we shall consider the Appeal on merits without concerning ourselves with the submission.

7. We are of the view that there is no merit in the submissions made by the learned counsel on behalf of the Appellant that Articles 58, 59 and 113 are attracted and that the Suit is within the limitation as it is filed within three years from the cause of action having arisen in or around 24th September, 2012. The mere seeking of a declaration of the agreement to be valid, subsisting and binding on the parties and cancellation of the Deed of Transfer of Reversionary Rights and permanent injunction cannot by itself attract these Articles, particularly when the Suit is filed for enforcement of the right of pre-emption of the Appellant for purchase of the suit property as provided under clause 6 of the agreement. Article 97 of the Limitation Act is clearly attracted in the facts and circumstances of the present Suit. Article 97 reads as under:-

97.	To enforce a right of pre-emption whether the right is founded on law or general usage or on special contract.	When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, where the subject-matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered.
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8. We find that the learned Judge has correctly held in the impugned order that it is clear from Article 97 that where the Plaintiff has in the present case admitted that physical possession of the whole of the suit property is still with the Plaintiff and is seeking enforcement of the right of pre-emption, then the second part of the Article 97 i.e. “where the subject matter of the sale does not admit of physical possession of the whole or part of the property” will cover the present case. We find no infirmity in the impugned order, particularly in the finding that the one year period would be calculated from 24th September, 2012 when this is stated in the Plaint as to the cause of action having arisen. The said period of one year under Article 97 has expired on 23rd September, 2013. The Suit having been filed thereafter i.e. on 15th April, 2015 is correctly held to be *ex-facie* barred by the Law of Limitation.

9. Accordingly, we find no merit in the present Appeal and the this Appeal is dismissed with no order as to costs.

(RIYAZ I. CHAGLA J.)

(B.R. GAVAI, J.)