

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 425 OF 2015

Hussain Nabi Jamadar

.....Appellant

V/s.

Smt. Asha Gajanan Raut
and anr.

....Respondents

* * * *

Mr. Shrishail Sakhare, Advocate for the appellant.

Mr. Tassawar Sagari, Advocate for respondents no.1 and 2.

CORAM : SANDEEP K. SHINDE, J.

Tuesday, 5th February, 2019.

P.C. :

1. Heard learned Counsel for the parties.
2. It is settled law that, there is no absolute proposition that the plaint can never be rejected under Order 7 Rule 11 on the basis of bar of limitation. This will depend upon the facts and circumstances of each case. Where the issue of limitation is a mixed question of law and fact or where a conclusion is not discernible from the statements in the

plaint that the suit is barred by limitation, the plaint cannot be rejected under Order 7 Rule 11(d) of CPC.

3. In the case in hand, the appellant had filed a suit on 11th June, 2012 for cancellation of the sale-deed dated 22nd August, 2009 (the first sale-deed) and the sale-deed between defendant no.1 and defendant no.2 dated 19th October, 2011 (second sale-deed). Another prayer in the suit was for a perpetual injunction to restrain the defendant from disturbing his possession over the suit lands.

4. An application was filed by the defendant seeking rejection of plaint under Order 7 Rule 11(d) on the basis of bar of limitation.

5. I have perused the plaint. It is the plaintiff's case that on 22nd August, 2008 though he executed a registered sale-deed, it was not an outright sale but it was a security document against the loan advanced by defendant no.1 to him. He pleaded on the basis of the said first sale-deed, defendant no.1 mutated his name in the revenue record. Nothing is pleaded as to when defendant no.1 mutated his name in the revenue records. In paragraph number- four of

the plaintiff, it is pleaded that, in the year October, 2009 he came to know that defendant no.1 was likely to sell the suit land and therefore he had issued the notice in the local newspapers and warned the public not to deal with the suit land. It is pleaded that the notice was issued on 17th January, 2009. In paragraph number-5 it is pleaded, after issuance of the notice in the newspaper, defendant no.1 had filed a Regular Civil Suit No. 737 of 2009 for injunction against the present appellant. In the said suit, he had appeared and filed his written statement. In paragraph no-six it is pleaded that, defendant no.1 sold the suit property to defendant no.2 vide sale-deed dated 19th October, 2007. In the said para, he pleaded his possession in the suit land. In paragraph number- seven, he pleaded obstruction at the hands of defendant no.1 and 2 to his possession.

6. So far as the pleadings in respect of the cause of action is concerned, it is averred in the plaintiff that he came to know about the second sale-deed only on 22nd April, 2012 when defendant no.2 attempted to disturb his possession in the suit land. Thus, according to the plaintiff the cause of

action arose on 22nd April, 2012 and thereafter filed a suit on 11th June, 2012.

7. The learned trial Judge rejected the plaint vide order dated 15th April, 2014, having found the suit was barred by limitation which was confirmed in Regular Civil Appeal No. 157 of 2014 by learned District Judge-II, Solapur on 30th September, 2014. It is against this order, this Second Appeal is preferred.

8. The learned Counsel for the appellant contended that, the appellant had issued public notice on 17th October, 2009 and by mistake it was pleaded that it was issued on 17th January, 2009. In support of this contention, he has placed on record, the zerox copy of a public notice published in the newspaper. It is contended that the cause of action arose when he learnt that defendant no.1 was likely to alienate the suit land and thereupon when he issued the public notice in the local newspaper. He contended that, the notice was published on 7th October, 2009 and not on 17th January, 2009 and therefore the suit instituted on 11th June 2012 was within limitation.

9. Admittedly, it is pleaded in the plaint throughout and also in the prayer clauses that, public notice was issued in newspaper on 17th January, 2009. Admittedly, the public notice was not produced alongwith the plaint. Be that as it may, plaintiff did not correct this mistake, in Appeal which was preferred by him against the order of the trial Court. It further appears that, he had filed an application to amend the plaint in October, 2013, however, even at that time, he did not attempt to correct the mistake. In the circumstances, at this stage, I am not inclined to accept that, cause of action arose on 11th June, 2012 being a correct date on which public notice was issued, in newspaper.

10. It is not in dispute that, on 22nd October, 2009 registered sale deed was executed by the appellant in favour of defendant no.1. Though, it is pleaded and claimed that it was not an outright sale but a security document against the loan advanced by defendant no.1 to him, no better particulars of such transactions were pleaded at all; like loan amount, its schedule of repayment, whether he had

repaid the amount and so on. Further, when defendant no.1 mutated his name in the 7/12 extract of the suit land on the basis of the sale-deed dated 22nd August, 2008, even at that point of time, he remained passive and did not take appropriate steps to protect his interest. Even the pleading which relates to mutation entry in the revenue record, no better particulars were offered or stated in the plaint. What is pleaded is that the cause of action arose on 22nd April, 2012 when his possession was attempted to be obstructed by defendant no.2. In fact, the entire plaint proceeded on the footing that the first sale-deed of 22nd August, 2008 was not an outright sale but a security document executed against the loan advanced to him by defendant no.1. In the given set of facts, the cause of action allegedly arose first time on 22nd April, 2012 is not conceivable. Even assuming first sale-deed dated 22nd August, 2008 was not an outright sale, but ostensible transaction, even then the fact of mutating name of defendant no.1 in the revenue record, would constitute 'cause of action'. However, plaintiff did not plead the particulars of it. Instead, he pleaded cause of action arose

on 22nd April, 2012 when his possession was allegedly obstructed. Thus, it is to be held that the plaintiff attempted to bring the suit within limitation by pleading alleged obstruction on 22nd April, 2012. Thus upon reading the entire plaint, in my view, the suit was clearly barred by limitation as this conclusion is discernible from the plain reading of the plaint and it does not involve any mixed question of law and facts. The Appeal, therefore does not give rise to any substantial question of law. The Appeal is accordingly dismissed.

(SANDEEP K. SHINDE, J)