

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 132 OF 2019

Ajit G. Nahar and anr. .. Applicants.
vs.
Mrs. Artee M. Chaphekar and ors. .. Respondents.

Mr. S.S. Shah a/w. Ms Gauri Shah for the Applicants.
Mr. Abhijit Tambe I/b Mr. P.M. Arjunwadkar for Respondent No.1.

CORAM : M. S. SONAK, J.
DATE : 18 MARCH 2019.

ORAL JUDGMENT

1] Heard Mr. S.S. Shah, learned counsel for the applicants.

2] Mr. Abhijit Tambe h/f. Mr. P.M. Arjunwadkar for respondent No.1 (original plaintiff).

3] The challenge in this revision application is to the order dated 5th January 2019 made by the learned Trial Judge dismissing the applicants' application under Order 7 Rule 11 of the CPC.

4] Mr. Shah, the learned counsel for the applicants, points out that the plaint/suit in the present case was required to

be rejected because the same failed to disclose any cause of action and further the plaint was clearly barred by limitation. Mr. Shah also submitted that though there was a challenge to the surrender deed, even this document was not annexed to the plaint as is required under Order 7 Rule 14 of the CPC. Mr. Shah submits that this is a case of clever drafting in order to create an illusion of cause of action when in fact, no cause of action at all arises in the matter. Mr. Shah relies upon the decision of the Supreme Court in ***Church of Christ Charitable Trust and Educational Charitable Society vs. Ponniamman Education Trust – (2012) 8 SCC 706*** in support of his submissions.

5] Mr. Abhijit Tambe, learned counsel for respondent No.1 – original plaintiff defends the impugned order on the basis of reasoning reflected therein.

6] Insofar as the first contention relating to the failure to disclose of cause of action is concerned, the same cannot be accepted. The case of the plaintiff is that she is daughter of Dattatray Pathak. It is her case that the suit property was

owned by late Dattatray G. Pathak and upon his demise, she too has a share in such property along with other legal representatives of late Dattatray Pathak. Based upon these pleadings, the plaintiff has sought for decree of partition.

7] Mr. Shah however contends that Dattatray Pathak had already surrendered his rights in the suit property in favour of defendant No.2 society and defendant No.2 society, in its turn, had allotted the suit property to Abhay Pathak, the brother of plaintiff and defendant No.1 in the suit. The applicants, claim to have acquired rights through said Abhay Pathak. Accordingly, it is contended that since Dattatray Pathak had no rights in the suit property, there is no question of the plaintiffs seeking any rights in the suit property and claiming any partition on the basis of such alleged rights.

8] Whilst deciding the application under Order 7 Rule 11 of CPC, it is not possible to go into the issue as to whether the averments made in the plaint by the plaintiffs are correct or incorrect. That is a matter which will have to be decided

on trial. As of now, it cannot be said that there is a failure to disclose a cause of action. There is a distinction between absence of cause of action and failure to disclose cause of action. Only in the later situation, can a plaint be rejected by resort to the Order 7 Rule 11 of CPC. If upon trial, the Courts comes to the conclusion that there was no cause of action or that the cause of action as pleaded was false and untenable, then, the Court can proceed to dismiss the suit. However, that is not a case for rejection of the plaint.

9] Insofar as the issue of limitation is concerned, the impugned order records that the suit has been instituted within limitation. However, Mr. Shah points out that though there is a challenge to the surrender deed, which is a document which was registered wayback in the year 2001, suit has been instituted only in the year 2016. He submits that from this, it is clear that the suit is barred by limitation.

10] The learned Trial Judge has observed that there are allegations of fraud and absence of knowledge insofar as surrender deed is concerned. In such a situation, learned

Trial Judge may not have been right in recording a categorical finding that the suit is within limitation. At the highest, learned Trial Judge ought to have held that the issue of limitation in the present case is a mixed question of law and fact which will have to be decided after record of evidence. In any case, once this is clarified, there is no necessity to interfere with the impugned order.

11] Mr. Shah also tried to contend that the suit is barred by Limitation Act and Section 149 of Maharashtra Regional Town Planning Act, 1966 or that the plaint was required to be rejected for alleged non-compliance of provisions of Order 7 Rule 14 of the CPC. Mr. Shah also contended that the provisions of section 91 of the Maharashtra Cooperative Societies Act, 1960 will also be attracted and this is an additional reason for rejection of the plaint.

12] The objections on basis of Order 7 Rule 14 of CPC or the provisions of Maharashtra Cooperative Societies Act were not even raised in the application seeking rejection of the plaint. The objections under section 149 of the Maharashtra

Regional Town Planning Act had been duly considered by the learned Trial Judge. Such an objection, was never raised by respondent No.5, i.e., Commissioner, Pune Municipal Corporation. In any case, these cannot be said to be the matters on basis of which the plaint itself was required to be rejected. Undoubtedly, the applicants will have right to raise all these objections and urge dismissal of the suit on merits. However, this is not a case where the plaint was required to be rejected by resort to the Order 7 Rule 11 of CPC.

13] In case of *Church of Christ Charitable Trust (supra)* the documents on which cause of action was based were not produced. That does not seem to be the position in the present case.

14] Accordingly, for all the aforesaid reasons, this Revision Application is disposed of. However, it is clarified that the issue of limitation as also all other objections raised by the applicants may not be taken as finally decided either by the impugned order or for that matter present order. All such issues and objections are specifically kept open to be decided

by learned Trial Judge on the basis of evidence that the parties will lead in the suit. In particular, it is made clear that the issue of limitation should not taken as concluded and such issue will have to be framed and decided along with all other issues which arise in the suit after the parties led their evidence in the matter.

15] Civil Revision Application is disposed of with clarification as aforesaid. There shall be no order as to costs.

16] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)