

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 1545 OF 2019

R. C. Kotiankar

...Petitioner

Versus

K. J. Sunnykutty

Through C.A. Shri. Ashwini

Ruparel and another

...Respondents

....

Mr. P.S. Kulkarni, Advocate for the Petitioner.

Mr. Murtaza Slatewala i/b. Shamim & Co. for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 27th JUNE, 2019

P.C.

1. Heard Mr. P.S. Kulkarni, learned counsel for the petitioner and Mr. Murtaza Slatewala, learned counsel for the respondents, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the orders (i) dated 14.9.2015 below Exhibit-49, (ii) dated 5.4.2018 below Exhibit-64 and (iii) dated 5.10.2018 below Exhibit-71 passed by the learned Judge, Court Room No.40 of the Court of Small Causes at Mumbai (Bandra Branch) in L.E. Suit No.60/71 of 2012.

3. By order dated 14.9.2015 below Exhibit-49, the learned trial Judge rejected the application made by the defendant for framing and

deciding the issue of limitation and maintainability of the suit as a preliminary issue under Section 9-A of Code of Civil Procedure, 1908 (for short, 'C.P.C.'). By order dated 5.4.2018 below Exhibit-64, the learned trial Judge rejected the application made by the defendant under Order VII Rule 11(a) & (d) of C.P.C. for rejection of the plaint on the ground that the plaint does not disclose cause of action and the suit is also barred by law. By order dated 5.10.2018 below Exhibit-71, the learned trial Judge rejected the application made by the defendant for recalling the order dated 5.4.2018 passed below Exhibit-64 and passing order afresh as may be deemed fit and appropriate in the interest of justice.

4. In support of this Petition, Mr. Kulkarni submitted that the defendant had earlier instituted Writ Petition No.2930/2015 in this Court. That Petition was instituted challenging the orders dated 13.2.2014 and 17.4.2014. By order dated 13.2.2014, the learned trial Judge dismissed defendant's application for framing additional issues on the point of limitation and maintainability. By order dated 17.4.2014, the learned trial Judge allowed the application made by the plaintiff under Order VI Rule 17 of C.P.C. for amending the plaint. In paragraph-3 of the order dated 3.7.2015, this Court noted that under Section 3 of the Limitation Act, 1963, every suit instituted after the prescribed period of limitation is required to be dismissed although

limitation has not been set out as a defence. Therefore, irrespective of whether any issue of limitation is framed or not, it is duty of the Court to satisfy itself as to whether the suit as instituted is within limitation or not.

5. Mr. Kulkarni submitted that on the basis of paragraph-3 of the order dated 3.7.2015 passed by this Court in Writ Petition No.2930/2015, the defendant filed various applications. He submitted that the learned trial Judge committed error in not framing preliminary issue under Section 9-A as regards limitation as also maintainability of the suit. The learned trial Judge failed to appreciate that the plaint is required to be rejected for want of cause of action under Order VII Rule 11(a) as also the suit is barred by law of limitation as contemplated by Order VII Rule 11(d) of C.P.C.

6. Mr. Kulkarni relied upon following decisions :

- (i) **Bangalore Turf Club Limited Vs. Regional Director, Employees' State Insurance Corporation, (2009) 15 SCC 33** to contend that the application of judgment given under one Act to a case covered under different Act is not applicable.
- (ii) **Pradeep Kumar Maskara Vs. State of West Bengal, (2015) 2 SCC 653** to contend that subsequent change in law after judgment has attained finality inter partes, reiterated, is not a ground to review the final judgment, which must be effectuated.

- (iii) **South Central Railway Employees Cooperative Credit Society Employees Union Vs. B. Yashodabai and others, (2015) 2 SCC 727** to contend that when a higher court has rendered a particular decision, said decision must be followed by a subordinate or lower Court unless it is distinguished or overruled or set aside.
- (iv) **Food Corporation of India Vs. West Bengal Food Corporation of India Workmen's Union, (2018) 9 SCC 469** to contend that once the order has attained finality it was required to be complied with in pith and substance.

7. On the other hand, Mr. Slatewala supported the impugned orders. He submitted that the defendant filed application Exhibit – 32 on 2.12.2013 for framing preliminary issue. That application was rejected on 13.2.2014. Though that order was challenged by instituting Writ Petition in this Court, this Court did not interfere with the order of rejecting the application filed by the defendant for framing issue of limitation as also issue as regards maintainability of the suit. The defendant, however, has successively filed applications Exhibits-49, 64 and 71 for identical reliefs. The applications filed by the defendant are dilatory tactics. As the defendant is occupying the suit premises, he is delaying the trial. He submitted that exemplary costs may be awarded to the defendant.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. On 21.10.2013, the learned trial Judge framed issues. The defendant filed application on 2.12.2013 *inter alia* praying for framing issue as regards jurisdictional facts; the suit is barred by law of limitation; maintainability of the suit as the plaint is not accompanied by the documents relevant to the dispute. It appears that by order dated 13.2.2014, the learned trial Judge rejected the application for framing of additional issues on the point of jurisdiction and maintainability. Aggrieved by this decision, the defendant instituted Writ Petition No.2930/2015. This Court declined to interfere with the order. Paragraph-3 of the order passed by this Court dated 3.7.2015 reads thus :

“3] The order dated 13 February 2014 dismissed petitioner's application for framing of additional issues on the point of limitation and maintainability. Although, there is no necessity to interfere with the impugned order, it must be noted that under Section 3 of the Limitation Act, 1963, every suit instituted after the prescribed period of limitation is required to be dismissed although limitation has not been set out as a defence. Therefore, irrespective of whether any issue of limitation is framed or not, it is the duty of the Court, to satisfy itself as to whether the suit as instituted is within limitation or not.”

9. In the light of these observations, Mr. Kulkarni submitted that bonafide the defendant has filed applications Exhibits-49, 64 and 71. It is not possible to accept this submission. Once this Court declined to interfere with the order passed by the trial Court refusing to frame the issue of limitation as also maintainability, the defendant filed application Exhibit-49 for framing preliminary issue under Section 9-A for deciding the issue of limitation and maintainability of the suit. By order dated 14.9.2015, the learned trial Judge for reasons recorded in paragraph-8, rejected the application.

10. The defendant did not challenge that order and for the first time it challenged that order in the present petition instituted in December, 2018.

11. That apart, the defendant thereafter filed application Exhibit-64 under Order VII Rule 11(a) & (d) of C.P.C. for rejection of the plaint on the ground that it does not disclose a cause of action as also the suit is barred by limitation. The learned trial Judge rejected the application by order dated 5.4.2018.

12. In paragraph-16, the learned trial Judge referred to the order passed below Exhibit-49 dated 14.9.2015. By application Exhibit-64, the defendant is praying for the same relief which amounts to seeking review of the earlier order. The learned trial Judge accordingly rejected the application. Not satisfied with this, the defendant filed

application Exhibit-71 for recalling the order dated 5.4.2018 passed below Exhibit-64. Said application was rejected by the learned trial Judge on 5.10.2018. In my opinion, the applications filed by the defendant at Exhibits-49, 64 and 71 are nothing but abuse of process of law as also abuse of process of Court. The defendant is in occupation of the suit premises and is therefore trying to prolong the hearing of the suit.

13. Mr. Kulkarni relied upon the decisions in **Bangalore Turf Club Limited** (supra), **Pradeep Kumar Maskara** (supra), **South Central Railway Employees Cooperative Credit Society Employees Union** (supra) and **Food Corporation of India** (supra). I fail to understand as to how these decisions are applicable in the present case. These judgments have absolutely no application in the facts of the present case.

14. In the case of **Maria Margarida Sequeria Fernandes Vs. Erasmo Jack de Sequeria (dead) through L.Rs.**, AIR 2012 SC 1727, the Apex Court has observed in paragraphs-84 and 85 thus :

“84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in

adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent.

85. This Court in a recent judgment in *Ramrameshwari Devi vs. Nirmala Devi*, (2011) 8 SCC 249 aptly observed at page 266 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least be minimized if exemplary cost is imposed for instituting frivolous litigation. The Court observed at pages 267-268 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings. ”

15. I have already held that the applications filed by the defendants are nothing but abuse of process of Court as also abuse of process of law. Hence, the petition fails and the same is dismissed with exemplary costs quantified at Rs.25,000/- (Rupees Twenty Five Thousand Only). The petitioner shall deposit Rs.25,000/- in this Court within four weeks from today. After depositing the amount, Registry

shall transmit said amount to “The Bombay Mothers & Children Welfare Society” having its address at 10, B.D.D. Chawls, N.M. Joshi Marg, Lower Parel, Mumbai – 400 013. The Bank details of said Society are as under :

“Account Name : The Bombay Mothers & Children Welfare Society,
Bank : State Bank of India,
Branch : Lower Parel Branch,
A/c. No. : 34227701406
IFSC Code No.: SBIN0003428.”

16. It is made clear that if the aforesaid amount is not deposited in this Court within the stipulated time, the defence of the defendant shall stand struck out without further reference to the Court. As the suit is instituted in the year 1995, the learned trial Judge is requested to dispose of the suit as expeditiously as possible and in any case on or before 31.12.2019.

17. List the matter for reporting compliance after five weeks.
Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)