

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2123 OF 2015
IN
SUIT NO.474 OF 2014

Mrs. Jennifer Fernandes ...Plaintiff

V/S.

M/s. Sharma Holdings Pvt. Ltd. And Ors. ... Defendants

Mr. Reyden L. Gonsalves, Advocate for Plaintiff.
Mr. Anand Mishra I/b. Mr. Ashok M. Saraogi for Defendants /
Applicants to Notice of Motion.

CORAM : B. P. COLABAWALLA, J.
DATED : 09th AUGUST, 2019.

P.C.

1. This Notice of Motion has been filed inter alia seeking an order to dismiss the suit under the provision of Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short “**CPC**”) or in the alternative to frame a preliminary issue that the suit is barred by the Law of Limitation.

2. As far as framing of preliminary issue is concerned, in view of the amendment to Section 9A of the CPC the said prayer would not survive. This position is also fairly conceded by the learned advocate appearing on behalf of the Defendants.

3. This now, therefore, only leaves me to decide whether the above suit can be rejected under the provisions of Order VII Rule 11 (d) of the CPC on the ground that the suit is barred by the Law of Limitation.

4. I have heard the learned advocate appearing on behalf of the Plaintiff as well as on behalf of the Defendants. In the present suit a declaration is sought that the Deed of Rectification cum Confirmation dated 20.01.1997 (Exhibit “B” to the plaint) is null and void and not binding on the Plaintiff. It is the specific case of the Plaintiff that they came to know of this Deed of Rectification only on 31.10.2013. In relation to this, the averments at paragraph Nos.8, 9, 10 and 19 read thus:

“8. The Plaintiff has filed Suit No.5794 of 2003 against the Defendants in respect of the said property, which is pending hearing and final disposal before the Bombay City Civil Court at Dindoshi. The Plaintiff has filed her Affidavit of Evidence and List of Documents and has relied upon the Consent Decree dated 04.08.1983 referred herein. The Plaintiffs had filed a notarised copy of the said Consent Decree as she did not possess a certified copy, which copy was not accepted in evidence. The Plaintiff therefore rushed to obtain a certified copy of the Property Card of the said property. The Plaintiff obtained the extract of the Property Card of the said property on 19.07.2013. Hereto annexed and marked EXHIBIT “F” is a copy of the said Property Card. After perusing the said

Property Card on 03.10.2013 the Plaintiff filed an application under the Right to Information Act for certified copies of the full file of the said Property Card with the City Survey Officer, Bandra. In response to the said application, the Plaintiff received the copy of the file of the said property from the City Survey Office on 31.10.2013. Amongst other documents, the Plaintiff received the copy of the said Deed of Rectification and Confirmation dated 20.01.1997 (a copy whereof is annexed at Exhibit – B to this Plaint).

9. The Plaintiff thus learnt that subsequently on or about 20.01.1997 the Defendants have once again used the said power of attorney (dated December 1982) executed by Mrs. Evelyn Noronha and Mrs. Jennifer Fernandes, the Plaintiff, to sign and execute the said Deed of Rectification and Confirmation dated 20.01.1997 (which is annexed at Exhibit “B” to the Plaint). The Defendant No.3 has signed and executed the said Deed of Rectification and Confirmation, as Constituted Attorney of deceased Smt. Evelyn Noronha much after her demise and with the full knowledge of the fact that the said Smt. Evelyn Noronha has passed away on 18.01.1995, much prior to the execution of the said Deed of Rectification Cum Confirmation.
10. It is evident that the Sub-Registrar of Assurance was also not informed of the fact that the said Smt. Evelyn Noronha has passed away on 18.01.1995. The said power of attorney is used by making false representations to the Sub-Registrar of Assurances, and by concealing the fact that the Donee of the said Power of Attorney had passed away on 18.01.1995 and on her demise the said Power of Attorney stood automatically cancelled. It appears that the Sub-Registrar has permitted the Defendants to act on the cancelled Power of Attorney on the mistaken belief that the said Power of Attorney is valid and subsisting.

19. The Plaintiff's claim in the suit is not barred by the Law of Limitation as the cause of action arose on 02.11.2013, when the Plaintiff received the copy of the said Deed of Rectification cum Confirmation.”

5. These averments clearly show that it is the case of the Plaintiff that they became aware of the Deed of Rectification dated 20.01.1997 only sometime in the year 2013, and thereafter, immediately lodged the present suit on 15.04.2014. It can hardly be disputed that when the Court decides an application under Order VII Rule 11 of the CPC, the same has to be decided on the basis of the averments in the plaint and the documents annexed thereto. It cannot take into consideration any defence raised by the opposite party. Perusing the averments in the plaint and as reproduced above, I do not think that the learned advocate appearing on behalf of the Defendants is correct in his submission that the plaint ought to be rejected on the ground that the claim made therein is barred by the Law of Limitation.

6. In these circumstances, I do not find any merit in the above Notice of Motion. It is accordingly dismissed. However, there shall be no order as to costs.

(B. P. COLABAWALLA, J.)