

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CIVIL REVISION APPLICATION NO.140 OF 2017

(ABDUL AZIZ KHAN ABDUL RASHID KHAN...VS.. SMT. ABIDA BEGUM ZUBEN KHAN.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri V.V.Bhangde, Advocate for Petitioner.
Shri V.D.Muley, Advocate for Respondent.

CORAM : Z.A.HAQ, J.

DATED : SEPTEMBER 03, 2019.

Heard.

2. The respondent has filed civil suit praying for decree for partition and separate possession of her 1/7th share in the suit property, claiming her share by succession as per Mohammedan Law. In the civil suit, the defendant No.1 (brother of the plaintiff) filed application (Exh.40) under Order VII Rule 11 (a) and (d) of the Code of Civil Procedure praying that the plaint be rejected as the claim of the plaintiff is barred by limitation and the plaintiff is estopped from claiming any share in the suit properties.

3. According to the defendants, on reading of paragraph Nos. 8 to 12 and 14 of the plaint it is clear that even according to the plaintiff she got knowledge on 28th April 1999 that the defendants had got their names mutated in the revenue records of the suit properties and therefore, if the plaintiff had any cause of action to claim her share, it arose on 28th April 1999. An affidavit sworn by the plaintiff in support of the claim stating that the contents of the plaint are true to her personal knowledge and belief is also relied

upon to contend that the plaintiff was aware that the defendants refused to recognize her share in the suit properties, on 28th April 1999 itself. It is submitted that the civil suit is filed on or about 9th April 2014 i.e. beyond the prescribed period of limitation of 12 years and therefore, the plaint is liable to be rejected on this count.

4. Relying on the pleadings in paragraph Nos. 8 to 12 and 14 it is further submitted on behalf of the petitioner/defendant No.1 that the plaintiff is estopped as per Section 115 of the Evidence Act to claim her alleged share in the suit properties as the plaintiff has admitted in the plaint that she was aware that the defendants had been selling the properties and changing the nature/character of the properties without consent of the plaintiff. To support the submission on the point of estoppel reliance is placed on the judgment given in the case of *Gulam Abbas vs. Haji Kayyam Ali & oth.*, reported in **AIR 1973 SC 554**.

5. With the assistance of the learned Advocates appearing for the petitioner and the respondent, I have gone through the documents placed on record of the petition.

6. After going through the plaint and the impugned order, I find that the learned trial Judge has rightly refused to reject the plaint at this stage, leaving the issue of limitation and estoppel open for consideration at appropriate stage after the parties adduce evidence. Though much is argued on behalf of the petitioner that in the present case the issue of limitation cannot be said to be a mixed question of fact and law and from the pleadings in paragraph Nos. 8 to 12 and 14 it can be culled out that the claim of the plaintiff is barred by

limitation, I am not convinced that this has to be accepted at this stage. The plaintiff cannot be deprived of the opportunity of proving by adducing evidence, that her claim is not barred by limitation. Similarly, the plaint cannot be rejected at this stage summarily on the point of estoppel also. The judgment relied upon on behalf of the petitioner/defendant No.1 does not assist him inasmuch as the point of estoppel in that case was considered in appeal which had arisen out of final adjudication of the matter before the subordinate Courts. In the present case, the petitioner/defendant No.1 is seeking summary rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure.

7. I find that the learned trial Judge has not committed any patent illegality or error of jurisdiction which necessitates interference by this Court in the revisional jurisdiction.

8. Hence, the Civil Revision Application is **dismissed**. In the circumstances, the parties to bear their own costs.

JUDGE