

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION 289 OF 2022

Panchshil Realty & Developers Pvt.Ltd.	...Applicant
vs.	
Saraswatibai Malhari Gaikwad & Ors.	...Respondents

Mr.S.S. Patwardhan for Applicant.
Mr.R.V. Bansode for Respondents.

CORAM : ROHIT B. DEO, J.

RESERVED ON : 15 JULY 2022

PRONOUNCED ON : 19 JULY 2022

JUDGMENT :

1. The Petitioner is a company registered under the Companies Act, 2013 and is arrayed as Defendant 54 in Special Civil Suit 2040/2021 which is instituted by Respondent 1 – plaintiff for partition, separate possession and declaration.

2. Declaration is sought by the plaintiff *qua* certain sale deeds which was executed in respect of part of portion of the suit property, and the declaration of invalidity is restricted to the share of the plaintiff in the suit property.

3. The suit property is situated at Tukadi, Taluka Haveli, District Pune within the territorial jurisdiction of the Pune Municipal Corporation and comprises part of portion of land assigned survey numbers 11.3, 11.6, 11.8, 11.14, 65.3, 67.1, 67.12, 69.1, 69.4, 70/3A/1, 70/3A/3, 71/2.

4. The plaintiff avers that Mr.Punaji Hari Pathare and Mrs.Tarabai Punaji Pathare have two sons, Yashwant and Dnyaneshwar (defendants 1 and 2) and three daughters, namely, Parvatibai Thakur (defendant 3), Rakhmabai Chaudhari (defendant 4) and deceased Saraswatibai Gaikwad. The plaintiff is the daughter of deceased Saraswatibai Gaikwad.

4(i) The plaintiff avers that the suit property was owned and possessed by deceased Gunaji Hari Pathare as ancestral property and after the demise of Gunaji, the suit property was inherited by his widow Tarabai and five children, namely, Yashwant, Dnyaneshwar, Parvatibai, Rakhmabai and Saraswatubai. The plaintiff avers that although after the death of Gunaji, the names of all the legal heirs ought to have been recorded in the 7/12 extract, the defendant caused the mutation to be done only in the name of defendants 1 to 4. The case of the plaintiff is that the fact that her mother deceased Saraswatibai was also legal heir of Gunaji was suppressed, with the result that mutation entry 11292 is, therefore, challenged by the plaintiff in R.T.S. Appeal 778/2021 which is pending.

4(ii) The plaintiff further avers, behind her back defendants 1 to 4 executed certain sale deeds *qua* part or portion of the suit property. The plaintiff qualifies and explains the said averment by asserting that while the sale deeds are executed, neither title nor possession stands transferred in favour of the purchasers.

4(iii) The plaintiff refers to sale dated 2.12.1996 executed in favour of defendant 16 as regards portion of suit land at serial 1E admeasuring 2.15.06 HR. The plaintiff asserts that the sale deed is

not binding on her, to the extent of her share in the suit property which is ancestral property. The plaintiff then avers that the defendant 16 executed sale deed dated 10.3.2021 in favour of defendant 17 and asserts that neither title nor possession is transferred in favour of defendant 17.

4(iv) The plaintiff then refers to the suit property at serial 1U which is alienated by defendants 1 to 15 in favour of defendants 18 and 19 vide registered sale deed dated 9.10.2014. The plaintiff then avers that the defendants 1 to 15 transferred portion of the suit property in favour of defendants 51 to 53 vide sale deed dated 27.10.2010.

4(v) The plaintiff further avers that the defendants 1 to 15 have executed sale deed pertinent to portion of the suit property in favour of defendant 64 vide sale deed dated 21.9.2001 and in turn defendant 64 has executed sale deed *qua* portion admeasuring 54.90 R in favour of defendant 54 on 15.4.2009.

4(vi) The plaintiff further avers that defendants 1 to 15 have sold land admeasuring 54.90 R in favour of defendant 64 vide registered sale deed dated 21.9.2001 and land admeasuring 0.50 HR in favour of defendant 63 on 21.9.2001. On the same day, portion admeasuring 0.50 HR was sold in favour of defendant 65.

4(vii) The plaintiff avers that it was on 20.12.2001 that defendants 1 and 2 outrightly refused to give to plaintiff her share and interest in the suit property and insisted that defendants 1 and 2 are entitled to create third party interest in the suit property and to carry out

construction thereon. According to the plaintiff, the transactions entered into by the defendants *qua* part or portion of the suit property do not bind the plaintiff to the extent of her share in the suit property. The plaintiff has further averred that she was in cultivating possession of the suit property and it was only after the defendants 1 and 2 refused to give her share in the suit property that she made enquiries and obtained the documents pertaining to the suit property and the transactions of *qua* part or portion of the suit property came to light.

4(viii) In essence, the case of the plaintiff is that the cause of action to claim the relief of partition is her ouster, and it was only on 20.12.2021 that her share and interest in the suit property was denied, which denial and refusal constitutes ouster.

5. Defendant 54 preferred application Exhibit 192 under Order 7 Rule 11 of the Civil Procedure Code, 1908 (Code) on the sole ground that on the face of the plaint averments, the suit is barred by limitation. Defendant 54 contended that even according to the plaintiff suit property at serial 1A was transferred in favour of the predecessor-in-title of the defendant 54 vide sale deed dated 21.9.2001 and the defendant 54 in turn purchased the said property vide registered sale deed dated 15.4.2009, Defendant 54 contended that since the limitation for setting aside the sale deeds is three years, the suit is barred by limitation. While there is vague assertion in the application under Order 7 Rule 11 of the Code that the plaint does not disclose cause of action against defendant 54, there is no factual foundation and elaboration. Presumably, it is on the premise that the suit is barred by the limitation, that defendant 54 contended that the plaint does not disclose cause of action.

6. The learned trial Judge was pleased to reject the application under Order 7 Rule 11 of the Code vide order dated 5.5.2022. The learned trial Judge noted the case of the plaintiff that she came to know about the sale deeds executed in the year 2001 and 2009 only in November 2021. The learned trial Judge further noted the assertion of the plaintiff that she was in possession of the suit property. Relying on the decision of the Apex Court in **Chhotaben vs. Kiritbhai Thakkar**¹, the learned trial Judge reasoned that in the context of the plaint averments, whether the suit is barred by limitation raises a triable issue and the litigation cannot be nipped in the bud.

7. In the context of the submission of the learned Counsel for the Applicant, that the suit is ex facie barred by limitation, it would be apposite to note that the case of the plaintiff is that she had no knowledge of the execution of the sale deeds dated 21.9.2001 and 15.4.2009 and it was only when she noticed the construction on the suit property, and confronted defendants 1 and 2, that her share and interest in the suit property was denied, which denial constitutes ouster.

8. Mr.Patwardhan would argue that the fact that construction has progressed significantly on a portion of the suit property ought to have put the plaintiff on guard. Mr.Patwardhan would further argue that the registration of the sale deeds is constructive notice to the public at large, and therefore, *qua* the said sale deeds, the suit is barred by limitation.

9. At this stage, it would be appropriate to consider the

¹ AIR 2018 SC 2447

observations of the Apex Court in **Chhotaben vs. Kiritbhai Thakkar** (supra), on which reliance is placed by the learned trial Judge. The suit was for partition and separate possession and further declaration was sought that the registered sale deed dated 18.10.1996 executed in favour of the defendants be declared null and void. The defendants preferred an application under Order 7 Rule 11(d) for rejection of plaint on the ground that the suit was barred by limitation having been filed 17 years after the execution of the sale deeds. The trial Judge rejected the application and in civil revision application, the High Court held that the plaint is liable for rejection since the suit is, on the face of the averments in the plaint, barred by limitation since the same is filed three years after the execution of the sale deed.

The Apex Court held that the High Court committed manifest error in not appreciating that the issue of limitation was a triable issue inasmuch as the case of the plaintiffs was that they have no knowledge about the execution of the registered sale deed concerning the ancestral property. The relevant observations of the Apex Court read thus :

“11. After having cogitated over the averments in the plaint and the reasons recorded by the Trial Court as well as the High Court, we have no manner of doubt that the High Court committed manifest error in reversing the view taken by the Trial Court that the factum of suit being barred by limitation, was a triable issue in the fact situation of the present case. We say so because the appellants (plaintiffs) have asserted that until 2013 they had no knowledge whatsoever about the execution of the registered sale deed concerning their ancestral property. Further, they have denied the thumb impressions on the registered sale deed as belonging to them and have alleged forgery and impersonation. In the context of totality of averments in the plaint and the reliefs claimed, which of the Articles from amongst

Articles 56, 58, 59, 65 or 110 or any other Article of the Limitation Act will apply to the facts of the present case, may have to be considered at the appropriate stage.

12. What is relevant for answering the matter in issue in the context of the application under Order VII Rule 11(d), is to examine the averments in the plaint. The plaint is required to be read as a whole. The defence available to the defendants or the plea taken by them in the written statement or any application filed by them, cannot be the basis to decide the application under Order VII Rule 11(d). Only the averments in the plaint are germane. It is common ground that the registered sale deed is dated 18th October, 1996. The limitation to challenge the registered sale deed ordinarily would start running from the date on which the sale deed was registered. However, the specific case of the appellants (plaintiffs) is that until 2013 they had no knowledge whatsoever regarding execution of such sale deed by their brothers - original defendant Nos.1 & 2, in favour of Jaikrishnabhai Prabhudas Thakkar or defendant Nos.3 to 6. They acquired that knowledge on 26.12.2012 and immediately took steps to obtain a certified copy of the registered sale deed and on receipt thereof they realised the fraud played on them by their brothers concerning the ancestral property and two days prior to the filing of the suit, had approached their brothers (original defendant Nos.1 & 2) calling upon them to stop interfering with their possession and to partition the property and provide exclusive possession of half (1/2) portion of the land so designated towards their share. However, when they realized that the original defendant Nos.1 & 2 would not pay any heed to their request, they had no other option but to approach the court of law and filed the subject suit within two days therefrom. According to the appellants, the suit has been filed within time after acquiring the knowledge about the execution of the registered sale deed. In this context, the Trial Court opined that it was a triable issue and declined to accept the application filed by respondent No.1 (defendant No.5) for rejection of the plaint under Order VII Rule 11(d). That view commends to us.

13. The High Court on the other hand, has considered the matter on the basis of conjectures and surmises and not even bothered to analyse the averments in the plaint, although it has passed a speaking order running into 19 paragraphs. It has attempted to answer the issue in one paragraph which has been reproduced hitherto (in paragraph 7). The approach of the Trial Court, on the other hand, was consistent with the settled legal position expounded in *Saleem Bhai and Others Vs. State of Maharashtra and Others*, *Mayar (H.K.) Ltd. and Others Vs. Owners & Parties, Vessel M.V. Fortune Express and Others* and also *T. Arivandandam Vs. T.V. Satyapal and Another*.

16. In the present case, we find that the appellants (plaintiffs) have asserted that the suit was filed immediately after getting knowledge about the fraudulent sale deed executed by original defendant Nos.1 & 2 by keeping them in the dark about such execution and within two days from the refusal by the original defendant Nos.1 & 2 to refrain from obstructing the peaceful enjoyment of use and possession of the ancestral property of the appellants. We affirm the view taken by the Trial Court that the issue regarding the suit being barred by limitation in the facts of the present case, is a triable issue and for which reason the plaint cannot be rejected at the threshold in exercise of the power under Order VII Rule 11(d).”

10. In my considered view, the enunciation of law in **Chhotaben vs. Kiritbhai Thakkar** (supra) is a complete answer to the submission canvassed by Mr.Patwardhan that the suit is barred by limitation, on the face of the averments in the suit plaint. The factum of limitation raises a triable issue, in the context of the factual matrix of the case, and the lis cannot be nipped in the bud.

11. Mr. Patwardhan invites my attention to the decision of the learned Single Judge of the Delhi High in **Sh. Sukhbir Singh vs. Smt.**

Bhagyawanti & Others.² to buttress the submission that the factum of possession of the suit property constitutes ouster, and limitation is triggered. A close scrutiny of the factual matrix reveals that in that case, the plaintiff was admittedly not in actual possession of the suit lands. The learned Judge of the Delhi High Court held that the ouster is complete as against the plaintiff with respect to those lands which have been mutated in the name of the other family members. The observation in **Sh. Sukhbir Singh** (supra) must be restricted to the factual matrix. In any event, with deepest respect, I am not inclined to agree with the broad statement that mutation *ipso facto* constitutes ouster, particularly if the plaintiff is claiming to be in possession.

12. Mr. Patwardhan then relies on **Suraj Lamp and Industries Pvt. Ltd. Through Director vs. State of Haryana and another**³ to emphasis that in view of the statutory scheme of the Limitation Act, the registration of a document constitutes constructive notice and the limitation is triggered. Again I am not inclined to accept such submission which falls foul of the observations in **Chotaben vs. Kiritbhai Thakkar** (supra).

13. Mr. Patwardhan finally invites my attention to the decision of the Supreme Court in **Dahiben vs. Arvindbhai Kalyanji Bhanusali (Gajra) Dead through legal representatives and others**⁴ to submit that if the cause of action is illusory, the litigation must be nipped in the bud. **Dahiben** is pressed in service also in support of the submission that the limitation is triggered when the right to sue first accrues to the plaintiff. I have already held that considering the factual matrix, the observation in **Chotaben vs. Kiritbhai Thakkar** (supra) will apply on all fours since the issue of

² 2011 SCC OnLine Del 320

³ (2009) 7 SCC 363

⁴ (2020) 7 SCC 366

limitation will be a triable issue in view of the case of the plaintiff that she was not aware of the execution of the concerned documents.

14. I do not see any error in the order impugned, much less such error as would impel me to exercise writ jurisdiction.

15. The petition is dismissed.

(ROHIT B. DEO, J.)

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