

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.117 OF 2023

Rasulkhan s/o Walikhan Pathan,
Age 84 years, Occupation Agriculture
and Business, R/o Malikpura, Parali
Vaijnath, Taluka Parali Vaijnath
Dist. Beed.

...Applicant
(orig.Deft.No.1)

VERSUS

1) Jamshidbee w/o Rasulkhan Pathan,
Age 81 years, Occupation Household,
R/o Mujavarwada, Ambeves, Parli
Vaijnath, Taluka Parli Vaijnath,
Dist. Beed. (orig.Plaintiff)

2) Branch Manager,
Mahesh Urban Co.Op. Bank Ltd.,
Branch Parali Vaijnath,
Taluka Parli Vaijnath
Dist. Beed. **...Respondents**
(Orig.Deft.No.2)

CORAM : ARUN R. PEDNEKER, J.

Date of Reserving The Order : 14/07/2023

Date of Pronouncing The Order : 24/07/2023

ORDER :

By the present civil revision application the applicant is challenging the order passed by the Trial Court rejecting the application of the defendant No.1/applicant under Order 7 Rule 11 (d)

of the Code of Civil Procedure.

2. Brief facts leading to the filing of the present revision application can be summarised as under : -

The original plaintiff has a filed the suit for declaration of ownership and perpetual injunction in respect of suit property. The plaintiff claimed that she is legally wedded wife of defendant No.1. On 05/05/2016 dispute arose between the plaintiff and children of defendant No.1 from his second wife on the ground of suit properties, therefore, defendant No.1 started residing separately. The plaintiff contend that by way of oral "Hiba", defendant No.1 had put her in possession of the suit property. The plaintiff also prayed declaration to that effect. The plaintiff further prayed that the transaction, if any, executed by defendants are not binding upon her and prayed for perpetual injunction restraining the defendants from alienating the suit land by any mode.

3. It is contended by the plaintiff that the registration of 'Hiba' of the suit property is not necessary. On 07/09/2021, the defendant No.1 refused 'Hiba' (Gift) executed in favour of the plaintiff, and therefore, the cause of action arose.

4. On the receipt of summons, the defendant No.1 appeared before the Trial Court. The defendant submitted that he is running a shop under name "Janseva Trading Company" and he is owner of suit property. The suit properties are mutated in his name and he is cultivating the suit property. As per Muslim Law, the plaintiff has no right to claim partition in the property of defendant No.1 in his lifetime. It is contended by the plaintiff that the date of 'Hiba' agreement is not mentioned in the plaint and agreement is not fulfilled. Further the sons of defendant No.1 born by second wife are not added defendant in the suit. It is further alleged that the cause of action arose on 05/05/2016 for the first time and the plaintiff failed to file suit soon after the said date. Therefore, the suit is also barred by limitation.

5. Defendant No.1 moved an application under Order 7 Rule 11 (d) of the Code of Civil Procedure praying rejection of plaint. It is contended that the suit is barred by limitation. That the plaint does not contend ingredients of "Hiba" and the suit is also barred by principles of Muslim Law. The Trial Court on consideration of the pleadings in the plaint and held that on 07/09/2022 the defendant

No.1 denied "Hiba", and that gave the cause of action to the plaintiff as per the pleadings in the plaint and the complete reading of the plaint of the plaintiff, it appears that though the plaintiff has not pleaded period, however, the plaintiff stated that the defendant No.1 denied the "Hiba" on 07/09/2022. The Trial Court held that as per Article 58 of the Limitation Act, the suit for declaration of ownership has to be filed within three years from accrual of cause of action. Having considered the plaint and the period of limitation prescribed, the Trial Court held that as per the pleading the cause of action arose in 2022 and the suit is filed in the same year. Therefore, the limitation being a mix question of fact and law in facts of instant case, the Court held that it may be decided after evidence along with other issues and application under Order 7 Rule 11 was dismissed.

6. The learned Advocate submitted before this Court that the suit is barred by limitation, so also the ingredients of "Hiba" are not mentioned in the plaint, and as such, the suit be rejected under order 7 Rule 11 of the Code of Civil Procedure.

7. The period of limitation commences from the date of cause of action. In the instant case, the cause of action arose in the year

2022 and the suit is also filed in the year 2022. The cause of action accrued when the defendant denied "Hiba" (Gift) in favour of the plaintiff and asserted his rights in the suit property.

8. The defendant's contention that the cause of action arose at a much prior date in 2016, can only be tested after the evidence is led before the Court. The question of limitation in the instant case would be a mixed question of fact and law, and thus at the outset it cannot be said that the plaint is beyond limitation.

9. The cause of action arose when the plaintiff realised that the defendant No.1, who is residing with his second wife, are making an attempt to change the mutation entry in the name of the children of the defendant No.1 from his second wife, and thus the cause of action arose on 07/09/2022.

10. As regards the ingredients of "Hiba" are concerned, the plaintiff has submitted that there is pleadings that the oral gift is made to the plaintiff. The reliance placed by the learned Advocate for the applicant on the case of *Mr. Dilip Vasant Shetye and others Versus Mrs. Angela P. Oliveira and others*, reported in 2023 (1) BCR

488, to contend that there is an illusory cause of action, is not applicable in the instant case as the facts are different. There are disputes within the family member, the defendant No.1 is staying with the second wife and that the plaintiff pleaded that an attempt is made to change mutation entry from the name of defendant No.1 to the children of defendant No.1 from his second wife, and as such, there is denial of "Hiba" of the suit property in favour of the plaintiff.

11. In view of the same, no error is committed by the Trial Courts in rejecting the application under Order 7 Rule 11 of the Civil Procedure Code. Hence, the civil revision application stands dismissed.

(ARUN R. PEDNEKER, J.)

vj gawade/-.