

Nikita

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

CIVIL REVISION APPLICATION NO.21 OF 2020

Mohan Antu Salunkhe and Ors. ... Applicants
V/s.
Santosh Mahadeo Khape ... Respondent

NIKITA
KAILAS
DARADE
Digitally signed by
NIKITA KAILAS
DARADE
Date: 2023.10.17
18:42:22 +0530

Mr. Kalpesh U. Patil, for the Applicants.

Ms. Padmini Ainapure for Respondent (Appointed as
Legal Aid Council).

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 17 2023

P.C.:

- 1.** The defendant has filed present revision application challenging order dated 4th July 2019 passed by Trial Court rejecting application under Order 7 Rule 11(d) to dismiss the suit on the ground of limitation.
- 2.** The respondent filed Regular Civil Suit No.122 of 2017 seeking relief of declaration of ownership based of sale deed dated 2nd February 1915; for vacant possession from the defendant; injunction against defendant Nos.1 to 3.
- 3.** According to the plaintiff based on sale deed dated 2nd of February 1915, predecessor of plaintiff became owner as title of the property devolved on the plaintiff. On 19th December 2016,

plaintiff issued notice to respondent Nos. 1 to 12, to hand over the possession. On their refusal, plaintiffs filed suit on 30th March 2017.

4. The defendants Nos. 1 to 9, and 11 and 12 filed an application under Order 7 Rule 11 contending that predecessors of plaintiff on 24th June 1918 sold the suit property to the predecessors of defendant. By suppressing such fact, suit is filed. Therefore the suit is barred by limitation.

5. The Trial Court rejected the application holding that in the facts of the case, the issue of limitation is mixed question of law.

6. The learned advocate for the applicant submitted that non-disclosure of sale deed dated 24th June 1918 of the plaint is clever drafting. If plaintiff had disclosed the execution of sale deed dated 24th June 1918, the suit will be barred by limitation. Therefore, according to him, the plaintiff should not get the benefit of clever drafting. In support of his submission, he relied on judgment in the case of **Raghwendra Sharan Singh Vs. Ram Prassana Singh (dead) by Legal Representatives** reported in (2020) 16 SCC 601 and **Dahiben Vs. Arvindhbai Kalyanji Bhanusali (Gujra) dead thr. Legal Representatives and Ors.** reported in (2020) 7 SCC 366.

7. Per contra, learned advocate for the respondent relying on the judgment in case of **Shaki Bhog Food Industries Ltd. Vs. The Central Bank of India & Anr.** with Civil Appeal 2514 of 2020, and **Shihari Hanumandas Totala Vs. Hemant Vithal Kamat & Ors.** with Civil Appeal No.4665 of 2021, submitted

that in the facts of the case, the question of limitation is the mixed question of law and fact as the defendant needs to prove execution of the sale deed dated 24th June 1918 and the fact as to the date when the possession became adverse.

8. On perusal of the plaint, along with the documents annexed it appears that the plaintiff is seeking relief of declaration of ownership, possession and injunction. The suit would be governed by the Article 64 of the Limitation Act 1963. It is, therefore, necessary for the Trial Court to adjudicate as to when the possession of defendant become adverse based on the averments in the plaint and documents along with the plaint. At this stage this is not possible to record a finding as to when possession of defendant became adverse. Apart from it, the issue of declaration of ownership has claimed by the plaintiff needs to be adjudicated. The relief of possession would be dependent on the declaration of ownership sought by the plaintiff whereas a matter of fact.

The predecessors of plaintiff had executed sale deed on 24th June 1918, is a fact which parties needs to prove.

The plaintiffs were not parties to the said documents. Therefore, it cannot be said that the filing of suit and non-disclosure of alleged sale deed dated 24th June 1918 is result of clever drafting. Since the Trial Court based on evidence adduced by the parties need to consider the issue of title of plaintiff and relief of possession, the Trial Court was justified in rejecting the application holding that issue of limitation in the facts of the case is mixed question of law and fact.

9. In so far as the judgment relied upon by the applicant are concerned, there cannot be dispute about the legal preposition of law laid down by the Apex Court. It needs to be noted in **Raghwendra Sharan Singh** (supra). Apex Court held that adjudicated under Order 7 Rule 11 needs to be made based on averments in the plaint and document annexed therein. It is held that the averments in the written statements contentions of defendant has immaterial. It is also held that the plaintiff cannot be allowed to circumvent. Article 59 of the Limitation Act, 1963 governs clever drafting. In the facts of the case, the factum of execution of sale deed dated 24th June 1918 needs to be proved during the Trial.

10. In the case of **Dahiben** (supra) the Apex Court in paragraph No.23.5 has held that the power conferred on the Court to terminate a civil action being drastic one. Conditions enumerated under Order 7 Rule 11 are required to strictly adhered.

11. Therefore, in my opinion, for proof of transaction on 24th June 1918, the parties need to be given opportunity to lead evidence and only thereafter, the Trial Court needs to adjudicate the issue in relation to execution of sale deed in favour of predecessors of defendant, therefore, in my opinion, there is no error of jurisdiction committed by the Trial Court

12. The civil revision application stands disposed of in above terms. No costs.

(AMIT BORKAR, J.)