



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

CIVIL REVISION APPLICATION NO.28/2024

Mulchand S/o Bapudas Parate,
Aged about 76 years, Occ: Nil,
R/o Mpl. House No.90, Bhisikar
Mohalla, (Old-Koshtipura), Itwari,
Nagpur.

... Applicant
(Original Defendant)

- Versus -

Meghraj S/o Bapudas Parate,
Aged about 71 years, Occ: Nil,
R/o. Bhisikar Mohalla, (Old-Koshtipura),
Itwari, Nagpur.

... Non-applicant
(Original Plaintiff)

Mr. Palash R. Chakole, Advocate for the applicant.
Mr. A.P. Mishra, Advocate for the non-Applicant.

CORAM: MRS.VRUSHALI V. JOSHI, J.
DATE OF RESERVING THE JUDGMENT : 17.7.2025.
DATE OF PRONOUNCING THE JUDGMENT : 25.7.2025.

JUDGMENT

Rule. Rule made returnable forthwith. Heard finally
with the consent of learned Advocates for the parties.

2. The defendant has challenged the order dated
04.11.2023 passed by the learned 3rd Jt. Civil Judge, Senior
Division, Nagpur below Exh.15 in Regular Civil Suit

No.1704/2022 rejecting the application under Order VII Rule 11 of the Code of Civil Procedure to dismiss the suit of non-applicant on the ground of limitation.

3. The facts giving rise to the present application are as under:-

The parties are siblings and are children of late Bapudas S/o Mahadeo Parate and late Sundarbai W/o Bapudas Parate. Along with Regular Civil Suit No.1704/2022 the non-applicant had filed an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure for grant of temporary injunction against the applicant over suit house. It is stated that two houses bearing Nos.90 and 91 were purchased by their parents of which partition took place in respect of both the properties by registration of partition deed on 29.04.1987.

It is stated by the non-applicant that he became aware of the execution of will deed dated 21.09.2010 by the father of the parties in favour of the applicant as he is apprehended for sale of suit property. Therefore, the non-applicant is seeking relief of

declaration of the registered will executed by Bapudas S/o Mahadeo Parate to be null and void. Along with the same, he prays for right of pre-emption to purchase the share of applicant in the alleged suit property. The non-applicant is also claiming for possession of the half share of suit property on the basis of registered partition deed dated 29.04.1987.

4. The grounds raised by the applicants are as under:-

(a) The suit faces serious question of limitation as it was filed in the year 2022 as primarily declaration of nullity with respect to registered will deed dated 21.09.2010 is sought.

(b) Suit is barred by law of limitation as it was filed beyond thirty five years from the date of registration and execution of partition deed dated 29.04.1987. Onus was on the non-applicant to state material facts necessary for disclosing a surviving cause of action.

5. It is submitted by the learned Advocate for the applicant that the learned trial Court failed to rely on the judgement of the Hon'ble Supreme Court in the case of Dilboo

(Smt) (dead) by LRS. and others V/s. Dhanraji (Smt.) (Dead) and others reported (2000) 7 SCC 702 in which it is held that whenever a document is registered, the date of registration becomes the date of deemed knowledge. It is further submitted by the learned Advocate for the applicant that the learned trial Court ought to have observed that the non-applicant should have filed suit within 12 years from the date of death of mother of parties i.e. from 16.09.2009 as the cause of action for partition arose on the same date. He contended that the learned trial Court overlooked the provisions of Article 65 of the Limitation Act, 1963 observing that the relief of possession of suit property was not squarely applicable to Explanation (b) of Article 65 of the Limitation Act, 1963. It has also erred in observing that the suit as filed is not for possession based on title.

6. The learned advocate for the non-applicant strongly opposed the submissions made on behalf of the applicant/original defendant. He argued that whether the suit is barred by limitation is a mixed question of law and facts as held by the Apex Court in

Shakti Bhog Food Industries Ltd. V/s. Central Bank of India and another reported in (2020) 17 SCC 260. It has been categorically held in para 13 therein that the cause of action would consists of bundle of facts. Even for that reason, invoking order VII Rule 11 of the Civil Procedure Code is ruled out. Mr. Mishra further submitted that the suit is for partition and separate possession of half share of the plaintiff in the suit house property. The plaintiff nowhere in the suit has claimed adverse possession. In the light of pleadings of the plaintiff in plaint, the provisions regarding adverse possession contemplated under Article 65(b) has no application. In suit for partition no time limit is prescribed in any of the Articles of Part-V of Schedule-I of the Limitation Act 1963. The relief sought in the said suit is contingent to the act of transfer, which the defendant never alleged.

7. Heard the learned Advocate for the applicant and the learned Advocate for the non-applicant.

8. The plaintiff has filed suit for declaration, partition, separate possession and injunction. By this suit, the prayer is

made to declare the will dated 21.09.2010 which came to the knowledge of the plaintiff on 22.09.2022 as fraudulent, illegal and void, the partition and separate possession of half share of the suit property and right of pre-emption to purchase the share of defendant are also sought. The applicant herein has raised the objection of limitation stating that the will deed which is executed by the father of the plaintiff and defendant is dated 21.09.2010. The possession is also sought. For all these prayers the limitation is of 12 years from the date of execution of partition deed. The suit is filed on 20.6.2022. Therefore, as per the applicant the suit is barred by limitation. The applicant has relied on the judgment of this Court in case of Umed Realtors and others V/s. Shobha and others reported in **2017 (3) Mh.L.J.308**. The relevant observations in para 11 reads thus:-

“11Once it is found that the period of limitation under Article 65 of the said Act would commence from 14.5.1987 when the sale deed in question was executed by defendant no.5, the suit as filed on 2.10.2012 is beyond the period of twelve years, as prescribed. Under provisions of order VII, Rule 11(d) of the Code, the plaint can be rejected if it is found from a statement in the plaint to be barred by law. By considering the pleadings of the plaintiffs that the sale deed dated

14.5.1987 was a void document and as the plaintiffs seek possession on the basis of their title, it is clear that the claim as made is barred by limitation.”

9. The applicant has also placed reliance on Dilboo (Smt.) (Dead) by LRS. and others *supra*. It is about possession and the suit for redemption of mortgage. Facts in suit in hand are different. It is between two brothers and partition is claimed.

10. The plaintiff was not aware about the will executed during the life time of the father of plaintiff. In the year 2022 he came to know about the will when persons from real estate approached him for no objection of sale of suit property. It appears from the record that the suit property was in possession of the father and mother of the applicant as per partition deed dated 29.04.1987. Both father and mother have one half share in the said property as per partition deed and the applicant and non-applicant were having half share in another house property. The document of partition which is 30 years old document has presumptive value.

11. It is the contention of applicant that father of both the parties executed will in favour of non-applicant and it being registered will deed the applicant was having the knowledge about the will. The analogy applied by the applicant is that in case of the registered document the applicant must have knowledge and there is no presumption of constructive knowledge.

12. The prayer for pre-emption is also there. As per Article 97 of the Limitation Act the right of pre-emption ought to have been sought within one year from the date of registration of sale. According to plaintiff, the right of pre-emption starts from the date of registering partition deed i.e. 29.04.1987. Therefore according to the applicant the right of pre-emption is out of limitation.

13. On perusal of the plaint it appears that the registered partition deed is between four persons mother, father and two sons i.e. plaintiff and defendant. The existence of the right of plaintiff for pre-emption can be adjudged only after considering

the evidence and it cannot be adjudicated upon without oral and documentary evidence that said right is within limitation.

14. It is observed by this Court in case of Shri Sharad Sitaramji Shende and others V/s Shri Nilesh Subhashandji Katariya and others reported in **2002 (2) BCJ 279** that question of limitation is a mixed question of law and facts, it would require the parties to go to trial.

15. The plaintiff is not praying for possession on the basis of partition deed which was executed in the year 1987. In this case Article 65 of the Limitation Act will not be attracted as the plaintiff is not claiming adverse possession after the death of his mother, but is claiming that his father cannot bequeath the share of his mother by will. The right of plaintiff had arisen only after demise of his mother on 16.09.2009. The property in her share was not properly mutated in the name of all legal heirs. It is not the suit for possession based on title. The suit for partition and separate possession is not governed by Article 65 of the

Limitation Act. It appears from the record that the plaintiff is claiming the suit property being ancestral in nature as it was jointly possessed by his mother and father and as they were having equal half share, the father cannot transfer portion of share of his wife by his will. Therefore, the plaintiff and defendant have equal share after demise of their parents. The will is under challenge. As the plaintiff is claiming the share which his father has received in partition and it is the suit for partition and not the suit based on title in terms of Article 65 of Limitation Act, the trial Court has rightly rejected the application. As I agree with the observations made by the trial Court, the interference at the hands of this Court is not required. Hence the civil revision application is rejected. Rule discharged.

(MRS.VRUSHALI V. JOSHI, J.)