

(1998) 08 BOM CK 0035

In the Bombay High Court

Case No : Notice of Motion No. 2436 of 1996 in Suit No. 2480 of 1996

Agyarani Dua

APPELLANT

Vs

Vidyagauri J. Tripathi and another

RESPONDENT

Date of Decision : 27-08-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Limitation Act, 1963 — Article 14, 56, 57, 58, 59

Citation : (1998) 4 ALLMR 521 : (1998) 4 BomCR 844 : (1998) 3 MhLj 797

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : S.U. Kamdar and K.R. Parekh, for the Appellant; Nusrat Shah, P.D. Contractor, H. Wadia and Nomin, instructed by Naazish N. Shah, for the Respondent

Judgement

R.M. Lodha, J.—By this Notice of Motion taken out by the defendants it is prayed that plaint be rejected under Order VII, Rule 11, C.P.C. being barred by law of limitation.

2. The plaintiff in the suit has prayed for declaration that the agreement dated 24-11-1984 be declared to have been abdicated and/or given up or in the alternative it be declared that the said agreement for sale dated 24-11-1984 is void/void able for want of consideration and for not abiding by the material terms thereof and therefore illegal, bad in law and not binding on the plaintiff. The plaintiff has also sought the relief that the defendants being trespassers be ordered and decreed to hand over quiet, vacant and peaceful possession of the suit premises i.e. flat No. 12, Building No. 24, Ashish Co-operative Housing Society, Guru Nagar, J.P. Road., Andheri (West), Bombay. In the alternative, the plaintiff has prayed for decree of Rs. 3,71,000/- together with interest on the said principal sum at the rate of 18% per annum and damages to the tune of Rs. 30,00,000/-.

3. The brief facts which have been highlighted in the plaint are that on 1-9-1972

the said suit premises were given on the leave and license basis to one Jethalal Damodar Tripathi. The agreement for sale of the suit premises took place between the plaintiff and the present defendant No. 1, who is the wife of Jethalal Damodar Tripathi. The terms of the agreement for sale were not complied with by the defendant No. 1 and agreement for sale of said suit premises was revoked on 12-2-1984. Thereafter on 11-5-1988 the plaintiff issued notice to quit and notice of demand of arrears from 1-1-1985 to 30-4-1988 amounting to Rs. 20,000/- since the said premises were let out to the husband of the defendant No. 1. On 1-8-1988 the plaintiff filed a suit for eviction against Jethalal Damodar Tripathi for recovery of possession and arrears of rent. The plaintiff obtained ex parte decree for possession and for recovery of arrears of rent from Small Causes Court on 18-3-1991. The plaintiff then levied execution of the ex parte decree and in the said proceedings the defendants puts obstruction to warrant of possession and accordingly the plaintiff took out Obst. Notice on 3-8-1992. The defendant No. 1 filed reply to the Obst. Notice on various pleas and it was also brought to the notice of the Court that Jethalal Damodar Tripathi had died in the year 1986 and filing of the suit against the dead person by the plaintiff and decree obtained thereon was a nullity. Ultimately on 19-7-1995 the Obst. Notice taken out by the plaintiff was dismissed by the Executing Court. An appeal came to be filed by the decree holder before the Appellate Bench of the Court of Small Causes but without any success. Writ Petition was then filed by the plaintiff challenging the orders of the Small Causes Court and the writ petition too was dismissed. Thereafter the present suit has been filed by the plaintiff seeking aforesaid reliefs on 9-7-1996.

4. Mr. Shah, learned Counsel appearing for the defendants in the back ground of aforesaid averments made in the plaint submit that limitation in the present suit is governed by Article 58 of the Limitation Act. According to him the limitation provided to obtain declaration as prayed for by plaintiff is 3 years when the right to sue first accrued. The learned Counsel for defendant would urge that right to sue accrued to the plaintiffs in the year 1987 itself and, therefore, filing of the present suit in the year 1996 is hopelessly time barred. Mr. Kamdar, learned Counsel for the plaintiff on the other hand relied upon Article 59 and Article 65 of the Limitation Act and urged that suit is within limitation.

5. I have already referred to the reliefs prayed for the plaintiffs. It is clear therefrom and also the tenor of the plaint that the principal relief prayed for by the plaintiff is for declaration that the agreement dated 24-11-1984 stands abdicated and given up and other consequential reliefs flowing from such declaration including possession.

Article 58 of the Limitation Act reads thus :

58. Description of suit - To obtain any other declaration

period of limitation - three years -

time from which period begins to run - when the right to sue first accrues.

It would be noticed from the Article 58 that for obtaining any declaration which is not covered by Article 56 and 57 is 3 years when right to sue first accrues. According to the plaintiff himself the agreement dated 24-11-1984 stood terminated when within 15 days of the notice dated 12-12-1984 terms of the agreement were not complied with by the defendant No. 1 and payment of balance amount of Rs. 86,000/- was not made. Thus it is apparent that the right to sue accrued to the plaintiff when terms of the agreement dated 24-11-1984 were not complied with and in any case on expiry of fifteen days of the notice dated 12-12-1984 the agreement stood revoked and terminated. Obviously, therefore, the suit seeking declaration that the agreement dated 24-11-1984 stands abdicated or given up or is void or voidable was required to be filed within 3 years from 27-12-1984 i.e. on expiry of fifteen days from notice dated 12-12-1984. The present suit has been filed long thereafter on 9-6-1996 and, therefore, it is hopelessly barred by limitation.

6. The learned Counsel for the plaintiff sought to rely upon Articles 59 and 65 in support of his submission that the suit is within time. Article 59 thus reads :

59. To cancel or set aside an instrument or decree or for the rescission of a contract - period of limitation, three years, time from which period begins to run - when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.

In accordance with the Article 59 the suit seeking relief of cancellation or setting aside an instrument or decree or for the rescission of a contract is required to be filed within 3 years when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him. As I already observed above according to the plaintiff himself the agreement for sale dated 24-11-1984 stood revoked and terminated since terms were not complied with by defendant No. 1 within time which was essence of contract. The plaintiff also gave notice to the defendants on 12-2-1985 calling upon him to pay amount of consideration of Rs. 86,000/- within 15 days which was not complied with by defendants. Even if it be assumed that Article 59 has application then also the facts entitling the plaintiff to have the agreement of sale dated 21-11-1984 cancelled or set aside or revoked or rescission came to his knowledge in the month of February 1985 and therefore the suit is hopelessly time barred even under Article 59 of Limitation Act.

Article 65 on which the plaintiff also sought to place reliance reads thus :

65. For possession of immovable property or any interest therein based on title --- period of limitation - twelve years (but 30 years in respect of immovable property belonging to a member of the Scheduled Tribes as specified in Part III to the Schedule to the Constitution (Scheduled Tribes) Order, 1950 - Time from which period begins to run - When the possession of the defendant becomes adverse to the plaintiff.

Explanation--For the purposes of this article -

a) Where the suit is by a remainder man, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only

when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession;

b) Where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;

c) Where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment debtor who was out of possession.

7. Article 65 has no application in the facts and circumstances of the present case since the principal prayer made by the plaintiff in the suit is for declaration that the agreement dated 24-11-1984 is abdicated or given up and be declared void or voidable. The prayer for possession is consequential reliefs to that declaration inasmuch as according to the plaintiff, as per the agreement dated 24-11-1984 the defendants were put in possession and since the Small Causes Court has ultimately found that the defendants are in possession under the agreement for sale, upon declaration of that agreement is bad in law, the possession be restored. Thus the present facts definitely render section 65 in-applicable.

8. At this stage Mr. Kamdar sought to place reliance on section 14 of the Limitation by urging that time taken by the plaintiff in suit for eviction be excluded while computing limitation. Section 14 of the Limitation Act provides for exclusion of time during which plaintiff has been prosecuting with other proceeding bona fide in Court without jurisdiction. It reads thus :

"14. Exclusion of time of proceeding bona fide in Court without jurisdiction - 1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

Apparently section 14 has no application and cannot be invoked by plaintiff for more than one reason. In the plaint nowhere the plaintiff has sought for exclusion of time on the ground that the plaintiff proceeded bona fide in the Small Causes Court which was having no jurisdiction in the matter. The facts which may constitute exclusion of time u/s 14 of Limitation Act are not at all pleaded in plaint. Even otherwise plaintiff has not filed the suit before the Small Causes Court seeking reliefs which are sought for in the present suit. The reliefs

sought for in the Small Causes Court were absolutely distinct and different based on different cause of action from the reliefs which plaintiff is seeking in the present suit. The earlier suit was filed by the plaintiff against Jethalal Damodar Tripathi seeking eviction against him. The suit was not directed against the present defendants. Jethalal Damodar Tripathi died in the year 1986 and dispute that fact the suit for eviction was filed against dead person and ex parte decree was obtained by the plaintiff against the dead person. Prosecution of such suit by no stretch of imagination can be said to be in good faith or bona fide with due diligence. Section 14 of Limitation Act has, thus, no application.

9. I, therefore, hold that suit is time barred and deserves to be rejected under Order VII, Rule 11 of C.P.C. and is rejected accordingly. Notice of Motion is made absolute in terms of prayer (a) which reads thus :

"(a) That this Hon"ble Court be pleased to reject the plaint of the plaintiff filed on 9th July 1996 under the provisions of Order 7, Rule 11, the same being barred by the Law of Limitation as well as there being no cause of action."

No order as to costs.