

(2015) 03 BOM CK 0028

In the Bombay High Court

Case No : Notice of Motion Nos. 170 of 2012 and 173 of 2014 in Suit No. 2678 of 2010

Parwan Constructions Pvt. Ltd. and Others

APPELLANT

Vs

Ranjitsingh Linga and Others

RESPONDENT

Date of Decision : 23-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1(1), Order 23 Rule 1(3)(b), Order 23 Rule 2, Order 23 Rule 3(b), Order 23 Rule 4
Limitation Act, 1963 — Section 14(3)
Transfer of Property Act, 1882 — Section 3

Citation : (2016) 1 ALLMR 252

Hon'ble Judges : R.S. Dalvi, J.

Bench : Single Bench

Advocate : Vivek Walavalkar, Sameer R. Bhalekar, and Vidita B., for the Appellant; S.S. Joshi, Advocates for the Respondent

Judgement

R.S. Dalvi, J.—This Notice of Motion is taken out for rejection of the plaint under the provisions of Order 7 Rule 11(a) and (d) of the CPC.

2. The main dispute between the parties is with regard to the Law of Limitation. If the suit is barred by the Law of Limitation, the other aspects would not be required to be seen.

3. It is argued on behalf of the defendant Nos. 1 and 2 that the suit is barred, the cause of action having been accrued to the plaintiff on 2nd January, 1997 when the conveyance by the ultimate predecessor-in-title of the plaintiff took place with plaintiff's predecessor-in-title one Mehta and Kanakiya. Thereafter on 31st October, 2002 the plaintiff obtained the conveyance from Mehta and Kanakiya.

4. It is argued that the plaintiff was put to notice of the fact alleged in the plaint from that date of 1997 because in the conveyance in favour of the plaintiff the right, title and interest of the plaintiff's predecessor-in-title under their earlier

conveyance would be made known to the plaintiff and the plaintiff would be imputed such knowledge.

5. My attention is drawn to the clause relating to the notice under Section 3 of the Transfer of Property Act which runs thus :

"a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it. 6. The plaintiff would be taken to have notice of the fact of whatever was the title of the plaintiff's predecessor-in-title on the date of the conveyance in favour of the plaintiff which was on 31st October, 2002. Of course, if the right of the plaintiff's predecessor-in-title was barred by limitation the plaintiff's right is also be barred by limitation. Otherwise the plaintiff would get the remainder of the period to sue if not barred by Law of Limitation. The plaintiff would step into shoes of ultimate predecessor-in-title who was one Muktaben, the owner of the entire property.

7. The suit property was tenanted to various tenants including defendant Nos. 1 and 2 by Muktaben. Muktaben entered into the conveyance in favour of the plaintiff's predecessor-in-title to 2nd January, 1997. In that conveyance the fact of illegal construction done by various occupants (tenants) including defendant Nos. 1 and 2 so as to affect balance available FSI of the said property was recited. The plaintiff's predecessors-in-title were unaware of such unauthorized construction. The plaintiff's predecessors-in-title executed the conveyance in favour of the plaintiff on 31st October, 2002. Upon the execution of the conveyance, therefore, the plaintiff would have the remainder of the time to sue if the suit was not barred on that date. Under Article 66 of schedule 1 to the Limitation Act, 1963 the suit for possession of the immovable property by reason of breach of any condition would be 12 years when the condition was broken. Even if the condition was taken to be broken from 1997 the plaintiff's predecessors-in-title or thereafter the plaintiff could sue within 12 years of 2nd January, 1997. Such a suit, therefore, could have been filed on or before 1st January, 2009. The plaintiff sued all the tenants / occupants including defendant Nos. 1 and 2 in 2007 which was within the period of limitation.

8. The plaintiff withdrew that suit on 21st June, 2010 with liberty to file the fresh suit upon the same cause of action. The cause of action in that suit was the unauthorized construction by the tenants / occupants including defendant Nos. 1 and 2 herein so as to affect the FSI of the owner. The plaintiff as the owner would be entitled to the FSI of the ultimate predecessor-in-title, Muktaben and immediate predecessor-in-title, Mehta and Kanakiya.

9. Under Order 23 Rule 2 of the CPC which runs thus :

Limitation law not affected by first suit.-

In any fresh suit instituted on permission granted under the last proceeding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the

first suit had not been instituted.

10. The Limitation Law to file a fresh suit would not be affected by the first suit. Hence in any suit filed the plaintiff would be bound by the Law of Limitation in the same manner as if the first suit was not filed. The plaintiff would, therefore, nevertheless have to sue on the same cause of action within the period of limitation. That would end in 2009.

11. Under Section 14(3) of the Limitation Act, 1963, which runs thus :

Notwithstanding anything contained in rule 2 of Order XXXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.--For the purposes of this section,-

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

12. Hence despite the Order 23 Rule 2 of the CPC the exclusion of time for bonafide purchaser in a Court without jurisdiction would be allowed. If the permission is granted on the ground of any defect of jurisdiction including misjoinder of parties and causes of action the plaintiff can file the fresh suit, later than the expiring of the period of limitation. This is one such suit. This suit is filed on 25th August, 2010. The suit has been filed against defendant Nos. 1 and 2 who were some of the tenants / occupants in the previous Suit No. 1251 of 2007. The plaintiff has filed other separate suits against other occupants / tenants initially in this Court which have been transferred to the Bombay City Civil Court upon the question of pecuniary jurisdiction. Hence it was the defect of jurisdiction in suing all the tenants / occupants together which was sought to be remedied for which the plaintiff applied for and obtained leave and then sued separately.

13. That was for the cause of action relating to unauthorized construction affecting the FSI of the plaintiff as the owner much as it affected the FSI initially of Muktaben and later of Mehta and Kanakiya. Thus seen the suit for that cause of action would not be barred.

14. The plaintiff has sued on another cause of action also. That the application of defendant Nos. 1 and 2 for registration of the co-operative society made on 17th

July, 2009 well after the first suit was withdrawn and before the second suit being the fresh suit came to be filed upon the leave and liberty granted. The plaintiff would contend that that application came to be rejected in 15th September, 2009. The plaintiff would contend that upon that cause of action the plaintiff could have filed a separate suit. The suit filed within a year and a month of that application would not be barred by any Law of Limitation.

15. Hence it is seen that there are two causes of action upon which the plaintiff has sued. They are in respect of the same property and against the same party. The plaintiff can join those causes of action to sue. The plaintiff could sue in respect of the initial cause of action consequent upon the leave granted. The plaintiff could file any other suit on any other cause of action within the period of limitation. Hence the plaintiff could sue on the second cause of action even without the leave. That is the inherent right of the plaintiff to sue in civil court. That right is not barred.

16. Consequently the first right which would otherwise be barred is saved by the leave granted upon the defect of jurisdiction. The second right is not barred at all.

17. The chronology of the events and dates and the averments in plaint, therefore, do not show that the suit is barred by the Law of Limitation and the plaint, therefore, cannot be rejected on the ground that the suit is barred by the Law of Limitation under Order 7 Rule 11(d) of the CPC. Hence prayer "c" of the Notice of Motion is rejected.

18. It is also contended that this suit is filed upon the leave granted in Suit No. 1251 of 2007. This suit, however, extends further. Leave has been granted obviously to sue on the same cause of action. The cause of action in that suit was unauthorized construction and encroachment outside the premises of defendant Nos. 1 and 2 as also the other occupants / tenants. This suit is filed on that cause of action.

19. It is not contended that these two causes of action, one initially for which the leave was obtained and the other which accrued later upon a further act of defendant Nos. 1 and 2 would constitute misjoinder of the causes of action. Indeed it does not appear to constitute any misjoinder.

20. It is contended on behalf of the defendant Nos. 1 and 2 that this suit should be filed only as per the leave granted. It is not so filed and hence must be rejected cannot be accepted. The suit is indeed not only as per leave granted but is a suit as per leave granted as also upon another cause of action which accrued to the plaintiff thereafter. The plaintiff could have filed two separate suits; one upon the leave being granted and one upon a fresh cause of action. Instead to avoid multiplicity of proceedings the plaintiff has sued on both the causes of action.

21. Under Order 23 Rule 1(1) the plaintiff may withdraw a plaint. Under Order 23 Rule 3(b) if there are sufficient grounds the Court may allow the plaintiff to file a

fresh suit for the subject matter of the suit itself. That is the suit filed by the plaintiff upon such leave under Rule 3 ((b) with regard to the unauthorized construction and the encroachment made by the defendant Nos. 1 and 2. However, Order 23 Rule 1(3)(b) does not prevent a plaintiff from suing upon any cause of action also. The plaintiff would, therefore, be entitled to sue upon such cause of action also and the suit thus filed cannot be rejected in the absence of the bar to file fresh suit on the another cause of action also.

22. In the case of Rakhmabai Piraji Sapkal Vs. Mahadeo Narayan Bundre, , the suit for ejectment was withdrawn as the notice to quit was not given to the defendant. Another suit for ejectment was brought after the notice to quit was given. The suit was withdrawn without leave. It was held that the second suit was not barred because the two suits were not in respect of the same subject matter. In the first suit there was no cause of action for want of notice in the second suit there was cause of action upon such notice. Therefore, the causes of action were not the same.

23. It is contended on behalf of defendant Nos. 1 and 2 that for the fresh suit to be filed (which would be after expiry of the period contemplated in Section 14(3) of the CPC.) must be for the same subject matter. The "subject-matter" is explained in the case of Vallabh Das Vs. Madan Lal and Others, .

The expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject-matter of the second suit is the same as that in the previous suit. In that case the first suit was for partition and separate possession. The cause of action was division of the status of the parties. The accrual of the cause of action was when the plaintiff was separated from his family conversion of joint possession into separate possession was claimed. The fresh suit was for possession of the suit property from a trespasser on the basis of his title. The cause of action would arise upon a series of transactions which formed the basis of his title to the suit properties.

24. The application of the defendant under prayer "b" of the Notice of Motion for rejection of the plaint on the ground of the bar created under Order 23 Rule 1(1) r/w. Order 23 Rule 3(b) and Order 23 Rule 4 as prayed for by the plaintiff, therefore, cannot be accepted.

25. Hence prayer "b" also rejected.

26. Prayer "a" in the Notice of Motion has been considered in Notice of Motion No. 173 of 2014 and has been rejected on Friday, 20th March, 2015. Hence it need not be reconsidered.

27. Consequently the Notice of Motion is dismissed.