

(2010) 08 BOM CK 0046

In the Bombay High Court

Case No : Civil Rev. Application No. 15 of 2009

Suresh Bhalchandra Shetye

APPELLANT

Vs

Anil Vasant Pednekar and Others

RESPONDENT

Date of Decision : 13-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2, Order 7 Rule 4
Evidence Act, 1872 — Section 92
Limitation Act, 1963 — Article 58, 65, 27

Citation : (2011) 7 ALLMR 619 : (2011) 1 BomCR 251 : (2011) 1 MLJ 387

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : S.G. Dessai and A. Gaonkar, for the Appellant; A.D. Bhobe, for the Respondent

Final Decision : Dismissed

Judgement

F.M. Reis, J.—The above Revision challenges the Order dated 1st August, 2009, passed by learned Civil Judge, Senior Division, Panaji, in Special Civil Suit No. 104/08/B, whereby the application under Order 7, Rule 11 of CPC filed by the Petitioner came to be rejected.

2. The parties shall be referred to as in the manner as they appear in the cause title of the impugned Judgment.

3. It is the case of the Plaintiffs that the Plaintiff No. 1 is the son of late Vasant Sada Pednekar while the Plaintiff No. 2 is his daughter-in-law of the said Vasant Pednekar. It is their contention that the said Vasant Pednekar expired on 19-2-1985 leaving behind the Defendant No. 2 as moiety sharer and as his sole and universal heirs, his five children namely the late Audhut Vasant Pednekar, who was married to Plaintiff No. 2, Shri Uday Pednekar, married to Lalita Uday Pednekar, Shri Anand Vasant Pednekar, married to Usha Anand Pednekar and Shri Anil Vasant Pednekar, the Plaintiff No. 1 herein married to Anita Anil Pednekar. It is further their case that the said Savita along with her husband Shri

Ramakant had relinquished their right to the estate of the said deceased Vasant Pednekar, by Deed of Relinquishment of Right dated 17-9-1987. It is further their case that there was a Partnership entered into by him with the Defendant No. 1 and one Shri Harishchandra Kandolkar under the name and style of "Shridutta Enterprises" and that the partnership firm had purchased two properties at Calapur Village. It is further their case that the second property which was purchased by the said partnership firm was admeasuring 41325 square metres and is surveyed under No. 193 of Village Calapur, while the first property admeasuring an area of 38,308 square metres is surveyed under No. 197 of Village Calapur while another part of the said property admeasuring 23,852 square metres is surveyed under No. 198 of Village Calapur. It is further their contention that upon the death of the said Vasant Pednekar, his right devolved upon his widow Defendant No. 2 and their four sons and their respective spouses which included the Plaintiff Nos. 1 and 2. It is further their contention that in utter defiance of their right and share over the said properties, the Defendants along with said Harishchandra Kandolkar, executed among themselves a Deed of Reconstitution of Partnership dated 18-9-1987 whereby the said Harishchandra Kandolkar retired from the Partnership while the Defendant No. 2 was admitted as a new partner and as such the partnership firm was continued by Defendant Nos. 1 and 2. It is further their case that on 10-3-1989, a Deed of Dissolution was executed whereby the Defendant No. 1 retained the 50 percent share and the remaining 50% share of the said property was allotted to Defendant No. 2. It is further their case that the Plaintiff and the legal heirs of the said Vasant were not informed about the aforesaid arrangements and the said documents were executed at the instance of Defendant No. 1 as Defendant No. 2 was illiterate lady and except that she could sign her name in Marathi language, she did not know to read and write. Thereafter, the Defendant Nos. 1 and 2 execute a Deed of Sale dated 19-1-2006, registered before the Sub-Registrar, whereby the Defendant No. 2 sold her 50% undivided rights in the said property to Defendant No. 1. It is further their case that Defendant No. 1 had mala fide valued the 50% share at Rs. 14,00,000/- in the said Deed and the same was grossly undervalued. It is further their case that the market value of the land at the time of execution of the said Sale Deed was Rs. 24,00,00,000/- and the value of the undivided share was Rs. 12,00,00,000/- approximately. It is further their case that prior to the execution of the Deed, the Defendant No. 1 had obtained the signatures of Plaintiff Nos. 1 and 2 on some Agreements which were executed with M/s Kamat Real Estates and M/s Kamat Constructions Pvt. Ltd., in or around the year 1992 and 1997. It is further their case that at the execution of the said Agreements, the Defendant No. 1 had represented to the Plaintiffs that the said properties would be developed through M/s Kamat Real Estate and M/s Kamat Constructions Pvt. Ltd., and the Plaintiffs along with the heirs of the late Vasant Pednekar, would be paid requisite consideration amount as per their shares in the said properties but, however, the said amounts were not paid. It was further the case of the Plaintiffs that by Deed dated 19-1-2006 and 16-5-2006, they have not been made parties nor any consideration amount has been paid to them. It is

further their case that the said Deeds have been executed in a collusive manner and that the said properties have been grossly undervalued and have been executed illegally and mala fidely by the Defendant No. 1. It is further their case that on the basis of the said Sale Deed dated 19-1-2006 and 16-5-2006, the Defendant No. 1 had acquired rights of ownership over the said properties. It is further their case that all the documents executed are in possession and custody of Defendant Nos. 1 and 2 but, however, the reference thereof has been mentioned in the Deed of Sale dated 19-1-2006 and 16-5-2006. Consequently, it is their contention that they are entitled for a declaration that the Sale Deeds dated 19-1-2006 as well as the Deed dated 16-5-2006 are null and void and liable to be cancelled and also for permanent injunction as prayed for therein.

4. The Defendant No. 1 filed an application for rejection of plaint under Order 7, Rule 11 of the Code of Civil Procedure. The grounds on which the said application is filed is that the plaint does not disclose any cause of action and that the suit on the face of it is barred by law of limitation. It is further their contention that the Plaintiffs have no legal rights existing capable of being enforced for maintaining the above suit. It is further their case that the Plaintiffs are not entitled for any legal character or any legal right to the said property and have no locus standi thereof. It is further their case that the suit is barred by limitation to claim any right to the said properties as the cause of action had arisen on 19-2-1985 when the husband of Defendant No. 2 expired and thereafter when the Defendant No. 2 was admitted as a partner on 18-9-1987. It was further their case that the plaint lacks particulars under Order 6, Rule 4 of the CPC and that the suit is bad for non-joinder of necessary parties.

5. The Plaintiffs filed their reply to the said application disputing their said contention and it is further their case, that the application has been filed only to delay the matter. The learned Civil Judge, Senior Division, by impugned Order dated 1-8-2009, dismissed the said application filed by the Defendants.

6. Being aggrieved by the said Order, the Defendant has preferred the present Revision Petition.

7. Shri S.G. Dessai, the learned Senior Counsel appearing for the Petitioner/ Defendant No. 1, has assailed the impugned Order passed by the learned Trial Judge and submitted that as a Deed of Dissolution of the partnership was executed in the year 1989 between the Defendant Nos. 1 and 2 whereby both of them became equal owners of the suit properties, the suit itself was barred by law of limitation. He further submitted that the Plaintiffs have not impugned the said Deed in the present suit and, as such, the question of claiming any declaration with regard to the Sale Deeds executed in the year 2006, does not arise at all. He further submitted that without setting aside the said Deed of Dissolution executed in the year 1989, the question of claiming any reliefs in the present suit would not arise. He further submitted that on the basis of the documents produced by the Plaintiffs then claim is to be held to be barred by limitation and, consequently, the plaint deserves to be rejected as it does not

disclose any subsisting cause of action. He further submitted that as the Plaintiffs have not prayed for any declaration about any subsisting right to the immovable property which is the foundation of their claim, the question of seeking any declaration, that the Sale Deeds are null and void would not arise at all as the suit for declaration of title has become time barred. He accordingly submitted that the learned Judge has acted with material irregularity to in exercise of his jurisdiction which requires interference by this Court. In support of his submission, he relied upon the judgment of the Apex Court reported in *Hardesh Ores Pvt. Ltd. Vs. Hede and Company*, in the case of *Hardesh Ores Pvt. Ltd. Vs. Hede and Company*,

8. On the other hand, Shri A.D. Bhole, the learned Counsel appearing for the Plaintiff Nos. 1 and 2 has disputed the said contentions advanced by the learned Senior Counsel. He submitted that in the process of deciding an application under Order 7, Rule 11 of Code of Civil Procedure, no amount of evidence can be read but the plaint has to be read as a whole. He further submitted that the suit for declaration of title under Article 58 of the Limitation Act, cannot be barred by law of limitation unless the right to immovable property would extinguish by adverse possession. He further submitted that acquiescence and estoppel cannot defeat title to immovable properties. He further submitted that the contention of the Plaintiffs at para 13 of the plaint is that the execution of the documents were made at the instance of Defendant No. 1/Petitioner herein as the Defendant No. 2 is an illiterate lady and except that she can sign her name in Marathi language, she does not know to read and write. He further submitted that at para 14 of the plaint, it is averred that in utter defiance of the right, title and interest and claim of the Plaintiffs in the suit property. Deed of Sale dated 19-1-2006, has been executed in favour of Defendant No. 1. He has further submitted that at para 15 of the plaint, it has been averred by the Plaintiffs that the suit property has been erroneously valued as, according to the Plaintiffs, the market value of the said property was Rs. 24,00,00,000/- approximately and the value of undivided 50 percent share was Rs. 12,00,00,000/- approximately. He further submitted that at para 16 of the plaint, the Plaintiffs have pleaded that the Defendant No. 1 represented to the Plaintiffs that the said property would be developed by M/s Kamat Real Estates and M/s Kamat Constructions Pvt. Ltd., and the Plaintiffs along with other co-heirs of late Vasant Sada Pednekar, would be paid requisite consideration amount as per their share in the said properties. He further submitted that the Plaintiffs are not made parties to the impugned Sale Deeds and the same have been executed by collusion with each other thereby depriving the Plaintiffs of their legitimate right and share in the said properties. He further took me to paras 18 and 19 of the plaint to demonstrate that the documents referred to in the impugned Sale Deeds are in the possession of the Defendant Nos. 1 and 2. He has as such submitted that the Plaintiffs are entitled for a declaration as sought for by them as the cause of action as stated at para 24 aroise on or about 20-12-2006, wherein they came to know about the impugned Sale Deeds and the suit was filed on 19-11-2008, which is within the period of

limitation.

9. Having heard the learned Counsel and on perusal of the records, I find that the learned Judge whilst passing the impugned Order, has come to the conclusion that whether a plaint discloses a cause of action is essentially a question of fact or whether it does or does not is from the reading of the plaint itself and for the said purpose, the pleadings made in the plaint in their entirety must be held to be correct. On perusal of the plaint, I find that the case of the Plaintiffs is that their father late Vasant Pednekar, had admittedly a share in the partnership firm and the suit property was one of the assets of the partnership firm. It is further their case, that the Plaintiffs being some of the children of the said deceased Vasant Pednekar, are entitled to the said property which has devolved upon them upon his death. It is further their case that though some signatures were obtained from the Plaintiffs on some documents at the instance of Defendant No. 1, nevertheless, the Plaintiffs are not parties to the impugned Sale Deeds executed in the year 2006.

10. From the documents on record, I find that in the Agreement for Sale dated 5-9-2005, the Plaintiffs are not parties to the said Agreement. So also, in the impugned Sale Deeds dated 19-1-2006 and 16-5-2006, the Plaintiffs are not parties thereof. There are averments in the plaint at para 16 that there was an oral understanding at the time of obtaining their signatures in the documents in the year 1992 and 1997. There are also averments at para 15, that the value of the suit property is more than Rs. 24,00,00,000/-. Para 13 also stipulates that the Defendant No. 1 does not know to read and write. There are further averments in the plaint that the impugned Sale Deeds have been executed in utter defiance of the rights, title, interest and claim of the Plaintiffs in the suit property. Considering the said averments in its entirety, I find that the Plaintiffs, prima facie, appear to have a cause of action for filing the suit. Though, even assuming that the Defendant No. 2 had 50 percent share in the suit property on the basis of earlier documents, nevertheless, whether the Sale Deeds have been executed by collusion to defeat the rights of the Plaintiffs over the suit property will have to be decided at the trial of the suit. As per the law in force, the Defendant No. 2 cannot prejudice the mandatory share which has to devolve on the descendants to be inherited by the children equally. Apart from that, provisions of Section 92 of the Indian Evidence Act, permits a party to establish a fact which would invalidate any document as also the existence of any separate oral Agreement as to any matter on which a document is silent or/as not inconsistent with its terms. The proviso (3) further contemplates that a party can establish the existence of any separate oral Agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of the property can also be established. Every said aspect can be established if the Plaintiffs are so entitled in the trial of the suit. There are pleadings to that effect at Para 16 of the plaint.

11. Besides that, as the Plaintiffs are the children of the said Vasant Pednekar,

his rights devolved also upon the Plaintiffs herein. Whether, merely on the basis of being confirming parties to the Agreements, would by itself defeat their rights in the immovable properties, would be another aspect which will have to be determined at the trial of the suit as law prescribes a specific form by which a party relinquishes and surrenders their rights to the inheritance or immovable properties. The law is well settled in the judgment of the Apex Court reported in 2007(5) ALL MR 461, in the case of M/s Kamakshi Builders v. Ambedkar Educational Society and Ors., wherein the Apex Court has held at paras 24, 25 and 26, thus:

24. Acquiescence on the part of Respondent No. 1, as has been noticed by the High Court, did not confer any title on Respondent No. 1. Conduct may be a relevant fact, so as to apply the procedural law like estoppel, waiver or acquiescence, but thereby no title can be conferred.

25. It is now well-settled that time creates title.

26. Acquisition of a title is an inference of law arising out of certain set of facts. If in law, as person does not acquire title, the same cannot be vested only by reason of acquiescence or estoppel on the part of other.

As such, on reading of the plaint, I find that the Plaintiffs have, prima facie, established that they have a cause of action in filing the suit and, in any event, the Trial Judge was justified in coming to the conclusion that whether a plaint discloses a cause of action is essentially a question of fact.

12. The judgment of the Apex Court relied upon by the learned Senior Counsel appearing for the Petitioner in the case of Hardesh Ores Private Limited v. Hede & Co., (supra), is not applicable to the facts and circumstances of the present case. The facts in the said case in short were that a party was claiming an injunction to enforce a term in the Agreement injunction, Government was relying upon a renewed Agreement almost four years after the Defendants therein categorically denied the said renewal. In such circumstances, the Apex Court held that as the suit for specific performance on the basis of the said renewal Agreement had already become time barred, the question of obtaining an injunction on the basis of the said Agreement would not arise. Such denial in the said case was unequivocally effected in December, 2001 and the suit was filed in August, 2005, which the Apex Court held was time barred for enforcing such Agreement and, consequently, the injunction could not be granted without seeking a relief for enforcement of an Agreement which relief was time barred. In such circumstances, the said judgment is not applicable to the facts of the present case.

13. In the judgment of the Apex Court reported in 2008 (12) SCC 66, in the case of Kamala v. K.T. Eshwara Sa, it has been held at Paras 21, 22, 24 and 25, thus:

21. Order 7, Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the

averments made in the plaint. Different clauses in Order 7, Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking Clause (d) of Order 7, Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a Court can be invoked at different stages and under different provisions of the Code. Order 7, Rule 11 of the Code is one, Order 14, Rule 2 is another.

22. For the purpose of invoking Order 7, Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision.

23. ...

24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained.

14. In 2007 (14) SCC 183, in the case of C. Natrajan v. Ashim Bai, the Apex Court has held at paras 8, 9, 11, 12, 13 and 14, thus:

8. An application for rejection of the plaint can be filed if the allegations made in the plaint even if given face value and taken to be correct in their entirety appear to be barred by any law. The question as to whether a suit is barred by limitation or not would, therefore, depend upon the facts and circumstances of each case. For the said purpose, only the averments made in the plaint are relevant. At this stage, the Court would not be entitled to consider the case of the defence. (See Popat and Kotecha Property v. SBI Staff Assn. 1)

9. Applicability of one or the other provision of the Limitation Act per se cannot be decisive for the purpose of determining the question as to whether the suit is barred under one or the other article contained in the Schedule appended to the Limitation Act.

10. ...

11. In Popat and Kotecha Property v. SBI Staff Assn., this Court, inter alia, opined: (SCC p.517, para 23)

23. Rule 11 of Order 7 lays down an independent remedy made available to the

Defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word "shall" is used clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the Defendant. In any event, rejection of the plaint under Rule 11 does not preclude the Plaintiffs from presenting a fresh plaint in terms of Rule 13.

It was further opined: (SCC p. 517, para 25)

25. When the averments in the plaint are considered in the background of the principles set out in *Sopan Sukhdeo* case the inevitable conclusion is that the Division Bench was not right in holding that Order 7, Rule 11 CPC was applicable to the facts of the case. Diverse claims were made and the Division Bench was wrong in proceeding with the assumption that only the non-execution of lease deed was the basic issue. Even if it is accepted that the other claims were relatable to it they have independent existence. Whether the collection of amounts by the Respondent was for a period beyond 51 years needs evidence to be adduced. It is not a case where the suit from statement in the plaint can be said to be barred by law. The statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7, Rule 11. This is not so in the present case.

12. However, we may notice that another Division Bench of this Court, in *Balasaria Construction (P) Ltd. v. Hanuman Seva Trust* stated the law thus: (SCC p. 661, para 8)

8. After hearing counsel for the parties, going through the plaint, application under Order 7, Rule 11(d), CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court touching upon the merits of the dispute are set aside but the conclusion arrived at by the High Court is affirmed. We agree with the view taken by the trial court that a plaint cannot be rejected under Order 7, Rule 11(d) of the Code of Civil Procedure.

13. In the said decision, it may be placed on record, on the question as to whether Order 7, Rule 11(d) can be applied when a suit was filed on the premise that a suit is barred by limitation, this Court noticed: (*Balasaria Construction* case, SCC pp. 660-61, para 4)

4. This case was argued at length on 30-8-2005. Counsel appearing for the Appellant had relied upon a judgment of this Court in *N.V. Srinivasa Murthy v. Mariyamma* for the proposition that a plaint could be rejected if the suit is ex

facie barred by limitation. As against this, counsel for the Respondents relied upon a later judgment of this Court in *Popat and Kotecha Property v. SBI Staff Assn.* in respect of the proposition that Order 7, Rule 11(d) was not applicable in a case where a question has to be decided on the basis of fact that the suit was barred by limitation. The point as to whether the words "barred by law" occurring in Order 7, Rule 11(d) CPC would include the suit being "barred by limitation" was not specifically dealt with in either of these two judgments, cited above. But this point has been specifically dealt with by the different High Courts in *Mohan Lal Sukhadia University v. Priya Soloman*, *Khaja Quthubullah v. Govt. of A.P.*, *Vedapalli Suryanarayana v. Poosarla Venkata Sanker Suryanarayana*, *Arjan Singh v. Union of India* wherein it has been held that the plaint under Order 7, Rule 11(d) cannot be rejected on the ground that it is barred by limitation. According to these judgments the suit has to be barred by a provision of law to come within the meaning of Order 7, Rule 11, Code of Civil Procedure. A contrary view has been taken in *Jugolinija Rajia Jugoslavia v. Fab Leathers Ltd.*, *National Insurance Co. Ltd. v. Navrom Constantza*, *J. Patel & Co. v. National Federation of Industrial Co-op. Ltd.* and *SBI Staff Assn. v. Popat & Kotecha Property*. The last judgment was the subject-matter of challenge in *Popat and Kotecha Property v. SBI Staff Assn.* This Court set aside the judgment and held in para 25 as under: (SCC p. 517)

25. When the averments in the plaint are considered in the background of the principles set out in *Sopan Sukhdeo* case the inevitable conclusion is that the Division Bench was not right in holding that Order 7, Rule 11, CPC was applicable to the facts of the case. Diverse claims were made and the Division Bench was wrong in proceeding with the assumption that only the non-execution of lease deed was the basic issue. Even if it is accepted that the other claims were relatable to it they have independent existence. Whether the collection of amounts by the Respondent was for a period beyond 51 years needs evidence to be adduced. It is not a case where the suit from statement in the plaint can be said to be barred by law. The statement in the plaint without addition or subtraction must show that it is barred by any law to attract application of Order 7, Rule 11. This is not so in the present case.

14. If the Plaintiff is to be granted a relief of recovery of possession, the suit could be filed within a period of 12 years. It is one thing to say that whether such a relief can be granted or not after the evidence is led by the parties but it is another thing to say that the plaint is to be rejected on the ground that the same is barred by any law. In the suit which has been filed for possession, as a consequence of declaration of the Plaintiffs title, Article 58 will have no application.

15. Apart from that, a person can file a suit for declaration of title as long as their right to the immovable property has not been extinguished. The learned Senior Counsel has sought to rely upon Section 27 of the Limitation Act to contend that the right to immovable property has been extinguished as no suit

has been filed within a period of 12 years from the date of the execution of the Agreement. Section 27 of the Limitation Act provides that at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to the such property shall be extinguished. The determination of the rights to immovable properties on the basis of title is under Article 65 of the Limitation Act which provides that the suit has to be filed within a period of 12 years from the date, time, when the possession of the Defendants became adverse to the Plaintiff. As such, until and unless the rights to immovable property have been determined on the basis of the provisions of Section 27 of the Limitation Act, the suit for declaration of title cannot face defeat. Considering the said Judgments of the Apex Court, I find that at this stage, it cannot be said that on the face of the pleadings of the Plaintiffs that their rights to the immovable property can be stated to have been extinguished unless the matter is decided on merits. Apart from that, there are allegations on collusion and claims that the Sale Deeds are vitiated and executed only to prejudice the rights of the Plaintiffs in the said properties. All these aspects will have to be adjudicated at the trial of the suit. At this stage, it cannot be accepted that the plaint can be rejected on the ground that the suit on the basis of the Agreements wherein the Plaintiffs have been confirming parties, have not been impugned. As such, the contention of the learned Senior Counsel appearing for Defendant No. 1 cannot be accepted.

16. It is clarified that the findings arrived at are for the purpose of deciding the application under Order 7, Rule 11 of the CPC and all the contentions raised by the parties are left open to be decided on its own merits on the basis of evidence which will be adduced by the parties without being influenced with the prima facie findings arrived at herein.

17. In view of the above, I find that there is no irregularity committed by the learned Trial Judge by rejecting the application filed by the Defendant No. 1 and, as such, no interference is called for in the impugned Order. Hence, the above Revision Application stands dismissed.

18. Parties are directed to appear before the Civil Judge, Senior Division, Panaji, on 6th September, 2010, at 10.00 a.m.