

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 607 OF 2012
IN
SUIT NO. 1320 OF 2011**

Garment Cleaning Works and Ors. .. Plaintiffs
Vs.
Vijay Anant Gangan & Ors. .. Defendants

Mr. Tejas Vora a/w. Mr. D.R. Mishra for plaintiffs.

Mr. S.C. Naidu i/b M/s. C.R. Naidu & Co. for defendant no.1.

Mr. Parag Sharma i/b M/s. Udawadia & Udeshi for defendant no.2.

**CORAM : K.R.SHRIRAM, J.
DATED : 11TH SEPTEMBER, 2014**

P.C.

1 The notice of motion is taken out on behalf of the defendant no.1 for rejection of the plaint (a) under Order VII Rule 11(a) of Code of Civil Procedure, 1908 for non-disclosure of cause of action and under Order VII Rule 11(d) of the Code of Civil Procedure as the suit is barred by limitation and (b) for directing the plaintiff to deposit deficit Court fees. Prayer (b) is a non issue any more as the plaintiffs have paid the requisite court fees. The motion today is restricted only for prayer (a).

2 The counsel for defendant no.1 stated that the Court first considers

submissions under Order VII Rule 11(d) and if the Court is inclined to reject the plaint on the ground of it being time barred then we may not have to go into deciding the other prayer under Order VII Rule 11(a). The counsel for defendant no.1 submitted that the suit from whatever date we take as mentioned in the averments in the plaint, will be grossly time barred.

3 Mr.Vora, counsel for the plaintiffs, while arguing that his clients were already in possession of the property, submitted that the suit is for possession and hence the limitation period should be taken as 12 years from 4.05.1990. The relevance of this date will be apparent later. Reading the entire plaint and the reliefs sought, it is quite clear that the suit is not for possession and therefore 12 years limitation period for filing a suit for possession does not apply. Even if we accept his submissions, still the suit will be time barred as 12 years from 4.05.1990 would be 3.08.2002, whereas the suit was lodged only in year 2011.

4 Mr.Vora also submitted that the plaintiffs had filed a suit in the Court of Small Causes, Bombay against defendant no.2 for evicting defendant no.2 from the Worli property as mentioned in paragraph 19 of the plaint. Reading of paragraph 19, which is reproduced below in paragraph 6, shows that what the plaintiffs were seeking therein was possession of the Worli

property from its tenants. That does not mean this suit would become a suit for possession. The Small Causes Court action is absolutely irrelevant to the matter in hand. In any event, in paragraph 30, it is stated that defendant no.1 intervened in the Small Causes Court suit in or about 2007 by taking out an interim application. Therefore, even if we take three years from 2007, still the suit will be beyond three years as the suit lodging date is 28.04.2011

5 For the sake of convenience, before I deal with the submissions of the opposing counsel, let us reproduce Order VII Rule 11 (a) to (d), which read as under :

ORDER VII- PLAINT :

11. Rejection of plaint— The plaint shall be rejected in the following cases:—

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the

plaint to be barred by any law :

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper , as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]

Order VII, Rule 11(d) of Code of Civil Procedure makes it clear that relevant facts which need to be looked into for deciding an application therein are the averments or the statements in the plaint.

6 The relevant portions of the plaint are reproduced herein. Paragraphs 3, 16, 17, 18, 19, 30, 32 and prayer (b) read as under :

3 The present suit is being filed for seeking inter alia following declarations and reliefs, i.e.,

(i) that the late Chunnilal Ukabhai Padia was not the sole and absolute owner of the two suit properties and had no absolute right, title and interest in respect of them i.e one being leasehold rights in respect of the plot of land situate at 37/43 Dr.Annie Basent Road, Worli, Mumbai-18, bearing C.S. No.1/123 of Lower Parel Division admeasuring 5054 Sq.Yards or thereabouts, wherein building known as 'Garment House' which was constructed, during the life time of the said deceased and which has been let out to the Reserve Bank of India, i.e., the defendant no.2, under the duly registered Lease dated 1st

September 1969 and further supplementary Indenture of Lease dated 1st September, 1976 (duly registered) and by further supplementary Indenture of Lease 29th August, 1979 (duly registered) and the said suit properties are the asset of the plaintiff no.1, i.e., the said Partnership Firm, namely 'Garment Cleaning Works';

(ii) second being the property, i.e., leasehold rights of Plot of land at Banganga Bearing C.S. No.62 (part) of Malbar and Cumballa Hill Division, admeasuring 2226 sq.yards or tenement and building situate therein. Both the said properties are more particularly described in Exhibit "D" hereto, and that the said deceased Chunnilal Ukabhai Padia had no right to deal with the said two suit properties by treating as his own absolute property in his Will dated 1st July, 1985. Hence, the Probate dated 7th October, 1989 obtained by the Defendant No.1 is not enforceable against the said two properties, as more particularly mentioned at Exhibit "D" hereinabove, and in the facts and circumstances and on the grounds, as more particularly, set out hereinafter.

16 As stated earlier, a Probate Petition which was filed by the said Executors of the purported Will of late Chunnilal Ukabhai Padia, dated 1st July, 1985, i.e., Mr.Amrutlal Goverhandas Jalal (since deceased) and Vijay Anand Gangan. On or about 7th October, 1989 the Probate was granted by this Hon'ble Court to the said Executors, in respect of the said last Will and Testament of late Chunnilal Ukabhai Padia, in view of the fact that the full blood sister of said Chunnilal Ukabhai Padia, i.e., his only heir and legal representative Mrs.Hamiben gave her no objection and/or consent for issuance of the Probate qua said Will. After obtaining the Probate, the Executors took the control and charge of the said property and estate of the deceased save and except the

said Banganga property, which was and is in possession of Plaintiffs, started controlling and mismanaging the same as per their whims and caprices. Hereto annexed and marked Exhibit "P" is a copy of the said Probate dated 7th October, 1989.

17 Thereafter on or about 4th May 1990, a Petition being Misc.Petition (Testamentary) No.12 of 1990 came to be filed by one Mr.Amrutlal Ukabhai Padia for the revocation of the said Probate on the various grounds, as more particularly set out in the said Misc.Petition (Testamentary) No.25 of 1990 came to be filed by said Smt. Hamilben @ Hem Kunvar Jagjivandas Asara i.e. full blood sister and only heir & legal representative of Chunnilal Padia (who had earlier given consent and/or NOC for the Probate, as stated earlier). By the said Petition, said Full Blood sister of the said deceased, for the reasons set out in the said Misc. Petition, sought revocation of the said Probate on the various grounds i.e. that she was misled and that it was misrepresented to her and that her consent was obtained by fraud. Unfortunately, said Hamiben expired on or about 6th July, 1994. However, as per the knowledge prior to her death, her deposition/evidence has already been recorded on Commission at Rajkot, which is on record of this Hon'ble High Court. Unfortunately, after death of said Hamiben, her heirs, did not prosecute the said Petition, hence which ultimately came to be dismissed for want of prosecution. In the mean time, a Notice of Motion being Notice of Motion no.2126 of 2004 was taken out by the Petitioner in the Misc.Petition (Testamentary) No.12 of 1990 for seeking various, interim reliefs. However, ultimately, said Notice of Motion came to be disposed of by this Hon'ble Court on or about 22nd July, 2005. The plaintiffs crave leave to refer to and rely upon the said papers & proceedings, as and when produced.

18 However, ultimately the said Misc. Petition (Testamentary) No.12 to 1990 also came to be disposed of and/or dismissed by this Hon'ble Court. Hereto annexed and marked Exhibit "O" is copy of the said

order dated 30th June, 2006.

19 Prior to that, in or about 2003, the Plaintiffs herein in their capacity as the land owner of the said Worli Property, filed the suit in the Court of Small Causes at Bombay being R.E.& R. Suit No.175/187 of 2003 against the Reserve Bank of India *inter alia* for the reliefs i.e.

“(a) The Defendant Nos.1 and 2 be ordered and decree to vacate and hand over the Plaintiff vacant and peaceful possession of suit premises viz. Gr., 1st, 2nd, 3rd floor and 4th floor total admeasuring 97645=50 sq.ft. of Garment House with compound situated at 13/43, Dr.Annie Besant Road, Worli, Mumbai-400 018.

(b) The Defendant order and decree to pay arrears of rent from 1st October 2001 to June, 2003 at rate of Rs.1,20,431.84 amounting to Rs.25,29,068=60.

(c) The Defendant be order and decreed pay to the Plaintiff damages/mesne profits for wrongful use of suit premises from 1st July, 2003 till deliver the possession of the rate of Rs.78,11,640 or at such on rate Hon’ble Court deem fit and proper.

(d) Pending the hearing and final disposal of suit defendant nos.1 and 2 be directed to deposit aforesaid amount in the Court.

On the grounds and facts and circumstances, as more particularly mentioned therein. The suit is being contested by the said Reserve Bank of India, i.e., defendant no.3 herein and the same is pending or want of hearing and final disposal in the Court. The Plaintiffs will rely upon papers and proceedings of the said suit as and when produced.

30 The said Chunilal Ukabhai Padia expired at Mumbai on or about 1st April 1987. The Probate was obtained by the Defendant No.1 on or about 7th October

1989. The Plaintiffs filed the Suit for possession against the defendant no.2 in the Court of Small Causes at Bombay in or about 2003, as stated, hereinabove wherein, the defendant no.1 disputed the claim of the Plaintiff for the first time in or about 2007 by taking out interim Application NO.278 of 2007 in T.E. & R. Suit No.17/187 of 2003, which came to be dismissed on or about 14th July, 2008. Thereafter, defendant no.1 has taken out another Interim Application for setting aside the dismissal order dated 14th July, 2008 on or about 8th October, 2010. Thus, the Defendant No.1 for the first time disputed the right of the Plaintiffs in October 2008 by taking out the said application. The Plaintiffs crave leave to refer to and rely upon the said Interim Application dated 8th October, 2010 as and when produced. The same is pending in the Court for want of hearing and final disposal in the said Small Causes Court. The Plaintiffs are in use, occupation and enjoyment of the suit property i.e. Banganga property, prior to 1950. The present suit is being filed for a declaration i.e. that the Probate dated 7th October 1989 granted by this Hon'ble Court is not enforceable against the said two suit properties, as more particularly mentioned in Exhibit "D" hereto or any part thereof, in the facts and circumstances and on the grounds, as more particularly set out hereinabove. Thus, no part of the Plaintiffs claim is barred by Law of Limitation.

32. The Plaintiff therefore, prays :-

(a)

(b) That this Hon'ble Court be pleased to declare that the Probate dated 7th October 1989 in respect of Will dated 1st July, 1985 of late Chunilal Ukabhai Padia, granted by this Hon'ble Court is not enforceable against the suit properties, i.e., Worli Property and Banganga Property, as more particularly mentioned in Exhibit "D" hereto or any part thereof;

....

7 Therefore, as per the averments in the plaint that the Will dated 1.07.1985 of late Chunnihal Ukabhai Padia was granted Probate by this Court on 7.10.1989. After obtaining the Probate, the Executors took the control and charge of the properties and estate of the deceased, save and except the Banganga property, which was and is in possession of the plaintiffs. The plaintiff nos.2, 3 and defendant no.3 had also filed a miscellaneous petition on or about 4.05.1990 for revocation of the said Probate. This miscellaneous petition got dismissed on or about 30.6.2006.

8 Article 58 of the Limitation Act, 1963 provides a period of limitation to be three years from the date the right to sue first accrues. The suit was lodged on 28.04.2011. Therefore, I am not going into the issue as to when the right to sue first accrues, i.e., whether it accrues from the date of Probate or the date of the knowledge of the Probate because whatever date is taken, the three years period got over latest by June 2009.

7 Mr.Vora's, reliance upon a judgment of this Court in the matter of ***Export Credit Guarantee Corporation of India Ltd. Vs. Mr.T. Mathew & Ors.***¹ is misplaced. Certainly, when the suit has to be dismissed on the ground of limitation and when the application under Section 9A of CPC has

1 2014(4) All. MR 135

to be taken out, it will be a mixed question of law and fact and evidence may have to be led. The present application is not for dismissal of the suit but is for rejection of the plaint under Order VII Rule 11(d) of the CPC. The Apex Court in the matter of ***Saleem Bhai and Ors. Vs. State of Maharashtra & Ors.***¹ has held that the Court can exercise the power under Order VII Rule 11 CPC at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial and while deciding an application under Order VII Rule 11, the Court need to look into the relevant facts only from the averments in the plaint. Paragraph nos. 9 and 10 read as under :

9 A perusal of Order VII Rule 11 C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 C.P.C. at any stage of the suit-before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII C.P.C. the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 C.P.C. cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court, however, did not advert to these aspects.

1 AIR 2003 SC 759

10 We are, therefore, of the view that for the aforementioned reasons, the common order under challenge is liable to be set aside and we, accordingly, do so. We remit the cases to the trial court for deciding the application under Order VII Rule 11 C.P.C. on the basis of the averments in the plaint, after affording an opportunity of being heard to the parties in accordance with law.

(emphasis supplied)

10 The Apex Court even in the judgment of **Ram Prakash Gupta Vs. Rajiv Kumar Gupta & Ors.**¹ also confirms this decision.

11 In the circumstances, from the averments contained in the plaint seen from every angle, the suit is filed beyond three years and hence, the plaint is liable to be rejected under VII Rule 11(d) of the CPC and the same is rejected. In view of this, I am not deciding other prayer, i.e., rejection of the plaint under Order VII, Rule 11(a) of CPC.

10 Notice of motion is disposed. No order as to costs.

(K.R. SHRIRAM, J.)

1 (2007) 10 SCC 59