

Regular Civil Suit No. 156/2007

Order Below Exh.115

(1) Read this application given by Ld. Advocate for defendant under Order-VII Rule-11 of the Civil Procedure Code, 1908, reply vide Exh. 124 filed by the plaintiff and heard Ld. Adv. Shri A.D.Padhiyar for the defendant and Ld. Adv. Shri Y.L.Bachani for the plaintiff.

(2) Ld. Adv. for the defendant in support of this application submits that the present suit filed by the plaintiff is barred by limitation. It is submitted that plaint does not disclose cause of action and therefore deserves to be rejected. It is submitted that plaintiff suit is barred by order-2, Rule-2 of Civil Procedure Code. It is submitted that plaintiff had filed Regular Civil Suit no. 176/07 for agreement dt. 2.5.2003 which suit has been dismissed on 31.3.2016 and therefore there is no reason for the plaintiff to file the present suit.

It is submitted that plaintiff's right accrues due to the agreement dt. 2.5.2003. However, the suit filed for the execution of this agreement R.C.S. 176/07 has been dismissed on 31.3.2016 and therefore plaintiff does not have any right with respect to the agreement. It is submitted that the plaintiff in his plaint has no where mentioned specific date as to when the cause of action has arised and the suit also being barred by limitation deserves to be rejected. It is submitted that the possession of the suit shop is handed over over to Jayeshkumar Dharamdas Kachoriya and in this circumstances Jayeshkumar Dharamdas Kachoriya is a necessary party but he is not joined as party in the suit. Ld. Adv. for the defendant in support of his argument has relied on certain citations which are discussed ahead and has requested to allow this application.

(3) Ld. Adv. for plaintiff has denied the facts stated in this application. Ld. Adv.

states that the present suit has been filed in the year 2007 and after framing of the issues, evidence is also produced on record. The injunction application Exh.5 has also been decided and as defendant has breached injunction an application has been filed by plaintiff under C.P.C.Order-39, Rule-2(a) vide Exh.92 which is at present pending for hearing. It is submitted that defendant has not given application under Order-7, Rule-11 at the initial stage but at present when the matter is for hearing of Exh.92 he has given the present application to delay the matter. It is submitted that plaintiff has specifically stated the cause of action in the plaint and the suit is not barred by Order-2, Rule-2 of C.P.C. and therefore has requested to reject the application.

(4) The present application is filed by defendant under Order-VII, Rule-11 of the Civil Procedure Code, 1908. It is settled position of law that while exercising powers under Order-VII, Rule-11 of the Code of

Civil Procedure the court has to look to the averments contained in the plaint and documents attached with the same and if ex-facie if the suit appears to be barred by any of the provisions of law then the plaint can be rejected. In context of the aforesaid settled provisions of law the court has to first of all examine the averments contained in the plaint.

The short facts of plaintiff suit are as under. It is the say of plaintiff that the shops at Piplavala Complex, Delhi Gate, Palanpur are of the ownership of defendant and are running in his name in Nagarpalika. This shops are located at city survey no. 222 to 232, which property was running in the name of Shah Kirtilal Maneklal. It is the say of plaintiff that at that time he was the tenant of shop no. 3/614 and at that time Shah Kirtilal Maneklal was the owner of the same. It is stated that as the owner intended to construct new shopping centre, it was decided that shop no. 1 would be given to plaintiff in the new shopping

centre and regarding the same an agreement was also entered on 2.5.2003 and accordingly plaintiff had given the vacant possession of shop to Kirtilal Maneklal Shah. It is the contention of plaintiff that as per the agreement plaintiff was to be given possession of shop no.1 and till the possession was given, shop no. 6 and 8 were agreed to be given to the plaintiff as per the agreement dt. 2.5.2003. It is the say of plaintiff that after the complex being made Shah Kirtilal Maneklal did not give the possession of shop no. 1 to plaintiff but gave shop no.6 and 8 as per the agreement in which the plaintiff is running the business of Ice cream Parlour. It is contended that shop no.1 Municipal House no. 3/588 is running in the name of Rajeshkumar Ramabhai Patel in Nagarpalika who is also in possession of the same and as per the information received by plaintiff, the shop No.1 has been sold by the defendant to Rajeshkumar Ramabhai Patel. It is the contention of plaintiff that as the

agreement dt. 2.5.2003 cannot be executed now in that circumstances plaintiff is entitled to retain the possession of shop no. 6 & 8. It is the contention of plaintiff that the defendant is trying to dispossess plaintiff from shop no. 6 & 8 and is trying to transfer the property and therefore cause of action has arised to file the present suit. The plaintiff has therefore filed the suit seeking relief that permanent injunction be given directing defendants do not dispossess the plaintiff from shop no. 6 & 8 and do not transfer the said property. Looking to the record, order below Exh.5 defendant has been directed to maintain statusquo with regard to the ownership and possession of property shop no. 6 & 8 till final disposal of suit. Looking to the record of the case the matter is at the stage of plaintiff evidence and for hearing of Exh.92, the application given by plaintiff for breach of injunction.

(5) Ld. Adv. for the defendant in support of this application has relied on the judgment of (1) **Hardesh Ores Pvt. Ltd. Versus Hede And Company, 2007 (0) GLHEL-SC 39274** wherein Hon'ble Supreme Court has held that trial court and High Court were justified in holding that plaint deserve to be rejected under Order-7, Rule-11 of C.P.C. since the suit appeared from the statement in the plaint to be barred by the law of limitation (2) **Premji Ratansey Shah Versus Union of India., 1994 (0) GLHEL- SC 21505.,** wherein Hon'ble Supreme Court has held that an injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession as against true owner.

(6) Ld. Adv. for the plaintiff in support of this application has relied on the judgment of (1) **Gujarat Maritime Board Versus. Jogadia Polimers Pvt. Ltd., 2018 (3) GLH 517,** wherein Hon'ble High Court has held that there is a difference between non disclosure of cause of action and absence of

cause of action and if averments or allegation prima facie discloses cause of action then there can be no rejection of plaint under Order-7, Rule-11(a) of C.P.C.

(2) Vithalbhai Private Limited Versus Union of India 2005 Lawpad (SC) 1639 wherein Hon'ble Supreme Court has held that if the suit proceeds ahead and at a much later stage the court is hold upon to decide the plea as to non maintainability of the suit on account of its being premature then the court shall not necessarily dismiss the suit.

(7) Ld. Adv. for the defendant has given this application under Order-7, Rule-11 on two grounds : first cause of action and second limitation.

While considering the question whether plaint discloses any cause of action or not, the court has to find out from the allegations made in the plaint. I may reproduce the averments made in para- 9 the

plaint as regards cause of action which reads as under.

" આ કામના પ્રતિવાદીએ કરી આપેલ ઉપરોક્ત તા. ૨/૫/૨૦૦૩ ના લખાણનો અમલ કરતા નથી અને વાદીના કબજામાં રહેલ દુકાન નં. ૬ અને ૮ વાળી ગેરકાયદેસર રીતે તબદીલ કરવા માંગે છે અને વાદી પાસેથી બળ જબરીનો કબજો પણ લઈ લેવા માંગે છે. તેથી આ કામે દાવો કરવાનું કારણ તાજેતરમાં ઉત્પન્ન થયેલ છે "

Looking to the plaint it is the say of plaintiff that he is tenant and he had entered an agreement with defendant's father on 2.5.2003 and as per the agreement he had vacated the shop for construction of new shopping centre and as per the agreement he was to be given shop no.1 in the new shopping centre and till the handing over the shop no.1 to the plaintiff, the possession of shop no.6 and shop no.8 was given to the plaintiff as per the agreement. It is the say of plaintiff that as per the information received by him shop no.1 (Municipal House no.3/588) in the new shopping centre is sold by defendant to one Rajeshkumar Ramabhai Patel and therefore the

agreement dt. 2.5.2003 cannot be implemented and therefore they are entitled to retain the possession of shop no. 6 & 8. Looking to the para-9 of the plaint, the plaintiff has specifically stated that he is in possession of shop no.6 & 8 and as the defendant is trying to dispossess and dispose of the property, he has filed the present suit. As such the plaintiff has specifically averred the cause of action for filing the suit. Therefore it cannot be said that there is failure to disclose cause of action. The ground for rejection of plaint is failure to disclose cause of action and not there is no cause of action for the suit and there is difference between the two as held in the judgment of **Gujarat Maritime Board V/s. Jogadia Polimers Pvt. Ltd.**, produced by Ld. Adv. for plaintiff. The correctness or otherwise of the allegations constituting the cause of action is beyond the purview of Order-7, Rule-11(a) of C.P.C. In the present suit plaintiff's right to sue is clearly disclosed and therefore it cannot be said

that plaint does not disclose cause of action.

(8) Ld. Adv. for the defendant in this application Exh.115 has also taken the ground of limitation. It is the say of Ld.Adv. for defendant that plaintiff has filed R.C.S. 176/07 against the defendant in which defendant has sold the shop no.1 to Rajeshkumar Ramabhai Patel on 4.12.2003 by registered sale-deed and the plaintiff having information regarding the same and the present suit being filed on 28.11.2007 is barred by limitation. Looking to the plaint, the plaintiff has filed the present suit as the agreement dt. 2.5.2003 cannot be implemented as shop no.1 is sold to Rajeshkumar Ramabhai Patel and therefore to protect his possession in shop no. 6 & 8 has filed the present suit seeking relief that defendant do not dispossess without due process of law. Looking to the record of case my predecessor has passed an order below Exh.5 that defendant to maintain

statusquo with respect to possession and ownership of shop no. 6 & 8 till final disposal of suit. As such the present suit being filed to protect their possession, the limitation period cannot be considered from the date of registered sale-deed produced in R.C.S. 176/07. Further, limitation being mixed question of fact and law can be decided on leading evidence by respective parties. Further, looking to the record of the case the defendant in his reply has never raised the plea of limitation in his written statement and accordingly no issue has also been framed regarding the same. As such the suit cannot be considered barred by limitation and therefore judgment of Hardesh Private Ltd., relied by Ld. Adv. for defendant is not helpful to him as the facts and circumstances of the present case being different. Ld.Adv. has also relied on the judgment of Premji Ratansey Shah which is with regard to injunction and as the facts and circumstances of the present case

being different is also not helpful to the plaintiff.

(9) Ld. Adv. for the defendant in this application also states that the suit is barred by Order-2, Rule-2 of C.P.C., as the R.C.S. No. 176/07 filed by plaintiff has been dismissed. Ld. Adv. for the defendant submits that R.C.S. No. 176/07 was filed by the plaintiff for the implementation of the agreement, which has been dismissed on 31.3.2016 and therefore the present suit is barred by Order-2, Rule-2 of C.P.C. Looking to the plaint the cause of action to file the present suit is to protect possession of plaintiff in shop no. 6 & 8. Therefore when the two cause of action are different though they might have been part of the same transaction it cannot be said that subsequent suit is hit by Order-2, Rule-2 of C.P.C.

(10) For reasons discussed above, the plaint as it specifically discloses the

