

Presented on	16-10-2014
Registered on	18-10-2014
Decided on	30-04-2015
Duration	0Y 4M 12D

In the Court of 6th Addl. Judge, Small Causes Court, Pune At Pune.

(Presided over by Ms. C.P. Jain)

Spl.C.S.No. 1406/2014
Exh. 1

Shri. Ananda Vishwanath Shelar
Age about 52 years, Occu. - Agri.
R/at Nigade, Taluka- Maval,
District Pune.

... **Plaintiff**

Vs

- 1] Shri. Dnyanoba @ Dnyaneshwar Baburao Chavan
Age about 70 years, Occu. - Agri.
R/at Nigade, Taluka- Maval,
District Pune.
- 2] Sou. Bababai Dnyaneshwar Chavan
Age about 65 years, Occu. - Agri.
R/at Nigade, Taluka- Maval,
District Pune.
- 3] Shri. Balu Chabu Ghare
Age about 45 years, Occu. - Agri.
R/at Chintamani Moreshwar Sahakari
Gruhrachana Sanstha, H wing, 3rd floor,
Varale Road, Talegaon Dabhade,
Tal. Maval, Dist. Pune
- 4] Sou. Savita Balu Ghare
Age about 35 years, Occu. - Agri.
R/at Chintamani Moreshwar Sahakari
Gruhrachana Sanstha, H wing, 3rd floor,
Varale Road, Talegaon Dabhade,
Tal. Maval, Dist. Pune.

5] Shri. Namdev Rama Kasabi
Age about 80 years, Occu. - Agri.
R/at Nigade, Taluka- Maval,
District Pune.

6] Shri. Ramdas Dhondiba Chavan
Age about 45 years, Occu. - Agri.
R/at Nigade, Taluka- Maval,
District Pune.

7] Shri. Shivaji Haribhau Borhade
Age about 65 years, Occu. - Agri.
R/at Nigade, Taluka- Maval,
District Pune.

.... Defendants

Appearance :-

Adv. Shri. R.G.Rane for plaintiff.

Adv. R.D.Bhandari for defendants nos. 1 to 8.

**Suit for partition, recovery of
mesneprofit, recovery of separate
possession and declaration with
decree of permanent injunction
valued for Rs.6,05,000/-.**

JUDGMENT

(Delivered on 30th April, 2015)

1] Present suit is filed by plaintiff for partition and separate possession of 1/2 share in suit properties, declaration that sale deeds executed by defendant no.1 and 2 in favor of defendant no. 3 are sham and bogus and for perpetual injunction restraining defendants from alienating the suit properties

2] Defendants 1 and 2 have appeared and contested the suit by filing their say cum written statement at exh.33. They have specifically denied all the averments in the plaint except those which are specifically

admitted by them. Amongst various other grounds defendants have specifically raised the jurisdiction of this court on the point that the plaintiffs have challenged the will and sale deed dtd.30.10.1973 by way of this suit which is filed on 16.10.2014, therefore clearly barred by law of limitation. Defendants have preferred application at exh.37 u/o 7 r 11, sec.9 A and sec. 151 of C.P.C.. Plaintiffs had filed their say at exh. 39. On hearing both the Ld counsels this court has framed preliminary issue at exh.1. The preliminary issue is reproduced below with its finding and for reasons to follow :-

Sr. No.	ISSUES	FINDINGS
1	Whether suit is barred by law of limitation ?	Yes
2	What order and decree ?	As per final order.

REASONS

3] Both the parties have not led any oral evidence on this preliminary issue. They have given their close pursis at exh.40 and 41 respectively.

4] **As to Issue No.1 :**

The ld counsel for defendants vehemently argued that plaintiff though have challenged the will and sale deed dtd 30.10.1973, suit is not filed within three years from the date of sale deed or will. Therefore, suit is out of limitation. Plaintiffs had issued notice dtd.04.08.2014 prior filing of suit. In said notice, plaintiffs had specifically alleged that on basis of will and sale deed, defendants are in

possession of suit properties and taking fruits and getting income of more than Rs. Five lacs. Therefore, according to him, plaintiffs have admitted that defendant no.1 is in possession of suit properties since 30.10.1973 i.e. date of sale deed. Suit is filed challenging the rights of defendant accrued to defendant no.1 due to will after the demise of Muktabai Bhagwat on 01.10.1974. Therefore, suit is clearly out of limitation. Ld counsel has also relied upon the observations in *Lachhman Singh (Dead) thr. Lrs. Vs Hazara Singh (Dead) and ors.* [2008(5) SCC 444], *Foreshore Co-op Hsg Soc. Ltd Vs Praveen D. Desai (Dead)thr Lrs in [C.A.No.7732 of 2011(Supreme Court)]*, *Food Corporation of India and Ors. Vs M/s Babulal Agrawal [AIR 2004 SC 2926]*, *Vishnu Dutt Sharma Vs Daya Sapra [2009(13) Supreme Court Cases 729]*, *Mangilal Jagrupji Jain Vs Bharat Shankarlal Dhakad and ors.* [2012 (1) Mh.L.J. 587], *T.Arivandandam Vs T.V. Satyapal [1977 (4) SCC 467]*, *Punithavalli Ammal Vs Minor Ramalingam [1970(1) SCC 570]*, *Pravin Vs Executive Engineer PMGSY [2013(1) MhLJ 800]*, *Minguel Francis D'Costa Vs Sultan Gulamli Karim and ors.* [1999(2) MhLJ 4373], *Sudesh Sushilkumar Hnada Vs Abdul Ajiz Umarbhai and anr.* [2001(1) MhLJ 324], *Fedroline Anthoney Joseph Vs Vinod Vishanji Dharod and ors.* [2002(3) MhLJ 865], *Arjun Dada Vs Mallappa Gurappa [2003(4) MhLJ 256]*, *IIP Co.op. Society Ltd Vs Jahanara [2004(1) MhLJ 910]*, *Anandlaxmi Enterprises Vs Vasant Balu Mhatre and ors.* [2009(1) MhLJ 445], *Bhagirath Ramprasad Charkha Vs Ramprasad Chunilal and ors.* [2010(6) MhLJ 169], *Popat Vs State of Maharashtra [2012(5) MhLJ 884]* and *Sunita Sudam Ranaware Vs Rama Vijay Oberoi and ors.* [2013(3) MhLJ 81].

5] Ld counsel for plaintiffs strenuously submitted that plaintiffs have averred cause of action in their plaint. The averments in notice cannot become pleadings. Plaintiffs have also paid appropriate court fees. The issue of jurisdiction is mixed question of law and fact and so plaint cannot be rejected u/o 7 rule 11 of C.P.C. and this issue also cannot be decided as preliminary issue. Ld counsel relied upon observations in ***Export Credit Guarantee Corporation of India Ltd. Vs. T. Mathew & Ors. in 2014(2) Bom.C.R.481.***

6] I have given anxious thought to arguments of both the ld counsels. Also perused all the citations relied upon both sides. At the outset I would like to clarify that preliminary issue is already framed. Therefore the arguments of Ld counsel for plaintiffs that issue of limitation is mixed question of law and fact and cannot be decided as preliminary issue is not tenable at this stage. It is now settled legal position that issue of limitation if raised, has to be tried as preliminary issue upon giving opportunity of hearing to both the parties. U/o 7 R 11 of C.P.C., the averments in plaint are only to be taken into account. Therefore, the objection of limitation if raised by defendants u/o 7 r 11 of C.P.C., it should be decided as preliminary issue instead of rejecting the plaint u/o 7 r 11 of C.P.C.. It is observed in the citation of ***Export Credit Guarantee Corporation of India Ltd.*** cited supra that plaint cannot be rejected u/o 7 r 11 of C.P.C, on the ground of limitation. If ground of limitation is raised, it can be tried by court as preliminary issue. As in present case defendants have invoked the provision of u/o 7 r 11 of C.P.C., sec. 9A and sec. 151 of C.P.C., the preliminary issue was framed. Therefore the arguments of Ld. counsel for plaintiffs on this aspect is not acceptable. As issue under Sec. 9-A is already framed and

for the discussion above, observations in *Food Corporation of India and Ors. Vs M/s Babulal Agrawal* [AIR 2004 SC 2926], *Vishnu Dutt Sharma Vs Daya Sapa* [2009(13) Supreme Court Cases 729], *Mangilal Jagrupji Jain Vs Bharat Shankarlal Dhakad and ors.* [2012 (1) Mh.L.J. 587] are not relevant.

7] Though it was observed that issue of limitation is mixed question of law and fact and so it should not be tried as jurisdictional issue u/sec 9 A of C.P.C. in citation of *Kamlakar Eknath Salunke Vs Baburao Vishnu Jawalkar and ors.* by Hon'ble Supreme Court, in *Foreshore Co-op Hsg Soc. Ltd* cited supra it is observed that decision rendered by division bench in case of *Kamlakar Eknath Salunke* is per incuriam in view of earlier law settled by constitution bench and three judges bench of this court followed by other decisions of division bench in *Pandurang Dhondu Chowgule Vs Maruti Hari Jadhav* AIR 1966 S.C.153, (Five Judges Bench) in *Manick Chandra Nandy Vs Debdas Nandy*, (1986) 1 Supreme Court Cases 512, *National Thermal Power Corpn.Ltd. Vs. Siemens Atkeingesellschaft*, (2007) 4 Supreme Court Cases 451, *Official Trustee Vs Sachindra Nath Chatterjee*, AIR 1969 SC 823, *ITW Signode India Ltd. Vs CCE* (2004) 3 Supreme Court Cases 48 and *Kamlesh Babu Vs. Lajpat Rai Sharma* (2008) 12 Supreme Court Cases 577. It is clearly observed in the citation of *Foreshore Co-op Hsg Soc. Ltd* that issue of limitation if raised, should be tried as jurisdictional issue as preliminary issue u/sec 9 A of C.P.C.. In view of aforesaid legal position discussed in the citation of *Foreshore Co-op Hsg Soc. Ltd.* and as similar observations are found in citations of *Pravin Vs Executive Engineer PMGSY* [2013(1) MhLJ 800], *Minguel Francis D'Costa Vs Sultan Gulamli Karim and ors.* [1999(2) MhLJ

4373], Sudesh Sushilkumar Hnada Vs Abdul Ajiz Umarbhai and anr. [2001(1) MhLJ 324], Fedroline Anthoney Joseph Vs Vinod Vishanji Dharod and ors. [2002(3) MhLJ 865], Arjun Dada Vs Mallappa Gurappa [2003(4) MhLJ 256], IIP Co.op. Society Ltd Vs Jahanara [2004(1) MhLJ 910], Popat Vs State of Maharashtra [2012(5) MhLJ 884] and Sunita Sudam Ranaware Vs Rama Vijay Oberoi and ors. [2013(3) MhLJ 81], at the cost of repetition, I avoid to mention those observations and discussion on it.

8] As plaintiffs have not led any oral evidence, whether suit of plaintiff is within limitation or not has to be concluded from recitals in plaint and the documents on record. In plaint, plaintiffs have not pleaded as to when did they get the knowledge of will as well as sale deed dtd.30.10.1973. The recitals in notice issued by plaintiffs on 04.08.2014 are crystal clear that plaintiffs have admitted the possession of defendant no.1 in suit properties since the date of sale deed i.e. 30.10.1973. In said notice, plaintiffs have also admitted that since 30.10.1973 defendants are taking fruits and income more than Rs. Five Lacs per year. In pleadings in plaint, plaintiffs have pleaded that cause of action for filing the suit had arose on 04.08.2014 when notice on behalf of plaintiffs was sent to defendants. From the recitals in notice it is clear that plaintiffs have admitted the possession of defendant no.1` in suit properties since 30.10.1973 on basis of will and sale deed. No where in notice or in plaint, plaintiffs have pleaded that they were not having knowledge of said documents of sale deed and will when they were executed. There are no pleadings in notice or plaint that as to when plaintiffs came to know for first time about the will and sale deed dtd 30.10.1973. It is now settled legal position that in order to get

declaration of declaring any instrument void, suit should be filed within three years from date of execution of instrument or date of first time knowledge of that document under article 59 of Limitation Act, 1963. In present case, plaintiffs have challenged the will and sale deed dtd 30.10.1973 after the period of three years from the date of will and sale deed. As discussed above, there are no pleadings as to when did plaintiffs come to know about the aforesaid documents first time. In such circumstances the suit filed by plaintiff on 16.10.2014 cannot be said to be within limitation. The observations in *Anandlaxmi Enterprises cited supra*, are squarely applicable in present case. Even in cited case, suit was filed in 2007 seeking declaration of validity of the agreement executed in 1989 and for damages upon its breach. It was therefore, held that suit is clearly barred by the law of limitation.

9] There is no dispute that defendants are in possession of suit properties on basis of sale deed and will. Plaintiffs are entitled to relief of partition and perpetual injunction only when the relief of declaration is answered in their favour. The relief of partition is not main relief in present case. As relief of declaration is main relief in present case and same being not within limitation, the relief of partition and perpetual injunction cannot come within limitation. The arguments for Ld counsel for defendants has substance. For all aforesaid discussion, arguments of Ld. counsels for plaintiffs cannot be countenanced.

10] As regards the observations in *Lachhman Singh (Dead) thr. Lrs. Vs Hazara Singh (Dead) and ors. [2008(5) SCC 444]*, *T.Arivandandam Vs T.V. Satyapal [1977 (4) SCC 467]*, *Punithavalli Ammal Vs Minor Ramalingam [1970(1) SCC 570]*, *Bhagirath Ramprasad Charkha Vs Ramprasad Chunilal and ors. [2010(6)*

MhLJ 169], they being not relevant, are not discussed.

11] For aforesaid discussion, the suit of plaintiffs deserves to be dismissed being barred by law of limitation. Considering the nature of suit it will be proper that both parties bear their own costs. Consequently, I answer Issue No. 1 in affirmative and proceed to answer issue no. 2 by following order.

O R D E R

- 1] The suit is dismissed.
- 2] Decree be drawn up accordingly.
- 3] Both the parties to bear their own costs.

Pune.
Dt. 30.04.2015.

(Smt. C.P.Jain)
6th Addl. Judge,
Small Causes Court, Pune.

CERTIFICATE

I affirm that the contents of this PDF file judgment are same word for word as per original judgment.

Name of steno	:	
Name of Court	:	Ms. C.P.Jain, VI Addl. Judge, Small Causes Court, Pune.
Date	:	30-4-2015
Judgment signed by PO on	:	22-5-2015
Judgment uploaded on	:	22-5-2015