(2022) 10 GUJ CK 0065

In the Gujarat High Court

Case No : R/Civil Revision Application No. 112 Of 2021

Dilipkumar Jayantilal Shah — APPELLANT

Vs

Yasinbhai Faridbhai Hokabaj — RESPONDENT

Date of Decision : 11-10-2022

Acts Referred:

Limitation Act, 1963 — Article 54, 59
Code Of Civil Procedure, 1908 — Section 115, Order 7 Rule 11, Order 7 Rule 11(d)

Citation : (2022) 10 GUJ CK 0065

Hon'ble Judges : A.S. Supehia, J

Bench : Single Bench

Advocate : SP Majmudar, Shashvata U Shukla, Mtm Hakim

Final Decision : Dismissed

Judgement

A.S. SUPEHIA, J

(1) In the present Civil Revision Application filed under Section 115 of the Code of Civil Procedure, 1908 ("the CPC" for short) the applicants seek to challenge order dated 18.01.2021 passed by Judge, Court No.12, City Civil Court, Ahmedabad, rejecting the application of the defendants below Exh.48 moved in Civil Suit No.1311 of 2012 seeking rejection of plaint under Order VII Rule 11 of CPC.

(2) The parties shall be referred as per their status before the trial court.

(3) Learned advocate Mr.Majmudar has submitted that the suit is barred by limitation under the provisions of Article 54 of the Limitation Act, 1963 (the Limitation Act) since the plaintiffs in the plaint, have sought specific performance of agreement to sell dated 05.06.1975 after delay of 35 years i.e. till the institution of the suit in the year 2012. Learned advocate Mr.Majmudar has invited the attention of this Court to the notices issued by the plaintiffs on 08.02.1980, 30.08.1983, 31.05.1981 and 26.12.1984 calling upon the defendants to execute a registered sale deed in view of the agreement to sell

executed in the year 1975. Thus, he has submitted that the plaintiffs were having the knowledge about such refusal to execute the sale deed in the year 1984 at the most and hence, the suit should have been instituted within three years from such date and hence, the plaint is liable to be rejected under Order VII Rule 11(d) of the CPC. Learned advocate Mr.Majmudar has submitted that the agreement to sell dated 05.06.1975 specifically provides 12 months period of validity and in view of the above period provided in the agreement to sell, the suit is barred by limitation, which has been instituted after a period of 35 years. It is further submitted that the cause of action, as mentioned in the plaint, is allegedly oral refusal by the defendants for execution of the sale deed on 21.04.2012, which cannot be considered in order to bring the suit within the period of limitation. Thus, he has submitted that the impugned order rejecting the application seeking rejection of the plaint under Order VII Rule 11 of the CPC may be quashed and set aside and the plaint may also be rejected.

3.1) In support of the aforesaid submissions, learned advocate Mr.Majmudar has relied upon the judgments of the Apex Court in the cases of Dahiben vs. Arvindbhai Kalyanji Bhanusali, (2020) 7 S.C.C. 36 and Fatehji & Company vs. L.M.Nagpal, (2015) 3 S.C.C. 390 and the judgment of this Court in the case of Shantaben wd/o. Darubhai Jibhai vs. Hasmukhbhai Bhailalbhai Patel, 2012 (2) G.L.R. 1719.

(4) In response to the aforesaid submissions, learned Mr.M.T.M Hakim for learned Advocate Ms.Isa Hakim has submitted that the dates specified in the agreement to sell dated 05.06.1975 was extended by the defendants in view of the communication dated 08.09.1979. It is submitted that the plaintiffs have paid the entire amount to the defendants and last such payment was made on 08.09.1976, however, despite the same since the sale deed was not executed the plaintiffs had issued notices to the defendants on 08.02.1980, 30.08.1983, 31.05.1981 and the last notice was on 26.12.1984, however, since nothing was done, the plaintiffs had waited for specific performance of execution of the sale deed. It is submitted that in the plaint it is specifically averred by the defendant No.1 that on 21.04.2012 for the first time the plaintiffs have been orally informed that they would not be executing the sale deed and would transfer the suit property to someone else. Learned advocate has submitted that as per the provisions of Article 54 of the Limitation Act, the time for limitation will begin from the date fixed for the specific performance and if no such date is fixed, when the plaintiffs have noticed that the performance is refused. Thus, it is submitted that when in the year 2012, the plaintiffs had refused the performance of execution of the sale deed, in view of the agreement to sell dated 05.06.1975, the plaintiffs have instituted the suit seeking specific performance. It is submitted that the application filed by the defendants seeking rejection of the plaint is appropriately rejected by the Court below and hence, the same may not be interfered with.

4.1 In support of his submission, learned advocate Mr.Hakim has replied upon the judgments of this Court in the case of Urvashiben & Anr. Vs. Krishnakant Manuprasad Trivedi, (2019) 13 S.C.C. 372.

CONCLUSION:

(5) It is well settled proposition of law that for the purpose of invoking Order VII Rule 11 of the CPC, the averments made in the plaint and the accompanying documents have to be only exclusively examined, and no evidence can be looked into. The issue on merit of the matter, which may arise between the parties would not be in the realm of the Court at that stage. The defence taken by the defendants in the written statement cannot be taken into consideration and the plaint has to be read as a whole and the application cannot be decided in context of few averments made in the plaint. On the presentation of the plaint, it is the solemn duty of the Trial Court to examine whether the suit discloses the cause of action or is it barred by any law, and the Trial Court does not have to wait for such objection being taken by the other party.

(6) I have perused the recitals of the plaint along with the documents which form part of the plaint. In the plaint the plaintiffs have specifically asserted that an agreement to sell was executed between the plaintiffs and the defendants on 05.06.1975 for sale consideration of Rs.22,500/-. It is further narrated that the last payment was made by the plaintiffs on 08.09.1976 and on that date the validity of the agreement to sale was extended till the defendants obtain the requisite permission under the Urban Land (Ceiling and Regulation) Act, 1976 (the Land Ceiling Act). In Paragraph No.13 of the plaint, it is averred that the plaintiffs have issued notices to the defendants on 08.02.1980, 31.05.1981, 30.08.1983 and 26.12.1984 calling upon the defendants to execute the sale deed. In the cause of action for instituting the suit it is averred that on 21.04.2012, the defendant No.1 and his brothers had demanded more amount and the plaintiffs have tried to make them understand, however, the plaintiffs had threatened that they would be transferring the suit property to some one else. Thus, the cause of action specifically mentioned about the incident which had occurred on 21.04.2012, which constrained the plaintiffs to institute the suit against the defendants seeking execution of the agreement to sell dated 05.06.1975. Along with the plaint, the plaintiffs have annexed the agreement to sell dated 05.06.1975 and also notices as well the receipts of accepting the payment made to the defendants.

(7) Paragraph No.1 of the agreement to sell stipulates the validity of the same is for 12 months only. Paragraph No.2 of the agreement to sell mentions about the conditions to be fulfilled such as right, title and interest in favour of some minor and to hand over the possession. Thus, the agreement to sell contains its validity for 12 months after its execution i.e. on 05.06.1975 to 05.07.1976. Thereafter, the plaintiffs have produced the receipts of payment made to the defendants. The relevant receipt, which requires to be noticed is issued on 08.09.1976 which is issued by the defendant No.1. The contents of the receipt reveal that the plaintiffs have paid all the amount, as agreed upon between the parties and as

per the receipt dated 08.09.1976 an amount of Rs.2,500/- was finally paid to them. It also mentions that the total amount of Rs.22,500/- towards sale consideration is paid and nothing is required to be paid. It also narrates that "it is agreed that since the "Land Ceiling Act" is in force, after obtaining necessary permission under the said Act, the sale deed will be executed, and till such permission is obtained, the validity of the agreement to sale deed shall stand extended".

(8) Thereafter, it is the case of the plaintiffs that they had issued various notices issued dated 08.02.1980, 31.05.1981, 30.08.1983 and 26.12.1984 calling upon the defendants to execute the sale deed. The contents suggest that the plaintiffs have called upon the defendants to do the needful and get the sale deed registered at the earliest. The defendants have raised a contention that the contents of the last notice dated 26.12.1984 will indicate that the specific performance was refused in the year 1984, hence though the plaintiffs were having the knowledge of refusal or they have noticed refusal, the suit has been filed in the year 2012, which is beyond the period of limitation as prescribed under the second part of Article 54 of the Limitation Act. The contents of Notice dated 26.12.1984 issued by the plaintiffs to the defendants are translated and reproduced as under :

"I, Faribhai Rokabaj from Ahmedabad, with sincere regards for all, state that, I have sent you a numerous letters, i.e. dated 31/05/1981, 08/02/1980, 30/08/1983 but, no reply is received from you. We have kept enough patience as we want to keep the good terms, but, you should, at least for the sake of our relations, had given any reply. It's a past now. On receiving this letter, at least please let me know as to what is to be done. Though we have rendered you the full consideration of the land for such a long time, i.e. since 08/09/1976, you do not execute the Deed thereof in our favor. I do not understand why it is so. Practically also, it is not fair. I am left with no other option, I have to write that, though I have waited for such a long time considering our good relations, but you do not care for our relations. Neither have you maintained the good relations nor terms. Now, this is my final request that you may come here and get a registered Deed executed, which will complete our pending work and improve our relations. It gives me a lot of pain to write such harsh words. But, I am left with no other option. Please read the letters in their full context. I expect that you will come soon and get the Deed executed.

I hope that Jayantibhai must be well. Always praying for well being of all."

The aforementioned contents of the notice only reveal that the plaintiffs have expressed their displeasure and despair in not executing the sale deed by the plaintiffs despite payment of full consideration. The contents of the notice are not to be read in isolation for holding the plaint being barred under the second part of Article 54. The entire bundle of facts as mentioned in the plaint is to be examined. In the present case, the plaintiffs have also alleged that the defendants have not performed their part of the contract. In such circumstances the issue of limitation becomes the issue of mixed question of fact and law which can only be examined in a full fledged trial.

(9) With the aforementioned facts, the recitals on the plaint are to examined in light of the provisions of Article 54 of the Limitation Act, 1963 which reads as under:

Description of suit

Period of Limitation

Time from which period begins to run

For specific performance of a contract. Three years.

Three Years

The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

(10) The Limitation period provided for specific performance of the contract under Article 54 of the Limitation Act, which is three years and the time prescribed is in two pars. (1) from the date of performance, and (2) if no such date is fixed when the plaintiff has noticed that the performance is refused.

(11) At this stage, I may incorporate the conditions Nos.1 and 2 of the Agreement to sell dated 05.06.1975 (translated from Gujarati):

"1. The limitation period for the present Agreement to Sell is determined to be 12 months from today.

2. Within the stated limitation period, we shall get all the rights, title and interest, including the rights, title and interest of the minor cleared and marketable and consequent to receipt of the remaining consideration amount for the sale as determined qua the terms and conditions stated in the Agreement to Sell, we bind ourselves to execute a Sale-Deed in the name of whomsoever as may be stated by you and hand over a vacant and actual possession of the land and in case of default from our side, you reserve right to take legal action against us and get the sale-deed executed and recover all the expense and damage incurred by you in connection with it from

us."

(12) As noted hereinabove, the recital in the plaint and the accompanying documents suggest that initially the date, which was fixed for agreement to sell dated 05.06.1975 is for 12 months, however, the same has been extended, as mentioned in the receipt dated 08.09.1976 signed by the defendant No.1 till the appropriate permission is obtained under the Land Ceiling Act. It is specifically asserted in the plaint that the defendants have not undertaken any steps as per the conditions of the agreement to sell, including taking all necessary permissions as well as clarifying the rights of minor. The plaintiffs have also

asserted that they have paid all the amount of sale consideration.

(13) In the case of Urvashiben (supra) the Apex Court, after examining the Second Part of Article 54 of the Limitation Act in suit seeking specific performance on contract had held thus:'

"14 On the other hand, Gunwantbhai (supra) this judgment Court in has the held case as under :

"8. We may straightaway say that the manner in which the question of limitation has been dealt with by the courts below is highly unsatisfactory. It was rightly noticed that the suit was governed by Article 54 of the Limitation Act, 1963 . Then, the enquiry should have been, first, whether any time was fixed for performance in the agreement for sale, and if it was so fixed, to hold that a suit filed beyond three years of the date was barred by limitation unless any case of extension was pleaded and established. But in a case where no time for performance was fixed, the court had to find the date on which the plaintiff had notice that the performance was refused and on finding that date, to see whether the suit was filed within three years thereof. We have explained the position in the recent decision in R.K. Parvtharaj Gupta v. K.C. Jayadeva Reddy (2002) 2 SCC 428. In the case on hand, there is no dispute that no date for performance is fixed in the agreement and if so, the suit could be held to be barred by limitation only on a finding that the plaintiffs had notice that the defendants were refusing performance of the agreement. In a case of that nature normally, the question of limitation could be decided only after taking evidence and recording a finding as to the date on which the plaintiff had such notice. We are not unmindful of the fact that a statement appears to have been filed on behalf of the plaintiffs that they did not want to lead any evidence. The defendants, of course, took the stand that they also did not want to lead any evidence. As we see it, the trial court should have insisted on the parties leading evidence on this question or the court ought to have postponed the consideration of the issue of limitation along with the other issues arising in the suit, after a trial."

In the aforesaid case, it is clearly held that in cases falling in second limb of Article 54 finding can be recorded only after recording evidence. The said view expressed by this Court supports the case of the respondent-plaintiff. In the judgment in the case of Rathnavathi (supra) in paragraphs 42 and 43 it was clearly held that when the time is not fixed in the agreement, the limitation of three years to file a suit for specific performance would begin when the plaintiff has noticed that defendant has refused the performance of the agreement. In the judgment in the case of Ahmadsahab Abdul Mulla(2)(Dead) by Proposed LRs. v. Bibijan & Ors., 2009 5 SCC 462 while interpreting Article 54 of the Limitation Act, it is held that words "date fixed for the performance" is a crystallised notion. The second part "time from which period begins to run" refers to a case where no such date is fixed. In the case of Balsaria Construction (P) Ltd. v. Hanuman Seva Trust & Ors., 2006 5 SCC 658 and Chhotanben (supra) this Court clearly held that issue of limitation, being a mixed question of fact and law, is to be decided only after evidence is adduced.

15 By applying the aforesaid principles in the judgments relied on by Sri Dushyant Dave, learned senior counsel appearing for the respondent, we are of the considered view that merits and demerits of the matter cannot be gone into at this stage, while deciding an application filed under O.VII R.11 of the CPC. It is fairly well settled that at this stage only averments in the plaint are to be looked into and from a reading of the averments in the plaint in the case on hand, it cannot be said that suit is barred by limitation. The issue as to when the plaintiff had noticed refusal, is an issue which can be adjudicated after trial. Even assuming that there is inordinate delay and laches on the part of the plaintiff, same cannot be a ground for rejection of plaint under O.VII R.11(d) of CPC."

(14) The facts in the case before the Apex Court suggest that it was averred in the plaint by the plaintiff that when he had visited the site on 25.05.2017, he had come to know that the same land was sold to the third parties and the defendants had refused performance. A suit for specific performance was instituted after a period of 25 years and the Apex Court has held that the issue as to when the plaintiff had noticed the refusal, is an issue which cannot be adjudicated after trial and even assuming that there is inordinate delay and latches on the part of the plaintiff, the same cannot be the ground of rejection of the plaint under Order VII Rule 11(d) of the CPC.

(15) Thus, when the plaintiffs have specifically narrated the incident, which had occurred in the year 2012 as cause of action for institution of suit couple with the fact that as per the contents of the receipt dated 08.09.1976, the validity of the agreement to sell was extended by the defendant No.1 till the appropriate permission is obtained under the Land Ceiling Act, the plaint cannot be rejected at the threshold by invoking provisions of Order VII Rule 11 of the CPC. The plaintiffs are seeking specific performance of the execution of the sale deed, after the\ payment of the entire amount of the sale consideration. The issues with regard to the alleged non-performance of the conditions of the agreement to sell on the part of the defendants and the contents of receipts, the extension of period of validity of agreement\ to sell, the incident which happened on 21.04.2012, the date of refusal of specific performance on the part of the defendants are all triable issues, which can be adjudicated only in a full-fledged trial.

(16) The reliance placed by the plaintiffs on the judgment of the Apex Court in the case of Dahiben (supra) will not rescue them since the said pertains to declaration sought in the suit for setting aside the registered instrument or decree. In the case before the Apex Court the facts suggest that the plaintiffs had admitted and executed a registered sale deed and also the entire sale consideration, which was paid by the plaintiffs and the cancellation of the registered sale deed was sought by instituting the suit, which did not disclose any cause of action. The Apex Court has held that the suit being barred under Article 59 of the Limitation Act. It was held that the cause of action, which was

happened on 02.07.2009 by registration of a sale deed, which was sought to be cancelled after a period of more than 5.5 years. In the case of Fatehji & Company (supra) the facts suggested in the said case will not govern the present case as there was subsequent suit instituted for specific performance, after the first suit of one of the defendants was dismissed. So far as in the case of Shantaben wd/o. Darubhai Jibhai (supra) the Division Bench was ceased of the matter, wherein it is stipulated that if in an agreement a specific time limit is specified for performance of the part of the contract, after the prohibition of transfer of fragmented land was removed, the suit was instituted after three years of such removal of prohibition and the court had held the same to be barred by limitation under Article 54 of the Limitation Act.

(17) In this view of the matter, the revision application fails. RULE is discharged.