
(2022) 08 BOM CK 0004

In the Bombay High Court

Case No : Civil Revision Application No. 16, 17 Of 2022

Sharad Sitaramji Shende And Others

APPELLANT

Vs

Nilesh Subhashandji Katariya And Others

RESPONDENT

Date of Decision : 03-08-2022

Acts Referred:

Limitation Act, 1963 — Article 54

Code Of Civil Procedure, 1908 — Order 7 Rule 11, Order 7 Rule 11A, Order 7 Rule 11(d)

Citation : (2022) 08 BOM CK 0004

Hon'ble Judges : Manish Pitale, J

Bench : Single Bench

Advocate : M.G. Bhangde, S.S. Bhalerao, S.P. Dharmadhikari, Deoul Pathak

Final Decision : Dismissed

Judgement

Manish Pitale, J

1. Admit. Heard finally with the consent of learned counsel appearing for the contesting parties.

2. These two Revision Applications have been filed by defendants in a suit filed by the respondent No.1 for specific performance. While Civil Revision Application No.16/2022, is filed by the original defendant Nos.1 to 4 and 6 to 8, Civil Revision Application No.17/2022, is filed by the original defendant Nos.5 and 9. In these Revision Applications, the applicants have challenged common order dated 20/01/2022, passed by the Court of Civil Judge, Junior Division, Warora, District Chandrapur on Exhs.39 and 57, i.e. the two applications filed for rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC). The Court below has rejected both the applications, holding that the suit filed by the respondent No.1 deserves to go to trial.

3. The facts, in brief, leading to filing of the present Revision Applications are that on 03/02/2011, a document titled as "Sauda Chitthi", was executed between

the respondent No.1 with one Jodhrajji Kothari on the one hand and the applicants herein on the other. In these documents, it was stated that the applicant had agreed to sell specific area of land at Rs.40,00,000/- per acre, in respect of which amount of Rs.2,01,000/-, was received by the applicants and that an agreement in that regard would be executed on 17/02/2011, on which day, further amount to the extent of 25% of the consideration would be received by the applicants.

4. Subsequently, a document was executed between the said parties on 17/02/2011, titled as document for extension of time to execute agreement. In this document, reference was made to the earlier "Sauda Chitthi", dated 03/02/2011 and it was stated that thereafter, when advertisement was published on 06/02/2011, in a newspaper as regards the said "Sauda Chitthi", written objections were received on 11/02/2011, from some relatives of the applicants herein, due to which the parties had agreed for extending the time beyond 17/02/2011, for execution of the agreement. It was further stated that upon the objections being dealt with and settled, the agreement would be executed.

5. In May, 2018, the respondent No.1 filed Special Civil Suit No.11/2018, before the Court below for specific performance of the said document i.e. "Sauda Chitthi", dated 03/02/2011, read with document dated 17/02/2011, for extension of time. It was claimed that in terms of the said documents, a concluded contract had come into existence between the parties. It was submitted that as per the document executed on 17/02/2011, for extension of time, it was clear that time was not the essence. As objections were raised in respect of the said transaction, the applicants had filed a suit against the objectors, resulting in a decree against them, which was then taken in appeal and the same is pending. It was claimed that when the respondent No.1 got knowledge of repudiation of the said contract by the applicants, that he was constrained to file the aforesaid suit. Apart from claiming specific performance in the aforesaid manner, the respondent No.1 claimed alternative relief of grant of decree of Rs.6,02,01,000/-, in his favour.

6. In the said suit, the applicants filed the said applications at Exhs.39 and 57, under Order VII Rule 11 of the CPC, for rejection of the plaint. While the applicants in C.R.A. No. 16/2022, claimed that there was no concluded contract and no specific performance could be granted of an agreement to enter into an agreement, the applicants in C.R.A. No.17/2022, additionally sought rejection of the plaint because they were not even signatories to the said documents, of which specific performance was claimed. In other words, the applicants claimed that there was no cause of action disclosed in the plaint, thereby justifying its rejection. It was further claimed by the applicants before the Court below that the suit was hopelessly barred by limitation and on that ground also the plaint deserved to be rejected.

7. By the impugned common order, the Court below rejected both the applications, holding that the documents in question read with the contents of the plaint sufficiently disclosed cause of action and that in the facts and

circumstances of the present case, limitation being a mixed question of facts of law, the plaint could not be rejected on either ground raised by the applicants.

8. Aggrieved by the same, the applicants filed the present Revision Applications, wherein notices were issued and interim stay was granted. The contesting respondent No.1 appeared through counsel and the applications were taken up for hearing on merits.

9. Mr. M.G. Bhangde, learned Senior Counsel appearing for the applicants in both the applications submitted that the impugned common order deserved to be set aside and the plaint ought to be rejected as the documents in question clearly demonstrated that the parties had executed an agreement to enter into an agreement and, therefore, no decree of specific performance could be granted on the face of it. It was submitted that the contents of the plaint read with the aforesaid two documents demonstrated that no concluded contract was executed and that it was merely a desire of the parties to enter into an agreement, which was yet to be executed and, therefore, there was no question of specific performance of such a document being granted by the Court below.

10. The learned Senior Counsel invited attention of this Court to the contents of the aforesaid two documents to submit that there was no question of any ambiguity in the matter and that the documents did not signify a concluded contract for the reason that a specific agreement stating the terms of the contract between the parties was yet to be executed. The mode and method of payment, as also time fixed for performing the contract were not specified, thereby showing that the respondent No.1 could not claim existence of cause of action for filing the suit for specific performance.

11. The learned Senior Counsel further submitted that specific performance of the contract is based on existence of a valid and enforceable contract and that the Court cannot make a contract between the parties where none exists. It was emphasized that in the absence of the details of the manner of payment of consideration and the time fixed for performance of the contract, it could not be said that there was "consensus ad idem", between the parties. It was also submitted that only the terms of the documents in question could be looked into and there was no scope to examine the nature of the documents on the basis of previous or subsequent conduct of the parties, since the documents themselves ought to demonstrate a concluded contract between the parties.

12. It was further submitted that the suit was barred by limitation on the face of it, because the contents of the plaint itself demonstrated that the respondent No.1 was well aware about the transaction not going through, well before filing of the suit in May, 2018. It was submitted that the limitation period of three years from the date of knowledge of repudiation of the contract was over, years before the suit was actually filed.

13. In Civil Revision Application No.17/2022, Mr. Bhangde, learned Senior Counsel, specifically submitted that the applicants therein were not even

signatories to the documents in question and, therefore, there was no question of seeking specific performance against those who were not parties. It was submitted that in such circumstances, the suit could certainly not proceed against the said applicants i.e. original defendant Nos.5 and 9.

14. The learned Senior Counsel in support of his contentions relied upon judgments of the Hon'ble Supreme Court in the cases of Speech and Software Technologies (India) Private Limited Vs. Neos Interactive Limited reported in (2009) 1 SCC 475; Satish Kumar Vs. Karan Singh and another reported in (2016) 4 SCC 352 and Fatehji and Company and another Vs. L.M. Nagpal and others reported in (2015) 8 SCC 390. The learned Senior also relied upon judgments of this Court in the cases of Jayantilal Devji Shah (Haria) Vs. Mangesh Dasrath Gaikar and others reported in 2018(2) Mh.L.J. 709 and Abu Zar Prehman Khan Vs. Prakashchandra Shriram Gotmare and others reported in 2017(5) Mh.L.J. 460. The learned Senior Counsel also relied upon judgments of Delhi High Court in the cases of Sobhag Narain Mathur Vs. Pragya Agrawal and Ors., (judgment and order dated 04/02/2016, passed in CS (OS) No. 176/2007); M/s. Harison Traders Ltd. Vs. Mrs. Raj Bhalla reported in ILR (2006) I Delhi 219 and T. Muralidhar Vs. PVR Murthy reported in 2014 SCC OnLine Del 2326.

15. On the other hand, Mr. S.P. Dharmadhikari, learned Senior Counsel appearing on behalf of contesting respondent No.1 in both the Revision Applications submitted that, first and foremost it needs to be appreciated that the question of rejection of plaint at the threshold is being considered and the position of law sought to be emphasized upon by the applicants would have to be applied after a full dress trial is conducted and the parties are given an opportunity to lead evidence. It is submitted that limited enquiry at this stage is, as to whether the pleadings in the plaint read with two documents in question make out cause of action for the matter to go to trial. It is submitted that even the question of limitation in the facts and circumstances of the present case, being a mixed question of law and facts needs to go to trial and, therefore, no interference is warranted in the impugned common order passed by the Court below.

16. By referring to the contents of the aforesaid two documents i.e. "Sauda Chitthi", dated 03/02/2011 and the document for extension of time dated 17/02/2011, the learned Senior Counsel for the contesting respondent No.1 submitted that a bare reading thereof demonstrates that a concluded contract had taken place and that even if it was stated therein that an agreement would be executed, such execution of agreement was for giving form to the contract which was already entered into. The learned Senior Counsel submitted that the contents of the aforesaid "Sauda Chitthi", recorded the subject matter of the transaction, the rate at which the property was being purchased, the initial amount paid and future steps to be taken by the parties on the basis of such concluded contract for purchase of immovable property.

17. It was submitted that even if there was scope for contending that there was ambiguity in the documents, it would be a matter for trial, particularly in the light

of the manner in which the applicants themselves had proceeded in the suit filed on their behalf to contest the objections raised by certain parties to the aforesaid transaction. It was submitted that there were certain admissions given in the said judicial proceedings, which were now pending in the form of an appeal filed by the applicants before the competent Court, demonstrating that the applicants themselves had proceeded on the basis that the aforesaid documents signified a concluded contract. Therefore, it was indicated that the matter ought to go to trial for the parties to be given an opportunity to contest their claims by leading evidence before the Court below.

18. It was submitted that merely because the parties had stipulated that there would be a formal agreement prepared, embodying the terms stated in the "Sauda Chitthi", it could not be said that a concluded contract had not taken place or that the parties were merely at the stage of negotiation. It was emphasized that the documents in question, on the face of it, could not be classified as merely an expression of desire of the parties and that a bare reading of the documents, read with the pleadings in the plaint clearly demonstrated that entering into an agreement in future could not take away the basic character of a concluded contract under the documents in question. It was submitted that even if there was no specific agreement regarding the mode of payment, a conclusion could not be drawn at this stage that the contract was not complete. It was further submitted that the emphasis on time being fixed for completion of the sale or specific mode of payment on the part of the applicants was wholly misplaced and, therefore, it could not be claimed that there was no cause of action made out in the aforesaid plaint.

19. On the question of limitation, it was submitted that a bare reading of the plaint could demonstrate that the question being necessarily a mixed question of facts and law, requiring the parties to lead evidence, at this stage, it could not be said that the suit was barred by limitation. As regards absence of signatures of the original defendant Nos.5 and 9, it was submitted that in the plaint itself there were pleadings to indicate that according to the applicants, why absence of signatures of the said defendants would not absolve them of liability and that the said aspect also deserved to go to trial by giving an opportunity to the parties to lead evidence. On this basis, it was submitted that the revision applications deserved to be dismissed. The learned Senior Counsel relied upon judgments of this Court in the case of *Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram and others* reported in (1974) 1 SCC 242; *The Godhra Electricity Co. Ltd. and another Vs. The State of Gujarat and another* reported in (1975) 1 SCC 199, *Urvashiben and another Vs. Krishnakant Manuprasad Trivedi* reported in (2019) 13 SCC 372; *W.J. Rossiter, George Curtis and others Vs. Daniel Miller* reported in 1878 Vol. III 1124 and *Kollipara Sriramulu (Dead) by his legal representative Vs. T. Aswatha Narayana (dead) by his legal representatives and others* reported in (1968) 3 SCR 387.

20. Having heard the learned counsel for the rival parties, it needs to be

examined whether the plaint in the present case can be rejected at the threshold for non-disclosure of cause of action and being barred by limitation, on a bare reading of the plaint along with the documents filed therewith.

21. This Court is of the opinion that a lot would turn on the question, as to whether the construction of the two documents in question i.e. "Sauda Chitthi", dated 03/02/2011 and document for extension of time dated 17/02/2011, at this stage itself read with pleadings in the plaint, can be said to have made out a case for rejection of the plaint or that sufficient material exists for the matter to go to trial. If the plaint is to be rejected at this stage, this Court will have to come to a conclusion that the aforesaid two documents and the pleadings in the plaint, taken on their face value, do not warrant a full dress trial and that without the exercise of framing of issues and recording of evidence, the proceedings can be extinguished at this stage itself.

22. Before examining the documents in question and the pleadings in the plaint, it would be appropriate to refer to the position of law upon which the learned counsel for the rival parties have placed reliance. In the case of Speech and Software Technologies (India) Private Limited Vs. Neos Interactive Limited (supra), the Hon'ble Supreme Court has referred to the well settled legal position that the agreement to enter into an agreement is not enforceable and that it does not confer any right upon the parties. In the case of Satish Kumar Vs. Karan Singh and another (supra), the Supreme Court has clearly laid down that the Court will not make a contract for the parties who have not entered into a valid and enforceable contract.

23. In order to conclude that a document can be construed as a concluded or completed contract, certain factors need to be appreciated. As far back as in 1878, the House of Lords in the aforementioned case of W.J. Rossiter, George Cutis and others Vs. Daniel Miller (supra), held that the parties could be said to be in negotiation when they may have broadly agreed on cardinal points, but some essential particulars to the agreement still remain to be settled. But, merely because the parties have expressly stipulated therein that there shall be a formal agreement prepared in the future, that in itself cannot lead to the conclusion that the parties are merely in negotiation. The aforesaid position was referred to by the Supreme Court in the case of Kollipara Sriramulu (Dead) by his legal representative Vs. T. Aswatha Narayana (supra) and it was held as follows:

"4. In other words, there may be a case where the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract. In Rossiter VS. Miller Lord Cairns said:

"If you find not an unqualified acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise then you cannot find a conclude contract."

In *Currimubhoy and Company Ltd. VS. Creet*⁵ the Judicial Committee expressed the view that the principle of the English law which is summarised in the judgment of Parker, J. in *Von Hatzfeldt-Wildenburg V. Alexander*³ was applicable in India. The question in the present appeals is whether the execution of a formal agreement was intended to be a condition of the bargain dated July 6, 1952 or whether it was a mere expression of the desire of the parties for a formal agreement which can be ignored. The evidence adduced on behalf of Respondent 1 does not show that the drawing up of a written agreement was a pre-requisite to the coming into effect of the oral agreement. It is therefore not possible to accept the contention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written document. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed. We accordingly hold that Mr. Gokhale is unable to make good his argument on this aspect of the case."

24. In the case of *Bank of India and another Vs. K. Mohandas and others* reported in (2009) 5 SCC 313, the Supreme Court held that true effect must be given to the clear and unambiguous words used in a contract and that the intention of the parties must be ascertained from the language they have used, by considering the surrounding circumstances and nature and purpose of the contract.

25. It is significant that the said principles have to be kept in mind while reading the documents in question in the present case, at this stage, only to examine whether the contents of the said documents are such that there is no scope for the parties to go to trial on the claims made by the original plaintiff i.e. respondent No.1 herein and that the plaint deserves to be rejected at the threshold. In this context, the judgments upon which the learned Senior Counsel appearing for the applicants has relied in the cases of *Sobhag Narain Mathur Vs. Pragya Agrawal and Ors.* and *M/s. Harison Traders Ltd. Vs. Mrs. Raj Bhalla* (supra), can be of no avail because in the said two cases, judgments were rendered after full dress trial and opportunity for the parties to lead evidence. It was after recording of evidence and material that came on record that the Delhi High Court applied the aforementioned principles as regards construction of the documents, to conclude that an agreement did not exist, of which specific performance could be granted. As opposed to the said situations before the Delhi High Court, in the present case, this Court is called upon to reject the plaint at the threshold, without necessity to lead evidence.

26. In the case of *T. Muralidhar Vs. PVR Murthy* (supra), the Delhi High Court held on the facts that rejection of plaint was justified, because no cause of action was disclosed. It would necessarily have to be analyzed, as to whether, in the

facts of the present case, considering the pleadings in the plaint and the aforesaid two documents, at this stage, it can be said that no cause of action is made out by respondent No.1 i.e. the original plaintiff.

27. A perusal of "Sauda Chitthi", dated 03/02/2011, shows that the area of the subject property is specified, the rate at which it is to be purchased is specified, the specific amount exchanged between the parties is stated and it was specifically recorded that "Sauda" was executed on the said date and that a "Visarpatra" i.e. agreement would be executed on 17/02/2011. There is no dispute about the fact that on 17/02/2011, instead of executing the agreement, the said document for extension of time was executed, in the light of the admitted position that certain objectors had objected to the transaction between the parties.

28. Even in the subsequent document for extension of time dated 17/02/2011, reference was made to the aforesaid "Sauda Chitthi", dated 03/02/2011, reiterating the details of the area of land, rate at which it was agreed to be sold and specific amount that exchanged hands, stating that "Sauda" had been entered into. Thereafter, the said document for extension of time recorded the nature of objections raised, the manner in which the Revision Applicants intended to deal with the objections and that after settling the said dispute they were to execute the "Visarpatra" with respondent No.1 i.e. original plaintiff.

29. In the light of the aforesaid two documents, when the pleadings in the plaint are perused, it is seen that according to the respondent No.1 i.e. original plaintiff, the contract was executed between the parties on 03/02/2011, titled as "Sauda Chitthi", further referring to the obligation of the parties to execute the agreement and ultimately the sale deed. After referring to subsequent events that took place in the form of the necessity to execute the document for extension of time, the respondent No.1 also referred to Special Civil Suit No.26/2011, filed by the revision applicants as a consequence of the objections raised by certain parties to the said contract, the manner in which the suit proceeded and the fact that the appeal arising from the suit, bearing R.C.A. No.14/2014, was pending before the competent Court.

30. After stating such facts, the respondent No.1 claimed that he had suffered projected financial loss due to the revision applicants and after stating as to the manner in which the cause of action arose, relief was sought in the form of seeking specific performance of "Sauda Chitthi" read with the document for extension of time and in the alternative specific amount was claimed from the revision applicants.

31. This Court is of the opinion that applying the above-mentioned principles pertaining to the question, as to whether the documents signify a concluded contract or not, at this stage, the respondent No.1 has clearly made out a prima facie case for the matter to go to trial, with an opportunity to the parties to lead evidence in respect of their respective stands. As noted above, the position of

law as clarified by the Supreme Court specifies that the language of the document has to be construed in the light of surrounding circumstances. The reference to the manner in which the revision applicants were constrained to file the suit and the fact of pendency of the appeal arising therefrom, shows the circumstances in which the extension of time was necessitated in the context of the "Sauda Chitthi", and it could not be said at this stage that the parties had merely expressed their desire to enter into a contract or that at this stage itself it can be said emphatically that there was no concluded contract between the parties. This applies equally to the objection raised by original defendant nos. 5 and 9, as regards absence of their signatures on the documents, for the reason that certain facts are pleaded in the plaint about why absence of their signatures would not absolve them of their liability and that decree of specific performance ought to be passed against them also. This aspect would also require an opportunity for the parties to lead evidence.

32. In this context, the learned Senior Counsel appearing for the respondent No.1 is justified in relying upon judgment in the case of *The Godhra Electricity Co. Ltd. and another Vs. The State of Gujarat* (supra), wherein it is laid down that when there is latent ambiguity that the necessity for extrinsic evidence arises, particularly, while interpreting certain statements or documents that may clear the latent ambiguity. Thus, even if the contentions raised on behalf of the revision applicants are to be considered, at this stage, at worst, there could be said to be some latent ambiguity in the documents, which would necessarily require full dress trial with an opportunity for the parties to lead evidence. This Court is not in agreement with the learned Senior Counsel appearing for the revision applicants that applying the above-mentioned position of law laid down by the Supreme Court in various judgments, at this stage itself, an emphatic finding can be rendered that there was no concluded contract between the parties.

33. The emphasis on the absence of details of the mode of payment of consideration and time being fixed for conclusion of the contract is answered by the judgment of the Supreme Court in the case of *Kollipara Sriramulu (Dead) by his legal representative Vs. T. Aswatha Narayana* (supra), which in turn relies upon the judgment of House of Lords in the case of *W.J. Rossiter, George Vs. Daniel Miller* (supra).

This Court is of the opinion that the material on record, including the pleadings in the plaint and the documents in question cannot lead to a conclusion that the plaint deserves to be rejected at the threshold and that the trial is not at all warranted in the facts and circumstances of the present case. To that extent, the respondent No.1 would be justified in claiming that, the admissions made in judicial proceedings in the form of aforesaid suit filed by the revision applicants and the pending appeal arising therefrom, would have to be looked into to examine as to the real nature of the documents of which specific performance is sought in the present case. Considering the aforesaid aspects of the matter, it

cannot be said that the Court below erred in holding that no case was made out by the revision applicants for rejection of plaint under Order VII Rule 11-A of the CPC, for failure to disclose cause of action.

34. Insofar as the question of limitation is concerned, this Court is convinced that the pleadings in the plaint including circumstances pleaded by the respondent No.1, particularly filing of RCS No.26/2011, by the revision applicants and pendency of RCA No.14/2014, arising therefrom, as also other facts pleaded in the plaint demonstrate that the plaint cannot be rejected on the ground that it is barred by limitation, on the face of it. The question as to whether the suit was filed within limitation, applying second part of Article 54 of the Limitation Act, 1963, would have to be answered after giving an opportunity to the parties to lead evidence, because in the facts of the present case, it is found to be a mixed question of law and facts. There can be no quarrel with the proposition laid down in the judgments relied upon by the learned Senior Counsel appearing for the revision applicants, but, in the facts and circumstances of the present case, no fault can be found with the finding of the Court below that as the question of limitation is a mixed question of law and facts, it would also require the parties to go to trial.

35. Hence, it is found that revision applicants cannot claim rejection of the plaint at the threshold by application of Order VII Rule 11(d) of the CPC. In view of the above, it is found that the revision applications are without any merit and accordingly, they are dismissed. Interim relief stands vacated.

36. Pending applications, if any, are disposed of.

LATER ON :

Upon pronouncement of judgment, the learned counsel appearing for the applicants prayed for extension of interim order operating during pendency of revision applications. But, since this Court has stated detailed reasons as to why no case is made out for interference in revisional jurisdiction, this Court is of the opinion that no case is made out for extension of interim order.

Accordingly, the prayer is rejected.