

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1388 OF 2013

Lupin Limited

... Appellant

Vs.

Prashant Garden Co-operative
Housing Society Ltd. & Ors.

... Respondents

Mr.Prashant Chavan a/w Ms.Reshma Nathani & Ms.Sharvari Shinde i/b
P.S. Legal for the Appellant

Mr.Y.S. Jahagirdar, Sr. Adv. a/w. Mr.G.S. Godbole i/b Mr.N.V. Khaladkar
Nos.6 and 8

Mr.Tejas Dande a/w Mr.Bharat Gadhavi and Krupanshree Nandu i/b Tejesh
Dande & Asso. for Respondent No.9

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 16th SEPTEMBER, 2015

P.C.:

1. This appeal is directed against the order dated 1.2.2013 passed by the Civil Judge, Junior Division, Pune in Special Civil Suit No.2106 of 2010 below exhibit 57, thereby rejecting the plaint under Order 7 Rule 11(d) of the Civil Procedure Code as being barred by law of limitation. The plaintiff is a purchaser of the suit property, that is, six plots from respondent Nos.1 to 5. Respondent No.1 is the society. Respondent Nos.2 and 3 are the office bearers and respondent No.4 is a Developer. Initially, the plaintiff and respondent Nos.1 to 4 entered into agreement on 28.9.1994. Thereafter, in respect of the six plots, three agreements were entered into between the

plaintiff and the respondent Nos.1 to 5 on 2.12.1995. The total amount of consideration was fixed at Rs.33 lacs and the entire amount of consideration was paid by the plaintiffs to respondent No.4. Respondent No.1 society was registered subsequently and it was obligatory on the part of the respondent Nos.1 to 5 to hand over peaceful and clear possession of the suit land to the plaintiff. However, it was not done since 1995 till 2010. In between, the Government had expressed its inclination to acquire the suit land and therefore there were some steps taken by the respondents. However, subsequently the government withdrew the proposal of acquiring the suit land and the land was free. Again there was some persuasion on the part of the plaintiff for the performance of the contract from the respondent Nos.1 to 5. The plaintiff on 7.2.1998, sent notice and demanded back the entire money, and so also, filed a criminal case against the respondents i.e., C.C. No.1516 of 2000 u/s 420 of the IPC. Thereafter the society – defendant No.1 and respondent Nos.1 to 5 showed willingness for the performance of their obligations under the contract and also invited the plaintiff to attend the meeting. They also sent a letter dated 12.9.2003 and informed that the society is interested in taking steps towards conveyance and the steps are also taken considering that the Government of Maharashtra has scrapped the proposal of acquiring the land. The defendant Society by its letter dated 23.3.2005 called a general

body meeting and wanted to give post facto approval for the development agreement in respect of the society as the society has sold the land to defendant Nos.6 to 8 on 31.1.2005. The plaintiff thereafter received a letter from defendant Nos.1 to 3 dated 4.12.2006 informing the plaintiff to collect the amount of consideration and calculated the amount as Rs.47,58,000/-. However, the plaintiff thereafter realised that the defendant Nos.1 to 5 have sold this land dishonestly in favour of the defendant Nos.6 to 8. Thereafter the plaintiff sent one notice dated 29.7.2007 calling upon defendant Nos.1 to 6 to carry on their part of the performance of the agreement. Subsequently, reply was sent on 12.10.2007 by the defendants refusing the performance of the agreement. Thereafter, the plaintiff filed suit in September, 2010 for the specific performance against defendant Nos.1 to 8.

2. The learned Counsel for the appellant has submitted that the learned Judge has committed error in dismissing the suit under Order 7 Rule 11(d) of the CPC. He submitted that the learned Judge ought to have taken into account the date and has committed an error in accepting the date of the cause of the suit prior to September, 2007. He submitted that though the averments in para 24 of the plaint ought to have been considered by the trial Court that the first cause of action initially arose on 28.12.1994 when the MoU was entered and thereafter, it arose again when the defendant

showed their willingness to perform their obligation and the plaintiff was assured about the same. So also, the letter was sent on 12.12.2003 from the defendant about holding a general body meeting and taking steps towards conveyance. He further submitted that the plaintiff sent notice for the specific performance on 29.9.2007 and the refusal on the part of the defendants to perform their obligation should have been taken as the date of the cause of action which arose last. If the cause of action that arose last is taken as September, 2007, then the suit filed by the plaintiff in September, 2010 is very much within limitation and the Court ought not to have dismissed the suit. He further submitted that though the suit was dismissed under Order 7 Rule 11(d), as per the ratio laid down in **Balasaria Construction (P) Ltd. vs. Hanuman Seva Trust & Ors.**¹ It is observed that the law of limitation is not to be covered under Order 7 Rule 11(d). He prayed that the order of the civil Court is to be set aside.

3. Mr.Jahagirdar, the learned Senior Counsel for Respondent Nos.6 to 8, and also the learned Counsel for Respondent Nos.1 to 5 and 9, the contesting respondents, opposed this Appeal. It is submitted that if the averments in the plaint are considered, the cause of action arose later in the year 1995 or in the year 1998 when the amount was returned and the agreement entered into in the year 1995 was cancelled by the plaintiff. It

1 (2006) 5 SCC 658

is further submitted that there are documents annexed alongwith the plaint and those documents also can be relied on at the time of considering the averments on the point of Order 7 Rule 11(d). In support of his submission, reliance is placed on para 37 of the judgment in **Liverpool & London S.P & I Association ltd. vs. M.V. Sea Success I and anr.**²

4. Perused the order of the trial Court. Read the plaint. After going through the plaint and the submissions made by the learned Counsel for both the sides, it is clear that though the parties have initially entered into agreement on 28.12.1994, finally the cause of action arose latest on 4.12.2006 when the defence wanted to repay the amount of consideration. In fact, a letter was sent by the defendant society on 23.3.2005 calling for special general body meeting in which the defendant society proposed to get a post-facto approval for the development agreement in respect of the suit land with defendant Nos.6 to 8 from 31.1.2005. This shows that the defendants were not interested in performing their part and they have already violated the agreement. Thus, the time can be stretched in respect of cause of the action at the most upto 2006 and not thereafter. The learned trial Judge has taken a correct view. In the case of **Balasaria (supra)**, in para 8 of thereof, the Supreme court has held that the suit cannot be dismissed as barred by limitation without proper pleadings and

² (2004) 9 SCC 512

framing of issue of limitation and taking evidence. However, if the pleadings are proper and there is a specific mention in the averments and the limitation if at all, can easily be construed on the basis of the averments and also on the basis of the documents, then, it can be covered under order 7 Rule 11(d).

5. Thus, the appeal is dismissed as the plaint is rejected under Order 7 Rule 11(d) of the CPC.

(MRIDULA BHATKAR, J.)

CERTIFICATE

Certified that this Judgment/Order uploaded is a true and correct copy of original signed Judgment/Order.