



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 5/2/2015

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C O R A M

THE HONOURABLE Mrs.JUSTICE PUSHPA SATHYANARAYANA

C.R.P.PD(MD) No.1746 of 2013

Vadivel ... Petitioner

Vs

A. Velayutham ... Respondent

Petition filed under Article 227 of the Constitution of India against the order dated 12/9/2013 in unnumbered O.S.No.---- of 2013 on the file of the Subordinate Judge, Tirunelveli.

For petitioner ... Mr.G.Prabhu Rajadurai
For respondent ... Mr.R.Anand

ORDER

This Civil Revision Petition is filed challenging the return of the plaint on the ground of limitation.

2. The suit is one for specific performance directing the defendant to execute the sale deed in favour of the plaintiff based on an oral agreement. The agreement is dated 24/1/2008. But the suit is filed on 10/9/2013. Therefore, the Sub-Court, Tirunelveli had returned the plaint as barred by limitation.

3. The plaint was re-presented by the plaintiff endorsing that the suit was filed based on the strength of the agreement dated 24/1/2008, wherein the entire sale consideration was paid. Further, it was endorsed that the suit would fall under the purview of Section 54 of the Limitation Act as per which the suit has to be filed within three years from the date fixed for the performance or if no such date is fixed from the date of refusal of performance.

4. According to the plaintiff, the defendant had refused his part of performance only on 1/8/2013 based on which the suit has been filed which according to him is well within the time. However, the Principal Sub-Judge, Tirunelveli had returned the plaint as not maintainable. Aggrieved by the same, the above Civil Revision has been filed.



5. Heard the learned counsel appearing for the petitioner and the respondent.

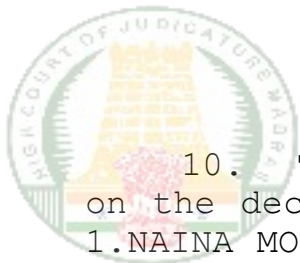
6. The learned counsel appearing for the petitioner submitted that the suit filed as such would fall within the ambit of Article 54 of the Limitation Act as the agreement did not specify the date for performance. Therefore, the period of limitation would run from the date of refusal to perform.

7. In this case, the plaintiff approached the defendant on 1/8/2013, requesting him to execute the sale deed as agreed. But the defendant refused to execute the sale deed and sent the registered notice on 29/8/2013 denying the receipt of sale consideration and refusing to execute the sale as agreed. As the reply notice is dated 29/8/2013, wherein for the first time, the defendant refused to perform his part of contract. The limitation starts from that date as specified in Article 54 of the Limitation Act and it was contended that the suit is well within the time and the same ought to have been ordered.

8. The learned counsel for the petitioner places his reliance on the decision KANNAN (DIED) AND OTHERS Vs. DHANALAKSHMI reported in 2015 (1) MLJ - 303. The operative portion in paragraph 14 is usefully extracted hereunder.

".... Only in the plaint in O.S.No.319 of 1995, the defendant came out with a plea that the plaintiff did not perform her part of the contract and therefore, he cancelled the agreement. Therefore, I am of the view that the question of limitation in the present case would commence only from the date of knowledge of refusal by the defendant and consequently, the suit filed by the plaintiff in O.S.No.506 of 1995 is within the period of limitation. Both the Courts below have rightly dealt with this aspect of the matter and held that the plaintiff had knowledge about the denial on the part of the defendant only on receipt of summons in O.S.No.319 of 1995...."

9. As per the above decision also, the question of limitation will start running only from the date the plaintiff had knowledge about the refusal by the defendant to perform his part of contract. Therefore, the suit can be entertained and the same can be decided at the time of trial.



10. The counsel for the petitioner also places his reliance on the decision reported in {2012 (5) L.W - 250} M.CHINNAIYAH Vs. 1.NAINA MOHAMMED AND ANOTHER. Paragraph Nos.5 and 7 are extracted hereunder:

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"5. On a perusal of the plaint averments, it is seen that the petitioner has sought for the relief of specific performance of the sale agreement on the basis of the oral agreement entered into between the plaintiff and the defendants. The trial Court can reject a plaint, only when it is found that any of the conditions under Rule 11 of Order 7 of CPC exists. The trial Court has gone into the merits of the case and rejected the plaint on the ground that the averments stated in the plaint have not been substantiated by documentary evidence, which is clearly a matter of trial. The trial Court can ascertain as to whether the plaint discloses cause of action or not, but cannot ascertain as to whether the plaintiff would be entitled to get the relief prayed for in the facts and circumstances disclosed in the plaint.

7. The merits of the allegations made in the plaint cannot be gone into at the threshold or at the stage of numbering, as it is a matter to be tried in a suit and decided on the basis of the materials on record. In the present case, the trial Court, without even numbering the case and without considering the relevant facts stated in the plaint, has gone into the merits of the allegations made in the plaint and thereafter, has rejected the plaint which is not sustainable in law. Therefore, the impugned order rejecting the plaint under Order 7 Rule 11 of CPC suffers from illegality and improper exercise of jurisdiction and it is liable to be set aside."

11. The question of limitation being the mixed question of law and facts cannot be decided even before numbering of the suit. If the case falls within the six limbs of Order 7 Rule 11 of the Code of Civil Procedure, perhaps the trial Court can reject the plaint. The trial Court only can ascertain whether a cause of action is being made out by the plaintiff or not. In the present facts and circumstances, Order 7 Rule 11 (d) will also have no application as the same has to be decided only in the trial.

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12. The learned counsel appearing for the petitioner places reliance on the decision {2006 (5) Supreme Court Cases -



658}BALASARIA CONSTRUCTION (P) LTD Vs. HANUMAN SEVA TRUST AND OTHERS to the paragraph 8 and the same is extracted hereunder:-

“After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11 (d) CPC and the judgments of the trial Court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court touching upon the merits of the dispute are set aside but the conclusion arrived at by the High Court is affirmed. We agree with the view taken by the trial Court that a plaint cannot be rejected under Order 7 Rule 11 9d) of the Code of Civil Procedure.”

13. In view of the above proposition also, it can be seen that it is not the case of either side that the application under Order 7 Rule 11 (d) can never be based on the Law of Limitation. The plaint has to be numbered only based on the facts of a particular case and the question of applicability of Order 7 Rule 11 (d) would be based on the Law of Limitation which can be dealt with only in the suit.

14. In view of the above decisions, it has been held that the suit cannot be thrown out at the threshold on the question of limitation without giving an opportunity to the parties to let in evidence to decide the same. When the agreement does not prescribe any time limit, Article 54 of the Limitation Act will come into play. In this case, the reply notice by the defendant is crucial. As the plaintiff alleges that he got the knowledge about the refusal of the performance by the defendant only from the letter dated 29/8/2013, the corrections of the same can be decided only in the trial, after affording an opportunity to both the parties.



15. In the result, this Civil Revision Petition is allowed. No costs. The learned Subordinate Judge, Tirunelveli is directed to number the plaint and dispose of the same in accordance with law. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(Writs)

/True Copy/

Sub Assistant Registrar

To

The Subordinate Judge, Tirunelveli.

+1cc to Mr.G.Prabhu Rajadurai,Advocate Sr.No. 5583

+1cc to Mr.R.Anand, Advocate Sr.No. 5351

mvs

AA/23.02.2015/5p- 4c/

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