

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6465 of 2011

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1. Birendra Yadav Son Of Late Bidyanath Yadav Resident Of Village- Barmasia, Katihar Police Station Sahayak Thana Mirchaibari, District- Katihar.

.... Petitioner/s

Versus

1. Madan Mitra Son Of Late Panchand Mitra Resident Of Mohalla- Tejatola, Katihar, Police Station And District- Katihar
2. Monu Mitra Wife Of Madan Mitra Resident Of Mohalla- Tejatola, Police Station And District- Katihar
3. Debbate Bhattacharya Son Of Late Naresh Chandra Bhattacharya Resident Of Mohalla- Mahatma Gandhi Road, Sahid Chowk, Katihar, Police Station And District- Katihar.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. S.S. Dwivedi, Sr. Advocate
Mr. Rakesh Chandra

For the Respondent/s : Mr. Najib Ahmad

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

ORAL JUDGMENT

Date: 11-02-2016

Defendant 2nd party is the purchaser of the subject land from Defendant 1st party. In a suit filed by the plaintiff-respondent 1st set, vide Title Suit No. 148 of 2009 for specific performance of contract, they were arrayed as defendants. An application filed under Order XIV Rule 2 of the Code of Civil Procedure (for short 'CPC') by the defendant was considered and rejected by the learned Sub-Judge-I, Katihar on 20.1.2011. Assailing the aforesaid order, the present writ petition is filed.

I have heard Sri S.S. Dwivedi, Senior Counsel in support of the application and Sri Najib Ahmad for the contesting plaintiff-respondent.



The case of the plaintiff-respondent is that defendant no. 1 agreed to sell the suit land in favour of the plaintiff for a value of Rs. 2,25,000/- and received the part consideration amount under the *baibayana* executed on 13.05.2005. As the plaintiff was looking after the properties of the defendant, he was allowed to construct house thereon. It was contemplated in the agreement (*baibayana*) that the purchaser would pay the entire consideration money and get the deed of conveyance executed within one year from the date of execution of the *baibayana*. On 03.06.2006, a bank draft towards the consideration amount was drawn in favour of the plaintiff which was handed over to the defendant seller and encashed by him on 13.06.2006. Even thereafter, the request of the plaintiff to execute the sale deed was refused by the defendant seller. Thereafter, on 29.01.2007, a bank draft for a sum of Rs.10,000/- was tendered to the defendant which was refused. Again on 19th February, 2009, a bank draft in the sum of Rs. 50,000/- drawn in the name of the defendant 1st party was tendered with a request to receive the same and execute the sale deed which was denied by the defendant. On 15.06.2009, it came to the notice of the plaintiff that the defendant 1st party sold the suit land in favour of the petitioner-defendant 2nd party by a sale deed 21.03.2009. Promptly thereafter, the suit was filed on 04.07.2009 in which an application under Order XIV Rule 2 of the CPC was filed by



the defendant-petitioner for framing a preliminary issue with regard to the maintainability of the suit and to answer the same. According to the defendant-petitioner, the suit was barred by limitation having been filed beyond 03 years of the extended time i.e. 13.06.2006. The plaintiff-respondent filed rejoinder thereto. The Trial Court, on a consideration of the materials on record, rejected the said application filed by the defendant-petitioner.

Mr. Dwivedi, appearing for the petitioner, has drawn attention of the Court to Section 3 of the Limitation Act in order to contend that a duty is cast on the Court to consider the question of limitation even if not raised. Section 5 of the Limitation Act shall not be applicable in suits. Although the question of limitation is a mixed question of fact and law but in this case the facts are not much in dispute and, as such, the Trial Court ought to have allowed the application and framed the issue of limitation as a preliminary issue and answer the same. In not doing so, the Trial Court has erred in law. He has further submitted that the period of three years in the case shall be counted from 13.06.2006 when, as per the plaint, the defendant encashed the demand draft tendered by the plaintiff towards part of the consideration money. The suit ought to have been filed within one year therefrom but the same was filed on 4.7.2009. In support of his contention, he has relied on **2012 (4) PLJR 168**

(Amiteshwar Dayal vs. Shambhu Dayal) (paragraph 29 and 31).

Mr. Ahmad appearing for respondent nos. 1 and 2 (plaintiff(s)), in contra, supported the impugned order. It is argued, under the impugned order, the trial Court, on a consideration of the rival pleadings, and rightly so, that the issue of limitation is a mixed question of fact and law. The issue of limitation shall be considered along with the other issues framed or to be framed in the suit. The Court thus has not declined to frame limitation as an issue to be considered and answered in the suit. According to him, the period of three years shall be computed from the date of notice about refusal to perform the contract by the defendant. True it is that in the *baibayana*, a period of one year was contemplated for performance of the obligation but part(s) of the consideration money was tendered by the purchaser-plaintiff after the expiry of the said period which was accepted and encashed by the defendant on 13.06.2006. Even thereafter, certain amount was tendered towards the consideration money but not accepted by the plaintiff. Time was thus not the essence of contract. This is a fact which the plaintiff shall demonstrate by adducing evidence/material at the trial of the suit. In support of his contention, he placed reliance on ***(2006) 3 SCC 634 (Gunwantbhai Mulchand Shah and Ors. vs. Anton Elis Farel and Ors)***.

Order XIV Rule 2 of the C.P.C. falls in Chapter XIV of



the CPC and provides notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule(2), pronounce judgment on all issues. However, an exception has been carved out in sub-rule (2) thereof which provides *inter alia* where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to –(a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force. Relying on the aforesaid provision under Order XIV Rule (2), the application was filed by the defendant which was rejected. True it is that Section 5 of the Limitation Act does not apply in relation to suits but it is to be seen as to whether on the pleadings on record, the suit was barred by limitation. The Counsel for the respondent-plaintiff(s) has relied on Article 54 of the Limitation Act in support of his contention which provides a period of three years for institution of suits for specific performance of contract. The time from when the period shall begin to run is the date fixed for the purpose, or if no such date is fixed when the plaintiff has noticed refusal of performance of the contract. Whether in consideration of the pleadings made in the plaint, the period of three years for the performance of the contract is fixed or not is a question of fact which on appreciation of evidence can be



examined by the Court. The plaintiff has stated that even after encashment of the consideration amount by the defendant on 13.06.2006, certain consideration money was tendered/offered by the purchaser-plaintiff to the seller-defendant, acceptance thereof was denied. It came to the notice of the plaintiff about refusal of the performance of the contract by the defendant seller when on 15.6.2009 it came to the notice of the purchaser-plaintiff that the defendant first party had executed a sale deed on 21.03.2009 in favour of the petitioner defendant-2nd party. The period of one year from 13.5.2005 shall lapse on 12.6.2006. Part of the consideration money was tendered by the plaintiff and encashed by the defendant seller on 13.6.2006. It shall be thus an extension of the period/time provided in the '*baibayana*'.

In case of ***Gunwantbhai Mulchand Shah (supra)*** which arises out of a suit for specific performance of contract and for grant of perpetual injunction, an agreement was entered on 18.12.1964 for purchase of the property. The contemplation for performance of the contract was three months of the date of getting due permission for such sale. The suit was filed on 4.4.1994. The defendant sought a trial of the issue relating to jurisdiction as a preliminary issue. The Trial Court allowed the question of limitation to be considered as a preliminary issue. No evidence was led by any party. The Trial Court



answered the preliminary issue against the plaintiff. The High Court affirmed the said order. The Apex Court set aside the orders and remitted the case to the Trial Court for a decision on all issues arising therein including the issue of limitation in accordance with law after giving the party an opportunity to adduce evidence in support of their respective cases.

In *Amiteshwar Dayal (supra)* on which the defendant-petitioner has relied, a learned Judge of this Court while hearing the appeals arising from the suit considered the submissions that indisputably the plaintiff had attained majority on 13.3.1951 whereas the suit was filed on 24.09.1954. The plaintiff was required to file the suit within three years from the date of his attaining majority to avoid the award or the decree. The period of three years was completed on 13.3.1954 but the suit was filed six months thereafter. Although, the said question was not canvassed before the Trial Court but this Court considering the provisions of Section 3 of the Limitation Act took notice of the admitted position and answered against the plaintiff. It is thus seen that in the said case, the date on which the plaintiff attained majority was not much in dispute.

Adverting to the present case, it is noticed from the pleadings that even after 13.06.2006 which, according to the plaintiff was the last date for filing the suit, certain amount was tendered to the

seller-defendant for the performance of the Contract which was refused. As I have indicated, the time of performance of the contract did not remain the same as was provided in the agreement/*baibayana*. These questions/issues shall, however, be considered by the Trial court at the trial of the suit as evidence will be required in support thereof. The Trial Court in the impugned order has observed that issue of limitation shall be framed along with other issues involved in the case shall be answered at the trial. Whether by accepting the payment of part/remaining consideration amount on 13.06.2006, the time contemplated for performance of the contract got extended or not is the crux which the Trial Court shall examine on appraisal of evidence at the trial. No two trials or hearing of the suit shall be advisable.

Viewing the case in the aforesaid manner and keeping in mind the well accepted principle of law that issue of limitation is a mixed question of fact and law, I do not find any patent illegality or perversity in the order passed by the Trial Court. The application is dismissed.

No order as to cost(s).

(Kishore Kumar Mandal, J)

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