IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NOS.25 AND 35 OF 2015

CIVIL REVISION APPLICATION NO.25 OF 2015

Shri Selwyn Agnelo Botelho, major of age, Indian National, r/o F-2, La Terrace Apts., La Campala Colony, Miramar, Tiswadi, Panaji, Goa.	….	Petitioner

Versus

1. Mr. Norton D'Souza, H. No. 406/2, PDA Colony, Porvorim, Bardez, Goa.		
2. Mrs. Shirley Annie Marie Botelho, wife of Selwyn Agnelo Botelho, F-2, La Terrace Apts., La Campala Colony, Miramar, Tiswadi, Panaji, Goa.	….	Respondents

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Mr. Jagannath Jayant Mulgaonkar, Advocate for the Petitioner.

Mr. Rohit Bras de Sa, Advocate for Respondent No. 1.

Mr. Valmiki Menezes, Advocate for Respondent No. 2.

WITH

CIVIL REVISION APPLICATION NO. 35 OF 2015

Mrs. Shirley Annie Marie Botelho, Major in age, service, F2-La Terrace Apartment, La Campala Colony, Miramar, Panaji, Tiswadi-	….	Petitioner

Goa.

Versus

1. Mr. Norton D'Souza, Major of age, H. No. 406/2, PDA Colony, Porvorim, Bardez, Goa.

2. Mr. Selwyn Agnelo Botelho, major in age, service, F2-La Terrace Apartment, La Campala Colony, Miramar, Tiswadi-Goa. …. Respondents

***

Mr. Valmiki Menezes , Advocate for the Petitioner.

Mr. Rohit Bras de Sa, Advocate for Respondent No. 1.

Mr. Jagannath Jayant Mulgaonkar, Advocate for Respondent No. 2.

CORAM :- C. V. BHADANG, J.

RESERVED ON :- 29th APRIL, 2016

PRONOUNCED ON :- 14th JULY, 2016

JUDGMENT:

Rule. Rule, made returnable forthwith. The learned Counsel for the respondents waive service. Heard finally by consent of the parties.

2. Both these revision applications are between the same parties and involve a common question as to

whether the plaint in a suit filed by the respondent no. 1 is liable to be rejected under Order VII Rule 11(a) and (d) of the Code of Civil Procedure (CPC). As such, these revision applications are being disposed of by this common judgment.

3. The brief facts necessary for the disposal of the revision applications may be stated thus:

Respondent no. 1-Norton D'Souza is the original plaintiff. The petitioner-Selwyn Agnelo Botelho (CRA No. 25/2015) is the original defendant no. 1, while the petitioner-Shirley Botelho (CRA No. 35/2015) is the original defendant no. 2 before the trial Court. Shirley Botelho is the wife of Selwin Botelho. The parties are hereinafter referred to in their original capacity as plaintiff and defendants.

4. The plaintiff filed Special Civil Suit No. 21/2011/A before the Senior Civil Judge, Panaji for specific performance of the contract of sale, as also injunction, mesne profits and compensation. The case made out in the plaint is that the defendant no. 1

had represented the plaintiff, that, by virtue of an agreement dated 09.07.1977, the defendant no. 1 had agreed to purchase a property bearing Survey No. 291/1 (Matriz No. 111) of Carambolim village of Tiswadi Taluka, admeasuring 2,47,925 square metres. The defendant no. 1 also represented to the plaintiff, that the defendant no. 1 had tentatively prepared a plan for sub-division of the property into farm plots and that he would secure marketable title from its owners. On the basis of the said representation, the plaintiff entered into separate agreements of sale with the defendant no. 1 for purchase of plot nos. C-1, C-2, C-7 and C-8, each admeasuring 2,000 square metres for a consideration of Rs.2,00,000/- each. Two out of the four agreements are dated 25.06.2003, the rest being dated 02.07.2003 and 30.07.2003. All these agreements are notorized before the Notary Public at Panaji, Mr. Wilfred Boadita. It was contended that under the material terms and conditions of the agreements, the defendant no. 1 had represented to the plaintiffs as under:

"a) The defendant no. 1 had tentatively prepared plan for such division of the said property into farm plots/suit plots;

b) The defendant no. 1 had agreed to secure marketable title to the said property from the owners and secure conveyance of the said property within 90 days of the execution of the said agreements;

c) The defendant no. 1 would carry the development of the said property at the defendant's own costs and expenses by constructing thereon roads and all the works required to be done as stipulated to form farm plots/suit plots;

d) Under all circumstances, the farm plots/suit plots agreed to be purchased by the plaintiff would be located/shown in the plan annexed to the said agreements and

e) The defendant no. 1 shall complete the same and do necessary conveyance in respect of the said farm plots/suit

> *plots in favour of the plaintiff within 4 months from the date of the said agreements."*

5. It was contended that in spite of payment of total consideration of Rs.8,00,000/- at the time of execution of the said agreements, the defendant no. 1 failed to perform his part of the contract and convey marketable title to the plaintiff. In such circumstances, the plaintiff issued a notice to the defendant no. 1 on 11.02.2011, calling upon the defendant no. 1 to execute the sale deed. A claim of damages/mesne profits at the rate of Rs.5/- per square metre i.e. Rs.10,000/- per month per plot, for a period of six months (till filing of the suit) and Rs.27,60,000/- (as on 30.03.2011) was also made. The respondent no. 1 neither complied with the notice nor issued any reply. It is in such circumstances, the plaintiff filed the suit for following reliefs:

> "*(a) For a decree and order directing the defendants to specifically perform the said agreements dated 25.06.2003, 25.06.2003, 02.07.2003 and 30.07.2003 and effect a proper Deed of Sale and*

Conveyance and transfer of the suit plots i.e. Plot No. C-1, C-8, C-7 and C-2 from the said property, surveyed under No. 291/1 of village Carambolim, Ilhas-Goa.

(b) For a decree and order directing the defendants to pay to the plaintiff compensation of Rs.27,60,000/- (Rupees Twenty-Seven Lakhs Sixty Thousand only) towards mesne profits @ Rs.40,000/- per month per suit plot.

(c) For a decree and order directing the defendants to pay to the plaintiff compensation of Rs.40,000/- (Rupees Forty Thousand only) towards mesne profits @ Rs.10,000/- per month per suit plot till the proper due and complete conveyance and transfer of the suit plots by the defendants in favour of the plaintiffs.

(d) For an order of temporary injunction restraining the defendants from in any manner transferring the said plots to any other party or in any manner create any third party interest in the suit plots.

(e) For an ex-parte, ad-interim relief in terms of prayer (e) above.

(f) For costs of this suit.

(g) For any other relief that this Hon'ble Court may fit deem and proper."

6. Insofar as the defendant no. 2 is concerned, it was contended in paragraph 16 of the plaint that the defendant no. 2, who is married to defendant no. 1 under the law of Communion of Assets, has become the necessary party and therefore, the defendant no. 2 also stood liable to transfer the said farm plots/suit plots, in favour of the plaintiff.

7. Both the defendants filed separate written statements and contested the claim. Insofar as the defendant no. 1 is concerned, it was not disputed that he had received the amount of Rs.8,00,000/-. It was however contended that the documents stated as agreement of sales were by way of co-lateral

securities and were never intended to be acted upon, and in fact, the parties never acted upon the same. The contention that the suit is barred by limitation was also raised. Defendant no. 2 contended that she is not privy to the contract with the plaintiff, she not being the party to the agreement. As such, the plaintiff had no cause of action to file the suit against her.

8. The defendant no. 1 filed an application (Exhibit-9) under Order VII Rule 11(d) of CPC, for rejection of the plaint on the ground that the same is barred by limitation. The defendant no. 2 filed an application (Exhibit-12) under Order VII Rule 11(a) of CPC for rejection of the plaint on the ground that it does not disclose any cause of action.

9. The applications were opposed by the plaintiff.

10. The learned trial Court by separate orders dated 08.10.2014 has rejected both these

applications, which are subject matter of challenge in these revision applications.

11. I have heard Mr. Mulgaonkar, the learned Counsel for the petitioner in CRA No. 25/2015, while Advocate Mr. Menezes appearing for the petitioner in CRA No. 35/2015. I have also heard Mr. De Sa, the learned Counsel appearing for the respondent no. 1-plaintiff. With the assistance of the learned Counsel for the parties, I have perused the agreements, of which the specific performance is sought, as well as the plaint and the impugned orders.

12. Mr. Mulgaonkar, the learned Counsel for the petitioner has pointed out the recitals in paragraph 19 of the plaint in order to submit that on his own saying, the plaintiff claims that the cause of action to file the suit first accrued in July, 2005 and thereafter, on 23.02.2011 i.e. on issuance of notice. The learned Counsel submits that issuance of notice cannot have the effect of accrual of subsequent cause

of action and the suit which is filed on 30.03.2011, is clearly barred by limitation under Article 54 of the Limitation Act. The learned Counsel has also pointed out the recital in the agreement which *inter-alia* provides that the sale deed/conveyance were agreed to be executed within a period of six months from the date of agreement, subject to extension of six months. He has also pointed out clause no. 3 to submit that in the event, the plaintiff fails to take conveyance from the erstwhile owners and the performance of the agreements with the owners becoming impossible, the defendant no. 1 was only liable to return the amount paid by the plaintiff, within a period of two months from the date of "happening of such contingency calculated at the rate of 12% per annum". He submits that Article-54 of the Limitation Act does not contemplate any continuing cause of action and in the present case, the date of performance having been fixed, the suit ought to have been filed latest by July, 2008. He submits that on a meaningful reading of the plaint as a whole, the suit is barred by limitation. He submits that the learned trial Court was in error in rejecting the defendants' application, on the ground that the question of limitation would be a mixed question of fact. He submits that in the facts of the case, nothing turned on the trial of the suit, as on the basis of the undisputed facts, the suit was barred by limitation.

13. Mr. Menezes, the learned Counsel appearing for the defendant no. 2 submits that insofar as defendant no. 2 is concerned, the defendant no. 2 has no privity of contract, in as much as the defendant no. 2 is not a party to the agreement and the plaint is liable to be rejected as it does not disclose any cause of action against the defendant no. 2.

14. Mr. De Sa, the learned Counsel appearing on behalf of the plaintiff has supported the impugned order. It is submitted that on reading the agreement as a whole, it would clearly show that the execution of the conveyance/sale deed in favour of the plaintiff was contingent upon the defendant no. 1,

obtaining a marketable title to the property from its erstwhile owners. It is thus submitted that the time fixed i.e. of four months with extension of six months cannot be read as a binding covenant, insofar as the parties to the agreement are concerned. The learned Counsel also submits that the agreement read as a whole, would show that time, was never the essence of the contract and therefore, notwithstanding the fact that the plaint mentions that the cause of action first accrued in July, 2005, the plaintiff will have to be permitted to adduce evidence, which can only be done at trial. The learned Counsel strenuously urged that the question of limitation is a mixed question of law and facts and thus, the plaint cannot be rejected under Order VII Rule 11(d) as being barred by limitation.

The learned Counsel has also placed reliance on the decision of this Court in the case of ***Western Coalfields Ltd. and Others***, 2010 (4) MhLJ 34, and the judgment of the Hon'ble Apex Court in the case of ***Balasaria Construction (P) Ltd. Vs. Hanuman Seva***

Trust and Others, (2006) 5 SCC 658, in order to submit that a plaint cannot be rejected under Order VII, Rule 11(a) of CPC, as being barred by limitation. Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of ***N.V. Srinivasa Murthy and Others Vs. Mariyamma (dead) by proposed LRs and Others***, (2005) 5 SCC 548, in order to submit that in the matter of an agreement pertaining to transfers of immovable property, the normal presumption is that the time is not the essence of the contract. It is submitted that the agreement read as a whole would clearly indicate that the time fixed was not a peremptory condition and was dependent on several factors, including the defendant no. 1 obtaining marketable title. The learned Counsel has also placed reliance on the decision of this Court in the case of ***Elmano Menino Dias Vs. Archbishop and Others***, 2008(5) MhLJ 18, in order to submit that where arguable questions of law and facts arise, the plaint cannot be rejected under Order 7, Rule 11(d) of CPC.

15. The learned Counsel also submits that the suit is not only for the relief of specific performance, but it is also for damages/mesne profits/compensation, which reliefs according to the learned Counsel would be relatable to Article 27 of the Limitation Act, which prescribes the starting point of limitation would be "when time specified arrives or the contingency happens".

16. Insofar as the claim of defendant no. 2 is concerned, it is contended that admittedly, defendant no. 2 is married to defendant no. 1 under the regime of communion of assets, in which, the wife has equal share as that of the husband and therefore, defendant no. 2 would be a necessary party to the suit, as in her absence, no effective decree can be passed in the suit. This would be notwithstanding that defendant no. 2 was not a party to the agreement. He therefore urged that the trial Court was justified in refusing to reject the plaint and the impugned order does not call for interference.

17. I have given my anxious consideration to the rival circumstances and the submissions made.

18. The law on the point of nature and exercise of the jurisdiction under Order VII, Rule 11 of CPC is fairly well settled. While under Order VII, Rule 11(a), the plaint can be rejected where it does not disclose cause of action, under Rule 11(d), the plaint can be rejected when it is shown to be barred by any law. There was some difference of opinion as to whether 'law', within the meaning of Order VII, Rule 11(d) of CPC would include law of limitation. The issue was referred to a larger bench in the case of ***Balasaria Construction (P) Ltd*** (supra). However, the reference was found to be academic in the facts of the particular case and the same was disposed of with the following order :

> *"Both sides very fairly state that it is not the case of either side that as an absolute proposition an application under Order VII, Rule 11(d) can never be based on the law of limitation. Both sides state*

that the impugned judgment is based on the facts of this particular case and the question whether or not an application under Order VII, Rule 11(d) cold be based on law of limitation was not raised and has not been dealt with. Both sides further state that the decision in this case will depend upon the facts of this case."

19. However, in a subsequent decision in ***Hardesh Ore (P) Ltd Vs. Hede and Company***; (2007)5 SCC 614, the Supreme Court has held that 'law', within the meaning of Order VII, Rule 11(d) of CPC, must include the law of limitation. The following observations in para 25 of the judgment are apposite :

"25. The language of Order VII Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that "law" within the meaning of clause (d) of Order VII Rule 11 must include the law of limitation as well. It is well settled that whether a plaint discloses a cause of

action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint if taken to be correct in their entirety, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order VII is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. As observed earlier, the language of clause (d) is quite clear but if any authority is required, one may usefully refer to the judgments of this court in ***Liverpool & London S.P. & I Association Ltd. Vs. M.V. Sea Success I and another :*** *(2004) 9 SCC 512 and* ***Popat and Kotecha Property Vs. State Bank of India Staff Association :*** *(2005) 7 SCC 510."*

20. Thus, it is to be seen whether the plaint when read as a whole can be said to be barred by limitation. In para 19, the respondent no.1 has averred thus :

> *"19. The cause of action to file this suit first in July 2005 and again on 23/02/2011 when the defendant no.1, having received the said legal notice dated 11/02/2011, failed to act thereupon and the same is of continuing nature. The suit is therefore within limitation."*

21. It can thus, be seen that on his own saying, according to the plaintiff, the cause of action for the suit first accrued in July, 2005 and, thereafter, on 23/02/2011. The suit is filed on 30/03/2011. A suit for specific performance is governed by Article 54 of the Limitation Act, which reads thus :

54. For specific performance of a contract	Three Years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

It is, thus, evident that under Article 54, the period of limitation of three years would begin to run from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that the performance is refused. It is obvious that Article 54 does not envisage any continuing cause of action as such. In the present case, time for performance of the agreement was fixed in terms of clause (C) of the Agreement for Sale (at page 31 of the paper book in CRA No.35/2015), which reads thus :

> *"C) AND the Party of the First Part declares that he shall complete the sale/ conveyance deed of the farm plot no.C-8 agreed to be purchased by the Party of the Second Part within a period of four months from the date of this agreement, subject to an extension of three months."*

Clause 1 (on page no.32) reads thus :

> *1) That in consideration of a payment of sum of Rs.2,00,000/- (Rupees Two Lakhs only) by the Party of the Second Part to the Party of the First Part, receipt of which the Party of the First Part do*

> *hereby acknowledge, the Party of the First Part hereby agrees to transfer and/ or sell to the Party of the Second Part farm plot no.C-8 in the said property described in Schedule-I in favour of the Party of the Second Part within a period of four months subject to an extension of three months.*

Clause (E) of the said agreement (at page no.31) contemplates that the petitioner shall secure marketable title to the said property from the erstwhile owners within 90 days of the execution of the agreement. The agreement does not stipulate that the execution of the conveyance in favour of the respondent no.1 plaintiff was contingent upon any other incident or happening. It can, thus, be seen that the date for execution of the conveyance was fixed and the same was to be executed within four months from the date of the agreement, subject to extension of three months. Thus, the period for execution of the conveyance was till July, 2008. Admittedly, the suit is not brought within three years of the same.

22. In terms of clause 3 of the agreement, in the event the respondent no.1 plaintiff was unable to obtain the conveyance from the erstwhile owners and the performance of the agreement becoming impossible, the defendant no.1 was only liable to return the amount paid by the plaintiff within a period of two months from the date of happening of such contingency, with interest calculated at the rate of 12 % p.a. It can, thus, be seen that from the averments made in the plaint, together with the contents of the agreement (which can be taken into consideration as forming part of the plaint), the suit is clearly barred by limitation. In the present case, it is undisputed that the defendants had obtained the conveyance from the erstwhile owners. In para 16 of the plaint, the plaintiff has stated thus :

> *"16. The plaintiff states that the defendant no.1, at the time of the execution of the said agreements in respect of the suit plots, was an agreement holder.*

Subsequent to the transfer of the said properties in favour of the defendant no.1, the defendant no.2, who is married to the defendant no.1 under the law of Communion of Assets, has become the necessary party, and therefore the defendant no.2 is also jointly liable along with the defendant no.1 to transfer/ convey the said farm plots/ suit plots in favour of plaintiff. The plaintiff is, therefore entitled to a decree directing defendant nos.1 and 2 to specifically performed the said agreements and consequently transfer the said farm plots/ suit plots in favour of the plaintiff by executing necessary Deed of Sale."

23. It can, thus, be seen that the plaintiff was also aware that subsequently, the defendant no.1 has obtained the title to the suit property from its erstwhile owners. In my considered view, the present case is covered by the first part of Article 54 in as much as the date for performance of the agreement was fixed and thus, the second part namely, 'the date from which the plaintiff has notice that performance is refused,' would not be attracted in this case.

24. Nonetheless, in para 12 of the plaint, the plaintiff has stated that the defendant no.1 has failed to perform the obligations contained in clause 4 of the said agreement in as much as neither the defendant no.1 has completed all the works, nor they executed the conveyance in respect of the said farm plots/ suit plots in favour of the plaintiff "despite repeated requests made by the plaintiff to the defendant no.1 since 2005 till date". The aforesaid averment would clearly show that the plaintiff was aware about the refusal by the defendant no.1 to abide by the said agreement since the year 2005. Thus, assuming that limitation period is to be reckoned from the date when the plaintiff has notice that the performance is refused, still the suit having been filed beyond three years from 2005, would be barred by limitation.

25. The learned Counsel for the respondent strenuously urged that Article 27 of the Limitation Act would be applicable in the present case. He

submits that within the meaning of the said Article, the period of three years begins to run when time specified arrives or the contingency happens. I do not find that the submission can be accepted. Article 27 of the Limitation Act reads thus :

27. For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contin-gency	Three Years	*When the time specified arrives or the contin-gency happens.*

It can, thus, be seen that Article 27 provides for a suit for compensation for breach of a promise to do anything at a specified time or upon the happening of a specified contingency. In such a case, the period of three years begins to run when the time specified arrives or the contingency happens. In the first place, the present suit would be governed by Article 54 as the said Article specifically provides for limitation in respect of the suits for specific performance of a contract and it is not possible to fall back upon Article 27 or the residuary Article 136 of the Limitation Act. However, assuming that Article 27 applies and can be called into aid, still the suit cannot be saved from the vice of being barred by limitation. This is because, even under Article 27, the period of three years begins to run when the time specified arrives, which in the present case, was four months from the date of the execution of the agreement. As noticed earlier, the execution of the conveyance in terms of the agreement was not made contingent on any other event. Thus, the submission based on Article 27 of the Limitation Act, to my mind, cannot be accepted.

26. The learned Trial Court has refused to reject the plaint mainly on the ground that the issue of limitation has to be decided after giving an opportunity to the parties to lead evidence. In other words, according to the Trial Court, the issue of limitation being a mixed question of law and fact, cannot be decided at the threshold, so as to non-suit

the plaintiffs. The learned Trial Court has observed in para 7 of the order that the plaint shows not only the prayer for specific performance but also a prayer for perpetual injunction, restraining the defendants from interfering with the possession of the plaintiff and from creating any third party rights. In the opinion of the Trial Court "whether the plaintiff is able to prove that he is in possession of the suit property as on the date of the suit and is entitled to the injunction, is a different matter from the maintainability or tenability of his case for specific performance." The Trial Court has further observed that there is also the question whether the relief of injunction can be treated as being only relief consequential to the relief of specific performance and whether the denial of one, would automatically lead to the denial of the other or whether they are independent reliefs. The learned Trial Court, then, went upon placing reliance on the residuary Article 113 of the Limitation Act, to hold that the limitation under the said Article begins to run when the right to sue accrues. This, according to the learned Trial Court, would depend upon the Court deciding when the right to sue accrued to the plaintiff.

27. In my considered view, the reasoning articulated by the learned Trial Court, cannot be approved for the reason that on a plain reading of the plaint itself, the suit appears to be barred by limitation and nothing could turn at the trial in the suit on this aspect. A distinction has to be drawn between an issue, which is a mixed question of law and fact and an issue, which may be a mixed question of law and undisputed facts. In other words, merely because the issue of limitation is a mixed question of law and fact, would not lead to a conclusion that in every case, it is a question, which is dependent upon disputed facts. There may be a case (as in the present matter) where the facts are undisputed and/ or clearly borne out of the record, in which the examination of any disputed question of fact may not be involved. In such a case, it would not be permissible to say that because the question of

limitation is a mixed question of law and fact, the plaint cannot be rejected. The matter can be looked at from another angle. As noticed earlier, the plaint can be rejected as being barred by limitation under Order VII, Rule 11(d) of CPC, as held by the Supreme Court in the case of ***Hardesh Ore (P) Ltd*** (supra). Had it been a case that in every case, the issue of limitation required examination of disputed facts, no plaint can be rejected under Order VII, Rule 11(d) of CPC as being barred by limitation, in as much as at the stage when such a question is considered by the Court, the Trial Court is not expected to go into any disputed questions and has to abide by the averments made in the plaint only. Thus, the very fact that a plaint, in a given case, can be rejected as being barred by limitation under order VII, Rule 11(d) of CPC, presupposes that there may be some cases in which the issue of limitation cannot be a question, which requires examination of disputed facts. In such cases, it is only a matter of application of the pleadings and the averments in the plaint as they stand, to be applied to the relevant statutory provision, to find out whether the plaint can be rejected as being barred by limitation. In the present case, I find that on a plain and meaningful reading of the plaint as a whole, it is clear that the plaint is liable to be rejected as being barred by limitation.

28. The learned Counsel for the respondent no.1 urged that there is nothing on record to show that the parties had agreed that time was the essence of the contract. He submits that as a normal rule in contracts for sale of immovable property, the presumption is that time is not of the essence of the contract. In my considered view, the submission cannot be accepted. The question whether time was essence of the contract or not, has no direct bearing on the issue of limitation. This is because Article 54 of the Limitation Act does not make any reference or distinction between contracts in which the time is of the essence of the contract or otherwise. The issue whether the time was of the essence of the contract or not, has a bearing on the discretion

whether specific performance needs to be granted or not. That apart the plaintiff has also not made out any case in the plaint, that because the time was not of the essence of the contract, the period fixed for execution of the conveyance was not a binding covenant, between the parties. Thus, confining to the plaint allegations, the submission that time was not of the essence of the contract and, therefore, the plaint cannot be rejected, as being barred by limitation, to my mind, cannot be accepted.

29. In the case of ***N.V. Srinivasa Murthy*** (supra), the principal issue was about survival of the arbitration clause when the agreement which contained such clause, ceases to exist. It has been, *inter alia,* held that whether time was of the essence of the contract or not, depends on the terms and conditions of the contract itself. In that case, an order restraining the respondents from creating any third party interest or from transferring with the property in dispute, was vacated by the High Court. It was found that by vacating the interim relief, the

entire arbitration proceedings were rendered infructuous.

30. In the case of ***Elmano Dias*** (supra), the case made out in the plaint was that the cause of action had arisen on 09/09/1974 and it was continuous and a recurring cause of action and the limitation as per the Special Law i.e. Canon Law was 30 years and, therefore, the suit was within limitation. This Court found that the issue involved was whether the provisions of Special Law i.e. the Canon Law are applicable or whether the provisions of Limitation Act are applicable. It was, in these circumstances, found that the said issue was expected to be decided not at the stage of rejection of plaint, but at the time of final hearing. It can, thus, be seen that the case is clearly distinguishable on facts.

31. In the case of ***Rathnavathi and another Vs. Kavita Ganashamdas;***(2015)5 SCC 223, it was found that there was no specific clause in the agreement, which

provided for a completion or its execution before any specific date. The issue involved in the said case would be clear if paras 39 and 42 are reproduced. They read as under :

> *"39. Reading both the clauses together, it is clear that time to perform the agreement was not made an essence of contract by the parties because even after making balance payment after the expiry of lease period, which was to expire in 1995, defendant no. 2 as owner had to make efforts to transfer the land in the name of plaintiff. <u>That apart, we do not find any specific clause in the agreement, which provided for completion of its execution on or before any specific date.</u>*
>
> 42. *<u>A Mere reading of Article 54 of the Limitation Act would show that if the date is fixed for performance of the agreement, then non-compliance with the agreement on the date would give a cause of action to file suit for specific performance within three years from the date so fixed.</u> However, when no such date is fixed, limitation of three years to file a suit for specific performance would begin when the plaintiff has noticed that the*

defendant has refused the performance of the agreement."

(Emphasis supplied)

In the present case in hand, the period is specifically fixed.

32. In ***Western Coalfields Ltd.*** (supra), a learned Single of this Court has held that the plaint cannot be rejected under Order VII, Rule 11(d) of CPC as being barred by limitation. As noticed earlier, the Supreme Court in the case of ***Hardesh Ore (P) Ltd*** (supra), has held that 'law', within the meaning of Order VII, Rule 11(d) of CPC includes the law of limitation. Thus, the respondent no.1 cannot conceivably place reliance on the decision of this Court in the case of ***Western Coalfields Ltd*** (supra).

33. This takes me to the challenge in CRA No.35/2015. Once it is found that the plaint, as a whole, is liable to be rejected as being barred by limitation, the question in this revision is largely of an academic nature. However, as the parties have

addressed on the issue involved in the said revision, I propose to briefly deal with the same.

The petitioner Shirley Botelho is the defendant no.2 and is the wife of defendant no.1. It is not disputed that the petitioner Shirley has married with Selwyn Botelho, under the regime of Communion of Assets. The learned Trial Court has held in para 10 of the impugned order that the defendant no.1 had subsequently got married to defendant no.2 and, therefore, she is necessary party for considering the relief of specific performance. Just to put the record straight, it is not the case that the defendant no.1 has married defendant no.2 after the defendant no.1 has obtained conveyance of the suit property from its earlier owners. However, that may be inconsequential. Once, it is not disputed that the defendant nos.1 and 2 have married under the regime of Communion of Assets, the defendant no.2 would be necessary or at least proper party to the suit notwithstanding that she is not a party to the agreement. However, as noticed earlier, nothing turns upon this finding, in as much as, the suit has to fail as it is barred by limitation, as a whole.

34. I am conscious of the limitation on the powers of this Court while entertaining a Civil Revision Application under Section 115 of CPC. Thus, this Court can only interfere where it is found that the Court below (i) has exercised the jurisdiction not vested in it; (ii) failed to exercise jurisdiction vested; or (iii) exercised jurisdiction with material irregularity. In my considered view, the impugned order would demonstrate that the Court has refused to exercise jurisdiction vested under Order VII, Rule 11(d) of CPC and in any event, the impugned order exhibits exercise of jurisdiction with material irregularity, in which case, this Court can step in and correct the error.

35. In the result, the following order is passed:

(i) CRA No.25/2015 is allowed.

(ii) The impugned order dated 08/10/2014 is hereby set aside.

(iii) Application Exh.9 filed by the petitioner (Original defendant no.1) is allowed. Consequently, the plaint would stand rejected as being barred by limitation.

(iv) In view of this, nothing survives in CRA No.35/2015, which is disposed of as being infructuous.

(v) In the circumstances, the parties are left to bear their own costs.

(vi) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

EV/SMA