

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 758 OF 2015

1. Raghupati Ramkrishna Bhandari,
Major of age, Indian National,
Residing at House No.1207,
Mahalaxmi Niwas, Bandora,
Ponda Goa.

2. Jayanti Raghupati Bhandari,
Wife of Raghupati Bhandari,
Major of age, Indian National,
Residing at House No.1207,
Mahalaxmi Niwas, Bandora,
Ponda, Goa.

..... Petitioners

V e r s u s

Ram Daryanani,
Son of Mr. Kaliandas Daryanani,
71 years of age, Indian National,
Occupation Business, Having his
Office at 421, Commerce House,
140, Nagindas Master Road,
Fort, Mumbai 40001.

..... Respondent

Mr. M. S. Joshi, Advocate for the Petitioners.

Mr. R. Rao, Advocate for the Respondent.

CORAM: S. B. SHUKRE, J.
DATE: 19TH JANUARY, 2016.

ORAL JUDGMENT:

Heard. Rule. Rule made returnable forthwith.

2. Heard finally by consent.

3. This writ petition challenges the order dated 9/6/2015 passed in Special Civil Suit no.10/2013/A by the Senior Civil Judge, Ponda, thereby rejecting the application of the defendants, who are the petitioners filed under the provisions of Order 7 Rule 11 of Code of Civil Procedure. The application was filed by the petitioner under Order 7 Rule 11 (d) C.P.C seeking rejection of the plaint on the ground that the averments made in the plaint, show that the suit was barred by law of limitation. Learned Civil Judge, after hearing both sides, rejected the application holding that the averments in the plaint apparently disclosed that the cause of action had arisen from failure of the petitioners to perform their part of the obligations contained in the Memorandum of Understanding (MOU) dated 28/4/2009 entered between the petitioners on one hand and the respondent on the other hand and so law of limitation will operate differently. The learned Civil Judge was also of the opinion that the issue involved was a mixed question of facts and law which could be decided only after the trial of the suit was over.

4. According to the learned counsel for the petitioners, the conclusion so drawn by the learned Civil Judge is erroneous and perverse. He submits that a bare perusal of the pleadings in the plaint would show that the suit is hopelessly barred by law of Limitation. He further submits that the suit

as filed by the respondent is purely for recovery of money of Rs.40 lakhs, which he had paid to the petitioners for selling their properties and that the suit being primarily based upon a claim of recovery of money paid by the respondent to the petitioners and the MOU being only secondary aspect of the whole case, the plaint ought to have been considered as barred by law, as contemplated under Clause (d) of Order 7 Rule 11. In support of his argument, he has placed reliance upon the case of **Popat and Kotecha Property Vs. State Bank of India Staff...** in Appeal (Civil) 3460 of 2000 decided on 29/8/2005.

5. Learned counsel for the respondent submits that the impugned order is correctly passed and no fault could be found with it. He further submits that the suit is mainly based upon the fact that there being failure on the part of the petitioners to perform their part of obligations in the MOU that the money paid by the respondent became recoverable from the petitioners. Therefore, learned counsel further submits that the Trial Court has rightly held that the plaint cannot be seen as barred by law just from the examination of the averments of the respondent.

6. Upon perusal of the pleadings contained in the plaint, various clauses of the MOU in question and also the impugned order, I find that the learned Civil Judge has properly considered the effect of the averments in

the plaint and the law governing the provision of Order 7 Rule 11 (d) of C.P.C.

7. Even a cursory perusal of the plaint as well as the MOU in question is sufficient to find that what is involved in the present suit is not a simple and pure money transaction, covered by Article 23 of the Schedule to the Limitation Act, 1963, as contended by the learned counsel for the petitioners and the suit appears to be based upon failure of the petitioners to fulfill various obligations cast upon them in the MOU dated 28/4/2009. This MOU contains different obligations to be performed by the petitioners upon their receiving amount of Rs.40 lakhs from the respondent which formed a part consideration for selling of the property mentioned therein to the respondent. In the MOU, there is no clause which refers to right of the purchaser or the respondent to recover money upon failure of the petitioners or vendors to perform their part of the obligation. On the other hand, there is one clause in the MOU which enables the vendor to cancel the MOU and forfeit 10% of the earnest money under certain conditions. There is also a clause which lays down that no interest shall be payable by the purchasers if there is a delay in completion of the transaction due to failure on the part of the vendors. In another clause, the purchaser has been entrusted with a duty to prepare draft of sale deed and get it approved from the vendor. So these clauses clearly refer to fulfillment of some obligations by either of the parties

and they also indicate what happens to the money received by the vendor under the agreement when there is a certain failure on the part of the parties. Such a MOU, therefore, can be prima facie seen as giving rise to a cause for the respondent to lay a claim of refund of money not from the date the money was paid but from the time there was failure to fulfill the obligations. This is only a prima facie view and would be subject matter of interpretation on merits by the Trial Court. So, ultimately the question whether or not the suit has been filed within the period of limitation would have to be considered on the merits of the case. The Trial Court is right when it observed that this issue involves a mixed question of law and fact and as such at this stage the plaint cannot be rejected under Order 7 Rule 11 (d). C.P.C. Thus, I find no substance in this writ petition and it is liable to be rejected.

8. In the case of **Popat and Kotecha** (supra), also, on the facts of that case, Hon'ble Apex Court found that the pleadings in the plaint did not disclose that the plaint was barred by law of limitation. It has been emphasized by the Hon'ble Apex Court while applying the provisions of Order 7 & Rule 11(d), that the Court has to consider only the averments in the plaint without any subtraction or addition. This principle of law, it is seen from the impugned order, has been followed by the learned Civil Judge.

9. In the circumstances, the writ petition is dismissed. No costs.

10. Rule is discharged.

S. B. SHUKRE, J.

Ap/-