

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 250/2016

Mohammed Iqbal Mulla & Anr.

... Applicants

V/s.

Smt. Laxmi Kacharu Ghuge & Ors.

... Respondents

Mr. Satyajeet H. Joshi for the Applicant

Mr. Satish C. Kekane for the Respondent Nos.1 to 3.

CORAM: K.K. TATED, J.

DATED : JULY 21, 2016

PC. :

1. Heard the learned counsel for the parties. By this Civil Revision Application the defendant challenges the order dated 27.11.2015 passed by the Civil Judge, Senior Division Thane below Exhibit- 18 in Special Civil Suit No. 317/2015 rejecting the application made by the defendant under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 for rejection of the plaint on the ground of limitation.

2. In the present proceedings, the plaintiff and defendant entered into an agreement for sale dated 02.02.2010 in respect of a row-house No.5 admeasuring 870 sq.ft. built up area equivalent to 80.85 sq.mtr. on the ground plus first floor at Saigal House Pokar Complex off Western Express High Way, Kashi, Kashimira, Mira Road, Dist. Thane 401107. As per the agreement for sale the plaintiff paid the entire consideration of Rs.15 lacs. Clauses 6 and 7 of the said agreement read thus:

“6. The transferors declares that on & after execution hereof and or on giving possession of the said Row House the transferee shall be exclusive owner of which the transferors have in the said Row House & then the transferee shall quietly and peacefully hold, possess, occupy and enjoy the said Row House without any let or hindrance or denial or demand or interruption or eviction or claim by the transferors or any other person or persons lawfully or equitable claiming through under or in trust for the transferors.

7. The transferors hereby agrees and undertakes to execute all further agreements, conveyance and affidavits, undertakings and forms etc in favour of the transferee whenever required by the transferee and/or the said builders for effectively transferring the said Row House with all benefits thereof unto the transferee.”

3. Consideration of Rs.15 lacs was paid by the plaintiff by cheques as under :

Cheque No.	Dated	Bank Name	Amount
95044	25/01/10	State Bank of India, Dadar (E) Branch, Mumbai	Rs.1,00,000/-
95045	05/02/10	State Bank of India, Dadar (E) Branch, Mumbai	Rs.4,00,000/-
95046	15/02/10	State Bank of India, Dadar (E) Branch, Mumbai	Rs.5,00,000/-
95047	25/02/10	State Bank of India, Dadar (E) Branch, Mumbai	Rs.5,00,000/-

4. It was specifically stated in the agreement for sale that on payment of entire consideration, the petitioner defendant to hand over vacant and peaceful possession of the suit premises to the plaintiff. As the defendant failed and neglected to give possession to the plaintiff, the plaintiff issued notice dated 30.05.2014 calling upon the

defendant to hand over the possession.

5. As the defendant failed and neglected to comply with the terms of agreement for sale and notice dated 30.05.2014, the plaintiff filed Special Civil Suit No.317/2015 in the court of Civil Judge, Senior Division Thane for specific performance of agreement of sale dated 02.02.2010 and for declaration with the following prayers:

“a. The Hon'ble Court be pleased to hold and declare that, the suit agreement dated 02.02.2010 in respect of the suit property i.e. row-house No.5 admeasuring 870 sq.ft. built up area on the ground floor and first floor at Saigal House Pokar Complex along with its three sides open spaces and terraces, parking space, front and rear front garden lying being and situated on a piece of land bearing Sy.No.7, Hissa No.7 & 8 and Sy.No.12, Hissa No.6 and 9 of Village Kashi, Kashmirira, Mira Road, Tq. & Dist. Thane is legal, valid, subsisting and binding upon the defendants.

b. The Hon'ble Court be pleased to hold and direct the defendants to specifically perform their part of contract agreed under agreement for sale dated 02.02.2010 and further direct them to hand over the physical, peaceful, vacant, actual and physical possession of suit property i.e. row-house No.5 admeasuring 870 sq.ft. built up area equivalent to 80.85 sq.mtr. on the ground plus first floor at Saigal House Pokar Complex along with its three sides open spaces and terraces, parking space, front and rear front garden lying being and situated on a piece of land bearing Sy.No.7, Hissa No.7 & 8 and Sy.No.12, Hissa No.6 and 9 of Village Kashi, Kashmirira, Mira Road, Tq. & Dist. Thane along with all relevant documents including bills, receipts, vouchers, correspondence etc. standing in the name of defendants and also to handover the original agreement for sale to the plaintiff.

c. The Hon'ble Court be pleased to hold and direct the defendants to pay the plaintiffs an amount of Rs.9,30,000/- being the mesne profit which the defendants have earned by using and occupying the suit flat illegally, high handedly and mala fide from 22.02.2010 (i.e. date of receipt of entire consideration of suit

property) till the date of filing of present suit and further @ of Rs.15000/- per month till the plaintiffs receive physical, peaceful and vacant possession of the suit property from the defendants.

d. The defendants, their agents, servants, attorneys, assignees and/or any person acting/claiming through or under them be restrained by an order of permanent injunction from parting with the possession of the suit property and/or portion thereof, and/or to sell, create third party interest in respect of suit property.

e. Interim, ex parte ad-interim injunction in terms of prayer (d) be granted in favour of the plaintiffs.

f.

g.”

6. The defendant made an application under Order VII Rule 11 (d) of the Code of Civil Procedure, 1908 being Exhibit- 18 for dismissal of the suit on the ground that the same was barred by law of limitation. The Trial Court by impugned order held that in view of Article 54 of the Limitation Act, 1963, the suit filed by the plaintiff was within limitation. The Trial Court in paragraph 6 of the impugned order held that the suit for possession can be filed within 12 years. Hence, the Civil Revision Application.

7. The learned counsel for the defendant submits that the Trial Court erred in coming to the conclusion that the plaintiff filed the suit for possession was within limitation. He submits that in fact there was agreement for sale between the plaintiff and defendant dated 02.02.2010. Though the entire amount was paid by the plaintiff as per the agreement for sale, the possession of the suit premises was not given to the defendant. He submits that the defendant for the first

time issued a notice dated 30.05.2014. That too after three years from the date of agreement of sale. He further submits that the suit filed by the plaintiff on 02.05.2015 was beyond the period of limitation of three years. These facts are not considered by the Trial Court at the time of passing the impugned order.

8. The learned counsel for the defendant submits that as per Article 54 of the Limitation Act, 1963, the suit for specific performance of contract has to be filed within three years from the date of expiry of date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused. He submits that in the present proceedings, though the plaintiff issued notice on 30.05.2014, same was not replied by the defendant. He submits that this itself shows the implied refusal of specific performance. He submits that the Trial Court at the time of dismissal of their application under Order VII Rule 11(d) specifically held in paragraph 6 that the plaintiff filed the suit for possession and therefore the limitation is 12 years. He submits that the said observation is contrary to the pleadings on record and hence the impugned order be set aside and the application under Order VII Rule 11(d) be allowed.

9. On the other hand, the learned counsel for the plaintiff vehemently opposed the Civil Revision Application. He submits that the issue of limitation is a mixed question of law and facts and for that purpose the parties have to lead evidence. In the present proceedings, the plaintiff filed the suit for specific performance of agreement for sale dated 02.02.2010. The plaintiff issued notice dated 30.05.2014

calling upon the defendant to comply with the terms and conditions of sale agreement. He submits that as per clause 6 and 7 of the agreement for sale as above, specific period was not mentioned for compliance. Thereafter suit was filed on 02.05.2015. Hence, the suit filed by the plaintiff was within limitation. There is no substance in the Writ Petition. Same is dismissed with costs.

9. Heard both sides at length. There is no dispute that the plaintiff filed the Special Civil Suit No. 317/2015 on 02.05.2015 for specific performance of agreement for sale on 02.02.2010. Bare reading of the agreement for sale shows that the defendant has to comply with the terms and conditions of the agreement as embodied in clauses 6 and 7. There was specific time provided in the agreement for sale. Considering these facts, in any case, the issue about limitation is a mixed question of law and facts and same is required to be decided after leading evidence by parties.

10. Considering these facts, I do not find any reason to interfere with the impugned order. Same stands rejected.

(K.K. TATED, J.)