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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.532 OF 2016**

Uday @ Nachiket Prabhakar Pethe	...	Petitioner
V/s.		
M/s M.D. Enterprises and ors	...	Respondents

Mr. Shashank Thatte, a/w Mr. Ketaki A.
Ajgaonkar, for the Petitioner
Mr. Haresh Jethalal Lubia, for the
Respondents.
Mr. Mangesh Shinde, for respondent

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 19th DECEMBER, 2017.

P.C. :

- 1] Heard learned counsel for the petitioner and respondent.
- 2] By this Revision, the petitioner is challenging the order dated 21.10.2015, passed by the City Civil Court, Mumbai, thereby holding that the suit claim is not barred by limitation.
- 3] The submission of learned counsel for petitioner is that the development agreement in this case was executed on 27.6.1995; whereas the suit is filed on 27th October, 2005. Moreover, it was to the knowledge of the respondent that by the notice dated 16th October, 2000, petitioner has terminated the agreement. The suit, therefore, should have been filed by the respondent within 3 years therefrom.

However, the respondent has filed suit in the year 2005 and the cause of action given is, the issuance of second notice by the petitioner to him on 12.9.2005. According to learned counsel for petitioner, mere issuance of second notice cannot bring the suit within the period of limitation. According to him, the suit for specific performance is required to be filed within period of three years as mandated in Article 54 of the Limitation Act, 1973 and/or from the date when the plaintiff has noticed that performance is refused. Here in the case, it is submitted that respondent-plaintiff has got knowledge that the performance was refused in view of notice issued on 16th October, 2000. Within three years thereafter the suit is not filed, but as it is filed in the year 2005, the suit is hopelessly barred by limitation and therefore, the finding given by the trial Court that it is not time barred, needs to be quashed and set aside.

4] However, as rightly submitted by learned counsel for respondent, Article 54 of the Limitation Act, clearly provides that the period of three years for specific performance of a contract is to be counted from the date fixed for performance or if no such date is fixed, when the plaintiff has noticed that the performance is refused.

5] In the present case even if the agreement of development was executed on 27.6.1995, as the first notice was issued by petitioner on 16th October, 2000 terminating the said agreement, it

could be held that at that time, respondent-plaintiff got the knowledge that the petitioner has refused performance of the agreement. However, in this respect the averments made in paragraph Nos. 14 and 15 of the plaint are very relevant and the trial Court has also considered the said averments. They clearly go to show that after receipt of the said notice, negotiations were held between the parties and clear assurance was given by the petitioner to the respondent that the notice was issued not for the purpose of termination of agreement, but for increasing total consideration amount. At this stage, these averments in the plaint can be relied upon as petitioner has not yet filed written statement challenging these averments.

6] According to petitioner, he was not aware what has happened between his father and respondent and therefore, he is not in a position either to accept or to deny these averments. Whatever it may be, the fact remains that as on today, these averments are unchallenged on record and they are made not only in the plaint but also in the affidavit-in-reply filed on behalf of respondent to the application filed by the petitioner before trial Court.

7] These averments clearly go to show that the petitioner more or less admitted that said notice was not for termination, but for increasing the consideration amount. What is most pertinent to note

is that the petitioner has also not acted on the said notice issued on 16th October, 2000. If it was really a notice of termination of agreement, petitioner should have filed the suit immediately on the basis of the said notice. However, petitioner has not taken any action thereon which prima facie show that those averments are true and correct. It also needs to be noted that if it was a notice of termination of the agreement, then there was no reason for the petitioner to issue fresh notice for termination of agreement in the year 2005.

8] Therefore, the trial Court has, on the basis of these facts on record, correctly held that only from the issuance of this fresh notice in the year 2005 that is after termination of agreement in the year 2005, as the Respondent got knowledge of refusal on the part of petitioner to perform contract and as the suit is filed within 3 years therefrom, the suit is required to be held as within the limitation and that is the prima facie finding of the trial Court. After the evidence is led, the issue of limitation being a mixed question of fact and law could be reconsidered again, but so far as rejection of the plaint, on the ground that the said claim is not within the limitation, cannot be ordered. Accordingly the trial Court has given finding and rejected the grievances raised by the petitioner.

9] Taking overall view of the matter and having regard to the provisions of law especially contained in Article 54 of the Limitation

Act, this Court does not find any illegality in the impugned order passed by the trial Court.

10] The Civil Revision Application , therefore, holds no merit and stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]