

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**CHAMBER SUMMONS NO.479 OF 2015
IN
SUIT NO.950 OF 2006**

Bombay Cycle and Motor Agency Ltd. .. Applicant

In the matter between

Hansraj Pragji Warehousing Pvt.Ltd. .. Plaintiff

vs.

Bombay Cycle & Motor Agency Ltd. .. Defendants

Mr.Akash Rebello a/w Mr.Sharan Jagtiani, Mr.Heer Gujral, Ms.Minal
Sangatwani i/b M/s.Jerome Merchant and Partners for the applicant /
defendant

Mr.Arif Bookwala, Senior Advocate a/w Mr.Dharmesh Pandya i/b
M/s.Ashwin Pandya & Associates for the plaintiff

**CORAM : K. K. TATED, J.
DATE : NOVEMBER 14, 2017**

PC.:

1. Heard.
2. This Chamber Summons is preferred by defendant under the provisions of Order VII Rule 11(d) of the Code of Civil Procedure, 1908 for rejection of the plaint on the ground of limitation.

3. Plaintiff filed Suit No.950 of 2006 for declaration that the agreement for sale dated 9th August, 1974 is valid, subsisting and binding on the defendants and in the alternative for decree of Rs.80,04,000/- as per particulars for claim. It is the case of the plaintiff that as per Articles of Agreement dated 9th August, 1974, defendant agreed to transfer land admeasuring 4,090 square yards equivalent to 3419.77 square metres from cadastral Survey No.3/136 of Lower Parel Division, Collector's Old no.232 (part) and 238 (part) New Nos.12,200 (part) and 12182 (part) New Survey Nos.1/3139 (part) 2/3139 (part) and 1-2/3139 (part) together with the building standing thereon at Dr. E. Moses Road, Bombay for Rs.22,00,000/-.

4. As per clause 3 of the said Article of Agreement, defendant was to obtain consent from lessor as provided in sub clause (i) of clause 2 of the said Indenture of Lease. Actually, the defendant by Indenture of Lease dated 2nd December, 1963 taken on lease basis the suit land from Gool Russi Bahadurji, Soonni Maneck, Bahadurji and Bhikoo Kharshed Bahadurji. As per clause 2(i), before making any third party transaction, defendant had to take permission from his lessor. The said clause (i) of clause 2 reads thus:

“The Lessees shall be entitled to assign the demised premises only after a period of fifteen years from the date hereof and not before and that only with the consent in writing of the Lessors for that express purpose under their hand first hand and obtained and such consent shall not be unreasonably withheld in the case of a respectable and responsible party PROVIDED that there shall be a structure of the value of at least Rs.8,00,000/- (Rupees Eight lacs) erected on the land at the time of such assignment. The Lessees shall be entitled to sub-let the premises, or any part or parts thereof without the consent of the Lessors. Before, assigning as aforesaid the Lessees shall give the first option to the Lessors to accept the assignment on the same terms as those on which it is proposed by the Lessees to assign by giving to the Lessors 30 days previous notice in writing to enable them to exercise such option Provided further that the Lessees shall not be bound to give any such option as aforesaid to the Lessors in case of sub-letting and in case of assignment of the whole of the

demised premises to person or firms or Companies associated with the Lessees.”

5. As the defendant failed and neglected to take permission from their lessor, plaintiff filed the present Suit for specific performance and alternative for damages. The defendants filed their written statement dated 22.10.2008 denying the plaintiff's claim. They also raised the objection about limitation. Hence, the defendant preferred the present Chamber Summons for rejection of plaint under the provisions of Order VII Rule 11(d) of the Code of Civil Procedure, 1908.

6. The learned counsel for the applicant original defendant submits that bare reading of the averments made in the plaint, it is crystal clear that the suit as it is filed by the plaintiff is required to be rejected only on the ground of limitation. He submits that the plaintiff has filed the present Suit for specific performance of agreement dated 9th August, 1974 on 3rd March, 2006 i.e. after 18 years. Hence, plaint is required to be rejected on the ground of limitation.

7. The learned counsel for the applicant defendant submits that as per agreement dated 9th August, 1974 particularly clause 3 period for completion of the transaction was only for five years from the date of execution of agreement. Clause 3 reads thus:

“3. The sale will be completed after a period of 5 years from the date hereof after obtaining the Lessors consent as provided in sub clause (i) of clause 2 of the hereinabove recited Indenture of Lease.”

8. The learned Counsel for the applicant submits that it is specifically stated in clause 3 that sale to be completed within the period of five years from the date of execution of the said agreement. He submits that bare reading of clause 3 of the said agreement itself shows that suit as it is filed by the plaintiff in the year 2006 is barred by limitation. Hence, plaint is required to be rejected.

9. The learned counsel for the applicant defendant submits that even bare reading of the plaint shows that Suit itself is barred by limitation on the basis of averments made by the plaintiff themselves. Considering the averments made by the plaintiff in plaint in paragraph nos.9, 12, 15 and 22, Suit is barred by law of limitation. Those paragraphs read thus:

*“9. By an Agreement for Sale dated 9th August, 1974 the Defendants agreed to sell to the Plaintiffs the suit property subject to the consent of the Owners first had and obtained for the price of Rs.22,00,000/- to be paid by the plaintiffs to the defendants as follows viz. a sum of Rs.12,00,000/- as earnest money or deposit on the execution of the said agreement and the balance sum of Rs.10,00,000/- on the completion of the sale and on other terms and conditions more particularly set out therein. A copy of the said agreement for sale dated 9th August, 1974 is hereto annexed and marked **Exhibit “D”**.”*

“12. Despite repeated requests and reminders the defendants failed and neglected to obtain the consent of the said Owners to the said agreement for sale as provided in the said agreement dated 9th August, 1974. Despite the Plaintiffs being ready and willing to pay the balance consideration of Rs.10,00,000/- the defendants failed and neglected to complete the sale and execute a Conveyance in favour of the Plaintiffs.”

*“15. As aforesaid the Defendants for the first time by the aforesaid letters evinced an intention to give a go by and/or repudiate the Agreement for Sale and/or refuse to convey the suit property to the Plaintiff. In the circumstances the Plaintiffs by their Advocates letter dated 27th February, 2006 recorded some of the aforesaid facts and called upon the Defendants to specifically perform the suit agreement for sale dated 9th August, 1974 and to complete the sale of the suit property in favour of the Plaintiffs. By the said letter the Plaintiffs repeated and reiterated that they always were and are still are ready and willing to perform their part of the agreement and to pay to the Defendants the balance consideration of Rs.22,00,000/-. A copy of the said letter dated 27th February, 2006 is hereto annexed and marked **Exhibit “I”**.”*

“22. The Plaintiffs say that the sale was to be completed after five years from 9th August, 1974 after obtaining the consent of the Lessor/Owners of the demised premises. The Plaintiffs submit that the Defendants have not yet obtained in writing the consent of the Lessor/Owners. In the circumstances the date fixed for performance of the contract viz. The time for completion of the sale has not yet commenced and/or arrived. Without prejudice to the aforesaid and in any event the Defendants have impliedly refused to perform their obligations under the said agreement for sale and complete the sale in December 2005 and February 2006. In the circumstances the suit is within time and is not barred by the law of limitation.”

10. The learned Counsel for the applicant defendant submits that plaintiff himself admitted in their pleading that by this Suit they are seeking enforcement of agreement dated 9th August, 1974 after lapse of 18 years.

11. The learned Counsel for the applicant submits that as per Article 54 of the Limitation Act, suit is required to be filed within 3 years for specific performance. In support of this contention, he relies on the judgement of the Apex Court in the matter of ***Fatehji and Company and another vs. L.M.Nagpal and Others, (2015) 8 SCC 390***. He submits that the Apex Court in this authority held that if the Suit is filed for specific performance of agreement to sell immovable property beyond the period of 3 years from the date of cause of action, same is required to be rejected as barred by limitation. He relies on paragraph 2 and 5 of the said judgment which reads thus:

“2. Briefly the facts are as follows: The perpetual lease hold right in respect of the suit land as vacant plot was granted in favour of original lessee Col. A.N. Kapur by registered lease deed dated 16.4.1962 by the Government of India and he built two storied building with barsati and he sold his rights in the said property to the first Defendant-Firm by registered sale deed dated 6.5.1963. The first Defendant entered into a written agreement

of sale dated 2.7.1973 in respect of the suit property with Smt. Ram Pyari. As per the terms of the agreement the possession of the suit property including the building was handed over to Smt. Ram Pyari Nagpal on the date of agreement itself. The date for execution of the sale deed was fixed for 2.12.1973. Extension of time for execution of sale deed on the plea of obtaining permission to sell the property from the lessor was sought by the Defendants by way of letters and the last of such extension was sought for six months w.e.f. August 1976. The sons of second Defendant in July 1985 filed a suit seeking for declaration that the suit property is joint family property and the sale made by Defendants in favour of Plaintiffs be declared as null and void, was filed against Defendants 2, 3 and the Plaintiffs and on contest the same was dismissed on 5.4.1989. According to the Plaintiffs the final cause of action accrued and arose after August 1991 when the Defendants began hiding themselves and avoiding the Plaintiffs and they filed the suit on 29.4.1994 seeking for a decree for specific performance of the agreement of sale dated 2.7.1973 against the Defendants.”

“5. We considered the rival submissions. The specific performance is claimed of a written agreement of sale dated 2.7.1973 and as per the terms the performance of the contract was fixed till 2.12.1973. The Defendants by subsequent letters dated 7.4.1975, 1.10.1975 and 1.8.1976 sought for extension of time to enable them to obtain permission of lessor and the last extension of six months expired on 1.2.1977. In view of Order VII Rule 11(a) and 11(d) the Court has to satisfy that the plaint discloses a cause of action and does not appear to be barred by any law. Article of the Limitation Act stipulates that the limitation for filing the suit for specific performance of the contract is three years from the date fixed for the performance or if no such date is fixed, when the Plaintiff has noticed that performance is refused.”

12. The learned counsel for the applicant defendant submits that application under Order VII Rule 11(d) of the Code of Civil Procedure can be filed at any stage. In support of this contention, he relies on the judgment of our High Court in the matter of ***Lily Realty Private Limited and Ors. vs. Altius Developers Private Limited and Ors. MANU/MH/2858/2016***. Paragraph 16, 32, 48 and 51 reads thus:

“16. In my opinion it is very clear that on these facts alone, based on a bare reading of the Complaint, the Suit would be barred by limitation, unless the bar of limitation is saved by any of the provisions of the Act. The Plaintiffs, being obviously conscious of this position, have sought to invoke an exclusion of time in paragraph 24 of the Complaint. This is really the only issue to be considered by the Court.”

“32. Once it is established that the Suit, as regards this challenge, is barred by the law of limitation and therefore liable to be dismissed, the challenge to the other 'subsequent documents' set out in paragraph 17 of the Complaint, does not survive. The challenge to all the other deeds and documents is premised on the Deed of Retirement being set aside and the Defendant No. 1 Company being restored to the position of Partner of Defendant No. 5 Firm. Without the Deed of Retirement being set aside, neither Defendant No. 1 nor its Minority Shareholders in a derivative action, would have any locus to challenge the other deeds and documents and would not be able to maintain any cause of action to challenge such deeds and documents executed by a partnership firm, of which Defendant No. 1 is not a partner and therefore not concerned with the same.”

“48. This judgment too clearly takes the view, as a matter of law, that in a given case a suit can be dismissed on the ground of limitation where the same is discernible from the complaint.”

“51. In other words, a plaint can be rejected under Order 7 Rule 11(d) of the CPC if from the averments in the plaint it is clearly barred by the law of limitation. For the reasons given in the first part of this Judgment, I have held that the Suit in the present case is *ex facie* barred by the law of limitation as is apparent from the averments in the plaint itself. When the rejection of the Plaint under Order 7 Rule 11(d) is on the ground of limitation, the same would tantamount to dismissal of the Suit itself. The Hon'ble Supreme Court in *Suresh Kumar Dagla v. Sarwan and anr.* [MANU/SC/0751/2014](#) : (2014) 14 SCC 354, at paragraph 17 has, whilst confirming an order of the Trial Court under Order 7 Rule 11(d) on the ground of limitation, 'dismissed' the Suit as barred by limitation.”

13. The learned counsel for the applicant submits that even Bombay High Court in the matter of ***Kanayalal Madhavji Thakkar vs. Shree Padmanabh Builders***, [MANU/MH/1776/2010](#) held that it is the statements in the plaint which have to be accepted on their face in determination as to whether the suit is barred by any law. Paragraph 10 of this authority reads thus:

“10. In this context, it would be necessary to advert to some of the well settled principles underlying the interpretation of Order 7 Rule 11 of the Code. In *Sopan Sukhdeo Sable v. Assistant Charity Commissioner* [MANU/SC/0071/2004](#) : AIR 2004 SC 1801 the Supreme Court held that the real object of Order 7 Rule 11 is to keep out of Courts irresponsible law suits. For the purpose of deciding an application under Clauses (a) and (d) of Order 7 Rule 11, the averments in the Plaint are germane. The plea taken by the Defendant in the Written Statement would be wholly irrelevant at that stage. In exercise of its jurisdiction under Order 7 Rule 11 what is required is a meaningful and not a formal reading of the Plaint and clever drafting which creates an illusion of a cause of action ought not to detract from the jurisdiction of the Court on an application for rejection. In *Popat and Kotecha Property v. State Bank of India Staff Association*

[MANU/SC/0516/2005](#) : (2005) 7 SCC 510 the earlier judgments on the subject were revisited and the Supreme Court held that under Order 7 Rule 11 an independent remedy is made available to the Defendant to challenge the maintainability of the suit irrespective of his right to contest it on merits. The use of the word "shall" casts a duty on the Court to perform its obligations in rejecting the plaint when it is hit by any of the infirmities provided in the four clauses of Rule 11. For that purpose, the statement of claim without addition or subtraction must show that it is barred by any law to attract the application of Order 7 Rule 11. A Bench of two Learned Judges of the Supreme Court in *Balasaria Construction (P) Ltd. v. Hanuman Seva Trust* referred the question as to whether the rejection of Plaint on the bar of limitation is within the scope of Rule 11(d) to a larger Bench. When the case came up before a Bench of three Learned Judges, Counsel for both the parties stated that it was not the case of either side that as an absolute proposition under Order 7 Rule 11(d) that an application can never be based on the law of limitation. Both the sides stated before the Court that the impugned judgment was based on the facts of that particular case. In view of the statement, the question which was referred to a larger Bench was rendered academic and the case was sent back to the Bench for disposal on merits. Thereafter in *Balasaria Construction (P) Ltd. v. Hanuman Seva Trust* the Bench of two Learned Judges of the Supreme Court held that "the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence" Holding that the question of limitation was a mixed question of law and fact, the Supreme Court held that *ex-facie* in that case on a reading of the plaint, it could not be held that the suit was barred by time. In *Hardesh Ores (P) Ltd. v. Hede and Company* [MANU/SC/7671/2007](#) : (2007) 5 SCC 614 a Bench of two Learned Judges of the Supreme Court accepted a plea that the Plaint was liable to be rejected on the ground that the claim was barred by limitation. This was in the context of a suit for specific performance where under Article 54 of the Limitation Act, the suit should have been filed within three years

from the date on which the Plaintiff had notice that the renewal of the agreement was refused by the Defendant.”

14. The learned Counsel for the applicant submits that case in hand shows that Suit filed by the plaintiff in the year 2006 for specific performance of agreement dated 9th August, 1974 i.e. after 18 years from the cause of action. He submits that our High Court held that clever drafting cannot be a ground for ignoring the limitation point at threshold under Order VII Rule 11(d) of the Code of Civil Procedure. He submits that the word ‘shall’ used in Order VII Rule 11(d) of the Code of Civil Procedure casts a duty on the court to reject the plaint when it is hit by any of the infirmities provided in the four clauses of Rule 11.

15. The learned counsel for the applicant submits that even the Supreme Court in the matter of ***Hardesh Ores Pvt.Ltd. vs. Hede and Company***, ***MANU/SC/7671/2007*** held that by the device of clever drafting of the plaint the question of limitation cannot be ignored. Paragraph 12, 13 and 21 of the said authority reads thus:

“12. Aggrieved by the order of the Trial Court the appellants preferred two appeals before the High Court which have been dismissed by the impugned order. Before the High Court it was urged that in deciding an application under Order VII Rule 11 of the CPC the contentions raised in defence or submissions advanced by the respondent-defendant about their case need not be considered and the matter must be decided on the basis of averments in the plaint and the documents annexed with the plaint. The Trial Court had fallen into an error when it referred to the defence of the defendant to determine as to whether the plaint was liable to be rejected as barred by limitation. It also noticed the submission urged on behalf of the appellant that the question of limitation was a mixed question of law and fact and, therefore, such a question could be adjudicated only in the trial.”

“13. On the other hand the appellants contended that the case was squarely covered by the ratio laid down by this Court in the case of N.V. Srinivasa Murthy and Ors. v. Mariyamma (Dead) by Proposed Lrs. and Ors. [MANU/SC/0403/2005](#) : AIR2005SC2897 . By the device of clever drafting of the plaint the question of limitation was sought to be got over by camouflaging the real issue in the suit and making it appear as if it was merely a suit for perpetual injunction.”

“21. 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 and London S.P. and I Association Ltd. v. M.V. Sea Success I and Anr. [MANU/SC/0951/2003](#) : (2004)9SCC512 and Popat and Kotecha Property v. State Bank of India Staff Association [MANU/SC/0516/2005](#) : (2005)7SCC510 .”

16. The learned counsel for the applicant submits that bare reading of the order VII Rule 11(d) of the Civil Procedure Code, 1908 shows that the application for rejecting the plaint on the ground of limitation can be preferred at any time. There is no bar in law that after filing written statement and or framing of issues the application is not maintainable. He submits that in the present proceeding, bare reading of averments made in the plaint and particularly clause 3 of the agreement dated 9th August, 1976 clearly shows that Suit filed by the plaintiff in the year 2006 was patently barred by law of limitation. Hence, the application preferred by defendant is required to be allowed holding that suit as it is filed by the plaintiff is hit by law of limitation. He submits that if the present Chamber Summons is not allowed, irreparable loss will be caused to the applicant defendant.

17. On the other hand, the learned Senior counsel for the plaintiff submits that application preferred by defendant itself is not maintainable in law. He submits that in the present proceeding, plaintiffs filed suit for specific performance of agreement dated 9th August, 1974 on 3rd March, 2006. Thereafter, the defendants filed their written statement on 22nd October, 2008. Considering the averments made in the plaint and written statement this court (Coram: S.J.Kathawala, J.) framed issues on 29th June, 2011 which are as under:

“1) Whether the Suit suffers from nonjoinder and misjoinder of parties ?

2) Whether Hansraj Pragji and Sons (Warehousing) was a joint stock company within the meaning of the Companies Act, 1956 ?

3) Whether the Plaintiff of the agreement dated 9th August 1974 was personal to the partners of M/s. Hansraj Pragji and Sons and was nonassignable and nontransferable ?

4) Whether the Plaintiff is not entitled to file the present suit for specific performance of the agreement dated 9th August 1974 in view of the fact Plaintiff was not party to the agreement dated 9th August 1974 ?

5) Whether the suit is time barred ?

- 6) *Whether the suit suffers from delay and latches ?*
- 7) *Whether the agreement dated 9th August 1974 was contingent and subject to the Defendant obtaining consent of the owner of the suit property ?*
- 8) *Whether the agreement dated 9th August 1974 was treated as cancelled and was given a go bye by both the parties ?*
- 9) *Whether possession of the terrace was given by the Defendant to the Plaintiff in part performance of the agreement dated 9th August 1974 ?*
- 10) *Whether the agreement dated 9th August 1974 was not properly stamped and therefore not enforceable ?*
- 11) *Whether the agreement dated 9th August 1974 is valid, subsisting and binding on the Defendant ?*
- 12) *Whether the Plaintiff has been and is ready and willing to perform his part of the agreement ?*
- 13) *Whether the Plaintiff is entitled to specific performance of the agreement dated 9th August 1974 ?*
- 14) *Whether the Plaintiff is entitled to the alternative reliefs claimed in prayer (c) of the Plaint ?”*

18. The learned Senior Counsel for the plaintiff submits that after framing issues including the issue on limitation point, the applicant defendant preferred the present Chamber Summons under Order VII Rule 11(d) of the Code of Civil Procedure for rejection of plaint on limitation point and hence, same is not maintainable.

19. The learned Senior Counsel for the plaintiff submits that bare reading of the paragraph 11, 12, 13 and 22 of plaint itself shows that Suit as it is filed by the plaintiff was within limitation. He submits that even as per terms and conditions of the agreement dated 9th August, 1974, defendant failed and neglected to obtain the permission of his lessor as provided in sub clause (i) of clause 2 of the Indenture of lease dated 2nd December, 1963. He submits that as per clause 3 of the

agreement dated 9th August, 1974, it is mandatory on the part of defendant to take permission from the owner of the property and thereafter within 5 years sale to be completed. He submits that neither in written statement nor in affidavit in support of the present Chamber Summons, defendant made any statement when they applied for permission from the landlord, when same was granted or not, when they communicated to the plaintiff. For want of this pleading, there is no question of rejection of plaint on the point of limitation. He submits that even as per Article 54 of the Limitation Act, limitation starts from the date of denial if some conditions are provided in agreement between the parties. He submits that this court by order dated 29th June, 2011 already framed issues and one of the issue is about limitation. Therefore, there is no substance in the present Chamber Summons and same is required to be rejected with costs.

20. I have heard both the sides at length. It is to be noted that while deciding the application under Order VII Rule 11(d) of the Code of Civil Procedure, 1908, we have to take averments as made in the plaint.

“11. Rejection of plaint.- The plaint shall be rejected in the following cases:—

(a)

(b)

(c)

(d) where the suit appears from the statement in the plaint to be barred by any law;”

21. What Rule 11(d) of the said Code shows is that the plaint is liable to be rejected when it appears from the statement in the plaint is barred by law of limitation. The question of limitation is a mixed question of facts and law. In such cases it may not be possible for the court to arrive at a prima facie conclusion whether the Suit is barred by law of limitation. Even the Apex Court in the matter of **Ramesh B. Desai and Others vs. Bipin Vadilal Mehta and Others, (2006) 5 SCC 638** held that starting point of limitation has to be ascertained on facts in every

case. Plea of limitation cannot be decided as a abstract principle of law divorced from the facts. Same is mixed question of facts and law. Paragraph 19 of the said authority reads thus:

“19. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. The question whether the words "barred by law" occurring in Order VII Rule 11(d) CPC would also include the ground that it is barred by law of limitation has been recently considered by a two Judge Bench of this Court to which one of us was a member (Ashok Bhan J.) in Civil Appeal No. 4539 of 2003 (Balasaria Construction Pvt. Ltd. v. Hanuman Seva Trust and Ors.) decided on 8.11.2005 and it was held: -

“8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the paint it cannot be held that the suit is barred by time.”

This principle would be equally applicable to a Company Petition. Therefore, unless it becomes apparent from the reading of the Company Petition that the same is barred by limitation the petition cannot be rejected under Order VII Rule 11(d) CPC.

22. Considering this principle under Order VII Rule 11(d) of the Code of Civil Procedure and the authority of the Apex Court in the matter of **Ramesh B. Desai and Others vs. Bipin Vadilal Mehta and Others** (Supra) I am deciding the present case on its own merits.

23. In the present proceeding, plaintiff filed Suit on the basis of agreement dated 9th August, 1974. As per clause 3 of the said agreement, duty cast upon the applicant defendant to bring no objection from their landlord on the basis of Indenture dated 2nd December, 1963. Neither in the written statement nor in the affidavit in support of Chamber Summons, applicant defendant discloses the date on which they made any application to their owner for granting permission to execute the sale deed as per terms and conditions of the Indenture dated 2nd December, 1963. Therefore the question remains whether as per clause 3 of the agreement dated 9th August, 1974 limitation starts after expiry of 5 years or from the date of bringing no objection and or rejection of no objection by the defendants from their landlord. This can be decided only after leading evidence by both the parties. There is no question of deciding the said issue on the basis of agreement dated 9.8.1976 only. The Apex Court in the matter of **Ramesh B. Desai and Others vs. Bipin Vadilal Mehta and Others** (Supra) held that limitation is a mixed question of question of facts and law.

24. It is to be noted that our High Court in the matter of **Meher Singh v. Deepak Sawhny and another, 1998(3) Mh.L.J. 940** held that determination of preliminary issue is provided in section 9A of the Code of Civil Procedure, 1908 as amended by Maharashtra Amendment Act, 65 of 1977) is required to be determined after giving opportunity to both the sides to lead the evidence. Paragraph 13 reads thus:

“13. In the result we hold that if section 9-A is not added, then at interim stage, the Court is not required to decide the issue of jurisdiction finally and the Court by referring to the averments made in the plaint, would ordinarily determine whether or not the Court has jurisdiction to try the suit. However, it is apparent that section 9-A is added with a specific object to see that objection with regard to jurisdiction of the Court is decided as a preliminary issue. According to the Legislature, the practice of granting injunctions without going into the question of jurisdiction even though raised, has led to grave abuse. Hence the said section is added to see that issue of jurisdiction is decided as

a preliminary issue notwithstanding anything contained in the Civil Procedure Code, including Order XIV, Rule 2. Once the issue is to be decided by raising it as a preliminary issue, it is required to be determined after proper adjudication. Adjudication would require giving of opportunity to the parties to lead evidence, if required.”

25. Bare reading of the paragraph 22 of the plaint it shows that the suit filed by the plaintiff was prima facie within limitation. The authority cited by the applicant in the matter of ***Fatehji and Company and another vs. L.M.Nagpal and Others*** (Supra) is not applicable in the facts and circumstances of the present case. In that Suit, even after knowing dishonest intention of sons of second defendant with regard to suit property in the year 1985, plaintiffs did not file the suit immediately. He filed the Suit in 1994 and hence, the Apex court held that inspite of knowledge about denial of specific performance plaintiff filed the Suit beyond the period of 3 years from the date of denial and hence, the same was barred by limitation. That is not the case in hand. In the case in hand, the defendant is silent on the permission from owner of the suit property as per clause 3 of the agreement dated 9.8.1974.

26. Even the authority cited by the applicant defendant in the matter of ***Lily Realty Private Limited and Ors. vs. Altius Developers Private Limited and Ors.*** (Supra) is not applicable in the facts and circumstances of the present case. In that case, plaintiff specifically made a statement in plaint for relief under section 14 of the Limitation Act. Plaintiff also made a statement in plaint that settlement talks were going on between the parties and therefore, there was delay on their part to file the Suit within limitation. Paragraph 51 of the said judgment clearly shows that on bare reading of the plaint one can decide that the suit filed by the plaintiff was barred by limitation. That is not the case in the case in hand. In the case in hand, there is a question of interpretation of Clause 3 of the Agreement dated 9th August, 1974 when limitation can start, after expiry of 5 years from the date of agreement or 5 years from the date of obtaining and or rejection of the

permission to the defendants from his landlord. Hence, the said authority is not applicable in the present case.

27. Even the authority cited by the applicant defendant in the matter of ***Kanayalal Madhavji Thakkar vs. Shree Padmanabh Builders*** (Supra) is not applicable in the facts and circumstances of the present case. It is specifically stated in paragraph 21 of the said judgment that plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by law. In the case in hand, bare reading of the averments made in the plaint do not disclose the case about barred by limitation.

28. Considering the above mentioned facts and the law declared by the Apex Court in the matter of ***Ramesh B. Desai and Others vs. Bipin Vadilal Mehta and Others*** (Supra) that the limitation is a mixed question of facts and law and same is required to be decided after giving an opportunity to both the sides to lead evidence, I am of the opinion that Chamber Summons preferred by defendant under Order VII Rule 11(d) of the Code of Civil Procedure is required to be dismissed.

29. Hence, Chamber Summons stands rejected.

30. No order as to costs.

(K.K.TATED, J.)