IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

FIRST APPEAL NO.1094 OF 2019
with
CIVIL APPLICATION NO.2735 OF 2019

Shri Rajesh B. Chavan & anr. … Appellants

Vs

M/s.Karan Group Development Corporation … Respondent

Mr.P.S. Dani, Senior Advocate i/b Mr.S.C. Wakankar for the Appellant

Mr.Mandar Soman for Respondent

CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.

ORDER RESERVED ON: AUGUST 27, 2019
ORDER DELIVERED ON: SEPTEMBER 4, 2019

P.C. (Per Akil Kureshi, J.):

1. Looking to the controversy involved, on the request of the learned Counsel for the parties, the First Appeal is taken up for final disposal at the admission stage.

2. This appeal is filed by the original plaintiff challenging the order dated 30.3.2019 passed by the learned Joint Civil Judge, Senior Division, Pune, below application exhibit 19 in Special Civil

Suit No.1510 of 2018. By the said order, the learned Judge was pleased to accept the application of the defendants urging the Court to reject the plaint in exercise of powers under Order 7 Rule 11 of Code of Civil Procedure.

3. Brief facts are as under:

The appellants - the original plaintiffs were owners of a piece of land situated at village Balewadi, Taluka Haveli, District: Pune. The plaintiffs had executed a development agreement with the defendants on 20.4.2006 in relation to the portion of such land admeasuring 80 ares, with which transaction, we are not directly concerned in this appeal. What is at issue is another development agreement dated 5.2.2008 executed by the plaintiffs with the defendants pertaining to 35 ares of adjoining land. Under such agreement, the defendants had agreed to pay consideration of Rs.2.28 crores to the plaintiffs, out of which an amount of Rs.50 lakhs was paid on 4.4.2008 and a further sum of Rs.78 lakhs was paid on 4.6.2008. The defendants had agreed to pay balance consideration of Rs.1 crore by 4.8.2008.

4. According to the plaintiffs as averred in the plaint, time was essence of the contract. The defendants did not pay the remaining amount of Rs.1 crore as agreed in the agreement and the cheque issued by the defendants for such amount was dishonoured. According to the plaintiffs, they had performed all obligations as per the said agreement dated 5.2.2008.

5. According to the plaintiffs, the defendants had offered delayed payment which the plaintiffs had refused, clearly indicating that they had revoked and cancelled the agreement dated 5.2.2008. According to the plaintiffs, the defendants had made an offer for payment of higher amount within a specified time in view of their past default. This formula was not acceptable to the plaintiffs. Alongwith the plaint, the plaintiffs had produced a copy of notice dated 26.12.2011 issued by their advocate on their behalf to the defendants *inter alia* pointing out that the agreement dated 5.2.2008 stood terminated. It was further pointed out that the revised offer had also not worked out.

6. In the plaint, the plaintiffs had averred that recently, they came to know that the defendants had submitted plans to Pune Municipal Corporation for development of the said land on the

basis of the development agreement dated 5.2.2008 which was already cancelled. The plaintiffs had, therefore, issued a legal notice dated 24.7.2018 to the defendants. According to the plaintiffs, the cause of action for filing the suit arose when they learnt about the defendants having submitted the building plans for sanction to the Pune Municipal Corporation on the basis of the cancelled agreement dated 5.2.2008. The plaintiffs, therefore, prayed for a declaration that the agreement dated 5.2.2008 was terminated, cancelled and not binding on the plaintiffs. Further prayer was for defendants to execute a deed of cancellation of the agreement. A claim of damages was also made. Permanent injunction restraining the defendants from taking possession of the suit lands or in any manner dealing with the property was also prayed for.

7. In such suit, the defendants appeared and filed application exhibit 19 contending that the defendants had already got the plans approved by Pune Municipal Corporation in the year 2010 and had also constructed three buildings over the suit property. It was averred that the suit does not disclose any cause of action. It was further contended that the plaintiffs after issuance of notices

dated 18.12.2008 and 26.12.2011, did not take any action regarding their claim for cancellation of agreement dated 5.2.2008. The suit which was filed after issuing notice dated 24.7.2018 was thus, barred by limitation.

8. The plaintiffs filed reply to the said application opposing the grounds for rejection of the plaint. In particular, it was contended that the development permission and development actually which may have taken place pursuant to such permissions was for 80 ares of land which did not form part of the suit lands.

9. The learned Civil Judge passed his impugned order on the application of the defendants rejecting the plaint on the ground of limitation. The learned Judge noted that the plaintiffs had cancelled the development agreement dated 5.2.2008 to the knowledge of the defendants despite which the suit came to be filed on 24.7.2018 on the plea of cause of action having arisen when the plaintiffs learnt about the defendants submitting building plans for sanction to the Pune Municipal Corporation. The learned Judge referred to the legal notice dated 26.12.2011 in which it was asserted that the development agreement was cancelled. In the opinion of the learned Judge, the suit should have been filed within

three years from the date of such notice. According to the learned Judge, the cause of action for filing the suit arose upon issuance of the said notice and subsequent notice dated 26.7.2018 could not revive the limitation. It was observed that when the suit is ex-facie barred by limitation, the same can be rejected in exercise of powers under Order 7 Rule 11(d) of the Code of Civil Procedure.

10. Having heard the learned Counsel for the parties and having perused the documents on record, we are of the opinion that the learned Judge has committed a serious error. It is well settled that a plaint cannot be rejected if it discloses cause of action and that cause of action has to be gathered on the basis of averments made in the plaint. The averments made in the plaint have to be read as a whole. Further, the plaint cannot be rejected on the basis of allegations made by the defendants in the written statement or in application for rejection of the plaint. In the context of rejection of plaint that is barred by limitation, the Supreme Court in the case of **Chhotanben and another vs. Kiritbhai Krushnabhai Thakkar and others**[1], made the following observations:

1 (2018) 6 SCC 422

> “15. What is relevant for answering the matter in issue in the context of the application under Order 17 rule 11(d) CPC, is to examine the averments in the plaint. The plaint is required to be read as a whole. The defence available to the defendants or the plea taken by them in the written statement or any application filed by them, cannot be the basis to decide the application under Order 7 Rule 11(d). Only the averments in the plaint are germane. It is common ground that the registered sale deed is dated 18-10-1996. The limitation to challenge the registered sale deed ordinarily would start running from the date on which the sale deed was registered. However, the specific case of the appellant-plaintiffs is that until 2013 they had no knowledge whatsoever regarding execution of such sale deed by their brothers, original Defendants 1 and 2, in favour of Jaikrishnabhai Prabhudas Thakkar or Defendants 3 to 6. They acquired that knowledge on 26-12-2012 and immediately took steps to obtain a certified copy of the registered sale deed and on receipt thereof they realised the fraud played on them by their brothers concerning the ancestral property and two days prior to the filing of the suit, had approached their brothers (original Defendants 1 and 2) calling upon them to stop interfering with their possession and to partition the property and provide exclusive possession of half (½) portion of the land so designated towards their share. However, when they realised that the original Defendants 1 and 2 would not pay any heed to their request, they had no other option but to approach the court of law and filed the subject suit within two days therefrom. According to the appellants, the suit has been filed within time after acquiring the knowledge about the execution of the registered sale deed. In this context, the trial court opined that it was a triable issue and declined to accept the application filed by Respondent 1 – Defendant 5 for rejection of the plaint under order 7 Rule 11(d). That view commends to us.”

11. With this background, we may revert back to the material on record. As per the plaintiffs, the defendants did not make the

full payment of sale consideration pursuant to the development agreement within the time prescribed. Time being the essence of contract, non-payment would result into cancellation of the agreement. Attempt at renegotiating and entering into fresh terms failed. Under the notice dated 26.12.2011, the plaintiffs had also brought these facts to the notice of the defendants. It was further pointed out that after the termination of the original agreement, there was attempt to renegotiate, which had failed.

12. Despite these facts, the plaintiffs shortly before filing the suit learnt that the defendants had applied to the Municipal Corporation for development permission on the basis of original agreement which had been cancelled. The main prayer of the plaintiffs, therefore, was for declaration that the development agreement dated 5.2.2008 executed between the plaintiffs and the defendants was terminated, cancelled and not binding on the plaintiffs. The learned Judge rejected the plaint as being barred by limitation. To come to such a conclusion, he pressed in service following three factors:

(i) In the entire plaint, the plaintiffs had nowhere pleaded that they had considered the proposal of the defendants and opportunity was given to the defendants to rectify their mistake of committing willful default of the conditions mentioned in the said development agreement.

(ii) In relation to cause of action, the plaintiffs had stated that such cause arose when in the month of February, 2018, the defendants had submitted the building plans to the Municipal Corporation and further when on 24.7.2018, the plaintiffs had issued a notice to the defendants that the development agreement and power of attorney were cancelled. However, the plaintiffs did not file documents to substantiate the pleadings about submission of the building plans for sanction.

(iii) In the notice dated 26.12.2011 issued by the plaintiffs to the defendants, there is specific mention that the development agreement dated 5.2.2008 had been cancelled. If the date of the notice is taken into consideration, clearly, the suit should have been filed within three years from the date of service of notice on the defendants which the plaintiffs had failed to do. The notice dated 24.7.2018 was merely a reminder of the earlier notice dated 26.12.2011 and would, therefore, not give a fresh cause of action.

13. On all counts, the learned Judge was erroneous. While referring to the conduct of the plaintiffs regarding consideration or non-consideration of the proposal by the defendants, the learned Judge entered into the arena of merits of the plaintiffs' claims. How was the conduct of the plaintiffs not giving opportunity to the defendants relevant for the purpose of limitation is not clarified at all. What would be the effect of the plaintiffs not filing the documents to substantiate the pleadings about submission of the building plans for sanction to the Municipal Corporation in the month of February, 2018 could be judged only during trial.

14. The main ground for rejection of the plaint being barred by limitation, would require some elaboration. According to the learned Judge, at any rate, the limitation should be reckoned from the date of service of the plaintiffs' notice dated 26.12.2011 on the defendants. Since the suit was not filed within three years from such date, it was held to be barred by limitation. In the process, the learned Judge failed to appreciate the prayers of the plaintiffs in correct perspective. The main prayer of the plaintiffs as noted,

was for a declaration that the development agreement dated 5.2.2018 stood cancelled. The remaining prayers were consequential to this main prayer. According to the plaintiffs, the agreement was cancelled long back and the defendants, therefore, could not have acted on such agreement. The plaintiffs had not prayed for a cancellation of the agreement but for a declaration that the agreement stood cancelled. As long as the defendants were not acting on such development agreement, the plaintiffs had no cause to approach the Court of law. The plaintiffs' cause of action arose only when the defendants applied to the Municipal Corporation for building permission relying on the said development agreement and when the plaintiffs came to know about the same.

15. The Counsel for the respondents however strenuously urged that the suit would be governed by Article 59 of the Schedule to the Limitation Act, 1963 which pertains to suit for cancellation or setting aside an instrument or decree or for rescission of a contract. The period of limitation prescribed for filing such a suit is three years and the time from which the period would begin to run is when the facts entitling the plaintiff to have the instrument or

decree cancelled or set aside or the contract rescinded first become known to him. In our opinion, the suit is not for cancellation of the agreement but for a declaration that the same stood cancelled and would appropriately fall under the Article 58. Part III of the Schedule pertains to suits relating to declarations. Article 56 contained in the said part applies to a suit to declare the forgery of an instrument issued or registered. Article 57 covers suits to obtain a declaration that an alleged adoption is invalid or never took place. Article 58 would include suits to obtain any other declaration and the period of limitation prescribed is three years and the beginning of limitation would be when the right to sue first accrues.

16. Under the circumstances, the impugned order 30.3.2019 is set aside. Special Civil Suit No.1510 of 2018 is restored to file and shall be decided on merits. The appeal is allowed and disposed of accordingly.

17. In view of the disposal of the Appeal, Civil Application No.2735 of 2019 also stands disposed of.

(S.J. KATHAWALLA, J.) **(AKIL KURESHI, J.)**

18. At this stage, learned Counsel for the Respondent prayed for stay of this order for a period of four weeks to enable the Respondent to approach the Supreme Court. The effect of this order is only to revive the suit and no immediate steps are required to be taken in pursuance thereof. The request for stay is, therefore, rejected.

(S.J. KATHAWALLA, J.) **(AKIL KURESHI, J.)**