

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.12.2019

CORAM

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH
AND
THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

A.S.No. 52 of 2016

K.Murali ... Appellant/Respondent/Plaintiff
Vs.

M.Mohamed Shaffir ... Respondent/Petitioner/
4th Defendant

PRAYER : Appeal filed under Section 96 of Civil Procedure Code against the judgment and decree dated 21.08.2015 in I.A.No.42 of 2015 in O.S.No.36 of 2013 on the file of Additional District Court, Krishnagiri.

For Appellant : Mr.Ravi
: for M/s.S.Indumathi Ravi
: Mr.P.Valliappan
For Respondent

JUDGMENT
(Delivered by M.M.SUNDRESH., J)

This appeal is preferred against the judgment and decree of the trial Court in allowing the application filed seeking to invoke Order VII Rule 11(d) of the Code of Civil Procedure on the ground of the suit being barred by limitation.

2. The appellant and the first defendant in the suit entered into an agreement for sale on 10.3.2008 with the total consideration at Rs.51,43,600/-. A sum of Rs.5,00,000/- as advance was also paid. Four months time has been fixed in the said agreement to pay the balance amount. The agreement further proceeds to state that if the appellant did not comply with his part of contract or delays in making payment beyond the specified time, he would lose the advance amount and the agreement would become invalid. On the refusal of the first defendant or adopting any delaying tactics by him, liberty is given to the appellant to work out the remedy before the Court.

Consequently, he can also compel the first defendant to perform his part of the contract, which is inclusive of rectification of mistake.

3. The dispute arose between the appellant and his brother, who has been arrayed as the third defendant in the suit, pursuant to which a complaint was given on 28.10.2008 against him by the appellant. To be noted, this dispute has arisen after the expiry of the period specified in the agreement for sale dated 10.03.2008.

4. According to the appellant, the second defendant took away the original agreement dated 10.03.2008. It is the further case of the appellant that he approached the first defendant for execution of the sale deed but it was declined on the ground of non-possessing of the original agreement by him. Thereafter, the appellant traced the copy of the agreement dated 10.03.2008 during the first week of December, 2010 and approached the first respondent. On his refusal, a legal notice was issued on 15.12.2010. The following averments in the legal notice would be appropriate:-

"6. .. But, after entering the same agreement there was misunderstanding arose between my client and one of his brother namely Ramesh Babu in the month of October 2008 at that time the said Ramesh Babu took the documents relating the properties stands in favour of my client and blank cheques of my client and tried to create documents in his favour or in favor of third parties taking advantage of the said blank stamp papers and cheques.

.....

My client further states that since the said Ramesh Babu took the original agreement dated 10.03.2008 entered with you and my client also not having copy of sale agreement and that my client unable to take effective steps based on the sale agreement and my client orally informed you that as and when the original agreement came to the hands of my client he will make payment of balance amount and get sale deed from you."

5. Thus, on perusal, there is no difficulty in holding that even according to the appellant, his brother, namely, the third defendant created trouble in the month of October 2008 and that was the reason why he was unable to take steps to comply with the terms of the agreement. The averments by themselves would clearly show that till the last date of the performance mandated under agreement - 10.07.2008, the appellant was obviously not ready and willing.

6. A reply notice was sent on 09.02.2011 by the first defendant denying the allegations made. A legal notice was also sent to the appellant by second defendant on 22.06.2011. It is alleged by the second defendant that the appellant entered into an agreement with him on 17.4.2008 with respect to the same suit property. Alleging that it was a forged document, a complaint was given by the appellant against defendants 2 and 3 which was also registered in Cr.No.63 of 2011. A reply was also given to the said effect by the appellant to the second defendant's counsel on 22.07.2011.

7. A suit was filed by the second defendant against the appellant and the first defendant in O.S.No.61 of 2011 for specific performance of the so-called subsequent agreement dated 17.04.2008. It was subsequently withdrawn as settled out of the Court. This suit was filed on 28.06.2011. After coming to know that part of the suit property has been sold even during the pendency of the earlier suit, with the averment that the purchaser should take care of the same, suit was filed by the appellant in O.S.No.36 of 2013 seeking specific performance. The respondent herein/fourth defendant, who is the subsequent purchaser, filed an application in I.A.No.42 of 2015 in O.S.No.36 of 2013 for rejection of the plaint. As the respondent purchased a part of the suit property, this application was allowed by the trial Court on the issue qua limitation and hence the appeal.

8. The learned counsel appearing for the appellant submits that Part II of Article 54 of the Limitation Act, 1963 would be attracted. Though the agreement for sale dated 10.03.2008 was in writing, there are averments to show that it has been extended orally. The first defendant has not complied with his part of the agreement by duly correcting the mistake found in the parent sale deed in his favour. Therefore, what is applicable is Part II of the Article 54 of the Limitation Act, 1963. To buttress his submission, the learned counsel appearing for the appellant has made reliance upon the following decisions:- (i) Panchanan Dhara and others v. Monmatha Nath Maity(Dead), through LR's and another reported in (2006) 5 SCC 340 and (ii) S.Brahmanand and others v. K.R.Muthugopal (Dead) and others reported in (2005) 12 SCC 764.

9. The learned counsel appearing for the respondent/fourth defendant submits that the statement made in the legal notice coupled with the averments made in the plaint and the agreement for sale would clearly show that the suit is barred by limitation. Even after the legal notice issued by the appellant on 15.12.2010, the suit has been actually filed on 28.07.2012. Time is the essence of the contract. The clause which mandates the first defendant would arise only on his failure to perform

his part of the contract. This is clearly seen from the conduct of the appellant himself through the legal notice and till the filing of the suit. There is a difference between the cause of action for filing the suit and the starting point of the limitation. In support of his contentions, the learned counsel has placed reliance upon the following decisions:- (i) Ramzan v. Smt.Hussaini reported in AIR 1990 SC 529, (ii) Raghwendra Sharan Singh v. Ram Prasanna Singh (Dead) by Lrs reported in 2019 (2) CTC 823 and (iii) Mahboob Pasha v. Syed Zaheeruddin and others reported in AIR 1988 Karnataka 83.

10. The facts narrated are not in dispute. Order VII Rule 11 (d) CPC has to be seen in the context of Section 3 of the Limitation Act which imposes a duty upon the Court to check and verify as to whether the lis is within the period of limitation. Though the question of limitation might involve disputed question of fact and law, it cannot be stated that in a given case the party is not entitled to invoke Order VII Rule 11(d) CPC.

11. Coming to the facts of the case, as rightly submitted by the learned counsel appearing for the respondent/fourth defendant, the agreement governing the appellant and the first defendant itself is not in dispute and the covenants thereunder clearly stipulate that time is the essence of the contract. This is also understood by both the parties. That is the reason why a plea has also been raised before us that the said agreement has been extended thereafter. This agreement also speaks about the consequence of refusal to comply with the terms by the appellant. The consequence is that the appellant would lose the advance amount and the agreement would be non est thereafter. Unfortunately, the appellant, through his counsel, has made averments which have already been recorded earlier. These statements would clearly show that the appellant was not even ready and willing during the period of agreement and thereafter only the problem arose between him and the third defendant, who is none other than his brother. The dispute between him and the third defendant has got no rationale or connection with the first defendant. Once an agreement becomes enforceable, the consequence will have to follow. This, we hold so on the admitted facts.

12. However, the contention of the learned counsel appearing for the appellant that the latter part of the agreement would govern and, therefore, the agreement is deemed to be extended also, cannot be countenanced. It was not even the case of the appellant throughout except at a later point of time. In the legal notice, no such plea has been taken nor in the cause of action shown in the plaint. It is the duty enjoined upon the second defendant when he was asked to appear before this Court

on his failure to perform his part of the contract. As stated above, that situation would not arise even otherwise since admittedly the appellant was not in a position to pay the remaining amount. Therefore, the question of pleading and proving the readiness and willingness would not arise.

13. The learned counsel appearing for the appellant also submitted that by considering the conduct of the parties even the oral extension could also be pleaded and proved. This may be so in a given case. This can be proved with the conduct of the parties and the proof is based upon the materials available. Except the oral observation there is no other material produced by the appellant. Suffice it to say that the onus is on the appellant to substantiate it. A clever drafting of the averment as rightly held by the Apex Court in Ramzan (supra) would not suffice. Thus, the aforesaid contention also stands rejected.

14. In the judgment relied upon by the learned counsel appearing for the appellant in the case of S.Brahmanand(supra), there was indeed a subsequent letter emanating from the defendants requesting for postponing the performance to a future date. That was taken into consideration by the Apex Court. Therefore, the aforesaid decision will not help the case of the appellant. In Panchanan Dhara (supra), the Apex Court was dealing with a case where it is proved that time fixed for the performance has been extended to the parties. Even it was held that in a case where time has been fixed, the Court has to find out whether suit was filed beyond the prescribed period, unless there is sufficient proof for extension. Thus, even the said judgment has got no relevancy to the case on hand.

15. We are conscious of the fact that while exercising the power of Order VII Rule 11(d) of the Code of Civil Procedure, the Court is not expected to conduct a roving inquiry. However, when it is so obvious that the attempt is only to overcome the period of limitation, this Court has to exercise its power. Certainly, limitation is the question which can be gone into by invoking Order VII Rule 11(d) of the Code of Civil Procedure. In this connection, we would like to place reliance upon the judgment of the Apex Court in Raghwendra Sharan Singh (supra). The following paragraphs would be apposite:-

"6.2 While considering the scope and ambit of the application under Order 7 Rule 11 of the CPC, few decisions of this Court on Order 7 Rule 11 of the CPC are required to be referred to and considered.

6.3 In the case of T. Arivandandam (supra), while considering the very same provision i.e. Order 7 Rule 11 of the CPC and the decree of the trial Court in

considering such application, this Court in para 5 has observed and held as under:

"5. We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentently resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving complaints. The learned Munsif must remember that if on a meaningful - not formal - reading of the complaint it is manifestly vexatious, and merit less, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the answer to irresponsible law suits....."

6.4 In the case of Church of Christ Charitable Trust and Educational Charitable Society (supra), this Court in paras 13 has observed and held as under:

"13. While scrutinizing the complaint averments, it is the bounden duty of the trial Court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the Plaintiff the right to relief against the Defendant. Every fact which is necessary for the Plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words "cause of action". A cause of action must include some act done by the Defendant since in the absence of such an act no cause of action can possibly accrue."

6.5 In A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem (supra), this Court explained the meaning of "cause of action" as follows:

12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual

infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

6.6 In the case of *Sopan Sukhdeo Sable* (supra) in paras 11 and 12, this Court has observed as under:

"11. In *I.T.C. Ltd. v. Debts Recovery Appellate Tribunal* [(1998) 2 SCC 70] it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.

12. The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and merit less in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. (See *T. Arivandandam v. T.V. Satyapal* (supra)."

6.7 In the case of *Madanuri Sri Rama Chandra Murthy* (supra), this Court has observed and held as under:

"7. The plaint can be rejected under Order 7 Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order 7 Rule 11 CPC can be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and merit less in the sense of not disclosing any right to sue, the court should exercise power under Order 7 Rule 11 CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order 7 Rule 11 CPC to the exercise of

power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order 7 Rule 11 CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage."

6.8 In the case of Ram Singh (supra), this Court has observed and held that when the suit is barred by any law, the plaintiff cannot be allowed to circumvent that provision by means of clever drafting so as to avoid mention of those circumstances, by which the suit is barred by law of limitation."

16. By applying the aforesaid principle, the Apex Court thereafter proceeded to held as follows:-

"7. Applying the law laid down by this Court in the aforesaid decisions on exercise of powers under Order 7 Rule 11 of the CPC to the facts of the case in hand and the averments in the plaint, we are of the opinion that both the Courts below have materially erred in not rejecting the plaint in exercise of powers under Order 7 Rule 11 of the CPC. It is required to be noted that it is not in dispute that the gift deed was executed by the original plaintiff himself along with his brother. The deed of gift was a registered gift deed. The execution of the gift deed is not disputed by the plaintiff. It is the case of the plaintiff that the gift deed was a showy deed of gift and therefore the same is not binding on him. However, it is required to be noted that for approximately 22 years, neither the plaintiff nor his brother (who died on 15.12.2002) claimed at any point of time that the gift deed was showy deed of gift. One of the executants of the gift deed -brother of the plaintiff during his lifetime never claimed that the gift deed was a showy

deed of gift. It was the appellant herein-original defendant who filed the suit in the year 2001 for partition and the said suit was filed against his brothers to which the plaintiff was joined as defendant No. 10. It appears that the summon of the suit filed by the defendant being T.S. (Partition) Suit No. 203 of 2001 was served upon the defendant No. 10-plaintiff herein in the year 2001 itself. Despite the same, he instituted the present suit in the year 2003. Even from the averments in the plaint, it appears that during these 22 years i.e. the period from 1981 till 2001/2003, the suit property was mortgaged by the appellant herein-original defendant and the mortgage deed was executed by the defendant. Therefore, considering the averments in the plaint and the bundle of facts stated in the plaint, we are of the opinion that by clever drafting the plaintiff has tried to bring the suit within the period of limitation which, otherwise, is barred by law of limitation. Therefore, considering the decisions of this Court in the case of T. Arivandandam (supra) and others, as stated above, and as the suit is clearly barred by law of limitation, the plaint is required to be rejected in exercise of powers under Order 7 Rule 11 of the CPC.

7.1 At this stage, it is required to be noted that, as such, the plaintiff has never prayed for any declaration to set aside the gift deed. We are of the opinion that such a prayer is not asked cleverly. If such a prayer would have been asked, in that case, the suit can be said to be clearly barred by limitation considering Article 59 of the Limitation Act and, therefore, only a declaration is sought to get out of the provisions of the Limitation Act, more particularly, Article 59 of the Limitation Act. The aforesaid aspect has also not been considered by the High Court as well as the learned trial Court.

8. Now, so far as the application on behalf of the original plaintiff and even the observations made by the learned trial Court as well as the High Court that the question with respect to the limitation is a mixed question of law and facts, which can be decided only after the parties lead the evidence is concerned, as observed and held by this Court in the cases of Sham Lal alias Kuldip (supra); N.V. Srinivas Murthy (supra) as well as in the case of Ram Prakash Gupta (supra), considering the averments in the plaint if it is found that the suit is clearly barred by law of limitation,

the same can be rejected in exercise of powers under Order 7 Rule 11(d) of the CPC."

17. Thus, the ratio laid down by the Apex Court, would certainly apply to the case on hand.

18. On the principle governing the application of Article 54 Part I or Part II, as the case may be, it has been held in Ramzan(supra), as under and paragraph (6) thereof is fruitfully reproduced hereunder:-

"The question is whether a date was fixed for the performance of the agreement and in our view the answer is in the affirmative. It is true that a particular date from the calander was not mentioned in the document and the date was not ascertainable originally, but as soon as the plaintiff redeemed the mortgage, it became an ascertained date. If the plaintiff had, immediately after the redemption, filed the suit, could it be thrown out on the ground that she was not entitled to the specific performance asked for? We do not think so. She would have been within her rights to assert that she had performed her part of the contract and was entitled to insist that her brother should complete his part. The agreement is a typical illustration of a contingent contract within the meaning of S. 31 of the Indian Contract Act, 1872 and became enforceable as soon as the event of redemption (by the plaintiff herself) happened. We agree with the view of the Madras High Court in R. Muniswami Goundar v. B. M. Shamanna Gounda, AIR 1950 Mad 820 expressed in slightly different circumstances. The doctrine of *id certum est quod certum reddi potest* is clearly applicable to the case before us which in the language of Herbert Broom (in his book dealing with legal maxims) is that certainty need not be ascertained at the time; for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. A similar question had arisen in *Duncombe v. The Brighton Club and Norfolk Hotel Company* (1875) 10 QB 371, relied upon in the Madras case. Under an agreement, the plaintiff had supplied some furniture to the defendant for which payment was made but after some delay. He claimed interest. The rule at Common Law did not allow interest in such a case, and the plaintiff in support of his claim relied upon a statutory provision which could come to his aid only if the price was payable at a certain time. Blackburn, J. observed that he did not have the slightest hesitation in saying that the agreement contemplated a particular day. which when

the goods were delivered would be ascertained, and then the money would be payable at a certain time; but rejected the plaintiffs demand on the ground that the price did not become payable by the written instrument at a certain time. The other learned Judges did not agree with him, and held that the statute did not require that the document should specify the time of payment by mentioning the day of payment. If it specified the event upon which the payment was to be made, and if the time of event was capable of being ascertained, the requirements of the section were satisfied. The same is the position in the case before us. The requirement of Article 113 is not that the actual day should necessarily be ascertained upon the face of the deed, but that the basis of the calculation which was to make it certain should be found therein. We, accordingly, hold that under the agreement the date for the defendant to execute the sale deed was fixed, although not by mentioning a certain date but by a reference to the happening of a certain event, namely, the redemption of the mortgage; and, immediately after the redemption by the plaintiff, the defendant became liable to execute the sale deed which the plaintiff was entitled to enforce. The period of limitation thus started running on that date. The case is, therefore, covered by the first part of Article 54 (third column) and not the second part."

19. We have perused the plaint filed. There is a marked difference between the cause of action for filing the suit and the starting point of the period of limitation. Therefore, the cause of action for filing may not be the starting point of limitation. Even in paragraph 13 which speaks about the cause of action, nowhere it has been stated that there was an oral extension, particularly because of the non-compliance of the terms of the agreement by the first defendant.

20. Thus, looking from any perspective, we do not find any reason to interfere with the judgment and decree of the trial Court. Accordingly, the appeal stands dismissed. No costs.

Sd/-

Assistant Registrar(ADI-MDU)

//True Copy//

Sub Assistant Registrar

ssm
To
The Additional District Judge,
Krishnagiri.

Copy To
The Section Officer
V.R.Section, High Court, Madras.

+lcc to M/s.S.Indhumathi Ravi, Advocate, sr.no. 103242

A.S.No. 52 of 2016

SSD(CO)
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