

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO.212 OF 2019

SMT. SAYYEDA AMATUL LATIFA W/O SHAIKH JAFAR PASHA

... PETITIONER

VERSUS

SHAIKH JAKER S/O SHAIKH MAHEBOOB AND ANR.

... RESPONDENTS

...

Mr. Shikrashna B. Solanke, Advocate for the Petitioner

Mr. Milind M. Patil, Advocate for Respondent No.1

Mr. Saeed S. Shaikh, Advocate for Respondent No.2

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CORAM : V. K. JADHAV, J.
DATED : 9th January, 2020

PER COURT :-

1. Heard finally with consent at admission stage.
2. The respondent no.1 herein instituted the suit bearing Special Civil Suit No.17 of 2016 before the learned trial court for specific performance of contract wherein the petitioner – original defendant no.2 has filed an application below Exhibit-64 for framing the preliminary issue of limitation. By impugned order dated 12.11.2019, the Joint Civil Judge, Senior Division, Beed has rejected the said application. Hence this application.
3. The brief facts essential for disposal of the civil revision application are as follows:

(a) On the basis of agreement of sale dated 28.02.2011, the respondent no.1 – original plaintiff had instituted the Special Civil Suit No.17 of 2016 for specific performance of contract in respect of the suit property. At the time of agreement, respondent no.1 – original plaintiff had paid an amount of Rs.30,00,000/- and it was agreed that till 16.07.2011, he would pay the remaining amount and get the sale deed executed in his favour. However, the transaction could not be completed on or before 16.07.2011 and therefore, on 04.08.2011, the agreement came to be executed between the parties whereby the time for execution of sale deed was extended upto 30.09.2011. Even on that date the respondent no.1 paid certain amount to the petitioner. It is a further case of respondent no.1 – original plaintiff that the petitioner and respondent no.2 herein avoided to execute the sale deed and therefore, the legal notice came to be issued on 03.11.2015 but the sale deed was not executed. Consequently, respondent no.1 – original plaintiff has instituted the suit in the month of March-2016.

(b) The petitioner and respondent no.2 appeared in the matter and filed their written statement. It is their case that respondent no.1 – original plaintiff failed to pay the

balance amount and get the sale deed executed. He has thus failed to prove his readiness and willingness to perform his part of contract. It has been specifically stated that the measurement was carried out on 28.05.2011 i.e. within the prescribed period as stated in the agreement. In the backdrop of all these facts, it is stated that the suit filed by respondent no.1 is not within limitation and the same is time barred.

(c) On 30.10.2017, the petitioner – original defendant no.2 filed an application below Exhibit-64 with a prayer that the preliminary issue of maintainability of the suit on the ground of limitation may be framed. The respondent no.1 – original plaintiff has strongly resisted the said application by filing his Say contending therein that the application came to be filed at belated stage and limitation is the mixed question of law and facts and accordingly, prayed for rejection of the application.

4. The learned counsel for the petitioner submits that the time was the essence of contract and the limitation begins to run from 30.09.2011 i.e. the last agreed date for execution of the sale deed. Learned counsel submits that the pleadings in the plaint are self explanatory and therefore, in the given set of facts, the issue of limitation is not a mixed question of law and facts. Learned counsel submits that the last date for filing

the suit was 30.09.2011 and as such, the suit instituted by respondent no.1 – original plaintiff on 14.03.2016, is barred by limitation. Learned counsel submits the the order passed below Exhibit – 64 by the trial Court is liable to be set aside and the Civil Revision Application is thus deserved to be allowed.

5. Learned counsel Mr. S.B. Salunke for the petitioner, in order to substantiate his contention placed reliance in the case of **Fatehji and Company and Anr. Vs. L.M. Nagpal and Ors.** reported in (2015) 8 SCC 390.

6. Learned counsel for the respondent no.1 – original plaintiff submits that various disputed facts are before the trial Court for adjudication and as such the scope of litigation cannot be expanded. Learned counsel submits that the suit involves several questions, namely, as to whether time was essence of contract or not, readiness and willingness on the part of plaintiff to get sale transaction completed and default on the part of parties in performing their part of contract. Learned counsel submits that all these issues are co-related to the issue of limitation. In view of the same, the issue of limitation in the present case would certainly be mixed question of law and facts and it would require a full fledged trial. Thus, the suit cannot be disposed off on the preliminary issue of limitation.

7. Learned counsel Mr. Milind M. Patil for respondent no.1, in order to substantiate his contentions placed reliance in a case of **Nusli Neville Wadia Vs. Ivory Properties and Ors.** reported in **AIR 2019 SC 5125**, wherein, the Supreme Court held that if the facts are disputed and the questions of law is dependent upon the outcome of the investigation of facts, such question of law cannot be decided as a preliminary issue.

8. I have heard the learned counsel appearing for respondent no.2 – original defendant no.1, who has adopted the submissions made on behalf of the petitioner – original defendant no.2.

9. On careful perusal of the plaint so also written statement filed by the petitioner and respondent no.2, it appears that the suit involves several questions such as whether time was essence of contract or not etc. The question of limitation can be decided based on the admitted facts, as a preliminary issue under Order 14 Rule 2(2)(b) of the Code of Civil Procedure. However, once facts are disputed, the determination of the question of limitation cannot be made under Order 14 Rule 2(2) as a preliminary issue or any other such issue of law which requires examination of the disputed facts.

10. In a case of Nusli Neville Wadia Vs. Ivory Properties and Ors. (*Supra*), the Supreme Court has made the observations to that effect.

11. In view of the above, I do not find any fault in the impugned order passed by the trial Court. There is no substance in this Civil Revision Application. The Civil Revision Application is hereby dismissed.

(V. K. JADHAV, J.)

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