IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.33 OF 2019

Mr. Pramod S. Koncolienkar ... Appellant

Versus

Mr. Krishnanand N. Bhat ... Respondents

Shri Abhay Nachinolkar, Advocate for the Appellant.

Shri A.D. Bhobe, Advocate for the Respondent.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 9th March 2020

ORAL ORDER:

Introduction:

In a suit for recovery of money, the defendants pleads limitation as the bar; he wants the trial Court to reject the plaint. So he applies under Order 7, Rule 11 of CPC. Now, we should decide this question: Is limitation a question of law, a question of fact, or a mixed question of fact and law?

Facts:

2. Respondent Krishnanand N. Bhat is the plaintiff, and appellant Pramod S. Koncolienkar is the defendant in Regular Civil Suit No.282/2017/D, before the Civil Judge, Junior Division, Margao.

Krishnanand filed the suit for recovery of money. Or is it? Pramod applied under Order 7 Rule 11 CPC, contending that the plaint ought to be rejected on the grounds of both lack of cause of action and limitation.

3. Pramod's pleas under Order 7, Rule 11 CPC found favour with the trial Court. Through its judgment, dated 23.04.2018, the trial Court rejected the plaint. Aggrieved, Krishnanand appealed. The First Appellate Court, through its judgment dated 06.02.2019, reversed the trial Court's finding. It has held that the plaint conforms to the legal requirements. That is, the First Appellate Court has felt that both the issues of cause of action and limitation should be matters of trial; the trial Court should frame proper issues and decide the dispute based on the evidence. This time, Pramod is aggrieved; so he has filed this Second Appeal.

Submissions:

4. Shri Abhay Nachinolkar, the learned counsel for appellant Pramod, has submitted that though the trial Court has given comprehensive findings covering both the issues, the First Appellate Court has however focused only on one issue. According to him, that is a non-issue: the cause of action. Shri Nachinolkar stresses that a comprehensive reading of the plaint unmistakably shows that the suit is barred by limitation. Therefore, the First Appellate Court, he

underlines, ought not to have upset the trial Court's well-considered findings.

5. To elaborate, Shri Nachinolkar has fairly submitted that there is an element of discrepancy or inconsistency between the documents the respondent has filed and his pleadings in the plaint. But that said, Krishnanand, as the plaintiff, has described the whole transaction as money lending, be it on friendly terms, and wanted only the recovery. Then, the limitation began on the date Pramod allegedly defaulted on his loan. Admittedly, the suit was filed beyond three years from that date. Therefore, to sum up his submissions, Shri Nachinolkar has submitted that it is a clear case where the pleadings demonstrate that the suit stood barred by limitation. So such an apparent conclusion could not be termed as a mixed question of fact and law. To support his contentions, he has relied on *Hardesh Ores Ltd. v. M/s. Hede and Company*[1] *Raghwendra Sharan Singh v. Ram Prasanna Singh* [2], *Saleem Bhai v. State of Maharashtra*[3]

Respondent:

6. On the other hand, Shri Bhobe, the learned counsel for Respondent Krishnanand, has submitted that it is not a money

1 2007 (5) SCC 614,
2 Civil Appeal No.2960 of 2019
3 2003 (1) SCC 557,

transaction, nor is there any instrument to be called a promissory note or any other species of negotiable instrument. According to him, there is an agreement of sale between the parties. Under that agreement of sale, Pramod agreed to sell his property after getting his title to that property established in the next three months. Only as a term *in terrorem* have the parties agreed to incorporate a particular date for Pramod to perform his part of the contract: three months.

7. In this context, Shri Bhobe insists that time is not the essence of the contract. And the limitation for specific performance, including the return of the part sale consideration, should be three years from the date of demand. He has, then, drawn my attention to not only the plaint averments but also to what is said to be the undertaking Pramod executed in Krishnanand's favour, besides the notice the respondent has issued.

8. To support his contentions, Shri Bhobe has relied on *Western Coalfields Ltd. v. Chandraprakash Khare*[4], *Narne Rama Murthy v. Ravula Somasundaram & Ors.*[5], *Ramesh Desai v. Bipin Mehta*[6], *Surjit Kaur Gill v. Adarsh Kaur Gill*[7], *Hareendran v. Sukumaran*[8] and *Urvashiben v.*

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4 2010 3 Bom CR 344
5 2005 (6) SCC 614
6 2006 (5) SCC 638
7 2014 (16) SCC 125
8 2018 (14) SCC 187,

Krishnakant Trivedi[9].

9. Heard Shri Abhay Nachinolkar, the learned counsel for the appellant; and Shri A.D. Bhobe, the learned counsel for the respondent.

Discussion:

10. Read in isolation, the plaint portrays the transaction as if it were a simple transaction of money lending—a friendly loan, at that—to help a needy friend. And that needy friend wanted to purchase certain property. But the documents referred to in the plaint and filed along with the plaint present entirely a different picture. Rather a contrasting one.

11. Admittedly, the initial transaction of whatever nature involved money, paid by Krishnanand to Pramod. From the undertaking executed by Pramod, it is evident that he received "part payment of 3 lakh rupees" from Krishnanand. Then, his undertaking reads that if he is unable to "hand over the clear title of the said property within 2 to 3 months, [he] will repay the above received amount with interest".

12. First, no interest has been specified on the money lent, if it were. Second, the period for returning the money has not been specific; it can be "two or three" months. Third, that repayment is contingent on

9 2019 (13) SCC 372

Pramod's failing to convey to Krishnanand a clear-titled property. At the very outset of that undertaking, Pramod declares that he is the owner of a particular piece of property measuring 432 sq. metres. This undertaking was executed on 05.05.2014.

13. Later, on 01.03.2017, Krishnanand issued a legal notice to Pramod, demanding him to repay the amount. It truly reflects the transaction as was set out in Pramod's undertaking. The notice asserts that Pramod could not perform his part of the contract, nor has he honoured his undertaking of repaying the amount. The notice accuses Pramod of not answering Krishnanand's phone calls and of remaining elusive.

14. So Krishnanand, through that notice, demands Pramod to repay, in 15 days, three lakh rupees with interest at 10% p.a. from 05.05.2014 till the date of its full and final payment. Later, Krishnanand filed the suit. In the suit, he has, prima facie, taken a different plea. He has contended that Pramod borrowed money from him to purchase a piece of property. Of course, that is the same property mentioned in Pramod's letter of undertaking. Krishnanand has further pleaded that he has helped Pramod with a friendly loan upon Pramod's specific request that he would repay in three months. In other words, Pramod secured a short-term loan or financial accommodation from Krishnanand for

purchasing a piece of property. Despite this plea of money lending, Krishnanand refers to Pramod's undertaking in para 5 of the plaint and to the legal notice in para 10 of the plaint.

15. As rightly contended by Shri Nachinolkar, if we read the plaint in isolation perhaps it leaves no manner of doubt that it is a money transaction. Pramod undertook to repay it at the end of the third month. Then, on his default the limitation ought to begin, begin at the end of the third month after the lending.

16. On the other hand, if we reckon this as a transaction of part performance under an agreement of sale and a failure of promise to sell a piece of immovable property, then the limitation should run from the date of demand rather than the date of default.

Precedential Position:

17. According to the Supreme Court in *Hardesh Ores*, the test is whether the plaint averments, if taken to be correct in their entirety, would entail a decree. For that, the plaint averments should be seen as a whole. Thus one can find out whether clause (d) of Rule 11 of Order VII applies. It is not permissible, *Hardesh Ores* stresses, 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 must be

looked into, the pleadings have to be construed as they stand, without our adding or subtracting words or changing their apparent grammatical sense.

18. In *Hardesh Ores*, on facts a mining lease required renewal. On fact, the Court observed that, to renew the lease, a document must have been executed, for there was "no concept of automatic renewal of lease by mere exercise of option by the lessee." So it disregarded the plaintiff's contention that by mere exercise of option claiming renewal, the plaintiff had the lease renewed. Thus, *Hardesh Ores* concluded that the plaint reading alone mattered, and the suit stood barred by limitation.

19. In *Raghwendra Sharan Singh*, the Supreme Court has found from plaint averments that the suit was barred by limitation. In this context, it has agreed that the question of limitation may be a mixed question of law and fact and may require evidence for the court to rule on it. But once the pleadings are clear and once it is found that the suit is barred by law of limitation, the plaint can be rejected under Order 7 Rule 11(d).

20. In this context, *Raghwendra Sharan Singh* has observed that when a suit is barred by any law, plaintiff cannot be allowed to circumvent that provision by means of clever drafting.

21. In a suit the defendants applied under Order 7, Rule 11 of

CPC; they wanted the trial Court to reject the plaint. Without deciding that application, the trial Court directed the defendants to file their written statement. Under those circumstances, in *Salim Bhai*, the Supreme Court has acknowledged that for deciding the application under Order 7, Rule 11 CPC, the trial Court needs no written statement. So its direction to the defendants to file the written statement is a jurisdictional error. So it set aside that order and remanded the matter.

22. When limitation is a pure question of law, and from the pleadings itself it becomes apparent that a suit is barred by limitation, then, of course, it is the duty of the court to decide limitation at the outset. That decision can be even in the absence of a plea to that effect, holds the Supreme Court in *Narne Rama Murthy*. But if the question of limitation is a mixed question of fact and law and if the suit does not appear to be barred by limitation on the face of the plaint, according to *Narne Rama Murthy*, the facts necessary to prove limitation must be pleaded, an issue raised, and then proved.

23. On facts, *Narne Rama Murthy* has observed that in that case the question of limitation is intricately linked with the question whether the agreement to sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse

possession. So *Narne Rama Murthy* has held that the plaint cannot be rejected at the threshold under Order 7, Rule 11 CPC on the grounds of limitation.

24. 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. It is entirely a question of fact. Quoting with approval its own decision in *Balasaria Construction Pvt. Ltd. v. Hanuman Seva Trust*,[10] the Supreme Court in *Ramesh Desai* has held that unless it becomes apparent from the reading of the plaint that it is barred by limitation, the suit cannot be rejected under Order VII Rule 11(d) CPC.

25. In a suit for partition, the defendants wanted the trial Court to reject the plaint on the grounds of limitation. When the matter reached the Supreme Court, in *Surjit Kaur Gill*, it has held that for deciding an application under Order 7 rule 11, one has to look at the plaint and decide whether it deserved to be rejected for the grounds raised in the plaint. In that context, *Surjit Kaur Gill* has reiterated that the "issue of limitation is always a mixed question of facts and law, and therefore, it could not be held that no case was made out for proceeding for a trial." *Hareendran*, too, reaffirms the proposition that limitation is a mixed

10 (2005) 7 SCC 501

question of law and fact.

26. In a suit for specific performance, the plaintiff pleaded that he had an agreement of sale with the defendants and paid the entire sole consideration. That was 25 years before he filed the suit. But when he visited the site in 2017, he learnt that the suit land was sold to third parties and that appellants had refused performance of contract. He filed a suit. The defendants wanted the plaint rejected on the grounds of limitation.

27. In that context, the Supreme Court in *Urvashiben* has held that an application for rejection of plaint has to be decided based on the averments in the plaint and not by entering into the merits of the case. Correctness of the allegations that concern the limitation should be determined only in trial.

28. Finally, we may refer to a decision of this Court. In *Chandraprakash*, a learned Single Judge of this Court has held in tune with the precedential position set out above. It holds that plaint is liable to be rejected under Order 7, Rule 11 (d) when it is barred by law. But that controversy should be resolved without entering into the aspect of limitation. For limitation is always a mixed question of fact and law, and it may at times require certain evidence. To hold thus, this Court has relied on *Hardesh Ores.*

Back to Facts:

29. It is too well established to be caviled about that under Order 7 Rule 11 CPC, the plaint does not stand alone, nor the fortunes of the parties tied irrevocably to the pleadings alone. A plaint has to be viewed comprehensively, and the plaint includes the documents that accompany it. The law, however, requires that those documents must have been referred to and relied on in the plaint. In other words, those documents become an integral part of the plaint.

30. Here, indeed, there is a slight variation in the pleadings from what was set out in the documents: Pramod's undertaking and the legal notice Krishnanand issued. But the fact remains that Krishnanand paid the money supposedly as an advance or as a part of the sale consideration. It was to enable Pramod to purchase a piece of property and, thereafter, to sell it to Krishnanand—in a time frame. When it comes to the conveyance of immovable property, time is not the essence of the contract. To have a contract enforced, the limitation should run from the date of demand—that is, from the date other party to the contract refuses to perform his part of the contract.

31. In this context, Shri Nachinolkar has insisted that the Appellate Court has not discussed the impact of limitation while disallowing the appeal. At any rate, though Pramod has taken two pleas

—that is, cause of action and limitation—the trial Court has rejected the plaint on the question of limitation. But the Appellate Court rejected Pramod's plea on "lack of cause of action", a non-issue in the appeal.

32. Nevertheless, in para 14 of the impugned judgment, the Appellate Court has alluded to limitation. It has observed:

> "[I]t appears that there is some error as the document and the pleading do not support each other. No amendment has also been carried out to verify error if any. However, from a broad reading of the material, there is no doubt that the defendant received part consideration towards sale of the property. This being so, there is a mixed question of fact and law and issue will require to be framed and adjudicated. Hence at this stage the plaint cannot be rejected."

33. I reckon though the Appellate Court has not expressly employed the expression "limitation," it did reckon that it is a mixed question of fact and law and that inconsistent as the pleadings may seem, they require further adjudication.

34. At this juncture, I may also note that the plaintiff as well as the defendant may take inconsistent pleas but not contradictory ones. To be precise, a defendant can take inconsistent pleas and persist with them throughout. Though the plaintiff, too, can take inconsistent pleas, when the trial Court frames issues, he may be put to election—to choose one or a few of many possible pleas. The plaintiff suffers this limitation, first, because it is he who should prove the case for earning a

decree. Second, it is because the plaintiff should draw the litigious lines clearly for the defendant to meet and traverse them. A plaintiff cannot have the luxury of hunting with the hound and running with the hare. The defendant may, if ever.

35. Here, going by the pleadings as set out in the pliant, and reading them in conjunction with the documents Krishnanand has relied on, we cannot conclude without further adjudication that it is a simple money transaction with limitation running from the date of the borrower's undertaking to repay, rather than from the date of actual demand and refusal to repay.

Answer:

36. Limitation is, usually, a mixed question of fact and law. Law is not invariable that every question of limitation should go to trial, after issue framed in that regard. On the contrary, if the plaint plainly reveals on its comprehensive reading that the suit is barred by limitation, Order 7, Rule 11(d) of CPC can be invoked. It can be at any stage. Cleve drafting can be seen through. But if the plaint averments give rise to a triable issue, it is incumbent for the trial Court to take that issue to trial. Courts will well do to err on the side of caution—that is, try the issue of limitation rather than throw out the case at the threshold, if the plaint has a tenable assertion on limitation.

Conclusion:

37. I therefore hold that the impugned judgment does not suffer from any legal lacunae, nor does it present any substantial question of law for this Court to interfere at this stage.

That said, as a matter of abundant caution, I observe that the defendant will have the liberty to take all pleas as law permits before the trial Court. And no observation by this Court in this judgment shall affect the rights of either party before the trial Court.

DAMA SESHADRI NAIDU, J.

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