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

NOTICE OF MOTION (S) CD NO.16 OF 2013
IN
COMMERCIAL SUIT NO. 71 OF 2012

M/s. Hilltop Consultants Pvt. Ltd. …..Applicants

In the matter between :-
M/s. Bharat Petroleum Corporation Ltd. …..Plaintiffs
v/s.
M/s. Hilltop Consultants Pvt. Ltd. and ors. …..Defendants

Mr. S.A. Bhawal i/b. M/s. Vyas and Bhawal for the Plaintiffs.
Mr. Simil Purohit with Mr. Anand Gandhi i/b. B.S. Naik for Applicant and for the Defendant No.1 in COMS/71/2012.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATE OF PRONOUNCEMENT OF ORDER : 31st January, 2020

ORDER :-

. The Defendant No.1 has by this Notice of Motion, sought rejection of plaint under Order 7 Rule 11 of the Civil Procedure Code, 1908 mainly on the ground that the suit is barred by the Law of Limitation.

2. Heard Mr. Simil Purohit, the learned counsel for the Defendant No.1. He submits that the Plaintiffs has filed the suit for specific performance of alleged contract recorded in the minutes of meeting dated 11/1/2002 and 6/2/2003. The Defendant No.1 has purchased the suit property from the Defendant Nos.2 to 4 by indenture of conveyance dated 29/9/2006. Referring to the averments in paragraphs 7, 9 and 11 of the

plaint, the learned counsel for the Defendants submits that the Plaintiffs was well aware of the said transaction and has admitted the Defendant No.1 as the owner of the suit property. He contends that the Plaintiffs has raised frivolous claims of charge over the suit property, perpetual lease, and agreement for sale etc. only on receipt of the notice of termination of tenancy. He has urged that the suit for cancellation of sale deed and specific performance has been filed beyond the prescribed period of limitation and hence the plaint is liable to be rejected under Order VII Rule 11 (d) of the CPC. In support of his contention he has relied upon the decision of the Apex Court in ***Church of Christ Charitable Trust and Educational Charitable Society v/s. Ponniamman Educational Trust , (2012) 8 SCC 706,*** decision of this Court in ***P.R. Sukeshwala and Anr. vs. Dr. Devdatta V.S. Kerkar & Anr. AIR 1995 BOM 227*** and the decision of the Alahabad High Court in ***Umesh Chandra Saxena vs. Administrative General, U.P, Alahabad, AIR All 109.***

3. Mr. S.A. Bhawal, the learned counsel for the Plaintiffs submits that the letters dated 20/6/2000 and 26/2/2001 as well as minutes of meeting dated 11/1/2002, annexed to the plaint at Exhibits- B, B1 and C indicate that the Defendant Nos.2 to 4 as trustees of the Popatlal Vora Inheritance Trust had agreed to sell the suit flats and all the rights in the property to the Plaintiffs for a total price of Rs.1.82 crores. It is stated that despite the said agreement the Defendant Nos.2 to 4 executed an indenture

of conveyance dated 29/6/2006 and conveyed the suit building and the suit property in favour of the Defendant No.1. The learned counsel for the Plaintiffs contends that the suit is within the prescribed period of limitation and the notice of motion is liable to be rejected.

4. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

5. Before adverting to the facts of the case it would be advantageous to refer to the decision of the Apex Court in ***Church of Christ*** (supra)**,** wherein the Apex Court while considering the scope and ambit under Order VII Rule 11 of the CPC has held thus:-

> *" 10...where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the time allowed by the Court, insufficiently stamped and not rectified within the time fixed by the Court, barred by any law, failed to enclose the required copies and the Plaintiffs fail to comply with the provisions of Rule 9, the Court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order VII Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial.*
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> *11. ....It is clear that in order to consider Order 7 Rule 11, the Court has to look into the averments in the plaint and the same can be exercised by the trial Court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other*

> *words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in Raptakos Brett & Co. Ltd. vs. Ganesh Property and Mayar (H.K.) Ltd. and Others vs. Owners & Parties, Vessel M.V. Fortune Express and Others. "*

6. In ***Madanuri Sri Rama Chandra Murthy v/s. Syed Jalal, (2017) 13 SCC 174,*** the Apex Court has reiterated these principles and has further observed thus :-

> *" 7. ...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 of 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. "*

7. It is thus well settled that Order VII Rule 11 of the CPC confers powers on the Court to reject the plaint, if any of the predicates of clauses (a) to (d) of Rule 11 are satisfied. This power can be exercised even before filing of the written statement, the object is to nix frivolous litigation, which suffers from vices of institutional defect, at the very threshold. While exercising power under Order VII Rule 11 of the CPC the Court has to consider only the averments in the plaint and cannot go into the disputed questions of fact or the pleas raised in the written statement.

8. In the instant case, the averments in the plaint indicate that vide Agreement dated 23/10/1952, the Plaintiffs, then Burmah Shell Oil Storage and Distribution Company had given construction loan of Rs.45,000/- to the Defendant Nos.2 to 4, the then owners of the plot no.32, Khar West, Mumbai. Vide Indenture dated 03/02/1953, the owners of the said plot granted lease in favour of the Plaintiffs in respect of the ten flats on the first and second floor of the building known as Vora building, constructed on the plot No.32. The lease agreement was renewed from time to time till the year 1969. The Plaintiffs continued to be in possession of the ten flats even after the expiry of the lease agreement dated 26/9/1969. Subsequently, the Plaintiffs surrendered two flats in favour of Defendant Nos.2 to 4.

9. The Plaintiffs claim that by letter dated 20/6/2000 the Trust gave a proposal for purchase of the Vora building. By letter dated 26/02/2001 the Defendant Nos.2 to 4 expressed willingness to sell the entire property to the Plaintiffs at a fair market consideration. Accordingly, a meeting was held and it was agreed that the ten flats and all the rights in the property would be sold to the Plaintiffs for a total consideration of Rs.1.82 crores, which was to be paid at the time of execution and registration of the sale deed. The terms and conditions of the agreement are recorded in the minutes of meeting dated 11/1/2002 and 6/2/2003.

10. The grievance of the Plaintiffs is that despite the said

agreement, the Defendant Nos.2 to 4 executed a sale deed dated 29/9/2006 and thereby conveyed the said building alongwith all the rights in the said plot No.32 in favour of the Defendant No.1. The Plaintiffs claim that the Defendant No.1 vide its letter dated 12/12/2001 submitted a proposal to the Plaintiffs for redevelopment of the suit building. It is averred that the Defendant No.1 had agreed to provide to the Plaintiffs 80% of the carpet area of the 8 flats on ownership basis, without any charges. The Defendant No.1 also agreed to provide additional 20% of the usable area in the form of flower bed and dry area.

11. The Plaintiffs claim that by letter dated 30/09/2008 they informed the Defendant No.1 that the Defendant Nos.2 to 4 had sold the said residential flats without giving the Plaintiffs an opportunity to exercise their preferential right to purchase the said property and that the sale deed executed in favour of the Defendant No.1 is null and void. The Plaintiffs claim that they are ready and willing to purchase the building and the plot of land at the sale price agreed in the contract dated 11/01/2002. The Plaintiffs claim that the Defendants are under an obligation to perform their part of contract. The Plaintiffs further claim that in the alternative they are ready to accept the alternative accommodation offered by the Defendant No.1 under letter dated 12/12/2007. Based on the aforesaid pleadings the Plaintiffs have filed a suit for the following reliefs:-

"(a) That pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to declare that the suit filed by the Plaintiffs is barred by law of limitation a nd liable to be dismissed under Order VII Rule 11 of the Code of Civil Procedure.

(b) Such further and other reliefs as the nature and circumstances of the case may required."

12. It is to be noted that the suit for specific performance of a contract has to be filed within three years from the date fixed for the performance, or, if no such date is fixed when the Plaintiffs has noticed that the performance is refused. In the instant case, the Plaintiffs have sought specific performance of a contract recorded in minutes of meeting dated 11/1/2002 and 6/2/2003. The terms of the agreement as recorded in the minutes of meeting dated 11/1/2002 read thus:-

(1) Voras shall sell and BPCL shall purchase all the 10 flats and all the rights in the property such as constructing additional floors, in case the FSI for the property increases or by purchasing TDR using terrace for any purpose on exclusive basis etc. at a total price of Rs.1.82 crores (Rupees One crore and eighty two lakhs only)
(2) BPCL shall also bear the Registration/Stamp Duty charges for the said purchase in addition to purchase price.
(3) Full payment of the price will be made upon the Execution and Registration of sale deed in a form drafted by BPCL.
(4) Aforesaid purchase is subject to :
    a) Clear title being made by Voras to the satisfaction of the BPCL.
    b) Approval of BPCL Management for the aforesaid proposal.
(5) Voras will arrange for all statutory clearances /permissions such as under Income Tax Act and BPCL will co-operate in the same.

(6) Voras will co-operate with BPCL in removing unauthorised extension to the shops and in proper maintenance of the building after aforesaid sale deed is completed.

(7) Voras have also offered to sell the entire property i.e. including the shops on 'as is where is' basis if consideration amount is increased to Rs.1.95 crores.

(8) As per item (1) or (7) above, BPCL can thus exercise the choice of either purchasing the entire property minus the shops at Rs.1.82 crores of the total property including the shops at Rs.1.95 crores. Stamp duty & Registration would be borne by BPCL additionally in both the cases."

13. The terms as recorded in minutes of meeting dated 6/2/2003 read thus:-

“ (1) Voras shall sell and BPCL shall purchase all the 10 flats and all the 13 shops and all the rights in the property such as constructing additional floors, in case the FSI for the property increases or by purchasing TDR, using terrace for any purpose on exclusive basis etc. at a total price of Rs.1.95 crores (Rupees One Crore and ninety five lakhs only)

(2) BPCL shall also bear the Registration /Stamp Duty charges for the said purchase, in addition to purchase price.

(3) Presently, a 10 feet wide access road from the 4th Khar road is partly encroached. The Sellers have undertaken to make a clear passage available to BPCL either from this passage or from one of the shops(either shop No.1 or 4). This may take sometime and the Seller needs to remain as Owners for taking any legal action. Accordingly, Rs.25 lacs out of Rs.1.95 crores mentioned in para (1) above would be withheld by BPCL and Sale deed may be made for remaining property for Rs.1.70 crores. Once the clear access road from 4th Khar road or from one of the shops is made available, same would be sold to BPCL against Rs.25 lacs.

(4) Full payment of the price will be made upon the Execution and Registration of sale deed in a form drafted by BPCL.

(5) Aforesaid purchase is subject to :

a) Clear title being made by Voras to the satisfaction of the BPCL.

b) Approval of BPCL Management for the aforesaid proposal.

(6) Seller will arrange for all statutory clearances/permissions such as under Income Tax Act and BPCL will co-operate in the same.
(7) The Sellers would also be liable to capital gains etc. arising from this transaction.
(8) Seller may initiate process of evicting some of the remaining tenants and also unauthorised encroachment/extensions. BPCL may continue with such case after purchasing as new "owners".
(9) The above offer from the Seller is valid for four months from today. ”

14. It is not in dispute that despite the said agreement, as recorded in the minutes of meeting dated 11/1/2002 and 6/2/2003, the Defendant Nos.2 to 4 had sold the building as well as the suit property to the Defendant No.1 vide indenture of conveyance dated 29/9/2006. The averments in paragraph 7 of the plaint clearly indicate that the Defendant No.1 vide letter dated 12/12/2006 had submitted a proposal to the Plaintiffs to develop the building in plot No.32. The averments in paragraph 9 of the plaint also reveal that by notice dated 28/08/2008 the Defendant No.1 had terminated the monthly tenancy in respect of the subject flats and called upon the Plaintiffs to vacate and hand over peaceful possession of the said flats. The Plaintiffs have averred that vide reply dated 30/09/2008 they had brought to the notice of the Defendant No.1 that the Defendant Nos.2 to 4 had sold the suit flats to the Defendant No.1 vide deed of sale dated 29/09/2006 ignoring their preferential right to purchase the said property. Hence, the sale deed executed in favour of the Defendant No.1 is null and void. The said reply, which is produced at Exhibit-G also makes a reference to the

proposal of the Defendant No.1 vide its letter dated 12/12/2007 to redevelop the building on terms and conditions mentioned in the letter. The Plaintiffs had stated that the said proposal was under active consideration.

15. The averments in paragraph 11 of the plaint vis-à-vis letter dated 28/11/2008 indicate that the Defendant No.1 had denied that the Plaintiffs had first right to purchase the property as per the loan agreement dated 23/10/1952. The Defendant No.1 denied that the sale deed executed in its favour is null and void. The Defendant No.1 has also informed the plaintiff that the offer made vide its letter dated 12/12/2007 was without prejudice to the rights and contentions of the parties and the same stood revoked/ withdrawn.

16. The averments in paragraph 12 to 16 of the plaint indicate that the Defendant No.1 had filed T.E. & R. Suit 119/173 of 2008 seeking eviction of the Plaintiffs from the suit premises. The said suit was contested by the Plaintiffs and was finally decreed in favour of Defendant No.1 by judgment and order dated 30/09/2010. The Plaintiffs challenged the said order in appeal No.229 of 2010, which was dismissed vide order dated 22/2/2012. The Revision Application filed against the said order has also been dismissed by giving time to the Plaintiffs to vacate the said eight flats.

17. The aforestated pleadings clearly indicate that the Plaintiffs had knowledge that by indenture of conveyance dated 29/09/2006 Defendant Nos.2 to 4 had sold the subject building and the property in favour of the Defendant No.1. The Plaintiffs accepted the Defendant No. 1 as the owner of the property and entered into correspondence with defendant no.1 to negotiate the proposal of redevelopment of the Suit property. The plea raised by the Plaintiffs that the said sale deed was executed without giving them an option of exercising their preferential right to purchase the building and the property and that the sale deed was null and void was also refuted by the Defendant no.1. The Defendant No. 1 had also informed the Plaintiffs that the proposal of redevelopment was withdrawn /revoked. The pleadings thus indicate that the Plaintiffs had knowledge of refusal of performance of contract as well as withdrawal of proposal of redevelopment as early as in the year 2008. Hence, the suit was required to be filed within a period of three years from the date of such knowledge. The suit filed in the year 2012 is ex facie barred by limitation.

18. In the result, the notice of motion is allowed. The plaint in Civil Suit No.1939 of 2012 is rejected under Order VII Rule 11 CPC.

(SMT. ANUJA PRABHUDESSAI, J.)