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

INTERIM APPLICATION NO. 1580 OF 2021
IN
COMMERCIAL SUIT NO. 1369 OF 2019

Mahendra K Patel & Anr ...Applicants

In the matter between

Crystal Buildwell Pvt Ltd ...Plaintiff

Versus

Jasodaben Kantibhai Patel & Ors ...Defendants

Mr Sanjay Jain, *with Viraj Jadhav, i/b Kevin Pereira, for the Plaintiff.*

Mr Mayur Khandeparkar, *with Viloma Shah, & Dhiren Durante, i/b Lexicon Law Partners, for the Applicants/Defendants Nos. 2 and 3.*

Mr Sushil Mishra, *i/b Deval Patel Associates, for Defendants Nos. 6 and 7.*

CORAM: G.S. PATEL, J
(Through Video Conferencing)
DATED: 9th August 2021

PC:-

1. Although the matter is listed for settlement, parties agree that the Defendant's Interim Application may be taken up for final hearing since no settlement is possible.

2. This is an application by original Defendants Nos. 2 and 3 under Order VII Rule 11(d) of the Code of Civil Procedure 1908 for rejection of the plaint in a suit in the commercial division for specific performance of an agreement for sale of immovable property.

3. I have heard Mr Khandeparkar for the Applicants and Mr Jain for the Plaintiffs.

4. Only a few dates are necessary. The agreement in question is of 19th October 2012. The vendors were Defendants Nos. 1 to 5. The Plaintiff was the purchaser. The property is described in paragraph 2 of the plaint and in Exhibit 'A' at page 43. This is non-agricultural land with a ground plus two floor structure. The structure is about 10,000 sq ft. The plot is about 921.75 sq mts, at at Manchubhai Road, Malad (East), Mumbai 400 097.

5. On 15th July 2016, Defendants Nos. 1 to 4 through their Advocates issued a notice to the Plaintiff. A copy is at page 148 of the plaint, Exhibit 'K'. Paragraph 10 of this notice at page 153 is important. This is how it reads:

> "10. Out clients repeat and reiterate that they were and are ready and willing to complete the transaction for sale and transfer of the said Property. We under the instructions of our clients, hereby finally call upon you to make the

> payment of the Balance Consideration along with interest at the rate of 18% p.a. calculated on Rs. 1,00,00,000/- (Rupees One Crore only) for the period commencing from 11 March 2014 to 31 May 2014 and thereafter on the entire Balance Consideration for the period commencing from 1st June 2014 till the date of payment thereof, within fourteen (14) days from the date of this notice, time for payment being of the essence, **failing which the said Agreement and the said Addendum shall be deemed to be terminated with immediate effect and our clients shall take such other steps / measures / remedies solely at your risks as to costs and consequences thereof.**"

(*Emphasis added*)

6. On any reasonable reading of this, what Defendants Nos. 1 to 4 said was that they were willing to perform their obligation if the Plaintiffs performed its reciprocal obligations within 14 days of the date of the notice, i.e. by about 29th July 2016. In the plaint the reference to this notice is in paragraph 17:

> "17. In or about July, 2016, the Defendant Nos. 1 to 4 and the IMALA MALIK vide their Advocate's letter dated 15th July, 2016 levelled baseless and false allegations against the Plaintiff and threatened the Plaintiff that **they would terminate the said Agreement and the said Addendum, if the Plaintiff fail to pay the balance consideration along with interest at the rate of 18% p.a. on a sum of Rs. 1,00,00,000/- (Rupees One Crore Only) within 14 days from the date of the said notice.** Hereto annexed and marked as **Exhibit K** is the copy of the Defendant Nos. 1 to 4 and IMALA MALIKs' Advocate's letter dated 15th July 2016 address to the Plaintiff."

(*Emphasis added*)

7. This is a misreading of the 15th July 2016 notice if it is supposed to mean that a future termination notice was in contemplation. As we shall presently see, in correspondence before the suit, that was not even the Plaintiff's own understanding or reading of the 15th July 2016 notice.

8. The Plaintiff replied to the 15th July 2016 notice by its Advocate's letter dated 6th August 2016, a copy of which is at page 154, Exhibit 'L'. The only response is in paragraph 17 where the Plaintiffs said that it was always ready and willing to complete the transaction but only upon Defendants Nos. 1 to 4 fulfilling their obligations. This does not take the matter further, because by this time, Defendants Nos. 1 to 4 had fixed a time for performance and made time of the essence.

9. There then followed a response from the Advocates for Defendants Nos. 1 to 4. This is of 21st September 2016. A copy is at Exhibit 'M' at page 169. The reference in this letter is to the 15th July 2016 notice by the Advocates for Defendants Nos. 1 to 4. This is referenced by outward number and is called for the purposes of 21st September 2016 letter 'the said notice'. Paragraphs 11, 21 and 23 of this 21st September 2016 letter (pages 174 to 177 of the plaint) say:

> "11. With reference to paragraph 10, our clients state that **on account of your clients failure to make payment of the outstanding sums within the stipulated period as stated in the said Notice, the said Agreements <u>have already stood terminated and cancelled</u>** and in view thereof the question of your clients being ready and willing

to complete the transaction does not arise let alone being subject to the purported terms, conditions and covenants to be complied with, observed and performed by our clients as alleged or at all. Our clients repeat and reiterate that your clients were liable to pay all the amounts as recorded under paragraph 10 of our Notice. Our clients deny that your clients have not committed breaches of the terms, conditions, covenants of the said Agreement as alleged or at all. Our clients deny that your clients have suffered any loss or trauma as alleged or for the reasons alleged or otherwise. Our clients deny that there was any failure on their part due to which the transaction could not be completed and put your clients to strict proof thereof.

21. With reference to paragraph 15 to 17 our clients state that the said Property was carved out of the 29 Gunthas i.e. 3943 sq. yds. However pursuant to a family partition effected on 22 September 1958, the said Property bearing CTS Nos. 188, 188/1 to 188/4 went to the share of late Manibhai Patel who in turn bequeathed the same to his three sons Kantilal, Jayantilal and Ramesh being the predecessors in title of the Vendors. Our clients state that therefore although the said Property was carved out of the aforesaid 29 Gunthas, the same in no way forms part of the parcel of land owned by the said Hareshchandra. Our clients state that your clients' contention that they were always ready and willing to complete the transaction by making balance payment to our clients is completely belied by their failure to deposit the post-dated cheques for the sum of Rs. 6,00,00,000/- (Rupees Six Crore Only) with Eastley Lam & Co. in accordance with the terms of the said Agreement and also to make payment of a further sum of Rs. 1,00,00,000/- (Rupees One Crore Only) on or before 10 March 2014 in accordance with the terms of the said Addendum. Our clients state that your clients inability to completely the transaction is borne out of the aforesaid

> repeated failures on their part to honour their contractual obligations. **Our clients state that in view of the said Agreements <u>having stood terminated</u> the question of your clients being ready and willing to complete the transaction does not arise**.
>
> **23. The said Agreements <u>have stood terminated</u> and therefore the question of your clients being ready and willing to perform the same is of no consequence.** Furthermore it is absurd that your clients' willingness to perform is not of the said Agreements executed between the parties but of some new conditions which, on the face of it proves that the said Reply is merely an attempt to dispute the termination of the said Agreements and our clients' claims and no more and that your clients had / have no intention whatsoever to complete the transaction."

(*Emphasis added*)

10. These assertions make it clear that the 21st September 2016 letter was emphatically not the termination notice. More than once, the letter says that the agreement 'stood terminated'. In paragraph 11 the reference is to 'the said notice'. As we have seen, this is a reference to the 15th July 2016 notice.

11. Mr Jain's reliance on paragraph 21 to suggest that Defendants Nos. 1 to 4 are still willing to perform is facially incorrect.

12. This Suit itself was lodged on 16th August 2019.

13. In my view, the Suit is completely out of time for all purposes. The averment in paragraph 43 of the plaint is that the termination is of September 2016. That is incorrect on any reading of the correspondence.

14. If there was any doubt about this, it is put to rest by the Plaintiffs own letter of 11th August 2018. A copy is at Exhibit 'S' at pages 207. In paragraph 15 at page 213 the Plaintiffs say this:

> "15. It is material to note that inspite of paying Rs. 3,00,00,000/- as mentioned in the agreement, in spite of assessment bill being paid and inspite of security guards been appointed by our client in order to protect the property, **<u>you no. 1, 2, 3, 4 and the said deceased by letter dated 15th July 2016 for the best known reasons terminated the agreement dated 19th October 2012</u>**. Simultaneously you No. 1, 2, 3, 4 and the said Deceased further mentioned that they were ready and willing to continue the transaction on payment of Rs. 1,00,00,000/- as mentioned therein."

(*Emphasis added*)

15. This is the clearest possible admission that even on the Plaintiff's understanding, Defendants Nos. 1 to 4 terminated the agreement by the letter of 15th July 2016. Thus, there can be no dispute that the termination is by the notice dated 15th July 2016 and is not of September 2016. Mr Jain's submission that the first time that the Plaintiff had 'notice of termination' was by the applicants' advocates' letter of 21st September 2016 is patently incorrect. The Plaintiff's own letter of 11th August 2018 makes it clear beyond all doubt that even the Plaintiff took the notice of 15th July 2016 as the notice of termination.

16. If it is argued that the notice extended time for performance, then that is partly correct. It was. But only by 14 days until about 29th July 2016 and no further.

17. Article 54 of the Limitation Act reads thus:

	Description of suit	Period of limitation	Time from which period begins to run
54.	For specific performance of a contract.	Three years.	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

18. From this it is clear that performance was refused on 15th July 2016, or, at the latest by 29th July 2016 and no later. That is even as the Plaintiff itself understood it.

19. Mr Jain argues that the first time the Plaintiff had 'notice of refusal of performance' was by the Applicants' notice of 21st September 2016, Exhibit 'M' at page 169. On the face of it, this is incorrect. As I have noted, paragraphs 11 and 23 of the 21st September 2016 letter both clearly say that the agreement 'stood terminated', i.e., that the termination was earlier — meaning that the Applicants were no longer required to perform their obligations under the Agreement. Further, if the Applicants extended time for performance, it was only until about 29th July 2016. Last, the Plaintiff itself understood that the 15th July 2016 notice was one of termination, i.e., a refusal by the Applicants to perform beyond the slightly extended period of 14 days. Once the Plaintiff itself acknowledges that the agreement stood terminated on 15th July 2016, I do not see how it can argue that the Applicants had —

despite that termination — still held out that they would perform their obligations even after the termination. The termination by the Applicants ended any commitment to perform. A termination and a promise to perform cannot coexist. They are mutually exclusive. If an agreement is terminated, there is no question of the terminating party assuring performance. A termination is nothing but a party asserting that it is no longer required to perform. That happened by the notice of 15th July 2016, and time for performance ended 14 days thereafter. This is not just the Applicants' understanding, and mine. It is also the Plaintiff's.

20. Mr Jain submits that the Plaintiffs will lead evidence to show that time was extended. That is not possible because there is no underlying pleading to that effect at all. There is, therefore, no possibility of the Plaintiff leading evidence in support of a case not pleaded.

21. Then Mr Jain argues that prayer clause (c) is for 'a refund'. That is incorrect. This is a prayer for damages of over Rs. 8.69 crores in lieu of specific performance. The particulars of claim at Exhibit 'X' at page 232 include the initial amount paid by the Plaintiffs, Rs. 3 crores. But this does not make it a claim for refund. The claim is one and indivisible. The claim for damages includes interest on the amount paid and other claims as well. There is no separate prayer for a refund.

22. Lastly, Mr Jain argues that once the Defendants have admitted the juridical relationship in the contract, time must be deemed to have been extended. He submits that by their letter of 29th August 2018 (Exhibit 'T' at pages 216), in the second unnumbered paragraph at page 219, Defendants Nos. 1 to 4 have admitted that there was a contractual relationship. According to him, this constitutes an acknowledgment of liability to refund the amount paid by the Plaintiffs. Nothing could be more inaccurate. The submission is only to be stated to be rejected. The paragraph in question at pages 219 to 220 reads thus:

> "With reference to paragraph 17 of your notice, our clients deny that our clients have dispossessed your client, as alleged. Our clients further state that the question of your client being entitled to possession of the said Property does not arise as the said Agreement stands terminated. Our clients deny that there has been any collusion or connivance between our clients or that your client has been dispossessed. Our clients state that in 2016 your client was called upon to complete the said Agreement by paying the balance amount to our clients. However, your client chose not to make payments to our clients and raised frivolous grounds as an afterthought. In view of our clients having terminated the said Agreement, the question of election does not arise. Further it is pertinent to note that the amount of Rs. 3,00,00,000/- (Rupees Three Crores Only) paid by your client was towards part payment of the said Agreement which agreement was subsequently terminated by our clients on account of the default on the part of your client. Consequently, the question of our clients being liable to pay your client any interest does not arise. Per contra, on account of the delay on the part of your client in making payment of the balance consideration of Rs. 6,00,00,000/- (Rupees Six Crores Only), our clients are entitled to interest @18% on the sum of Rs. 6,00,00,000/- (Rupees Six Crores Only) from the date the aforesaid sum was due and payable

> i.e. 31 July 2013 till payment thereof. It was all along the obligation of your client to safeguard the said Property and hand over the possession back to our clients. However, it appears that your client has failed to safeguard the said Property and consequently our clients are also entitled to damages from your client on account of the failure on the part of your client to preserve the said Property."

23. It contains no acknowledgement of liability of any kind whatsoever.

24. Lest it be argued that in an Order VII Rule 11(d) application, one cannot look at the annexures to the plaint, this has been now settled by the decision of the Supreme Court in *Dahiben v Arvindbhai & Ors.*[1] Paragraphs 23.6 and 23.11 of the decision read:

> "23.6 Under Order VII Rule 11, a duty is cast on the court to determine whether the plaint discloses a cause of action by scrutinizing the averments in the plaint (*Liverpool & London S.P. & Assn. Ltd v M.V. Sea Sources I, (2004) 9 SCC 512.)*, read in conjunction with the documents relied upon, or whether the suit is barred by any law.
>
> 23.11 The test for exercising the power under Order VII Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed. This test was laid down in *Liverpool & London S.P. & I Assn. Ltd. V M.V. Sea Success I (SCC p. 562, para 139)*, which reads as :
>
>> "139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found

1 2020 (7) Supreme Court Cases 366.

> out from reading the plaint itself. For the said purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed."

25. Lastly, this is not a case where there are successive causes of action. Even on that, paragraph 27 of *Dahiben* says:

> "27. In *Khatri Hotels (P) Ltd v Union of India (2011) 9 SCC 136 : (2011) 1 SCC (Civ) 181* this Court held that the use of the word 'first' between the words 'sue' and 'accrued', would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. That is, if there are successive violations of the right, it would not give rise to a fresh cause of action, and the suit will be liable to be dismissed, if it is beyond the period of limitation counted from the date when the right to sue first accrued."

26. Finally, I do not think it is possible for the Plaintiffs to argue that the claim for damages is independent of the claim for specific performance. Recently, I had occasion to consider this aspect of the law in *BCCI v Deccan Chro*nicle Holdings Ltd.[2]

27. The suit is, for these reasons, ex facie beyond limitation. Accordingly, the Interim Application is made absolute in terms of prayer clause (a). The plaint is rejected as being completely time-barred.

2Commercial Arbitration Petition (L) No. 4466 of 2020, decided on 16th June 2021; paras 241–243.

28. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production of an ordinary copy of this order.

(G. S. PATEL, J)