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# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
## CIVIL APPELLATE JURISDICTION
## FIRST APPEAL NO. 1394 OF 2015

Jugraj Himmatlal Palresha …Appellant
*Versus*
Sheetal Tejwani …Respondent

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**Mr Abhishek Pungaliya**, *for the Appellant.*
**Mr Srinivas Bobde**, *with Deepali Kedar & Sagar Kursija for the Respondent.*

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**CORAM G.S. Patel &**
**Gauri Godse, JJ.**
**DATED: 28th July 2022**

**PC:-**

**1.** Admit. We take up the appeal for final disposal immediately since the plaint was rejected on a threshold objection taken under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 ("**CPC**"). There was no evidence that needs to be re-appreciated.

**2.** The extraordinary submission by the Appellant before us challenging an order made under Order VII Rule 11(d) of the CPC. on the question of limitation is that pleadings in the Plaint are immaterial. This submission needs only to be stated to be rejected.

**3.** The Plaintiff sued for a refund of Rs.6,22,50,000/- and interest. The Plaintiff and the Defendant are both builders and developers. The Plaintiff says that in June 2007, the Defendant offered to sell him a large property at Mundhwa, Pune. The parties met and then arrived at a Memorandum of Understanding ("**MOU**") dated 8th June 2007. The Plaintiff says that the Defendants agreed to transfer her rights in this Mundhwa property for a total consideration of Rs.45 crores. It is at this time that the Plaintiff paid an amount of Rs.3.75 crores as an advance of part consideration.

**4.** On 5th August 2008, the Defendant sent a legal notice to the Plaintiff alleging that the Plaintiff could not proceed with the transaction. The Plaintiff says this notice was incorrect and it was the Defendant who could not fulfil her obligation. In the notice Defendant offered the refund or repaid the amount of Rs.3.75 crores.

**5.** The Defendant says that there were several meetings. Other proposals were discussed. Parties met with their Advocates. However, nothing came of these meetings and discussions, and this is the assertion in paragraph 13 of the plaint. Up to paragraph 20, there is a narrative of many of these discussions and meetings but there is no averment anywhere that the Defendant at any time after 2008 acknowledged her liability to the Plaintiff and coupled this with a promise to pay. There is no averment that there was any saving of bar of limitation.

**6.** In paragraph 6 of the Plaint, the Plaintiff says that although five years elapsed from the date of execution of the MOU, the Defendant did not perform her obligations under it.

**7.** Paragraph 22 again refers to the Defendant's notice of 5th August 2008. It is at page 28 of the Appeal Paper Book and it reads thus:

> "22. The Plaintiff states that it is pertinent to note that defendant admitted her liability to repay the amount of Rs. 3,75,00,000/-, in the notice dt.05.08.2008, the defendant has failed and/or neglected to refund the said amount and thus, the defendant has liable to pay interest @ 18% p.a. from the date of notice i.e. 05.08.2008, till today upon the amount of Rs.3,75,00,000/-, the interest component comes to Rs.2,47,50,000/- (Rupees Two crores forty seven lakhs fifty thousand only), the Plaintiff is making the suit claim accordingly."

**8.** The averment thus is only based on the notice of 5th August 2008 and nothing else.

**9.** Paragraph 24 sets out the cause of action. Obviously, the relevant date is 5th August 2008. The subsequent events cannot possibly extend time for a liability claimed as of 5th August 2008. Paragraph 24 reads:

> "24. Cause of action for filing this suit, first arose on the date of the notice of Adv. Rajashree Inamdar on 5/8/2008 when the defendant stated that she is refunding the amount of Rs.3,75,00,000/-. Since no time frame is mentioned by the defendant to refund the amount in the notice dated 5/8/2008 the cause of action is a continuous one. The

cause of action further arose when the defendant proposed to transfer residential units at Talegaon Dabhade, the cause of action further arose when this idea of allotment of the units in favour of the Plaintiff was finally dropped due to various reasons in the month of March 2011. The cause of action further arose on the date of notice of Adv. Shri. Prashant Patil on 10/4/2012 when the Plaintiff demanded the amount with interest, the cause of action further arose when the defendant failed to comply with the said notice. Thus the cause of action is a continuous one, and therefore the suit filed is well within limitation."

**10.** We now turn to prayers in paragraph 27 which reads thus:

(A) The suit may kindly be decreed.

(B) The defendant be directed to pay an amount of Rs.6,22,50,000/-(Rupees Six crores twenty two lakhs fifty thousand only) with interest thereon at the rate of 18% p.a., from the date of filing of suit till full final realization thereof.

(C) Full costs of this suit be awarded to this Plaintiff from the defendant.

**11.** The Suit itself was filed only on 21st or 22nd August 2012. In the impugned order, the Defendant filed an Application Exhibit 12 under Order VII Rules 11(a) and (d) of CPC. The ground under sub-clause (d) was that the suit was obviously time-barred. It ought to have been brought within three years of the commencement of the cause of action and this would be governed, according to the Defendant, by Article 54 of the Limitation Act or at any rate by the residuary Article 113 and could not be more than three years from 5th August 2008. The Suit would have had to be filed by 4th August

2011. The trial court held in favour of the Defendant, and said that the accrual of the cause of action would not be 5th August 2008 but the date on which Plaintiff received the notice i.e. 12th August 2008, which is also plausible. That would not really assist the Plaintiff.

**12.** From the impugned order, it does not seem to have been argued at any point before the Trial Court that this Suit was covered by Article 62 of the Schedule to the Limitation Act. The impugned order reflects no such argument. Yet it is precisely this that is now urged before us.

**13.** Article 62 of the Limitation Act Reads thus:

| Article | Description of suit | Period of limitation | Time from which period begins to run |
|---|---|---|---|
| 62 | To enforce payment of money secured by a mortgage or otherwise charged upon immovable property. | Twelve years | When the money sued for becomes due. |

**14.** Mr Pungaliya, learned counsel for the Appellant draws our attention to paragraph 14 of the Supreme Court's decision in *Videocon Properties Ltd v Dr Bhalchandra Laboratories & Ors.*[1] to suggest that no pleading was necessary if the claim was for refund of an amount paid under an agreement of sale of land because under Section 55 of the Transfer of Property Act that advance or part consideration would automatically become a charge on the property without the Plaintiff being required to do or say anything further. It

**1** (2004) 3 SCC 711 : AIR 2004 SC 1787.

is his specific submission that no pleading was required that the property was charged with repayment. It is also his submission that the prayer need not have been for enforcement of a charge. A simple claim for refund would suffice.

**15.** The first problem with this formulation is that the prayer in the suit is for a simple money decree, not a refund. The amount sought to be recovered is not only the advance paid, but a higher amount. If this includes interest, then it would have to be shown that the MoU allowed for it, or that there was a notice under the Interest Act (or that the Defendant later agreed to pay interest).

**16.** Paragraph 14 of the SCC report in *Videocon Properties Ltd* (paragraph 13 of the AIR report) does not say what Mr Pungaliya thinks it says. It recognises the statutory charge but it does not deal with the question of a lack of a necessary averment in the plaint, something essential for an Order VII Rule 11(d) application.

**17.** We are then invited to consider an unreported decision of learned Single Judge of the Madras High Court in *J Michael Visuvasa Raj v S Pasupathi*.[2] Paragraph 3 is cited before us, but again wrongly, because Article 62 of the Limitation Act was correctly interpreted by the learned Single Judge to mean a limitation period of 12 years granted for enforcing payment of money *secured by a mortgage or otherwise charged upon immovable property*. There is no finding that a Plaint may proceed without necessary averments.

**2** C.R.P (NPD)(MD)No.787 of 2019.

**18.** The decision of the learned Single Judge of the Rajasthan High Court in *Mst Anchi & Ors v Maida Ram*[3] is also unhelpful because that dealt with suit for specific performance and a cancellation of Gift Deed in that context.

**19.** We have examined the Plaint closely. There is no assertion that the property in question at Mundhwa was charged with the repayment to the Plaintiff of the amount claimed. There is no averment that the MoU provided for interest as claimed. The prayer in the Suit is not for enforcement of a charge at all but is a simple money claim for return of the advance. It is not even worded as a prayer for a refund. Article 62 applies where a Suit is filed "*to enforce payment of money secured by a mortgage or otherwise charged upon immovable property*." This means that it must be pleaded that the property is charged with this repayment. Article 62 was never argued or urged before the trial court. There is no pleading of the bar of limitation being saved.

**20.** In fact, the suit is not based on any so-called charge at all. That is emphatically not the cause of action in the plaint. The suit is brought on, and only on, the Defendant's letter of 5th August 2008 when the Defendant indicated her willingness to return the Plaintiff's advance. The Defendant's letter was irrelevant to a suit brought to enforce a charge on the property.

**21.** A question of limitation is a mixed question of facts and law. In this case, there were no additional facts sought to be brought on

**3** 1985 SCC OnLine Raj 27 : AIR 1987 Raj 11.

record by either side. The Defendant proceeded on the basis of the averments in the plaint. The Plaintiff did not seek to establish that there was factual material that would go to show that the suit was within time. The Defendant thus proceeded on the basis that even accepting the assertions in the plaint as correct, the suit was beyond limitation. Order VII Rule 11 reads:

> **Rule 11. Rejection of plaint.**
>
> The plaint shall be rejected in the following cases:
>
> (a) where it does not disclose a cause of action;
>
> (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
>
> (c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
>
> **(d) where the suit appears <u>from the statement in the plaint</u> to be barred by any law**;
>
> (*Emphasis added*)

**22.** This is not a case of the bar of limitation being invoked as a jurisdictional issue. It is simply a case where the Defendant said in its application that the statements in the plaint showed that the suit was barred by the Limitation Act. This is what the trial court held.

**23.** It is impossible to accept the submission that in an application under Order VII Rule 11(d) of the CPC, a Court need not trouble itself to look at the averments in the Plaint. Indeed that is the only thing that a Court hearing an Order VII Rule 11 application is to do. Almost every submission before us is on the basis of something not to be found in the plaint. Indeed, all the submissions before us are not on a reading of the plaint but, instead, of an imagination of what the plaint probably intended to, or should have, said or possibly meant. That is entirely outside the frame of Order VII Rule 11(d).

**24.** We find no infirmity in the impugned order.

**25.** The First Appeal is without merit. It is dismissed. No costs.

**(Gauri Godse, J)** **(G. S. Patel, J)**