* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment Reserved on : 07th March, 2022**
Judgment Delivered on : 16th March, 2022

\+ CS(COMM) 62/2021, I.A. 1735/2021 (O-XXXVIII R-5 of the CPC) & I.A. 1736/2021 (O-XXXIX R-1 & 2 of the CPC)

AB TOWERS PRIVATE LIMITED ..... Plaintiff
Through: Mr. Ankur Kashyap with Mr. Rohit Rajershi, Mr. Aman Bajaj & Mr. Abhay Singh, Advocates.

versus

DELHI APARTMENTS PVT. LTD. & ORS. ..... Defendants
Through: Mr. Sanjeev Sindhwani, Senior Advocate with Mr. Kunal Mittal and Mr. V.P. Rana, Advocates for defendants No.1 and 3.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J.

I.A. 5248/2021 (of the defendant no.3 u/O-VII R-11 of the CPC)

1. By this order, I shall decide the application filed on behalf of the defendant No.3 under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) seeking dismissal of the present suit. The main ground taken in the present application is that the suit is barred by limitation.

2. Notice was issued in this application on 12th April, 2021.

3. Pursuant thereto, a reply has been filed on behalf of the plaintiff and rejoinder thereto has been filed on behalf of the defendant No.3.

4. The suit was filed in December, 2020 by the plaintiff seeking, *inter alia*, recovery of purchase consideration to the tune of Rs.19,06,38,188/-, from the defendants on account of the defendant No.1 transferring 12 Bighas 1 Biswa of land to the plaintiff vide registered Sale Deed dated 4th September, 2006, out of which land, 5 Bigha 6 Biswas was with defective title.

5. The facts as pleaded in the plaint are reproduced as follows:

(i) The defendant No.1 is a Company, of which the defendant No.3 is a director. The defendant No.2 ceased to be a director of the defendant No.1 w.e.f. 28th January, 2020 and Mrs. Ramesh Kumari Bhardwaj, the mother of the defendants No.2 and 3, ceased to be a director of the defendant No.1 on account of her death w.e.f. 8th March, 2020.

(ii) Mrs. Ramesh Kumari Bhardwaj conspired to exchange agricultural land measuring 5 Bigha 6 Biswa of high value Deputy Commissioner (DC) land bearing Khasra No. 30/19/2 (1-5) and 20 (4-01) of village Kapashera (hereinafter referred to as the 'DC Land') with her other low value land.

(iii) The Consolidation Officer initially allowed the illegal exchange of the DC Land with the low value land of Mrs. Ramesh Kumari Bhardwaj on 1st December, 1995.

(iv) On the basis of material facts and irregularities pertaining to the low value land of Mrs. Ramesh Kumari Bhardwaj, the exchange dated 1st December, 1995 was cancelled on 11th January, 1996 [18th July, 1996 as noted by this Court in its judgment dated 5th December, 2008 in

Writ Petition No. 7687/2004 titled ***Dy. Commissioner (South West) Kapashera Vs. Ramesh Kumari & Ors.***].

(v) This Court in its judgment in ***Dy. Commissioner (South West) Kapashera*** (supra) held that the order dated 1st December, 1995 of the CO, resulting in the exchange of the DC Land by Mrs. Ramesh Kumari Bhardwaj, was fraudulent, illegal and void *ab initio*.

(vi) The appeal preferred against the aforesaid decision was dismissed by the Division Bench of this Hon'ble Court vide the judgment dated 15th January, 2009 and the Special Leave Petition preferred thereagainst was dismissed on 24th September, 2009, making the cancellation of the illegal exchange final and binding.

(vii) Notwithstanding the aforesaid, the defendants produced a Sale Deed dated 25th August, 2005, executed by Mrs. Ramesh Kumari Bhardwaj in favour of the defendant No.1 and the Sanction Letter dated 11th August, 2006 issued by the Municipal Corporation of Delhi for construction of a motel on the land sold, to defraud the plaintiff into buying the land with defective title.

(viii) The defendant No.1 transferred 12 Bighas 1 Biswa of land to the plaintiff vide registered Sale Deed dated 4th September, 2006 for purchase consideration of Rs.18,00,00,000/-, out of which land, 5 Bighas 6 Biswas was with defective title.

(ix) On 7th September, 2006, when the plaintiff filed for mutation of the land, it was intimated to the plaintiff by the concerned authority that mutation of the said land could not be done in plaintiff's name due to pendency of ***Dy. Commissioner (South West) Kapashera*** (supra).

(x) The plaintiff made repeated requests to Mrs. Ramesh Kumari Bhardwaj and the defendants for refund of the purchase consideration, however, the defendants fraudulently and maliciously kept misrepresenting that they will refund the payment made by the plaintiff towards to portion of land, which was the subject matter of the illegal transfer.

(xi) After the passing of the judgment in ***Dy. Commissioner (South West) Kapashera*** (supra), the defendants informed the plaintiff that the defendants would sell the original land as exchanged by them (hereinafter referred to as the 'Original Land') and refund the purchase consideration.

(xii) Till date not a single penny has been refunded by the defendants to the plaintiff, hence, the present suit.

6. In support of the application filed under Order VII Rule 11 of the CPC, the senior counsel appearing on behalf of the defendant No.3 has submitted that:

(i) From a reading of the plaint itself it is evident that the suit is time barred.

(ii) The entire case of the plaintiff, as set out in the plaint, is based on a right of recovery in respect of the consideration paid by the plaintiff for 5 Bighas 6 Biswas of the DC Land. However, in the reply to the application under Order VII Rule 11 of the CPC, the plaintiff has sought to make a new case based on a statutory charge being created in respect of the Original Land in favour of the plaintiff.

(iii) While examining an application under Order VII Rule 11 of the CPC, the Court only to see the plaint as filed and not any other pleading.

The only substantive prayer made in the plaint is prayer g), which seeks decree of recovery of Rs.19,06,38,188/-, being the purchase consideration towards the sale of 5 Bighas 6 Biswas of DC Land and interest accrued thereon, and other amounts paid towards registration fee, stamp duty etc.

(iv) The present case would be governed by Article 47 of the Schedule to the Limitation Act, 1963, which prescribes a limitation period of three years from the date of failure of consideration, which would be 5th December, 2008, being the date when this Court in its judgment in ***Dy. Commissioner (South West) Kapashera*** (supra) held that the order dated 1st December, 1995 of the CO, resulting in the exchange of the DC Land by Mrs. Ramesh Kumari Bhardwaj, was fraudulent, illegal and void *ab initio*. The fact that the matter was carried up in appeal before the Division Bench of this Court and to the Supreme Court would not extend the period of limitation.

(v) The plaintiff cannot take benefit of Section 18 of the Limitation Act as for the benefit of fresh limitation to be available, the acknowledgement of liability has to be in writing and has to be given before expiry of the original limitation period, which is not the case in the present case.

(vi) Reliance is placed on the judgment of the Division Bench of this Court in ***Minu Chibber Vs. S.S. Chibber***, MANU/DE/2437/2014 (DB) [Special Leave Petition (Civil) No.2068/2015 preferred whereagainst was dismissed on 30th January, 2015], to contend that limitation is not always a mixed question of law and fact and if it is evident from statement in the plaint that the suit is time barred, the suit should be rejected under Order VII Rule 11 of the CPC.

7. The counsel appearing on behalf of the plaintiff submits that:

(i) The plaint is based on assurances given by the defendants that in the event that they do not succeed in the Writ Petition No. 7687/2004, they will get Original Land back, which was exchanged by the DC and they will repay the plaintiff by selling the same. In this regard, reliance is placed on paragraphs 4 xviii. and xx. of the plaint.

(ii) Thus, a charge was created in favour of the plaintiff in respect of the Original Land and, therefore, Article 62 of the Schedule to the Limitation Act would apply, which prescribes a limitation period of 12 years.

(iii) It has been noted in the judgment dated 5th December, 2008 in ***Dy. Commissioner (South West) Kapashera*** (supra) that the private respondent therein, Mrs. Ramesh Kumari Bhardwaj, acted in concert with the Consolidation Officer and substituted valuable DC Land with less valuable land. Even during the pendency of the Writ Petition No. 7687/2004, Mrs. Ramesh Kumari and her family members persisted with sale transactions. Based on the aforesaid observations, the Writ Petition No. 7687/2004 was allowed.

(iv) The aforesaid observations made by the Single Judge of this Court were upheld by the Division Bench of this Court in its judgment dated 15th January, 2009. It was noted therein that the entire transaction was done in a clandestine manner for unlawful gain. It was noted therein that Mrs. Ramesh Kumari Bhardwaj made fraudulent and illegal transactions in respect of the DC Land between 1st December, 1995 and 15th December, 2005.

(v) Reliance is placed on the judgment of the Supreme Court in ***Delhi Development Authority Vs. Skipper Construction Co. (P) Ltd. and Ors.***, (2000) 10 SCC 130, to contend that as per Section 55(6)(b) of the Transfer of Property Act, 1882, the plaintiff shall have a charge on the defendants' interest in the property, which is the subject matter of the sale agreement insofar as the purchase money and interest on such amount are concerned. Furthermore, since the 5 Bighas 6 Biswas of the DC Land, as transferred to the plaintiff, was with defective title, the charge of the plaintiff would get converted into one over the Original Land, being the substituted security. Thus, in such cases Article 62 of Schedule to the Limitation Act would apply. Reliance is also placed on the judgment of the Supreme Court in ***Videocon Properties Ltd. Vs. Dr. Bhalchandra Laboratories and Ors.***, (2004) 3 SCC 711.

8. In rejoinder, the senior counsel for the defendant No.3 makes the following submissions:

(i) No relief has been claimed in the plaint in respect of the Original Property and therefore, Article 62 of the Schedule to the Limitation Act is not applicable.

(ii) The judgment in ***Skipper Construction Co. (P) Ltd.*** (supra) is not applicable, as in that case, there was no Sale Deed executed in favour of the buyer, whereas in the present case a Sale Deed was executed in favour of the buyer in respect of the subject land. Therefore, provisions of Section 55(6)(b) of the Transfer of Property Act are not applicable.

(iii) Reliance is placed on the judgment of the Privy Council in ***Ram Din Vs. Kalka Prasad***, MANU/PR/0025/1884 to contend that to claim benefit under Article 62 of the Schedule to the Limitation Act, the prayer has to be made in respect of the property and not a personal claim of recovery.

9. I have heard the counsels for the parties.

10. The main issue to be decided for the purposes of the present application is whether Article 47 of the Schedule to the Limitation Act would be applicable to the facts and circumstances of the present case or Article 62.

11. The two aforesaid competing entries are set out below:

" PART II.—SUITS RELATING TO CONTRACTS

xxx xxx xxx

47.	*For money paid upon an existing consideration which afterwards fails.*	*Three years.*	*The date of the failure.*

xxx xxx xxx

PART V.—SUITS RELATING TO IMMOVABLE PROPERTY

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."*

12. Section 55(6)(b) of the Transfer of Property Act relied upon by the parties is also set out below:

*"**Section 55. Rights and liabilities of buyer and seller.**—In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:*

(6) The buyer is entitled—

xxx xxx xxx

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, [1][* *] to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.*

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent."

13. I have gone through the plaint as filed on behalf of the plaintiff.

14. The plaint, as filed, is a simpliciter suit for recovery of Rs. Rs.19,06,38,188/- filed by the plaintiff against the defendants, based on a fraud committed by the defendants against the plaintiff. In this regard, reference may be made to paragraphs 9, 11 and 12 of the plaint, which are set out below:

"9. Accordingly, the Plaintiff is claiming a total of Rs.8,55,03,734/- along with interest @ 12% which at the date of filing of the present suit amounts to Rs 19,06,38,188.30/- .

xxx xxx xxx

11. That the Defendants has passed on a defective title of land to Plaintiff and in law, is liable to restitute the Plaintiff to the original position assuming that the transaction in question for purchase of land had not been entered into. Accordingly, the Defendants are liable to refund to Plaintiff the entire purchase consideration, the payment towards the payment of stamp duty and registration fees incurred by the Plaintiff for the aforesaid purchase consideration paid to the Defendants.

12. That the cause of action to file the present suit for recovery of the purchase consideration and associated cost incurred by the Plaintiff accrued on 04.09.2006.However due to pendency of earlier writ petition wherein the dispute over the title/ownership of the land in question measuring 5 Bigha 6 Biswas high value Divisional Commissioner Land bearing Khasra No. 30/19/2 (1-5) and 20 (4-01) of village Kapashera, Delhi was pending before this Hon'ble Court and thereafter before the Hon'ble Supreme Court came to be decided finally on 24.09.2010 by the Hon'ble Supreme Court and hence the cause of action again arose on 24.09.2010 after issue with respect title/ownership was finally rested by the Hon'ble Supreme Court. The further the cause of action kept arising when the Defendants kept fraudulently misrepresenting to the Plaintiff that it will refund the consideration paid by the Plaintiff for the illegal sale by selling the original land received back after cancellation of illegal exchange, after getting the Status Quo orders removed from the same as passed by the concerned DC. The cause of action further arose when Defendant No. 2 filed a complaint against Defendant No. 3 alleging siphoning of assets of Defendant No. 1 Company by Defendant No. 3 and his wife."

15. Clauses a) to j) are made in the prayer of the plaint, but clauses a) to f) thereof are only in the nature of prayers seeking interim relief. Clause h) of the prayer seeks ad interim relief in terms of clauses a) to f), clause i) seeks the award of cost of the suit in favour of the plaintiff and clause j) seeks grant of any other relief, which this Court may deem fit. The only substantive prayer made in the plaint is prayer g), which is set out below:

"g) A decree of recovery of Rs 19,06,38,188/- (Rupees Nineteen Crore Six Lakhs Thirty Eight Lakhs One Hundred Eighty Eight Only) i.e. the purchase consideration paid towards the illegal sale of 5 Bighas 6 Biswas government land, amount paid towards registration fee and stamp duty, other miscellaneous expenditure and cost of borrowing incurred by the Plaintiff for the purchase of land interest @ 12% from 24.09.2010 being the date on which the issue of title/ownership was finally rested by the Hon'ble Supreme Court till the filing of the present Suit and further pendente lite interest and future interest @ 12% till date of repayment;"

16. A reading of the aforesaid paragraphs of the plaint and the prayer clause of the plaint leaves no doubt in my mind that the present case is a simpliciter recovery case filed by the plaintiff. The plaintiff has pleaded that the defendants committed a fraud upon the plaintiff as a portion of the land sold by the defendants to the plaintiff vide registered Sale Deed dated 4th September, 2006 had defective title. There was a dispute with regard to the said portion of land, which eventually, the plaintiff lost on account of the Writ Petition No. 7687/2004, preferred by the DC, being allowed by this Court vide judgment dated 5th December, 2008, and which judgment was subsequently upheld by the Division Bench as well as the Supreme Court. There is no reference at all in the plaint to any charge being created in respect of the Original Land in favour of the plaintiff, pursuant to the return of the Original Land to Mrs. Ramesh Kumari Bhardwaj.

17. It is pertinent to note herein that the plaintiff invokes the indemnity clause in the Sale Deed dated 4th September, 2006 in support of its recovery claim as a part of the plaint as follows:

"4. That brief facts of the present suit are as follows:

ix. xxx xxx xxx

> *Significantly the Sale Deed also recorded that "... if the whole or any portion of the said property is taken away or goes from the possession of the Vendee on account of any legal defect in the ownership and title of the Vendor,* ***<u>then the Vendor will be liable and responsible to make good the loss suffered by the vendee and keep the Vendee indemnified,</u>*** *saved and harmless against all such losses, costs, damages and expenses accruing thereby to the Vendee.""*

18. It is evident from the aforesaid that the recovery as claimed in the present suit is based on the refund of the purchase consideration paid by the plaintiff to the defendants in respect of 5 Bighas 6 Biswas of the DC Land and the said consideration having failed on account of the defendants losing their title in respect of the said land.

19. The plaintiff has relied upon paragraphs 4 xviii. and xx. of the plaint to contend that a charge was created in their favour in respect of the Original Land. The aforesaid paragraphs are set out below:

> *"xviii. That the matter went upto the Hon'ble Supreme Court wherein the Hon'ble Court finally rested the issues involved. The Hon'ble Supreme Court passed an order dated 27.04.2009 and issued notice restricted only to consider the question whether a valuer should be appointed for regularizing the allotment by payment of the difference in valuation. The matter was later on dismissed on 24.09.2010 on which date the cancellation of the illegal exchange became final and binding. During all these legal proceedings Defendants and Mr Deepak Bhardwaj (since deceased) and Mrs Ramesh Kumari Bhardwaj (since deceased), were continuously assuring the Plaintiff that they will win the Court cases and hand over the land in question to the Plaintiffs. They further assured the Plaintiff that in case they lose this case, then they will get their original land back which was exchanged for DC Land, and they will repay us by selling the same.*
>
> *xxx xxx xxx*

xx. Further after first losing the case in this Court, Defendants informed the Plaintiff that the concerned DC has ordered Status Quo on their original land which they received back, and that the same cannot be sold, and they were trying to clear the same and soon they will sell the same and pay us our money. The Plaintiff craves leave for producing the record of Khataunies of said land with DC order in this regard, if required."

20. In my view, the aforesaid paragraphs do not suggest that the plaintiff has made out a case that any charge was created in favour of the plaintiff, either in respect of the land, which was the subject matter of the Sale Deed or the Original Land, which was exchanged for the DC Land. Upon a perusal of the Sale Deed dated 4th September, 2006, no clause is found therein which indicates the creation of a charge in favour of the plaintiff. Furthermore, neither is any relief in the plaint based on the creation of any charge in favour of the plaintiff, nor has any relief been claimed against the Original Land.

21. The senior counsel for the defendant no.1 and 3 has correctly relied upon the judgment of the Privy Council in ***Ram Din*** (supra), wherein the Privy Council has discussed the difference between invoking personal remedies and the remedies against an immoveable property. It was held by the Privy Council that the limitation period of 12 years would apply to suits in respect of immovable properties. The limitation period of 12 years would not apply in respect of personal remedy against the mortgagor. In the present case also, a reading of the plaint reveals that the plaintiff has invoked a personal remedy against the defendants. No remedy has been invoked in respect of the Original Property. Therefore, the plaintiff would not be entitled to invoke the period of limitation provided under Article 62 of the

Schedule to the Limitation Act. As noted above, there is not even a mention of any charge being created in favour of the plaintiff in the plaint.

22. There is also merit in the contention of the defendants that the plea of the creation of charge was taken by the plaintiff for the first time in their reply to the present application under Order VII Rule 11 of the CPC.

23. It is the settled position of law that for deciding an application under Order VII Rule 11 of the CPC, only the averments made in the plaint, in conjunction with the documents relied upon, have to be looked at. Reference in this regard may be made to the decision of the Supreme Court in ***Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) Dead Through Legal Representatives and Ors.***, (2020) 7 SCC 366. No reliance can be placed on any other pleading. The Division Bench of this Court in ***Minu Chibber*** (supra) has observed that the issue of limitation is not always a mixed question of law and fact and where from the plaint itself it emerges that the suit is barred by time, it should be rejected under Order VII Rule 11 of the CPC. The aforesaid judgment was followed by a Single Judge of this Court in ***J.M. Construction Pvt. Ltd. Vs. Krishna Sachdev & Ors.***, MANU/DE/0017/2016. The observations of this Court in the said case are also apposite in the facts and circumstances of the present case and are set out below:

> *"49. Even the alleged oral extensions alleged in the plaint cannot be taken note of, as no particulars as to when and how long those were, were not mentioned in the plaint, as held by the Supreme Court in Fatehji & Company and Another v. L.M. Nagpal and Others MANU/SC/0493/2015 : (2015) 8 SCC 390. Their Lordships in the above mentioned case in paragraph 9 of their judgment held as under:--*

> *"Though the plaintiffs claimed that oral extension of time was given, no particulars as to when and how long were mentioned in the plaint."*
>
> *xxx xxx xxx*
>
> *51. The Division Bench of this Court in Minu Chibber & Ors. v. Lt. Col. (Retd.) S.S. Chibber MANU/DE/2437/2014 : 2014 (IV) AD Delhi 289 held that "where a suit, from statement in the plaint can be said to be barred by time certainly a case for rejection under O.7 R.11 CPC is made out.""*

24. In the present case also, the plaint only makes references to oral representations of the defendants or of the deceased Mrs. Ramesh Kumari Bhardwaj to refund the amount to the plaintiff. No particulars of the aforesaid representations have been pleaded. In view of the clear language of Section 18 of the Limitation Act as well as the aforesaid judgment of this Court, the limitation shall not be extended on account of such oral representations of the defendants.

25. In respect of the reliance placed by the counsel for the plaintiff on ***Videocon Properties Ltd.*** (supra), it is apposite to note that paragraph 4 of the judgment in ***Videocon Properties Ltd.*** (supra) states that the plaintiff therein had asked for several reliefs, one among which was for declaration by the Court that the amount, interest and cost of suit, as sought, were validly secured by a statutory charge on the said land described in the plaint. In the present case, as noted above, there is no averment in the plaint as to the creation of a charge, statutory or contractual, in favour of the plaintiff by the defendants.

26. Further, it is prudent to reproduce the observations of the Supreme Court in ***Videocon Properties Ltd.*** (supra) as follows:

*"**<u>The buyer's charge engrafted in clause (b) of sub-section 6 of Section 55 of the Transfer of Property Act would extend and enure to the purchase-money or earnest money paid before the title passes and property has been delivered by the purchaser to the seller,</u>** on the seller's interest in the property unless the purchaser has improperly declined to accept delivery of property or when he properly declines to accept delivery — including for the interest on purchase money and costs awarded to the purchaser of a suit to compel specific performance of the contract or to obtain a decree for its rescission. The principle underlying the above provision is a trite principle of justice, equity and good conscience. **<u>The charge would last until the conveyance is executed by the seller and possession is also given to the purchaser and ceases only thereafter.</u>** The charge will not be lost by merely accepting delivery of possession alone. This charge is a statutory charge in favour of a buyer and is different from contractual charge to which the buyer may become entitled to under the terms of the contract, and in substance a converse to the charge created in favour of the seller under Section 55(4)(b)…The said statutory charge gets attracted and attaches to the property for the benefit of the buyer the moment he pays any part of the purchase money and is only lost in case of purchaser's own default or his improper refusal to accept delivery."*

27. On a reading of the aforesaid, the judgment in ***Videocon Properties Ltd.*** (supra) would not be applicable in the facts and circumstances of the present case. In the said judgment, it was specifically noted that under Section 55(6)(b) of the Transfer of Property Act, the charge as against the property would last only till conveyance is executed by the seller and possession is given to the purchaser and it ceases thereafter. Admittedly in the present case, the Sale Deed dated 4th September, 2006 had been executed in favour of the plaintiff pursuant whereto, the title in the subject land stood transferred to the plaintiff. Furthermore, even the possession of the subject property was given to the plaintiff. The factum of possession being handed

over to the plaintiff has been averred in paragraph 4 xiii. of the plaint. The relevant provision of the Sale Deed dated 4th September, 2006, to denote the transfer of possession to the plaintiff, may also be reproduced as follows:

> *"That the actual physical possession of the said property has been delivered by the Vendor to the Vendee, on the spot, at the time of the execution of this Sale Deed."*

28. Similarly, the judgment in ***Skipper Construction Co. (P) Ltd*** (supra) does not come to the aid of the plaintiff as upon execution of the Sale Deed dated 4th September, 2006, there is no seller's interest that remains in the property sold pursuant to execution thereof. Therefore, there cannot be any creation of charger in favour of the buyer in terms of Section 55(6)(b) of the Transfer of Property Act.

29. In this regard, reference may also be made to the judgment of the Madras High Court in ***M.K. Sundararamier Vs. C.M.V. Krishnamachary & Ors.***, MANU/TN/0190/1966, as relied on behalf of the defendants. It has been observed therein by the High Court of Madras that Section 55(6)(b) of the Transfer of Property Act cannot be availed by the buyer when the Sale Deed has already been executed in favour of the buyer. The relevant observations made in paragraph 3 of the aforesaid judgment are set out below:

> *"3. Sri S. Kothandarama Nayanar, learned counsel for the petitioner, urges that the above provision cannot be availed of by the buyer before the sale deed is executed and can be availed of by him only after the sale deed is executed. I am however unable to accept the contention, because if the sale deed is executed, the title would pass to the buyer and there is no point in giving a charge over the purchase money on the property which has become that of the buyer. The provision can have meaning only in a case where the title has not yet passed to the buyer in respect of the*

purchase money or any portion thereof paid by him. That the provisions of Section 55 will apply to the case of executory contract, that, is, where the sale deed has not been executed, is clear from the decisions quoted by the learned Subordinate Judge and the observations of the learned judges therein, namely, Adhikesavan Naidu v. Gurunatha Chettiar, ILR Mad 338: AIR 1918 Mad 1315 , Khathamuthu Pillai v. Subramania Chettiar 1926 Mad WN 271: MANU/TN/0663/1925 : AIR 1926 Mad 569 and Krishnaswami Rao v. Srinivasa Desikan, 71 MLJ 850 : AIR 1937 Mad 261 . Hence the learned Subordinate Judge had jurisdiction to declare the charge."

30. I am in respectful agreement with the view of the High Court of Madras in ***M.K. Sundararamier*** (supra). Therefore, no charge can be said to be created under Section 55(6)(b) of the Transfer of Property Act, where a sale deed has been executed and pursuant whereto, title in the property has passed from the seller to the buyer. The provisions of Section 55(6)(b) of the Transfer of Property Act would only apply in a case where the title has not passed from the buyer to the seller.

31. The counsel for the plaintiff has taken me through the observations made by the Single Judge Bench in its judgment dated 5th December, 2008 and the Division Bench in its judgment dated 15th January, 2009 against the conduct of the defendants. However, it may be pertinent to note herein that the counsel for the plaintiff was in attendance during the hearing of Writ Petition No. 7687/2004 and in the judgment dated 5th December, 2008 of this Court, observations have also been made in respect of subsequent purchasers and their contention that the exchange of the DC Land be regularized. In this regard, reference may be made to paragraph 46 of the judgment dated 5th December, 2008 as follows:

> *"46. xxx xxx xxx*
> *Although some of the subsequent purchasers may have got their plans for motels sanctioned or obtained NOCs and invested monies, these transactions cannot be the ground for regularizing their purchases. They will have to proceed independently against their vendors to work out their remedies... Nevertheless this Court is not persuaded to accede to the plea of the subsequent purchasers that the transfers consequent upon and subsequent to the order dated 1st December, 1995 of the CO should not be disturbed. No case for equitable relief is made out by any of the transferees, who took a risk in entering into illegal transactions concerning the land in question despite the pendency of court proceedings."*

32. Even in light of the aforesaid finding of the Single Judge Bench of this Court, the plaintiff has significantly delayed proceeding against the defendants in respect of the remedies as were available to the plaintiff post the decision of this Court dated 5th December, 2008.

33. In view of the above discussion, it is clear that the present plaint was filed as a simpliciter recovery suit by the plaintiff against the defendants. The plaintiff has neither claimed any right in respect of any property in the plaint, nor has any relief been claimed in the plaint in respect of the Original Property.

34. Therefore, in the opinion of this Court, Article 47 of the Schedule to the Limitation Act would apply in the present case, which provides for a limitation period of three years from the date of failure of the consideration. At best, the case of the plaintiff can be that the limitation would begin from the date of the judgment of the Supreme Court on 24th September, 2009, when the issue with regard to validity of exchange of the defendants'

Original Land attained finality. However even then, the present suit was filed only in December, 2020 and is therefore, evidently, time barred.

35. In terms of the dicta of this Court in ***Minu Chibber*** (supra) and in light of the observations above, I am of the opinion that the plaint is liable to be rejected on the grounds of limitation under Order VII Rule 11(d) of the CPC.

36. Accordingly, the present application is allowed and the plaint is rejected.

AMIT BANSAL, J.

MARCH 16, 2022
dk