

Nikita

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.589 OF 2019

Eknath Sadashiv Kandpile
(since deceased) Thr. Legal Heirs ... Applicants

V/s.

M/s. Shivshankar Builders and
Developers Thr, Partner Satish
Shivshankar Tripathi and Ors. ... Respondents

WITH

INTERIM APPLICATION NO.16916 OF 2022

IN

CIVIL REVISION APPLICATION NO.589 OF 2019

M/s. Shivshankar Builders and
Developers Thr, Partner Satish
Shivshankar Tripathi and Ors. ... Applicants

In the matter between

Eknath Sadashiv Kandpile
(since deceased) ... Applicants

V/s.

M/s. Shivshankar Builders and
Developers Thr, Partner Satish
Shivshankar Tripathi and Ors. ... Respondents

Mr. Miheer Jayakar a/w Ms. Gunjan Jayakar i/b Kedar
Seludkar for the Applicants.

Mr. Atul Damale Sr. Adv. a/w Roshan Hule i/b Sachin
Dhakephalkar for Respondent No.1.

Mr. Rohit Sakhudeo for Respondent No.2 to 4.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 26, 2023

P.C.:

1. This is an application under Section 115 of Code of Civil Procedure, 1908, rejecting application under Order 7 Rule 11 (d) of the Code of Civil Procedure, 1908.
2. Respondent No.1 filed Special Civil Suit No.411 of 2018 seeking relief of specific performance of agreement to sale dated 30th October 2006. The total consideration agreed was Rs.1,50,00,000/-, out of which Rs.37,50,000/- was paid towards the earnest amount. The time to execute the sale deed was not fixed in the agreement, and therefore, the case would be governed by the second part of Article 54 of the Limitation Act. According to the plaintiff, the cause of action accrued on 28th June 2018, when he received notice from defendant No.3, intimating that if the plaintiff fails to produce an order of competent Court, defendant No.2 will dispose of the plaintiff's objections for transfer. The suit was filed on 20th July 2018.
3. The applicant is original defendant No.1, who filed an application under Order 7 Rule 11 (d), contending that the applicant had issued notice on 26th April 2012, informing that the disputed agreement cannot be given effect. According to Defendant No.1, issuance of such notice amounts to refusal under the second part of Article 54 and therefore, the limitation to file the suit started on 26th April 2012. The suit filed in the year 2018, being beyond a period of three years, is barred by limitation.
4. The Trial Court rejected the application based on the following reasons.

a) Enforcement of the agreement was based only on allotment of the plot. The plot was allotted in 2018.

b) The date of issuance of a letter by CIDCO declining to entertain the plaintiff's objection is 28th June 2018, which is the starting point of limitation.

c) The cancellation of the agreement by notice dated 26th April 2012, being unilateral, cannot be considered a starting point of limitation.

5. I have considered the submissions made on behalf of the applicant. According to him, it was obligatory for the plaintiff to disclose in the plaint the termination of the agreement by notice dated 26th April 2012. According to him, non-disclosure of material amounts to fraud on the Court. Only on that ground the plaint deserves to be rejected. Moreover, it is submitted that the document of 26th April 2012 has been produced by the plaintiff not along with the plaint but after a leave of the Court and, therefore, such document needs to be considered by the Court to adjudicate the issue of limitation. According to him, the exercise of power by the Trial Court is based on irrelevant reasons and, therefore, the impugned order deserves to be set aside.

6. I have considered the submissions made on behalf of the applicants. In the context of the facts of the present case, it is necessary to consider paragraphs No.12.4, 12.5, and 12.6 of the judgment of Apex Court in the case **Dahiben v. Arvinbhai Kalyanji Bhanusali and Ors.** AIR 2020 SC 3310, which reads as under:

“12.4. Order VII Rule 14(1) provides for production of

documents, on which the plaintiff places reliance in his suit, which reads as under:

“Order 7 Rule 14: Production of the document on which plaintiff sues or relies:-

(1) Where a plaintiff sues upon a document or relies upon a document in his possession or power in support of his claim, he shall enter such documents in a list and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to document produced for the cross-examination of the plaintiff's witness, or, handed over to a witness merely to refresh his memory.”

(Emphasis supplied)

Having regard to Order VII Rule 14 CPC, the documents filed along with the plaint are required to be taken into consideration for deciding the application under Order VII Rule 11(a). When a document referred to in the plaint forms the basis of the plaint, it should be treated as a part of the plaint.

12.5 In exercise of power under this provision, the Court would determine if the assertions made in the plaint are contrary to statutory law, or judicial dicta, for deciding

whether a case for rejecting the plaint at the threshold is made out.

12.6 At this stage, the pleas taken by the defendant in the written statement and application for rejection of the plaint on the merits, would be irrelevant, and cannot be adverted, to or taken into consideration.”

7. On consideration of the said ratio, it is clear that while considering the application under Order 7 Rule 11, the averment in the plaint along with the documents annexed along with the plaint are required to be considered. The plaintiff produced the document of the notice dated 26th April 2012 after filing the suit. The Apex Court, in paragraph No.12.5, has laid down that only the documents filed along with the plaint are required to be taken into consideration for deciding an application under Order 7 Rule 11 (a) of the Code of Civil Procedure, 1908.

8. The rationale behind holding and laying down the said law is that the documents which are produced along with the plaint form part of the plaint, and as per the settled law, only averments of the plaint are required to be considered. Hence, only documents filed along with the plaint are required to be taken into consideration. Since the notice dated 26th April 2012 was not annexed with the plaint, it was not obligatory for the Trial Court to consider the document produced thereafter by the plaintiff. Consideration of such document would be beyond the purview of powers of the Court under Order 7 Rule 11 of the Code of Civil Procedure, 1908.

9. The next submission on behalf of the applicant is that by suppressing the document dated 26th April 2012, the plaintiff has

played fraud on the Court and, therefore, relying on the judgment in the case of **S.P Chengalvaraya Naidu v/s Jagannath AIR 1994 SC 853**, it is submitted that the person who practices fraud on the Court is not entitled to any relief. Such objection can be raised at any stage of the proceedings or even in collateral proceedings. Having considered the facts of **S.P Chengalvaraya Naidu** (supra), in my opinion, the scope of power under Order 7 Rule 11 and objections raised in the case of **S.P Chengalvaraya Naidu** (supra) operate in independent spheres. In the facts of the case, before the **S.P Chengalvaraya Naidu** (supra), the plaintiff in the said case had suppressed the registered relinquishment deed, filed suit for partition and obtained a decree for partition. In the execution of the decree obtained by suppression of such material document, the Apex Court held that the decree obtained by fraud is a nullity and, therefore, benefits of such decree cannot be allowed to be taken by any party who obtained such decree by practising fraud on the Court. In the facts of the case, the document was not produced along with the plaint. It is for the trial Court to consider the genuineness of the truthfulness of such document whenever such occasion arises for consideration of the Trial Court.

10. Relying on the judgment in the case of **Ahmmadsahab Abdul Mulla (deceased by L.Rs.) v. Bibijan and Ors. AIR 2009 SC 2193**, it is submitted that the second part of Article 54 of the Limitation Act is attracted as the plaintiff had notice of refusal. There cannot be a dispute about the preposition of law laid down by the Apex Court in paragraph No.7 of the judgment. However, in the facts of the case, considering the scope of enquiry under Order 7 Rule 11 (d)

based on averments in the plaint and documents annexed along with the plaint, it cannot be said that the plaintiff had notice of refusal. Whether there is suppression by the plaintiff of notice dated 26th April 2012 needs to be considered by the Court at the appropriate stage of the suit. At the stage of consideration of an application under Order 7 Rule 11 (d), the document having not been filed along with the plaint, the applicant cannot rely on such document.

11. Therefore, in my opinion, the order passed by the Trial Court does not suffer from an error of jurisdiction. No interference is called for under Section 115 of the Code of Civil Procedure, 1908.

12. The interim application does not survive and the same stands disposed of.

(AMIT BORKAR, J.)