IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.494 OF 2021

Mr. Nalin Omprakash Pahuja
Through His Constituted
Attorney Mr. Salil Khandekar …Appellant
V/s.
Mr. Rakesh Chamanlal Gupta …Respondent

WITH
INTERIM APPLICATION NO.4272 OF 2019
IN
FIRST APPEAL NO.494 OF 2021

Mr. Sanjeev R. Singh a/w. Ms. Nilima Hode for Appellant.

Mr. Subhash Jha a/w Ms. Alka Pandey Dwivendra i/by Law Global Dubey for Respondent.

CORAM : AMIT BORKAR, J.

DATE : JANUARY 30, 2023

P.C.:

1. The original plaintiff filed the appeal in a suit for specific performance filed for enforcement of the agreement to sale dated 16th November 1999. The trial court dismissed the suit under clause (d) of Order VII Rule 11 of the Code of Civil Procedure, 1908, recording a finding that the agreement to sell was executed on 16th November 1999; clause 3 of an agreement to sell mandates vendor to execute sale deed within three months from the date of the agreement; suit for specific performance of agreement having filed on 6th December 2010, is barred under the first part of Article 54 of the Limitation Act, 1963.

2. The relevant facts necessary for adjudication of the issue involved are as under:-

(i). On 6th December 2010, the appellant/original plaintiff filed Special Civil Suit No.613 of 2010 before the learned Civil Judge, Senior Division, Panvel, seeking a declaration that the agreement to sell dated 16th November 1999 is binding on the defendant and for specific performance of the said agreement to sale. Additionally, relief of injunction not to create third-party rights and not to disturb the plaintiff's possession over the suit property was also sought. The material averments in the plaint were to the effect that the properties in question were purchased by the partnership consisting of the plaintiff and defendant, which came to be dissolved on 18th October 1999. On 18th October 1999, the Memorandum of Understanding (for short "MoU") was executed between the parties requiring the defendant to pay the plaintiff an amount of Rs.8,50,000/- in six installments and in case of failure to pay such amount, the defendant was permitted to create third party rights and enjoy the said property bearing Gut No.119, Hissa No.1. According to the plaintiff on the same day, an agreement to sell dated 16th November 1999 was executed in favour of the plaintiff by defendant in relation to Gut No.119, Hissa No.1 for the area admeasuring 15,000 sq. ft. and surrounding open space for consideration of Rs.1,50,000/-. Towards the earnest amount, the plaintiff issued a cheque dated 20th November 1999. However, due to the failure of the defendant to perform his obligation under MoU, the plaintiff filed said suit for specific performance of the agreement dated 16th November 1999. According to the plaintiff, the agreement to sell dated 16th November 1999 is in force until the filing of the suit, and the failure of the defendant to perform his part of the agreement entitles the plaintiff to the relief of specific performance of the agreement dated 16th November 1999.

(ii). The defendant applied Order VII Rule 11(d) of the Code of Civil Procedure, 1908, seeking dismissal of the suit on the ground that the agreement dated 16th November 1999 requires the vendor to execute the sale deed within three months from the date of the agreement. Accordingly, the suit having been filed in the year 2010, is barred under Article 54 of the Limitation Act 1963.

(iii). By the impugned judgment, the trial court accepted the defendant's contention and dismissed the suit. Aggrieved thereby, the plaintiff has filed the present appeal.

3. Learned advocate for the appellant submitted that MoU dated 16th November 1999 and the agreement to sale dated 16th November 1999 were part of the same transaction. Agreement to sell dated 16th November 1999 was executed as and by way of security in case of failure on the part of the defendant to pay Rs.8,50,000/- which was the share of the plaintiff on the dissolution of the partnership. According to him, therefore, the agreement to sale dated 16th November 1999 cannot be read in isolation but needs to be read along with MoU dated 16th

November 1999. According to him, payment of installment as contemplated under the MoU dated 16th October 1999 modifies clause 3 of an agreement to sale, which creates an obligation on vendors to execute the sale deed within three months; therefore, according to him, the case would be governed by the second part of Article 54 of the Limitation Act, 1963.

4. Per contra, the learned advocate for the respondent invited my attention to the averments in the plaint, submitting that agreement dated 16th November 1999 needs to be treated as part of the plaint by reference. He invited my attention to the averments made in the plaint, which specifically refer to the agreement dated 16th November 1999. Prayer in the suit also refers to the agreement dated 16th November 1999. It is submitted that since the agreement dated 16th November 2000 is part of the plaint by reference, the Court can consider the conditions in the agreement, which mandates the vendor to execute the sale deed within three months from the date of agreement to sell. Since the period of performance has been fixed in the agreement itself, the suit would be governed by the first part of Article 54 of the Limitation Act 1963. Therefore, the trial court was justified in dismissing the suit.

5. Having heard learned advocate for the parties and having considered the documents on record, in my opinion, a conjoint reading of the plaint and agreement to sale makes it clear that the agreement to sell dated 16th November 1999 needs to be treated as part of the plaint as it has been referred in the plaint and has got incorporated in the plaint by reference.

6. The law on the point of incorporation of documents by reference in the plaint is no longer *res integra,* in view of the judgment of the Apex Court in the case of **Church of Christ Charitable Trust and Educational Charitable Society Vs. Ponniamman Educational Trust**, reported in (2012 (8) SCC 706). In the facts of the said case, the appeal arose out of a suit for specific performance, wherein the documents not annexed to the plaint nor terms were set out in the plaint, but the agreement to sell referred to in the plaint gets incorporated in the plaint by reference. The apex court relying on the earlier two judges in the case of **U.S. Sasidharan Vs K. Karunakaran & Anr**, reported in (1989 (4) SCC 482) and **Manohar Joshi Vs Nitin Bhaurao Patil & Anr.**, reported in (1996 (1) SCC 169), held that though the terms of the document were not set out in the plaint, the document can be treated as part of plaint being part of the cause of action. It is settled law that where a document is sued upon, and its terms are not set out in the plaint but referred to in the plaint, the said document gets incorporated by reference in the plaint. Therefore, in my opinion, in the facts of the case, the agreement to sale dated 16th November 1999 having been specifically referred to in the body of the plaint and the prayers, the document becomes part of the plaint by reference and can be considered for scrutinizing application under Order VII Rule 11(d) of the Code of Civil Procedure, 1908.

7. At this stage, it would be useful to refer to Clause 3 of the agreement to sale dated 16th November 1999, which reads as under:-

> *"The Vendor has also agreed to execute all necessary documents and declarations in favour of the purchaser within 3 months from the date of this deed."*

8. Reading of the said clause makes it clear that the respondent was under obligation to perform the sale deed within three months from the date of the agreement. The said period expired on 16th February 2000. Since in the agreement to sell itself, the period of the execution sale deed is mentioned, the suit would be governed by the first part of Article 54 of the Limitation Act, 1963. Therefore, the suit filed on 6th December 2010 is clearly barred by limitation.

9. Insofar as the contention raised by the appellant that while considering the cause of action for a suit for specific performance, in the facts of the case, MoU dated 16th October 1999, needs to be taken into consideration as the agreement has a material bearing on the terms of the agreement to sell. On overall reading of the plaint, it appears that the reference to MoU dated 18th October 1999 has been made as a historical fact and is not part of the cause of action. The relief sought in the prayer clause is only in relation to the agreement to sell dated 16th October 1999; therefore, the contention that the MoU dated 16th October 1999 modifies the terms of the agreement to sell cannot be accepted.

10. For the aforesaid reasons, in my opinion, the Civil Court was justified in dismissing the suit under Order VII Rule

11(d) of the Code of Civil Procedure, 1908.

11. There is no merit in the appeal. The appeal is, therefore, dismissed. No costs.

12. In view of the dismissal of the appeal, the interim application does not survive and stands disposed of as infructuous.

(AMIT BORKAR, J.)