



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

MISC. CIVIL APPLICATION NO. 634/2021 IN
SECOND APPEAL NO. 235/2012 (D)

Friends Cooperative Society Ltd. Nagpur thr. Secretary, Dilip Govindrao Kate

..Versus..

Smt. C. Padmawati Naidu and Ors.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. A. C. Dharmadhikari, Advocate for applicant.

Mr. V. V. Bhangde with Mr. S. N. Tapadia, Advocates for
respondent nos. 1 to 3.

CORAM : ANIL L. PANSARE, J.

ARGUMENTS WERE HEARD ON: **11.08.2023**

ORDER PRONOUNCED ON : **25.08.2023**

Heard learned counsel for the parties.

2. The applicant is original plaintiff. He had filed suit bearing Special Civil Suit No.564/1985, seeking decree of specific performance of contract and possession. The suit was based upon the agreement executed on 30.01.1975. The sale deed was to be executed on or before 30.01.1977.

3. According to the applicant, it is an admitted fact that on 17.02.1976, the *Urban Land (Ceiling and Regulation) Act, 1976* (hereinafter referred to as the 'Act of 1976') came into force and the suit property was specified for residential use in the master plan. As a result of this, all the transactions were prohibited, except of claiming exemption under Section 20 of

the Act of 1976. The original defendant no.1/owner, on 30.08.1976 filed an application before the appropriate authority, seeking exemption under Section 20 of the Act of 1976, by giving reference to the agreement dated 30.01.1975. During pendency of the said application, the applicant and original defendant no.1 filed a joint application on 05.02.1980, seeking exemption under Section 20 of the Act of 1976.

4. The applicant states that during the pendency of this joint application, the original defendant no.1 wrote a letter dated 12.07.1982 and informed the applicant that the agreement dated 30.01.1975 has been cancelled. According to the applicant, despite cancellation of agreement, the joint application filed by the applicant and the original defendant no.1 seeking exemption under Section 20 of the Act of 1976 was continued to be prosecuted. Ultimately, by order dated 31.12.1984, the State Government granted exemption. The said order refers to the agreement dated 30.01.1975 and states that the permission has been granted to transfer the property in favour of the applicant-society.

5. In the meantime, on 03.08.1982, the applicant responded to the letter dated 12.07.1982. The applicant stated that the agreement cannot be cancelled. On 10.12.1985, the applicant-society sought permission under Section 89 of the *Bombay Tenancy and Agricultural Lands Act, 1948* (hereinafter referred to as the “BTAL Act”). The

applicant called upon the original defendant no.1 to execute the sale deed. The original defendant no.1 did not pay heed. Accordingly, the suit for specific performance of contract, being Suit No.564/1985 was filed.

6. The suit was opposed by the original defendant no.1 on the ground that the agreement under question has been cancelled. The trial Court decreed the suit partly by its judgment and decree dated 21.04.1999. The original defendant no.1 was directed to execute the registered sale deed of the suit property.

7. The applicant states that the original defendant no.1 had challenged the aforesaid judgment and decree before the first appellate court bearing Appeal No.307/1999. During the pendency of the appeal, the original defendant no.1 expired and his legal representatives viz. present respondent nos.1 to 5 were brought on record. The appeal came to be dismissed vide judgment and decree dated 04.10.2011. The judgment and decree passed by the first appellate court was assailed before this Court in Second Appeal No.235/2012 by the respondent nos. 1 to 4. The respondent no.5 was arrayed as respondent no.2 before the second appellate court. In the second appeal, this court framed following substantial questions of law:

“(i) Whether the civil suit filed by the respondent No.1 Plaintiff was maintainable having been filed after three years of cancellation of the agreement dated 30.1.1975 ? (the appellants had

given the notice dated 12.07.1982 (Exh. No.82) terminating the agreement dated 30.01.1975 and the civil suit was filed on 30.12.1985).

(ii) Whether the civil suit was maintainable having been filed beyond the period prescribed by Article 54 of the Limitation Act, 1961?

(iii) The respondent no.1 plaintiff having not sought decree for declaration that the cancellation of agreement dated 30.01.1975 was illegal, whether the civil suit praying for decree for specific performance of the agreement was maintainable?

(iv) Whether the suit could be held to be bad for non joinder of necessary parties, namely, all the persons to the agreement Exh.63?"

8. On the first substantial question of law, this Court has noted that dispute is as regards land bearing survey no.127/3 admeasuring 3.46 Acre. Four persons were shown vendors. As stated earlier, on 12.07.1982 (Exh.82), the original defendant no.1 had issued notice stating therein that agreement stands cancelled. The reason being, for more than seven years he has not heard anything about the applicant's intention to purchase the suit property and, therefore, the agreement was cancelled. This Court has taken note of the correspondences exchanged between the parties and the law on the point of limitation and while answering two substantial questions this court held as under.

"16. ... In my opinion, the extract of the refusal reflected through Exh. 82 and reply Exh.83 given by the plaintiff clearly denotes that

*the defendant clearly cancelled or refused to perform his part of contract in writing and the plaintiff in terms understood the said refusal but took the defence that the defendant could not cancel it because of the pending proceedings u/s. 20 etc. In the Supreme Court judgment in the case of **Van Vibhag** the answer is clearly given that the limitation would commence and the suit could be filed or should have been filed subject to Sec.20 of the Ceiling Act. Both the Courts below however have ignored the above position of law and they chose to rely on the notice that was given by appellant/defendant dated 16.12.1985 reiterating and denying the allegations in notice dated 09.12.1985 wherein the plaintiff asked for performance of contract but there was no reason for the courts below to keep aside the refusal by way of Exh.82 dated 12.7.1982 qua Art.54 and full and conscious understanding of refusal by the plaintiff which is clear from its reply Exh. 83 dated 3.8.1982. Thus, within the meaning of Article 54 of the Limitation Act, when the plaintiff had clear notice that performance was refused on 12.07.1992 Exh.82, the suit ought to have been filed on 11.7.1985 or, at the most on 02.08.1985; but the suit was admittedly filed in the court on 30.12.1985. The suit was thus clearly barred by limitation. Hence I answer question Nos.1 and 2 holding that the suit was barred by limitation and thus was not maintainable, in view of the express refusal dated 12.7.1982 under Exh.82. Consequently the notice dated 09.12.1985 by plaintiff demanding execution of sale deed was of no consequence and was wholly irrelevant for examining the important question about limitation.”*

9. This Court has then considered the third substantial question of law and by referring to the judgment in the case of I.S. Sikandar vs. K. Subramani and others¹ held that in absence of any challenge to the act of termination of contract, the original suit was not maintainable.

10. This Court has then considered the next question of law which relates to non joinder of necessary party. The court noted that the agreement of sell dated 30.01.1975 was not only signed by the original defendant no.1 but also by Mrs. C. Suryabati w/o late S.J. Naidu; Smt. Padma Naidu and Shri Shriram Naidu. The objection to that effect was raised in the written statement. Despite such objection, the said persons were not made party defendant to the suit. This Court relied upon a couple of judgments and answered the fourth question in the affirmative. Accordingly, the second appeal came to be allowed and the judgments and decrees passed by the courts below were set aside and the suit was dismissed.

11. The judgment passed by this Court was challenged before the Hon'ble Supreme Court in *Special Leave Petition (Civil) No. 11521/2016* by the applicant herein. The Supreme Court dismissed the SLP by following order:

“Heard learned Senior Counsel appearing for the petitioner.

We do not find any reason to interfere with the order passed by the High Court of Bombay at Nagpur.

Accordingly, the Special Leave Petition is dismissed.”

The review application will have to be considered in the aforesaid background.

12. Mr. Dharmadhikari, learned counsel for the applicant submits that once the delay in filing the review application is allowed, the application will be maintainable, despite dismissal of the Special Leave Petition, in terms of the law laid down by the Hon’ble Supreme Court in the case of *Khoday Distilleries Ltd. and Ors. Vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd.*¹

13. He, then, submits that there is an error apparent on the face of record of the judgment delivered by this Court. According to him, this Court has not appreciated the effect of rejecting the second appeal by applying Article 54 of the *Limitation Act, 1963* instead of Article 113. Limitation is calculated from the date of first refusal which is an error apparent on the face of record as it was not the actual refusal. He submits that the suit for specific performance of contract can be filed not only from the date of refusal but also from the date of cause of action. According to him, the cancellation of agreement has subsequently become redundant and the cause of action arose when the non applicant breached the terms of contract and failed to act on the joint application filed under Section 20 of the Act of 1976. He further contends that the issue of limitation is a mixed question of

facts and law. Both the courts below have held that the suit was filed within limitation. The interference by this Court in the concurrent findings of facts rendered by the courts below is a perversity, therefore, can be reviewed.

14. Mr. Dharamdhikari contends that the order passed by the State Government while exempting the suit land has not been properly considered by this Court on the point of limitation. By the said order, the exemption was granted with a condition that the suit property shall be sold only to the applicant – society. The property however has not been sold to the third party. This act of selling the property to the third party without seeking fresh permission from the State Government is a fresh cause of action for filing the suit for specific performance which has been ignored by this Court. Mr. Dharmadhikari, learned counsel for the applicant submits that unless the suit property is exempted under Section 20 of the Act of 1976, it could not be sold. Therefore, until the permission to sell the property is granted by the State Government, no cause of action will arise to file the suit. Accordingly, he contends that, in the peculiar facts and circumstances of the case, Article 113 and 54 of the *Limitation Act, 1963* will apply to calculate the period of limitation.

15. Mr. Dharmadhikari has relied upon the judgment in the case of Krishnan Vs. Backiram and Anr.¹ and Kapil Kumar

1 Manu.SC/7893/2007

*Vs. Raj Kumar*¹, in support of his contention that the finding of the fact cannot be interfered unless perverse. He then placed reliance upon the judgment in the case of *Roque Fredrick Ladinho Collasso and Ors. Vs. Camilo Antonio Aquaviva and Ors.*² to contend that Article 54 of the *Limitation Act, 1963* will not apply where time is not essence of the contract. On the point of scope under section 100, he has relied upon judgment in *Chandrabhan (deceased) through LRs and Ors. Vs. Saraswati and Ors.*³ The Court held that the High Court in second appeal is not permitted to disturb the findings of fact particularly when the courts below have considered and appreciated the oral and documentary evidence on record. Lastly, he took the aid of the judgment in the case of *Shiv Cotex Vs. Tirgun Auto Plast P. Ltd. and Ors.*⁴, to contend that the agreement cannot be cancelled unilaterally unless the ingredients of section 14 of the *Specific Relief Act, 1963* are specified.

16. As against, the non applicant contends that there is a very limited scope to entertain the review application. In the present case, this Court has applied its mind on the point of limitation. He submits that though the limitation is a mixed question of facts and law, where the facts are explicitly clear or admitted, the law of limitation can be applied. In the present case, there is no dispute that the original defendant no.1 had cancelled the agreement to sell vide notice dated

1 Manu/SC/1340/2022

2 Manu/MH/0587/2021

3 Manu/SC/1224/2022

4 Manu/SC/991/2011

12.07.1992, Exh.-82. He further submits that this Court has dismissed the appeal not only on the point of limitation but also on other substantial questions of law. He further submits that there is no apparent error of law on the face of record. According to him, the Supreme Court has dismissed the special leave petition by stating that it did not find any reason to interfere with the order passed by this Court. This reasoning is, in a way, a decision on merit and, therefore, the review is not maintainable and even if it is presumed to be maintainable, there would not be a question of error committed by this Court apparent on the face of record.

17. Having given thoughtful consideration to the submissions made by both the sides, I am of the considered view that the applicant has failed to make out a case for review. Article 113 of the Limitation Act, 1963 provides for limitation of three years to file suit for which no period of limitation is provided. The period of limitation will commence when the right to sue accrues. This article will not be applicable in the present case inasmuch as Article 54 deals with limitation for specific performance of contract. The limitation provided is three years and time from which the period begins is the date fixed for the performance of contract and where no such date is fixed when the plaintiff has noted that the performance is refused. In the present case, undisputedly, the original defendant no.1 refused to perform his part of contract when he has, vide notice dated 12.07.1992, Exh.-82, cancelled the agreement to sell. This notice has been received by the applicant/plaintiff. This

Court has considered in detail the provision of Limitation Act, 1963 to render a finding that the suit is not within limitation. I do not find any error apparent on the face of record to review the order.

18. That apart, this Court has answered the third substantial questions of law in the affirmative. This Court has held that the suit is not maintainable, in the absence of challenge to the termination of the agreement. The counsel for the applicant relied upon judgment of Punjab and Haryana High Court in the case of Brahm Dutt Vs. Sarabjit Singh, RSA No. 2943/2017. In the said case, though the defendants therein claimed that the agreement was cancelled by issuing notice, he failed to prove that the said notice was served upon the plaintiff. The defendant failed to prove cancellation of agreement even in the evidence. He, therefore, opined that the cancellation of contract has not been proved. The High Court was, however, of the view that, the defendant could not have cancelled the agreement unilaterally except where the agreement is to be determined in terms of Section 14 of the Specific Relief Act, 1963. The High Court referred to the judgment in the case of I.S. Sikandar (supra) and held that there is no dispute regarding the prepositions laid down by the Hon'ble Supreme Court. The High Court however has distinguished the judgment, considering the facts before it. The High Court held that in the case before the Hon'ble Supreme Court, the defendants therein had, in fact, asked the plaintiff to make payment of

money and get the sale deed executed and on failure of the plaintiff to make the payment, the agreement had become determinable and the defendant had terminated the contract by specific communication. The Court then noted that in the case before the High Court, the appellant therein had not offered the performance of his part of contract and secondly the termination has not been proved.

19. In my view, the judgment of the Punjab and Haryana High Court will not be of any assistance to the applicant. This Court has relied upon the judgment of the Hon'ble Supreme Court in the case of I.S. Sikandar (*supra*) to answer the question of law as regards the maintainability of suit in absence of challenge to the termination of agreement. This court has given its reasoning as to why the plaintiff ought to have challenged the cancellation. The error, therefore, cannot be said to be an error on the face of record.

20. Further, the appeal has been dismissed for non joinder of necessary party as well. The question was formulated while passing the judgment but having heard both the sides, the parties who were signatories to the agreement which was sought to be performed, were not all made party defendant to the suit and, therefore, this Court held that the suit was bad for non joinder of necessary party. Counsel for the applicant failed to show that the said finding is hit by error apparent on the face of record.

21. The sum and substance of the above discussion is that the application does not fit in the parameters of permissibility of review. The contentions raised by the applicant by relying upon the judgments of the Supreme Court is nothing but an attempt made to rehear the appeal, which is not permissible in review jurisdiction. There is, thus, no merit in the application, the same is rejected.

(Anil L. Pansare, J.)