



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

CIVIL REVISION APPLICATION NO. 124 OF 2023

APPLICANTS

- : 1. Smt. Gita Wd/o. Vijay Bajpayee,
Aged 68 Years, Occ. Household.
2. Ku. Shital D/o. Vijay Bajpayee, Aged
43 Years, Occu. Household.
3. Shri Gaurao S/o. Vijay Bajpayee,
Aged 40 Years, Occ. Service.

All R/o. Plot No. 28, Hanuman
Nagar, Nagpur and at present
residing at Plot No. 309, in front of
house of Khurjekar, Hanuman Nagar,
Nagpur.

//VERSUS//

NON-APPLICANT

: Shri Shyam Prabhakar Lohakare,
Aged 54 Years, Occ. Chartered
Accountant, R/o. 314, Chandan
Nagar, Nagpur.

Mr. M.D. Samel, Advocate for the Applicants.
None for the Non-applicant.

CORAM : G. A. SANAP, J.
DATED : 14th JUNE, 2024.

ORAL JUDGMENT

. Heard.

02] **ADMIT.**

03] The applicants, who are the original defendants in Special Civil Suit No.1140/2022, have challenged the order dated 26th April, 2023, passed below Exh.19, whereby the learned 14th Joint Civil Judge (Senior Division), Nagpur, rejected the application made by the applicants for rejection of the plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short, “CPC”).

04] The non-applicant/plaintiff has been duly served in this application, but he has failed to appear before this Court since long. In this judgment, the parties shall be referred by their nomenclature in the plaint. The plaintiff filed the suit in the year 2022, seeking a decree of specific performance of the contract/agreement dated 21st January, 2009. It is the case of the plaintiff that, as per this agreement, the defendants have agreed to sell the suit property to him for a total consideration of Rs.50,00,000/-. Part consideration was paid on the date of the agreement. The tentative date for execution of the sale deed was 20th January, 2010. It is further case of the plaintiff that during the

subsistence of the agreement, an attempt was made by the defendants to dispose of the suit property, and therefore, he was constrained to file a suit for declaration and permanent injunction. The said suit was allowed to be withdrawn on the application of the plaintiff. The plaintiff then issued a notice on 24th September, 2022, and called upon the defendants to execute the sale deed as agreed under the agreement for sale.

05] The defendants filed the written statement and opposed the claim. The main contention of the defendants is that the suit is time barred. They filed an application under Order VII Rule 11 of the CPC for rejection of the plaint. According to them, the suit filed by the plaintiff is barred by limitation.

06] The learned Judge, on consideration of the material placed on record, opined that in case of transfer of immovable property, time is not the essence of the contract. The learned Judge also observed that the question involved is a mixed question of law and facts, and therefore, the application for rejection of the plaint could not be allowed. Being aggrieved by this order, the defendants are before this Court in this revision application.

07] I have heard Mr. M.D. Samel, learned advocate for the applicants/defendants. Perused the record and proceedings.

08] Learned advocate for the defendants submitted that, in respect of the agreement for sale dated 21st January, 2009, the suit was filed in the year 2009. Learned advocate submitted that before filing of the suit in the year 2009, which was withdrawn by the plaintiff, a notice dated 20th March, 2009, was issued by the plaintiff to the defendants. The said notice was replied by the defendants vide reply dated 7th April, 2009. Learned advocate submitted that, in this reply, the defendants contended that the so-called agreement for sale was a false and fabricated document. Learned advocate submitted that the defendants denied the agreement in toto. In short, learned advocate submitted that even if it is assumed for the sake of argument that there was any agreement, the performance of the same was specifically denied vide reply dated 7th April, 2009. Learned advocate submitted that after this reply dated 7th April, 2009, instead of filing a suit for specific performance of the contract, the suit was filed simpliciter for declaration and injunction. Learned advocate submitted that a specific date was mentioned in the agreement for performance of the contract i.e. 20th January, 2010. Learned advocate submitted

that the learned Judge has failed to properly consider all these admitted facts and has come to a wrong conclusion. Learned advocate submitted that the cause of action arose in favour of the plaintiff in the year 2009 itself, when the performance of the agreement/ contract was refused or denied. Learned advocate further submitted that, in any case, the plaintiff was required to file a suit within a period of three years from 20th January, 2010, which is the date fixed for execution of the sale deed. Learned advocate submitted that the plaint is silent about the steps taken by the plaintiff towards specific performance of the contract. Learned advocate submitted that the plaintiff did not call upon the defendants to discharge the obligation cast on them in terms of the agreement even till 2022. Learned advocate submitted that the issue raised by the defendants has been fully crystallized by the facts on record. Learned advocate submitted that, on the basis of clever drafting, the plaintiff cannot be allowed to circumvent the provisions of the law. In order to substantiate his submission, learned advocate has placed heavy reliance on the following judgments:

1. *Raghwendra Sharan Singh Vs. Ram Prasanna Singh (dead) by Legal Representatives [(2020) 16 SCC 601]*.
2. *Ahmmadsahab Abdul Mula Vs. Bibijan & Others [AIR*

(2009) SC 2193].

3. Surygandhi Vs. Lourduswamy [AIR (2004) Madras 8].

09] In the case of *Raghwendra Sharan Singh (supra)*, the Hon'ble Apex Court has held that for the purpose of deciding an application under Order VII Rule 11, the Court is not supposed to look into the averments made in the written statement or contentions of the defendants. The Court has to peruse the plaint in its entirety. It is held that, considering the averments of the plaint as a whole, if the suit is found to be barred by limitation, the plaintiff cannot be allowed to circumvent that provision by means of clever drafting so as to avoid mention of those circumstances by which the suit stood barred by limitation.

10] In the case of *Ahmmadsahab Abdul Mula (supra)*, the expression 'date' fell for consideration of the Hon'ble Apex Court in the context of Article 54 of the Limitation Act. The relevant observations can be found in paragraphs 6 and 7 of the decision. The same are extracted below:

“6. ‘Fixed’ in essence means having final or crystallized form or character not subject to change or fluctuation.

7. The inevitable conclusion is that the expression ‘date fixed for the performance’ is a crystallized notion. This is clear

from the fact that the second part “time from which period begins to run” refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on ‘when the plaintiff has notice that performance is refused’. Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances. Whether the date was fixed or not the plaintiff has notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression ‘date’ used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the calendar. We answer the reference accordingly. The matter shall now be placed before the Division Bench for deciding the issue on merits.”

11] The Hon’ble Apex Court has held that the expression ‘date fixed for the performance’ is a crystallized notion. This is clear from the fact that the second part, “time from which period begins to run” refers to a case where no such date is fixed. It is held that when a date is fixed, it means that there is a definite date fixed for doing a particular act. It is held that in the second part of Article 54, the stress is on, “when the plaintiff has noticed that the performance is refused”. It is held that, as per the second part, there is a definite point of time when the plaintiff notices the refusal.

12] In the case of *Surygandhi (supra)*, it is observed that though time is not an essence of contract, the claim for specific

performance after nine years could not be said to be within reasonable time. Such a claim has to be held as 'barred by limitation'.

13] In this case, reliance has been placed on the provisions of Article 54 of the Schedule to the Limitation Act. It provides limitation for specific performance of the contract. The limitation is three years. The time begins to run from the date fixed for the performance, or if no such date is fixed, when the plaintiff has noticed that the performance is refused. In my view, in this case, even if it is assumed that the date fixed for the performance of the contract was tentative, by invoking the second part of Article 54, the suit filed by the plaintiff could not be said to be within limitation.

14] The defendants, by their reply to the first notice dated 20th March, 2009, issued by the advocate for the plaintiff, categorically denied the contract. They have contended that it was a false and fabricated document. Similarly, they denied or refused to perform their part of the contract. It is the contention of the plaintiff that the performance of the contract was subject to certain stipulations with regard to the NOC of the NIT, renewal of the lease, and mutation entry of the property in the name of the

defendants. Perusal of the agreement would show that there is a stipulation with regard to an obligation on the shoulders of the defendants to do the needful in that matter. Perusal of the agreement further shows that the date was fixed for execution of the sale deed i.e. 20th January, 2010. The agreement also stipulates that the defendants shall be responsible for obtaining the NOC, the renewal of the lease, and the mutation entry in the record. The stipulation further provides that they shall bear the costs for this. It is nowhere stated in the agreement that the execution of the sale deed was subject to fulfillment of these conditions. The two stipulations are separate and independent. The agreement clearly stipulates that the date for the execution of the sale deed shall be upto 20th January, 2010. This fact would show that the outer limit for execution of the sale deed was 20th January, 2010. It is, therefore, evident that a specific date was fixed for the execution of the sale deed. It is further evident that the plaintiff did not issue any notice to the defendants, calling upon them to discharge their obligations as stipulated in the agreement, namely, to obtain the NOC, the renewal of the lease etc. The notice dated 20th March, 2009, was issued when the plaintiff noticed that defendants were intending to dispose of the suit property. It is further stated in paragraph 4 of the notice that the plaintiff has been ready and

willing to perform his part of the contract on or before 20th January, 2010. In their reply, the defendants categorically denied the existence of the contract as well as refused the performance of the contract.

15] The suit filed in the year 2009 was withdrawn on 29.09.2009. The date fixed for specific performance was 20th January, 2010. The plaintiff was put to notice by the defendants that they were not ready to perform their part of the contract. The defendants categorically denied the agreement and refused the performance of the agreement. The plaintiff was, therefore, required to take appropriate steps for taking the agreement for sale to a logical conclusion. After the withdrawal of the suit in September, 2009, the plaintiff kept mum till the date of the issuance of the notice on 24th September, 2022. It is, therefore, evident that for almost 12 years, the plaintiff did not do anything. Perusal of the plaint would show that it is silent about the steps taken by the plaintiff for taking the agreement for sale to a logical conclusion. Perusal of the plaint would show that there is no whisper about the steps taken seeking the decree of specific performance of the contract after the withdrawal of the suit in September, 2009 till the date of the issuance of notice dated 24th

September, 2022. It is evident that, on the basis of clever drafting and that too without explaining the intervening events and circumstances, the provisions of law have been circumvented. It has been stated in the plaint that the cause of action arose in 2022, inasmuch as the notice issued seeking specific performance of the contract was not complied with by the defendants. However, the plaint is silent about the circumstances by which the suit stood barred by limitation. The plaintiff was required to explain all the circumstances from the date of withdrawal of the suit till the date of notice in the year 2022. In any case, the date was fixed for the execution of the sale deed. The plaintiff was, therefore, required to file a suit for specific performance within three years from the said date. Similarly, the defendants denied the execution of the agreement. They denied the contention of the plaintiff that he has been ready and willing to perform his part of the contract. The reply given to the first notice in the year 2009 by the defendants would show that by raising a specific contention, they refused to perform their part of the contract. It is to be noted that, on the basis of reply of the defendants to his notice in the year 2009, it can be easily gathered that he was put to notice that the performance had been refused by the defendants.

16] It is evident that the learned Judge has not properly appreciated the undisputed facts on record. The plaint is silent about the steps taken by the plaintiff seeking performance of the contract till 24th September, 2022. In the plaint, this period of 12-13 years has not been explained. The plaintiff slept over his right to file suit. The suit has been filed on the basis of the cause of action pursuant to notice dated 24.09.2022. The cause of action is nothing but a bundle of facts. The cause of action pleaded in the plaint has to be considered in juxtaposition with the material facts pleaded in the plaint. In this case, *prima facie*, the suit was barred by limitation. The pleaded cause of action was nothing but an attempt to circumvent the provisions of the law by a skillful drafting. The skillful drafting in such a situation cannot save a party. The suit filed after 13 years from the date of the refusal of the contract and also from the date fixed for the performance of the contract was beyond limitation. As such, the order passed by the learned Judge cannot be sustained. The suit is not within limitation. Therefore, the application made by the defendants was required to be allowed. In view of this, I proceed to pass the following order:

ORDER

i] The Revision Application is **allowed**.

- ii] The order dated 26th April, 2023, passed below Exh.19 by the learned 14th Joint Civil Judge (Senior Division), Nagpur, is set aside.
- iii] The application, made below Exh.19 by the defendants, is allowed.
- iv] The plaint, filed by the plaintiff, is rejected.
- v] The Revision Application stands disposed of in the above terms. The decree be drawn up accordingly.

(G. A. SANAP, J.)

Vijay