IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 615 OF 2024

Sushila Jayantilal Shah and ors. ...Applicants

Versus

Abul Chandso Jamadar (since deceased)
through LRs. ...Respondents

Mr. Nilesh Wable,i/b Umesh Mankapur, for the Applicant.
Mr. Shashank Mangle, a/w Balwant Salunke, Atharv Gidaye, Tanmay Shevbavnekar, for the Respondents.

CORAM: N. J. JAMADAR, J.
DATED: 22nd APRIL, 2025

ORDER:-

1. The applicants – original defendants have preferred this revision application being aggrieved by an order passed by the learned Civil Judge, Sangli, dated 4th May, 2024, whereby an application preferred by the applicants – defendants for the rejection of the plaint under the provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908 ("the Code") came to be rejected.

2. Shorn of superfluities, the background facts can be stated as under:

2.1 Jayantilal Narottamdas Shah, the husband of defendant No.1 Smt. Sushila Shah and the predecessor-in-title of defendant Nos.3(a) and 3(e) was the holder of the suit properties, which were acquired under diverse instruments from Sinhasane, the original holder of the suit properties. A dispute arose as the Karad Janata Sahakari Bank ("the Bank") attached the suit properties and other properties of Sinhasanes' towards recovery of the debt purportedly advanced by the Bank to Sinhasanes.

2.2 As the litigation protracted and certain adverse orders were passed against late Jayantilal and defendant No.1 Sushila, on 17th October, 2002 Jayantilal and Sushila (D1) entered into a contract of sale of the suit properties in favour of Mr. Abul Chandso Jamadar, the predecessor-in-title of the plaintiffs. The entire consideration of Rs.15,50,000/- was received by late Jayantilal and defendant No.1. Possession was also delivered to the predecessor-in-title of the plaintiffs, under the said instrument. As the encumbrances at the instance of the Bank were recorded in the record of rights of the suit properties, it was not possible to register the instrument and, therefore, the property was professed to be sold under the said instrument dated 17th October, 2002 sans registration.

3. The plaintiffs claimed, eventually, the Bank went into liquidation. There were negotiations between the liquidator of the Bank and the plaintiffs and other co-owners of the properties over which the Bank had recorded encumbrances. And an order deleting the encumbrances in the record of rights of the suit property came to be passed. The plaintiffs thereupon lodged the instrument dated 17th October, 2002 with the District Collector of Stamps and paid the deficit stamp-duty and the penalty thereon. The plaintiffs also called upon defendant No.1 and other legal representatives of late Jayantilal to execute a sale deed and convey the title in favour of the plaintiffs. However, defendant No.1 surreptitiously executed two gift deeds in favour of defendant No.2 thereby professing to gift away the half portion of the suit properties bearing City Survey No.1145/B/2/3 and 1145/B/2/4. Hence, the suit for specific performance of the contract contained in the instrument dated 17th October, 2002 and a mandatory order to execute and register a sale deed in favour of the plaintiffs and the consequential reliefs of injunction.

4. The defendants appeared and filed an application for rejection of the plaint primarily on the ground that the suit was *ex facie* barred by law of limitation. No title could be conveyed to the plaintiffs under the instrument dated 17th October, 2002, which is unregistered. Consequently, the plaintiffs cannot seek reliefs of declaration and injunction.

5. By the impugned order, the learned Civil Judge was persuaded to reject the application observing *inter alia* that the question as to whether the suit was barred by law of limitation was a mixed question of law and facts and, therefore, the prayer for rejection of the plaint was unsustainable.

6. Mr. Nilesh Wable, the learned Counsel for the applicants, would submit that the learned Civil Judge committed an error in recording a finding that the question of limitation, in the facts and circumstances of the case, was a mixed question of law and facts. The suit was *ex facie* barred by law of limitation as the purported unregistered deed of sale was executed on 17th October, 2002 and the suit came to be instituted in the month of September, 2023. Since no date of the performance of the contract was stipulated in the instrument dated 17th October, 2002, the suit must have been instituted within three years thereof. Nor the plaintiffs have brought any material on record to show that there was a refusal to perform the contract on a particular date. Thus, the suit seeking the reliefs of the present nature was clearly barred by law of limitation.

7. To bolster up the aforesaid submission, Mr. Wable placed reliance on a recent judgment of the Supreme Court in the case of ***Nikhila Divyang Mehta and another vs. Hitesh P. Sanghvi and others[1].*** In the said case, in the context of the submissions that the limitation is a mixed question of law and facts and, thus, the plaint cannot be rejected at the threshold, the Supreme Court, albeit in the facts of the said case, enunciated as under:

> "27. The submission that limitation is a mixed question of law and fact and that it cannot be decided without allowing the party to lead evidence is of no substance. In the present case, we have earlier noted that the suit was admittedly instituted on 21.11.2017 whereas according to the plaint averments the cause of action first arose on 04.02.2014. Even assuming that the cause of action last arose in the first week of November, 2014, the suit ought to have been filed by 07.11.2017. The suit was filed on 21.11.2017. It was ex-facie barred by limitation for which, no evidence was required to be adduced by the parties. The above issue is purely an issue of fact and in the admitted facts as per the plaint, allegations stand concluded for which no evidence is needed."

8. Mr. Wable would urge that the aforesaid pronouncement is on all four with the facts of the case at hand.

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9. Mr. Shashank Mangle, the learned Counsel for the respondents – plaintiffs, controverted the submissions on behalf of the applicants. It was submitted that. in the plaint, the respondents – plaintiffs have indicated the circumstances on account of which they were constrained to institute the suit. It is only after the encumbrances of the Bank recorded in the record of rights of the suit properties came to be removed, the cause of action to seek the specific performance of the contract arose. Mr. Mangle would urge that, in the plaint, the plaintiffs have specifically pleaded the date of the execution of the gift by defendant No.1 in favour of defendant No.2 as the cause of action for the institution of the suit. Thus, the suit is well within the period of limitation.

10. I have perused the material on record. It is trite at the stage of consideration of the prayer for rejection of the plaint on the ground that the plaint does not disclose a cause of action (clause (a)) or that the suit is otherwise barred by any law, including law of limitation (clause (d)), the Court has to consider only the averments in the plaint and the documents annexed thereto. The defence of the defendants is wholly irrelevant.

11. From the tenor of the plaint, it becomes abundantly clear that defendant No.1 and her late husband Jayantilal had entered into a transaction to sell the suit properties with the predecessor-in-title of the plaintiffs. A copy of the said agreement dated 17th October, 2002, tendered for the perusal of the Court, indicates that the entire consideration was allegedly received by the vendors and even the possession of the suit properties was delivered to the predecessor-in-title of the plaintiffs. It also becomes evident that the parties were fully cognizant of the fact that there were encumbrances of the Bank over the suit properties and it was not possible to execute a registered instrument and, therefore, the said instrument dated 17th October, 2022 came to be executed.

12. It is the claim of the plaintiffs that the negotiations between the defendant and the Bank and others were underway and, eventually, in the year 2021, on account of the settlement arrived at between the parties hereto and the liquidator of the Bank, the encumbrances were removed. The claim of the plaintiffs that the instrument was thereafter impounded under Section 33 of the Maharashtra Stamp Act, 1958 and the deficit stamp-duty and penalty thereon was paid by the plaintiffs, finds support in the endorsement on the said instrument. This Court finds that in the paragraphs 11 and 14 of the plaint, the plaintiffs have made categorical assertions as regards the removal of encumbrances and the subsequent gift deeds by defendant No.1 in favour of defendant No.2.

13. If the aforesaid assertions in the plaint are read in conjunction with the recitals in the instrument dated 17th October, 2002, especially clause-5 thereof, it becomes abundantly clear that the factum of encumbrances of the Bank over the suit properties was clearly recorded therein and the parties acknowledged that on account of the said encumbrances it was not possible to execute a registered instrument.

14. *Prima facie,* the averments in the plaint regarding the accrual of the cause of action find support in the recitals in the instrument dated 17th October, 2002. In this context, the challenge to the tenability of the suit on the ground of bar of limitation deserves to be appreciated.

15. Under Article 54 in the Schedule to the Limitation Act, 1963, the period of limitation for a suit for specific performance of a contract is three years and the time begins to run from the date fixed for the performance, or if no such date is fixed, when the plaintiffs had notice that performance is refused. Article 54 is, thus, in two parts. If the parties have fixed date of performance of the contract, the period of limitation commences from the date so fixed. However, when no such date is discernible from the contract between the parties, the time begins to run when the plaintiffs have notice that performance is refused.

16. It is well recognized that it is not necessary that a specific date should be mentioned in the contract for the performance. The date fixed for performance can also be ascertained from the attendant circumstances and the other terms of the contract. In the case at hand, Mr. Wable submitted that the instrument dated 17th October, 2002 does not indicate the date fixed for the performance of the contract. Therefore, the suit ought to have been instituted within three years of the execution of the said instrument dated 17th October, 2002.

17. I am afraid to accede to aforesaid submission. Clause-5 of the instrument dated 17th October, 2002 provides a sustainable answer to the submission sought to be canvassed on behalf of the applicants. In addition to recording the fact that on account of the encumbrances over the suit property, a registered instrument could not be executed, late Jayantilal and defendant No.1 agreed to indemnify the plaintiffs predecessor-in-title, if any defect in the title of Jayantilal and defendant No.1 surfaced. The recital-5 in the instrument dated 17th October, 2002 *prima facie* indicates that the parties had agreed that the transfer could be effected after the removal of the encumbrances.

18. The said eventuality occurred in the year 2021. Upon the removal of the encumbrances of the Bank pursuant to the order passed by the authorities under the Maharashtra Co-operative Society Act, 1960 the restraint on alienation came to be removed. Thus, the question of limitation is required to be determined on the basis of the second part of Article 54 of the Schedule to the Limitation Act.

19. Is there pleading of refusal of performance of their part of contract by the defendants? From the perusal of the averments in the plaint, as a whole, it becomes abundantly clear that the plaintiffs have asserted that the refusal of performance became known to them after defendant No.1 executed the purported gift deed in favour of defendant No.2. Conversely, there is *prima facie* no material to indicate that there was refusal to perform the contract on the part of defendant No.1 and the legal representatives of Jayantilal, at any anterior point of time.

20. From this perspective, the learned Civil Judge was justified in returning a finding that the question as to whether the suit is barred by law of limitation is a mixed question of facts and law and, therefore, the plaint was not liable to be rejected on the said count.

21. I am, therefore, inclined to reject the application.

22. Hence, the following order:

: O R D E R :

(i) Application stands rejected.

(ii) No costs.

[N. J. JAMADAR, J.]