

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 432 OF 2024

WITH

CIVIL REVISION APPLICATION NO. 26 OF 2024

1. Sou Deepa Chandrashekar Shetty }
 aged 57 years, Occu: Housewife }
 R/o AMARDEEPA, }
 at Uliyaragoli, Post Kapu, Tal-Udupi, }
 Dist-Udupi, Karnataka }

2. Sou Rajshree Prasad Shetty }
 Aged 50 years, Occu: Housewife }
 R/o 7014, Glenfield prestige, }
 Wellington Park, 182, IAF Main }
 Road }
 Gangamma Circle, Jalahalli, }
 Bangalore-560013, Karnataka }

Both Appellants through their POA }
 Ashok Bhaskar Shetty aged---Years, }
 Occu: Business R/o Sudha Niwas, }
 A/P Korochi, Tal-Hatkanagale, Dist- }
 Kolhapur. }

.....(Petitioners/Applicants)
 Orig. Def. Nos. 1a and 1b)

Versus

Milind Jaykumar Kole }
 aged 39 years, Occu: Agri & }
 Business }
 an Indian inhabitant having address }
 at R/o Kabnur, Tal-Hatkanangale, }
 Distr-Kolhapur. }

....Respondent
 (Orig. Plaintiff)

 Mr. Yuvraj Narvankar I.by Prasad L Gajbhiye and N.B. Patil, for the
 Petitioners/Applicants.

Mr. Anilkumar Patil with Sachin Bhavar, Zeel Jain and Digvijay Patil,
for the Respondent.

CORAM : N.J. JAMADAR, J.

RESERVED ON : 17TH MARCH 2025

PRONOUNCED ON : 8TH APRIL 2025

JUDGMENT:

1. Rule. Rule made returnable forthwith and, with the consent of learned counsel for the parties, heard finally.
2. These petition and application arise out of the orders passed by the learned Civil Judge, Ichalkarnaji in Special Civil Suit No. 251 of 2005 and as the outcome of one may have a bearing on another, both the petition and the application were heard together and are being decided by this common judgment.
3. The background facts, leading to these proceedings, can be summarised as under:
 - 3.1 Guruprasad Narayan Shetty, the deceased defendant, and the predecessor in title of the applicants/petitioners was the holder of property bearing revenue survey No. 575/ 2, admeasuring 35.02 R situated at Tal-Hatkanangale, District-Kolhapur. The deceased-defendant entered into a contract to sell 15 R land out of the said property at the consideration of Rs.150 per sq. ft.

3.2 An agreement for sale dated 18th September 1996 came to be executed. Under the said agreement, the plaintiff claimed to have paid a part consideration of Rs.2,80,000/-. Balance consideration was to be paid at the time of the execution of the sale deed. The deceased defendant was to take requisite steps to have the record of rights corrected, get the property agreed to sold measured and obtain the consent of his heirs and execute the sale deed within a period of 11 months.

3.3 Asserting that the deceased-defendant did not take the requisite action and perform his part of the reciprocal promises, despite repeated requests, the plaintiff instituted the suit for specific performance of the contract. It was, *inter alia*, asserted that the plaintiff had addressed a notice on 2nd September 1999 and, eventually, on 2nd April 2003, the deceased-defendant flatly refused to perform the contract. Hence, the suit.

3.4 Initially, the suit proceeded ex-parte as the deceased-defendant did not appear despite the service of summons. By a judgment and order dated 14th March 2006, the learned Civil Judge was persuaded to dismiss the suit observing, *inter alia*, that the suit was not within the period of limitation.

3.5 The plaintiff preferred an appeal before the District Court. By a judgment and order dated 31st January 2020, the learned District Judge, Ichalkaranji reversed the judgment of the trial Court and passed a decree for specific performance of the contract. Aggrieved, the petitioners preferred second Appeal before this Court being Second Appeal No. 390 of 2022.

3.6 By an order dated 20th September 2023, this Court was persuaded to allow the appeal, set aside the judgment and order passed by the First Appellate Court and restore the suit to the file of the trial Court for afresh decision after providing an opportunity to the petitioner to file written statement and adduce evidence.

3.7 Post remand, the petitioners/defendants preferred an application for rejection of the plaint under Order VII Rule 11(d) of the Code of Civil Procedure ('CODE') contending, *inter alia*, that the suit was ex-facie barred by law of limitation and to circumvent the bar of limitation the plaintiff had resorted to clever drafting. From the averments in the plaint, it would be abundantly clear that the plaintiff had knowledge of refusal of performance of contract more than three years prior to the institution of the suit. Therefore, the plaint was liable to be rejected.

3.8 The plaintiff, in turn, filed an application for amendment in the plaint asserting, *inter alia*, that on account of inadvertence and omission on the part of the advocate who earlier represented the plaintiff, the office copy of the notice dated 2nd April 2003 was misplaced and certain averments with regard to the said fact could not be raised in the plaint.

3.9 The petitioners resisted the application for amendment.

3.10 By an order dated 8th December 2023, the learned Civil Judge ruled that the application for amendment would be decided first and, thereafter, the application for rejection of the plaint would be decided.

3.11 Eventually, by an order dated 8th December 2023, the learned Civil Judge was persuaded to allow the application for amendment as, in the view of the learned Civil Judge, the proposed amendment was necessary for the determination of real questions in controversy between the parties and since trial had not commenced the interdict contained in the proviso to Order VI Rule 17 was not attracted.

3.12 By a separate order dated 12th December 2023, the learned Civil Judge was persuaded to reject the application for rejection of the

plaint as, in the facts of the case, the question of limitation appeared to be a mixed question of law and facts and, thus, could be legitimately decided after the parties adduced evidence.

4. Being aggrieved, the defendants have assailed the order dated 8th December 2023, permitting amendment in the plaint, in Writ Petition No. 432 of 2024, and the order dated 12th December 2024 declining to reject the plaint, in Civil Revision Application No. 26 of 2024.

5. I have heard Mr. Yuvraj Narvankar, learned counsel for the defendants, and Mr. Anil Patil, learned counsel for the plaintiff at some length. The learned counsel took the Court through the pleadings and material on record.

6. At the outset, Mr. Narvankar, learned counsel for the defendants, would submit that the legality, propriety and correctness of the order dated 12th December 2024 declining to reject the plaint is required to be examined first. Thus, if the defendants succeed in establishing that the trial Court has exercised the jurisdiction with material irregularity and declined to reject the plaint though it is ex-facie barred by law of limitation, it would seal the fate of the writ petition assailing the order permitting amendment in the plaint.

7. Mr. Narvankar would urge that the Trial Court was in error in holding that the question of limitation, in the facts of the case, was a mixed question of law and facts and, thus, warranted adjudication at the trial. In arriving at such an erroneous conclusion, according to Mr. Narvankar, the learned Civil Judge failed to notice that the plaintiff had resorted to clever drafting to create an illusion of cause of action and that the suit is not barred by law of limitation. The trial Court was duty bound to read the averments in the plaint in a meaningful manner and a meaningful reading of the plaint would indicate that the suit is hopelessly barred by law of limitation.

8. Mr. Narvankar laid emphasis on the pre-suit notice dated 2nd September 1999 which was relied upon by the plaintiff. Special emphasis was laid on the fact that the said notice dated 2nd September 1999 referred to a prior notice which was allegedly addressed by the plaintiff to the deceased-defendant by RPAD as well as Under Certificate of Posting (UPC). And yet the deceased-defendant did not perform his part of the promise.

9. By the said notice dated 2nd September 1999, the deceased-defendant was called upon to execute the sale deed within a period of 72 hours, lest the plaintiff would institute a suit against the deceased-

defendant. This notice dated 2nd September 1999, and the consequent failure of the deceased-defendant to execute the sale deed, according to Mr. Narvankar, constituted a clear refusal to perform the contract on the part of the deceased-defendant. Mr. Narvankar strenuously submitted that the fact that the plaintiff had addressed a prior notice calling upon the deceased-defendant to execute the sale deed and the said notice was not complied with, further erodes the claim of the plaintiff as the period of limitation began to run upon failure of the deceased-defendant to comply with the said notice.

10. With a view to wriggle out of the aforesaid situation, the plaintiff resorted to the device of the amendment in the plaint to assert that despite service of notices the deceased defendant never refused to perform the contract and that notice dated 22nd April 2003 was misplaced. Such amendment could not have been permitted by the trial Court. In any event, such amendment, which was introduced to obviate an inevitable rejection of the plaint, does not advance the cause of the plaintiff.

11. To this end, Mr. Narvankar placed reliance on a judgment of the Supreme Court in the case of *'Patasibai and Ors vs Ratanlal'*¹, wherein it was enunciated that an amendment which was sought to be

1 (1990) 2 SCC 42

introduced to obviate the consequence of rejection of the plaint, cannot be permitted.

12. To buttress the submission that the plaint can be rejected when it is ex-facie barred by law of limitation, Mr. Narvankar placed reliance on the decisions of the Supreme Court in the cases of *'Dahiben vs Arvindbhai Kalyanji Bhanusali (Gajra) dead through legal representative and Ors.'*² and *'C.S. Ramaswamy Vs V.K . Senthil and Ors.'*³

13. Mr. Patil, learned counsel for the plaintiff, stoutly resisted the submissions on behalf of the defendant. Mr. Patil would urge that the defendants having obtained a remand on the premise that they have had no opportunity to contest the suit, cannot now be permitted to file an application to delay the disposal of the suit.

14. On the merits of the matter, taking the Court through the averments in Para 3 and Para 7 in plaint, Mr. Patil urged with tenacity that the question as to whether the instant suit is barred by law of limitation is indeed a question rooted in facts and law. Emphasising that at the stage of the consideration for rejection of the plaint only averments in the plaint and documents annexed thereto, are required

2 (2020) 7 SCC 366

3 (2024) SCC online 330

to be considered, Mr. Patil would urge, there is no material to show that the deceased-defendant had refused to perform the contract on a particular date. Whether there was indeed refusal to perform the contract and on what date, would be the matters for adjudication at the trial. Thus, no fault can be found with the impugned order, urged Mr. Patil.

15. To bolster up the submission that the question of limitation is a mixed question of law and facts and such question cannot be decided at the threshold, Mr. Patil placed a strong reliance on the decision of the Supreme Court in the case of *'Nusli Neville Wadia Vs. Ivory Properties and Others'*⁴,

16. The aforesaid submissions now fall for consideration.

17. Since the rejection of the Plaint was sought principally on the ground that the Suit is barred by law of limitation, it may be apposite to notice the provisions contained in Article 54 to the Limitation Act 1963. It reads thus:

Art 54. For specific performance of a contract	Three Years	The date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.
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4 (2020) 6 SCC 557

18. The controversy often revolves around the question as to the starting point of limitation for a Suit for specific performance. Evidently, the third column which indicates the time from which the period of limitation begins to run is in two parts.

19. The first part relates to a case where the parties to the contract for sale, stipulate a date for the performance. Thus the commencement of the period of limitation in the first part is from “the date fixed for the performance”.

20. The expression, “the date fixed for performance” is not necessarily restricted to a specific date named in the contract or an identifiable date but also a date which the parties intended should be the date when the contract is to be performed. It thus implies that the expression the date fixed covers in its fold not only the date expressly stipulated in the contract but the date which the parties intended that the contract should be performed. It might take the shape of a date to be ascertained on the happening of a contingent event specified in the contract.

21. Under the second part, where no date is fixed for the performance of the contract, the period of limitation begins to run when the Plaintiff has notice that performance is refused. To put in

other words, if no date is fixed for the performance of the contract, the period of limitation begins to run from the knowledge to the Plaintiff of refusal of the performance of contract by the Defendant.

22. Thus, while considering the aspect of limitation for a suit for specific performance, the Court has to first determine as to whether the case falls within the first or second part of Article 54 of the Limitation Act, 1963. In the case of **Pancham Dhara and Ors. V/s. Monmatha Nath Maity (dead) through LRs and Anr.**⁵, the Supreme Court enunciated that while determining the applicability of the first or the second part of the said provision, the court will firstly see as to whether any time was fixed for performance of the agreement of sale and if it was so fixed, whether the suit was filed beyond the prescribed period unless any case of extension of time for performance was pleaded and established. When, however, no time is fixed for performance of contract, the court may determine the date on which the plaintiff had notice of refusal on the part of the defendant to perform the contract and in that event the suit is required to be filed within a period of three years therefrom.

23. In the case at hand, the Counsel for the parties were in unison on the point that under the Agreement for Sale, the parties had

⁵ (2006) 5 SCC 340

not fixed the date for performance of the contract. It was stipulated that the Sale Deed will be executed under 11 months of the said Agreement, however, no date, as such, was fixed for the performance. The controversy thus really revolves around the question of the application of the second part of Column – 3 of Article 54. i.e., institution of the Suit within the period of limitation from the date of knowledge of refusal of performance by the deceased Defendant. That brings in its trail, the question as to whether there was refusal of performance by the deceased Defendant.

24. Mr. Narvankar, the learned Counsel for the Petitioner, strenuously urged that the claim of the Plaintiff that eventually on 2nd April 2003, the deceased Defendant refused to perform the contract is a self-serving assertion made with a view to create an illusion of cause of action. The events which preceded the institution of the Suit, especially, the notice dated 2nd September 1999 and, more particularly, reference to the prior notice which was allegedly served on the Defendant, according to Mr. Narvankar, clearly indicates that there was notice of refusal of performance at a much earlier point of time, thereby rendering the Suit ex-facie barred by law of limitation. Repetitive notices, according to Mr. Narvankar, would not resurrect

the cause of action for a Suit which was hopelessly time-barred. A factual investigation, in such a scenario, is not warranted, urged Mr. Narvankar.

25. In the case of ***Dahiben (Supra)***, on which a very strong reliance was placed by Mr. Narvankar, the Supreme Court, after adverting to the previous pronouncements on the rejection of Plaint, *inter alia*, enunciated that the underlying object of Order VII Rule 11(a) is that if in a suit, no cause of action was disclosed, or the Suit is barred by limitation under Rule 11(d), the Court would not permit the Plaintiff to unnecessarily protract the proceedings in the Suit. In such a case, it would be necessary to put an end to the sham litigation, so that further further judicial time is not wasted.

26. In the case of ***Raghwendra Sharan Singh (Supra)*** the Supreme Court had rejected the Plaint as it was clearly barred by law of limitation. The observations of the Supreme Court in paragraph 7 are instructive and, hence, extracted below :

“7. Applying the law laid down by this Court in the aforesaid decisions on exercise of powers under Order 7 Rule 11 of the CPC to the facts of the case in hand and the averments in the plaint, we are of the opinion that both the Courts below have materially erred in not rejecting the plaint in exercise of powers under Order 7 Rule 11 of the CPC. It is required to be noted that it is not in dispute that the gift deed

was executed by the original plaintiff himself along with his brother. The deed of gift was a registered gift deed. The execution of the gift deed is not disputed by the plaintiff. It is the case of the plaintiff that the gift deed was a showy deed of gift, and therefore the same is not binding on him. However, it is required to be noted that for approximately 22 years, neither the plaintiff nor his brother (who died on 15.12.2002) claimed at any point of time that the gift deed was showy deed of gift. One of the executants of the gift deed, brother of the plaintiff during his lifetime never claimed that the gift deed was a showy deed of gift. It was the appellant herein-original defendant who filed the suit in the year 2001 for partition, and the said suit was filed against his brothers to which the plaintiff was joined as defendant No. 10. It appears that the summon of the suit filed by the defendant being TS (Partition) Suit No. 203 of 2001 was served upon the defendant No.10-plaintiff herein in the year 2001 itself. Despite the same, he instituted the present suit in the year 2003. Even from the averments in the plaint, it appears that during these 22 years i.e. the period from 1981 till 2001/2003, the suit property was mortgaged by the appellant herein-original defendant and the mortgage deed was executed by the defendant. Therefore, considering the averments in the plaint and the bundle of facts stated in the plaint, we are of the opinion that by clever drafting the plaintiff has tried to bring the suit within the period of limitation which, otherwise, is barred by law of limitation. Therefore, considering the decisions of this Court in the case of T. Arivandandam (Supra) and others, as stated above, and as the suit is clearly barred by law of limitation, the plaint is required to be rejected in exercise of powers under Order 7

Rule 11 of the CPC”.

27. In the case of *C.S. Ramaswamy (Supra)*, the Supreme Court, following earlier judgments in the case of *T. Arivandandam Vs T.V. Satyapal & Anr*⁶ and *Raghwendra Sharan Singh Vs Ram Prasanna Singh*⁷ held that the Suits were barred by law of limitation and, therefore, the Plains were required to be rejected in exercise of the power under Order VII Rule 11 of the Code.

28. There can be no duality of opinion that once the Court comes to a conclusion that the Suit is ex-facie barred by law of limitation and no further enquiry is warranted to determine the aspect of limitation and an endeavour has been made to infuse life into a Suit which is on its face barred by law of limitation by resorting to clever drafting, the Court has a duty to pierce the facade of elusion and nip such litigation in its bud.

29. For that purpose, the Court is enjoined to read the averments in the Plaint as a whole in a meaningful manner. It is trite, the defence raised by the Defendant cannot be taken into account. A plea of rejection of the Plaint is essentially a plea on a demurrer. If the averments in the Plaint, taken as true and on their face-value, do

6 1977 4 SCC 467.

7 (2020) 16 SCC 601.

indicate that the Suit is barred by limitation, the Court may not hesitate to reject the Plaint as the provisions contained in Order VII Rule 11 also serve the cause of public justice by empowering the Court to strike at abortive and unnecessary litigation.

30. At the same time, the Court must be alive to the proposition that, more often than not, limitation is a mixed question of law and facts. Often the applicability of a particular Article or a part of given Article of the Limitation Act is intertwined with the proof of primary facts. In the case of *Nusli Wadia (Supra)*, the Supreme Court in the context of the provisions contained in Section 9(A) of the Code (as it then stood in its Application to the State of Maharashtra) enunciated that limitation is a mixed question of law and facts.

31. Re-adverting to the facts of the case, it is imperative to note that the Defendants seek the rejection of the Plaint on the premise that the Plaintiff had issued the notice on 2nd September 1999 and prior thereto also, and despite a categorical assertion in the notice dated 2nd September 1999 that in the event of non-performance of the contract within 72 ours thereof, the Plaintiff would be constrained to initiate action by way of Suit, the Suit came to be instituted in the month of October 2003 and, thus, the Suit was clearly barred by law of

limitation.

32. It would be contextually relevant to note that, by way of amendment, the Plaintiff asserted that despite those notices, the deceased Defendant never refused the performance of the contract and, instead, sought time to perform the contract.

33. On first principles, the amendment would ordinarily relate back to the date of the institution of the Suit. This amendment may possibly blunt out the objection on the ground of limitation. However, in the backdrop of submissions canvassed before the Court, I deem it appropriate to consider as to whether the Suit would appear to be barred by limitation, even if the amended portion of the Plaint is not taken into account.

34. A perusal of the averments in the Plaint and the notice dated 2nd September 1999 would indicate that the Plaintiff claimed that the notices were served on the deceased-Defendant calling upon him to perform the contract. Mr. Narvankar, was fully justified in canvassing a submission that the successive notices including the alleged notice in the year 2003 do not furnish a fresh cause of action. Nor they extend the period of limitation (**Venkappa Gurappa Hosur V/s. Kasawwa c/o Rangappa Kulgod**⁸). However, the pivotal question

8 (1997) 10 SCC 66

that wrenches the fore is, whether the service of the notice on the deceased Defendant, in itself, would amount to refusal to perform the contract on the part of the deceased Defendant.

35. Undoubtedly, refusal need not be express. Refusal to perform the contract can be gathered from the attendant circumstances and the conduct of the parties, including an act by which the Defendant has disabled himself from performing the contract. A case where the Defendant expressly refuses the performance of the contract, in response to the notice, or otherwise repudiates the contract, does not present much difficulty. The cases where an inference of refusal is required to be drawn on the basis of the attendant circumstances and conduct of the parties, on the other hand, may warrant an investigation into facts. Whether such refusal of performance can be interfered, in the instant case, without such investigation into facts, is the moot question.

36. From the averments in the Plaint and the documents which are annexed to the Plaint, an inference of a positive repudiation of the contract or refusal of its performance, by the deceased Defendant, cannot be drawn. What the notice dated 2nd September 1999 indicates is that a prior notice demanding the performance of the contract was

served on the deceased Defendant Under Certificate of Posting and the notice sent by Registered Post was refused by the deceased Defendant. Under the notice dated 2nd September 1999, the Plaintiff demanded the performance of the contract within 72 hours at the pain of an action for enforcement of the contract. However, the averments in the Plaint or the documents annexed thereto do not evince that there was refusal of performance. What the Defendants want the Court, at this stage, is to draw an inference that there was refusal of performance, on the count that despite repetitive notices, the deceased Defendant did not perform the contract. To put it differently, silence or inaction on the part of the deceased Defendant would amount to refusal of performance.

37. I am afraid, at the stage of consideration for the rejection of the Plaint, merely on the basis of service of the notices for performance, without anything more, the Court would be justified in drawing such an inference of refusal of performance. At the trial, the Defendants might succeed in persuading the Court that the necessary corollary of the inaction on the part of the deceased Defendant was, refusal of performance. That would necessarily warrant investigation into facts and appraisal of evidence. However, that cannot be the

sustainable premise on which the Complaint can be rejected at this stage.

38. The conspectus of aforesaid consideration is that on a meaningful reading of the Complaint as a whole, alongwith the documents annexed thereto, the Court does not find either an express refusal of performance or circumstances which would justify an inexorable inference that there was indeed refusal of performance by the deceased Defendant, on a given date, and the Plaintiff failed to institute the Suit within three years from such refusal of performance. Therefore, the learned Civil Judge cannot said to have committed any error in declining to reject the Complaint on that count.

39. On the aspect of the amendment in the Complaint, suffice to note that the amendment was sought at a pre-trial stage. The interdict contained in the proviso to Order VI Rule 17 of the Code, was not attracted. Even otherwise, on the touchstone of the two overarching principles, namely, necessity of the amendment from the point of view of deciding the real questions in controversy between the parties and the degree of potentiality of prejudice to the Defendants, this Court does not find that the amendment, permitted by the Trial Court, can be faulted at. The proposed amendment is essential for the determination of all questions in controversy between the parties.

40. Resultantly, this Court does not find any infirmity in the order permitting the amendment in the Plaint.

41. The upshot of aforesaid consideration is that both the Writ Petition and Civil Revision Application deserve to be dismissed.

42. Hence the following order:

:O R D E R :

- i) Writ petition and Civil Revision Application stand dismissed.
- ii) Rule discharged.
- iii) No costs.
- iv) The plaintiff is permitted to withdraw the amount which the Plaintiff has deposited pursuant to the order dated 28 March 2024 passed by this Court, alongwith interest accrued thereon.

(N.J. JAMADAR, J)