

ORDER BELOW EXHIBIT 1 AND 17 IN SPL.C.S.NO.60/2014

(Date : 10.04.2015)

Pravin S/o Kapoorchand Surana and another
Vs.
M/s Trilok builders and another

The defendant moved application Exh.17 under Order 7 Rule 11 CPC for rejection of plaint contending that the suit is barred by limitation.

2. On the basis of that application, the learned Predecessor framed preliminary issue as follows by order below Exh.1.

“Whether suit is within limitation?”

3. As per application Exh.17, the present suit is filed in the year 2014 for specific performance of agreement dated 06.12.2014. As per defendant, it has issued a notice dated 10.10.2006 and filed Spl.C.S.No.632/2007 for possession of the suit property from the plaintiff. As per the said notice and the suit, the defendant has dis-owned the right of plaintiff to get sale deed executed from the defendant. As such, the defendants refused to perform the contract on the day of notice i.e. 10.10.2006 and so the suit is barred by limitation.

4. The plaintiff filed reply vide Exh.21. It is submitted that the issue is mixed question of bundle of facts and Law governing the transfer of property and Maharashtra Flat Owner Act. Till date, the defendant did not get the completion certificate and as such the defendant is not in a position to transfer the property legally. As such, the cause of action shown by the plaintiff has to be seen.

5. Heard learned Counsel, Shri. Malani, for the defendant and learned Counsel, Shri. Shrimali, for the plaintiff. Both the learned Counsel submitted in consonance to the application and the reply respectively.

6. Learned Counsel, Shri.Malani for the defendant relied upon the following case laws.

- 1) ***“Salim bhai and others Vs. State of Maharashtra and others,2003(2) Mh.L.J.529”***
- 2) ***“Kishorbhai Premchand Shah Vs. Hirji Bhojraj and sons Kutchi Oswal Jain Chhataralay Trust and others,2014(2) Mh.L.J.187”***
- 3) ***“Anand Laxmi Enterpreises Vs. Vasant Balu Mhatre and others, 2009(1) Mh.L.J.445”***
- 4) ***“Kanayalal Madhavji Thakkar Vs. Shree Padmanabh Builders, 2011(1) Mh.L.J.939”***

7. Learned Counsel, Shri.Shrimali for the plaintiff relied upon the following case laws.

- 1) ***“Madhuvihar Co-Op Hsg.Soc. & ors. Vs. Jayantilal Investments & Ors.,2006(3) Bom.C.R.36”***
- 2) ***“Jeetmal Mangalchand Sakhlecha & others Vs. Neelkanth Building Corporation & others, 2004(6) Bom.C.R.303”***
- 3) ***“Ramesh B. Desai & Ors. vs. Bipin Vadilal Mehta & Ors., 2006(6) All MR 56(S.C.)”***
- 4) ***“Gunwantbhai Mulchand Shah & Ors. vs. Anton Elis Farel & Ors., 2006(3) All MR 85(S.C.)”***

8. In nutshell, the facts of the present matter are as under:

The plaintiff agreed to purchase the suit flat from the defendant-builder in the year 2004. The defendant-builder executed agreement to that effect in favour of the plaintiff in 2004. The possession of Flat was also given to the plaintiff. In the year 2007 the defendant-builder filed suit for possession of the suit land. The plaintiff filed the present suit in the year 2014 for specific performance of the agreement executed in 2004. As per the defendant, the suit ought to have been filed within three years from issue of notice by the defendant on 10.10.2006 when defendant claimed possession of the suit Flat. As per plaintiff, the defendant-builder could have transferred the title in the suit Flat on receipt of the completion certificate, the defendant-builder did not get the completion certificate and therefore the suit is within limitation.

9. The Hon'ble Supreme Court in the case of ***Salim bhai and others Vs. State of Maharashtra and others*** observed that the trial court can exercise power under Order 7 Rule 11 CPC at any stage before conclusion of trial.

10. The Hon'ble Supreme Court in the case of ***Kishorbhai Premchand Shah Vs. Hirji Bhojraj and sons Kutchi Oswal Jain Chhataralay Trust and others*** has also observed on the same footing.

11. In case of ***Anand Laxmi Enterprises Vs. Vasant Balu Mhatre and others*** referred by the defendant, the suit was filed in 2007 seeking declaration of validity of agreement executed in 1989. The Hon'ble Bombay High court held that the suit was barred by the law of

limitation.

12. In the case of ***Kanayalal Madhavji Thakkar Vs. Shree Padmanabh Builders***, the agreement was executed on 01.10.1989, as per defendant in the counter claim it was terminated on 07.02.2000. The suit was instituted on 27.3.2000. The Hon'ble Bombay High Court observed that the suit for declaration had to be filed within a period of three years of accrual of right to sue. It was observed that the suit was filed after a period of three years and it was barred by limitation.

13. In the case of ***Madhuvihar Co-Op Hsg.Soc. & ors. Vs. Jayantilal Investments &Ors.***, the dispute was between the co-operating housing society and the promoter/builder. In that case, the promoter/builder avoided to common title and execute necessary documents in favour of the society which was treated as breach of statutory obligation resulting in continuous cause of action. In that circumstances, the suit which was filed in 1997 after registration of society in 1998 was held within limitation. In that case, the facts in dispute were between the society and the builder. In the case in hand, the issue is between purchaser of Flat and the builder.

14. In the case of ***Jeetmal Mangalchand Sakhlecha & others Vs. Neelkanth Building Corporation & others***, an agreement of sale was executed, earnest amount was also paid but the defendant did not show the documents of title due to which the plaintiff withheld the payment of further instalments. In those circumstances, the Hon'ble Bombay High Court held that plaintiff was not under the obligation to pay the balance amount as certificate of title was not made available to the plaintiff by the

defendant.

15. In the case of ***Ramesh B. Desai & Ors. vs. Bipin Vadilal Mehta & Ors***, the Hon'ble Supreme Court held that the issue which is mixed issue of Law and fact can not be tried as a preliminary issue.

16. In the case of ***Gunwantbhai Mulchand Shah & Ors. vs. Anton Elis Farel & Ors***, the preliminary issue of limitation arose, the suit was for specific performance of agreement, the suit was filed after the lapse of 29 days, the plaintiff was in possession of the property after paying the entire amount of consideration. The agreement was silent about the time for its performance. In that situation, the Hon'ble Supreme Court observed with the question as to how long the plaintiff could be decided as preliminary issue and they are not question on the basis of which suit can be dismissed as barred by limitation. The Hon'ble Supreme Court further observed that the cause of action could depend upon the court decided when the right accrued on the basis of pleadings and the evidence in the case.

17. In the case in hand also though the agreement was executed in 2004, the plaintiff was put in possession of the suit property but admittedly the title was not transferred to the plaintiff till 2014. According to plaintiff, the builder/defendant did not secure the completion certificate and as such the builder/defendant could not have passed the title legally.

18. In the nature of aforesaid circumstances and in the light of observations of the Hon'ble Supreme Court in the case of ***Gunwantbhai***

Mulchand Shah & Ors. vs. Anton Elis Farel & Ors, as seen above, I find that the issue of limitation in the aforesaid set of circumstances can not be decided as preliminary issue and it would be decided on merits on going through the evidence of both the sides.

19. Accordingly, I answer the preliminary issue and application exh.17 stands disposed of.

Sd/-

(B.P.Kshirsagar)
2nd Jt.Civil Judge (S.D.),
Aurangabad.

Date : 10.04.2015.

CERTIFICATE

I affirm that the contents of this P.D.F. file Order are same, word to word, as per the original Order.

Name of the Stenographer	: Prachi Prashant Kulkarni
Court	: 2 nd Jt.Civil Judge, S.D.Aurangabad.
Date of order	: 10.04.2015.
Order signed by the presiding officer on	: 13.04.2015.
Order uploaded on	: 13.04.2015.