

Order below Exhibit-145, filed by the defendant No. 2 under Order-VII, Rule-11 of the Code of Civil Procedure, 1908 in Special Civil Suit No. 18 of 2018.

APPEARANCE :

On behalf of the plaintiff : Ld. Adv. Mr. M. B. Joshi.

On behalf of the defendant Nos. 1/3 & 1/9 : Ld. Adv. Mr. S. J. Mehta.

On behalf of the defendant No. 2: Ld. Adv. Mr. H. R. Shah.

[1.1] The plaintiff has filed the present suit for declaration, specific performance and perpetual injunction under Secs.-34 and 38 of the Specific Relief Act, 1963.

[1.2] The defendant has been duly served; and appeared through Ld. Adv. The defendant No. 1 has filed her written statements at Exh.-21 followed by affidavit at Exh.-23. The defendant No. 2 has filed his written statements at Exh.-16 followed by affidavit at Exh.-18 and filed this application on hand under Order-VII, Rule-11 of Civil Procedure Code, 1908 (*hereinafter referred to as the CPC*) at Exh. 145.

[1.3] The Ld. Adv. for the defendant Nos. 1/1, 1/11 and 3 and all the defendants had been served notice by Court for their appearance. The Ld. Adv. Mr. C. D. Karia has put a note below his intimation to appear before the Court that he has no instruction from the parties. After service of notice, the defendant Nos. 1/1, 1/2, 1/4 to 1/7, 1/8/1 to 1/8/3, 1/10, 1/11 and 3 have not appeared before this Court. Therefore, their right for arguments of the application on hand has been closed. After service of notice by Court, the defendant Nos.

1/3 and 1/9 have appeared through their Ld. Adv.

[1.4] The plaintiff has not filed his written reply / objections against the application on hand.

[2.1] Considered the pleadings of the plaint and the documentary evidence produced by the plaintiff-side. Read the application on hand at Exh.-145. Heard the Ld. Adv. for plaintiff and defendants. Perused the record and proceedings.

[2.2] The Ld. Adv. for the defendant No. 2 has filed their written arguments at Exh.-161. This Court has gone through the written arguments and considered the same. For avoiding repetition, the same have not been reproduced here again. The Ld. Adv. for the defendant No. 2 has relied upon the citations as listed at Exh.-163. Ultimately, the defendant No. 2 has prayed that the plaint may be rejected with costs.

[2.3.1] Highlighting the provision of Order-VII, Rule-11 of CPC and pointing out para-(15) on page-14 and para-(6) on page No. 5 of the plaint, the Ld. Adv. for the defendant Nos. 1/3 and 1/9 has argued orally that the responsibility to obtain NOC for NA is on the shoulder of the plaintiff; that agreement between the parties is reciprocal; that as per the condition No. (b)(2) of the agreement - fifty lac to be paid within 15 days from obtaining NOC of NA; that as per condition - (c) of the agreement, the responsible to obtain NOC for NA is of

the plaintiff; that on obtaining NOC for NA, the contract would be gone ahead / further; that the agreement could be over / completed; that the cause of action can be said arisen when the plaintiff is willing but the defendants deny; that then and then the cause of action could be arisen; that last three lines on page No. 9 "*even though proceeded as above, the Collector passed an order rejecting the application for NA on 15/02/2007*"; that on page No. 11, the plaintiff himself admits if the order favours him in High Court, then the plaintiff shall complete his side; therefore, the cause of action has not been arisen; that the plaintiff is within if then; that there is no specific cause of action arisen; then the plaint is within order-VII, Rule-11(a) and the plaint is required to be rejected.

[2.3.2] Further argued relying upon the provisions of section 15 of the Specific Relief Act - "unless he has performed his part of performance" argued that from the plaint itself, it is proven that the cause of action has not been arisen; that the present stage is performance of plaintiff's part is not within dispute; that there does not exist cause of action; that the plaintiff has already not performed his part of the contract / agreement; that the plaintiff is not entitled for any performance. Ultimately, prayed that the plaint may be rejected.

[2.4.1] The Ld. Adv. for the plaintiff has orally argued that the present application has been filed after 10 years from the date of filing of the suit; that the cause of action has been

shown in para-(14) and (15) of the plaint; that Order-VII, Rule-11(b) is not applicable as the Court Fee has already been paid at Dhrangadhra; that as per Rule-11(d), i.e. when the suit is barred by any other law and Rule-11(e), i.e. if the suit is not filed in duplicate, the same to be rejected; but the present suit has been filed previously; that Court can give time for filing of Court Fee; therefore, the suit does not fall within the said rules; that the arguments of the Ld. Adv. is related to evidence and at present the same cannot be considered; that the plaintiff shall suffer if the suit is rejected; that the suit is filed within limitation; that the notices had been given from both the sides; that after recording evidence of witnesses, the Court can decided the suit; that the Ld. Adv. is supporting the deft. No. 2. Ultimately prayed to reject the present application with costs; that heavy costs may be imposed as the precious time of the court has been wasted.

[2.4.2] Further argued orally that the reason for filing of the present application is only that they do not want to execute final sale deed; that the defendants want to sell the disputed property to third party; that the possession and occupation is with the plaintiff; that the defendant No. 2 has come with the contention that he has been joined wrongly and has been prayed for costs as misjoined; that pointing out para-(19) on page No. 19 of Exh.-145, the Ld. Adv. argued that the defendant has come with the contention that he has no concern with the present suit, then why the present application has been filed; that the defendant No. 2 has

come with the direction that the present application may be disposed of within one month. Ultimately, prayed to reject the present application with costs.

[3] At the outset, it is advantageous to refer the related provisions of law. Order-VII, Rule-11 read as under :

“Order-VII, Rule-11 : *The plaint shall be rejected in the following cases :-*

- (a) *where it does not disclose a cause of action;*
- (b) *where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*
- (c) *where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*
- (d) *Where the suit appears from the statement in the plaint to be barred by any law;*
- (e) *where it is not filed in duplicate;*
- (f) *where the plaintiff fails to comply with the provisions of Rule-9.*

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reason to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite-papers, as the case may be, within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff.”

[4] The application on hand at Exh.-145 has been filed by the defendant No. 2 - Jagdipbhai Gopalbhai Bole under Order-VII, Rule-11 of Civil Procedure Code, 1908

(hereinafter referred to as “the CPC”). On perusal of the said application and arguments of the defendant-side, it is crystal clear that the defendant-side has mainly contended that there is no cause of action arisen; therefore, the present plaint may be rejected under Order-VII, Rule-11(a) of the CPC. Whereas the Ld. Adv. for the plaintiff has argued that the cause of action has been shown in para-(14) and (15) of the plaint; and also argued the facts covered under Order-VII, Rule-11(b) to 11(e) of the CPC.

[5.1] The defendant-side has contended that the responsibility to obtain NOC and NA permission is on the shoulder of the plaintiff; that agreement between the parties is reciprocal; that as per the condition No. (b)(2) of the agreement - fifty lac to be paid within 15 days from obtaining NOC and NA permission; that as per condition - (c) of the agreement, the responsibility to obtain NOC and NA permission is of the plaintiff; that on obtaining NOC and NA permission, the contract would be gone ahead / further and the agreement could be over / completed; that the cause of action can be said arisen when the plaintiff is willing but the defendants deny; that then and then the cause of action could be arisen; that last three lines on page No. 9 of the plaint, i.e. *"even though proceeded as above, the Collector passed an order rejecting the application for NA on 15/02/2007"*; that on page No. 11, the plaintiff himself admits if the order favours him in High Court, then the plaintiff shall complete his side; therefore, the cause of action has not

been arisen; that the plaintiff has already not performed his part of the agreement and ; that there is no specific cause of action arisen and the plaintiff is not entitled for any performance; then the plaint is within order-VII, Rule-11(a) and the plaint is required to be rejected.

[5.2] The plaintiff has come with the following relief [para-(18) of the plaint] :

- "(a) that decree may be passed for specific performance of sale agreement accepting the remaining consideration of the property as scheduled in para-2 of the plaint.*
- (b) that the declaration may be passed to the effect that the defendants have no right or authority to cancel the power of attorney executed on 20/03/2006 as the same is coupled with interest and with consideration.*
- (c) that perpetual injunction may be decreed to the effect that the defendants do not take possession and occupation forcefully; nor transfer by virtue of deed, alinate, lease; nor obstruct ingressing and egressing in the property as scheduled in para-2 of the plaint.*
- (d) Optionally prayed if the Court does not allow the above relief, the amount of Rs. Twenty Five Crore Sixty Two Lakh may be decreed to be paid by the defendants to the plaintiff towards damages."*

[5.3.1] The documentary evidence produced at Exh.-3 by the plaintiff is part of the plaint. Therefore, for deciding application under Order-VII, Rule-11, the plaint as well as the documentary evidence should be considered as they are and as if proved. As per the ratio laid down by the Hon'ble High

Court of Gujarat in the case of **Becharbhai**¹, while considering the application under Order-VII, Rule-11 of the CPC, the Court is required to consider the averments in the plaint and the supporting documents produced along with the plaint. In the case of **N. V. Srinivasan Murthy**², the Hon'ble Apex Court has held that it is required to be considered the facts and circumstances of the case and even considering the averments made in the plaint and even accepting all the averments made in the plaint as they are.

[5.3.2] Considering the consent agreement produced at Mark-3/6, first para on page No. 3, i.e. sub-paragraph No. (5) of main paragraph-(3) read as under :

"That the above work would don't be completed in stipulated time fixed i.e. with in _____ months than whatsoever payments would have made meanwhile to the party of"

[5.3.3] As above reproduced lines, the stipulated time of month has not been filled in the said document at Mark-3/6. There is blank. And the defendant has given notice on 28/11/2007 for cancellation of the consent agreement produced at Mark-3/6. As per the pleadings of the plaint [para-(13)] and arguments of the defendant-side, the said fact regarding issuance of notice on 28/11/2007 is admitted. The plaintiff has pleaded that the matter before the Hon'ble High Court is pending against the order of the Collector

1 Becharbhai Zaverbhai Patel V/s. Jashbhai Shivlal Patel reported in 2012 (0) AIJEL-HC 227390

2 N. V. Srinivasa Murthy V/s. Mariyamma (D) by proposed Lrs. reported in 2005 (0) AIJEL-SC 35054

rejecting the NA permission. Therefore, the same is question of recording and appreciating the evidence, i.e. there is mix question of law and fact to be tried. In these circumstances, on the date of issuance of the said notice, the cause of action has arisen for the relief-(a) to (c), as reproduced in above para-[5.2], as prima facie appears that the stipulated time has not been fixed by the parties to the suit.

[5.3.4] And as per OPTIONAL relief-(d) as reproduced in above para-[5.2], the cause of action has arisen on the date of issuance of notice dated : 28/11/2007 by the defendant to the plaintiff for cancellation of consent agreement at Mark-3/6 and as per the agreed terms and conditions of the said consent agreement.

[5.4.1] The defendant No. 2 has produced written arguments at Exh.-161 wherein reproduced the entire consent agreement from page Nos. (3) to (8); and the Ld. Adv. has reproduced the blank on page No. (5) in Exh.-161 as under, which is in para-(1) in Mark-3/6 :

"and measuring land of total _____ sq. mt. which situated at Halvad, Tal: Halvad, Dist. Surendranagar"

[5.4.2] Whereas the blank for the stipulated time fixed in the consent agreement and as reproduced in above para-[5.3] has not been reproduced in his written arguments at Exh.-161, in third paragraph on page No. (7) and reproduced the same as under :

"That the above work would don't be completed in stipulated time fixed *i.e. with in months* than whatsoever... .."

[5.4.3] On perusal of the same, there are two time schedules in Mark-3/6 in para-(3), i.e. (i) Schedule for payment and (ii) stiuplated time fixed for completion of work agreed to be done by the parties to the said agreement; and wherein the time period as reproduced in above para-[5.3.2] has not decided by the parties.

[5.4.4] In view of the above, the material facts have been supressed by the defendant No. 2 in the written arguments that the stipulated time has not been fixed by the parties to the consent agreement.

[6] The defendants have contended that the plaintiff has not completed the process of NA permission within in 18 months and the notice for cancellation of consent agreement at Mark-3/6 has been given; therefore, there is no cause of action. On perusal of the plaint and consent agreement at Mark-3/6, there is no time limit fixed by the parties for obtaining NA permission.

[7.1.1] The defendant No. 2 has produced and relied upon the decision passed in the case of **C. S. Ramaswamy³** by the Hon'ble Apex Court wherein it has been held that from averments in plaint and bundle of facts stated in the plaint by clever drafting, it is tried to bring the suit within period of

3 C. S. Ramaswamy V/s. V. K. Senthil reported in 2022 (0) AIJEL-SC 69921

limitation, which otherwise is barred by limitation; such plaint should be rejected. The case was thus - that one suit was filed by minor, which was filed in the year 2006, in which some plaintiffs were also party to said suit and in the said suit, there was a specific reference to sale deed dated : 19/09/2005 and said suit came to be dismissed in year 2014 and immediately thereafter again the suit filed wherein the application under Order-VII, Rule-11(d) had been filed.

[7.1.2] The defendant No. 2 has produced and relied upon the decision passed in the case of **Hardesh Ores Pvt. Ltd.**⁴ by the Hon'ble Apex Court. It has been held that the limitation started to run when the right of renewal was denied by the defendant. The case was thus - that the plaintiff claimed renewal of agreement for excavation of ore which required execution of a document in accordance with law evidencing renewal; but the right of renewal was denied; and the claim would have been barred by limitation since more than three years had elapsed after a categoric denial of the right claiming renewal or automatic renewal.

[7.1.3] The present suit has been filed on 02/01/2008 and the notice for cancellation of consent agreement at Mark-3/6 has been given on 28/11/2007; therefore under Articles-54, 55 and 58, the suit is within the limitation of three years. Considering the facts of the citation in above para-[7.1.1] and [7.1.2] and the facts of the application on hand,

4 Hardesh Ores Pvt. Ltd. V/s. Hede And Co. reported in 2007 (0) GLHEL-SC 39274

there is no contention of the defendant-side that there is clever drafting which creates illusive cause of action in the suit on hand. Therefore, the ratio laid down by the Hon'ble Apex Court is not applicable. Hence, the citation is not helpful to the defendant No. 2.

[8.1] The defendant No. 2 has produced and relied upon the decision passed in the case of **I.T.C. Ltd.**⁵ by the Hon'ble Apex Court. It has been held that the plaint should be rejected when there is no cause of action even from the plaint allegations and issues framed in suit can not come in way of consideration of application under Order-VII, Rule-11 of the CPC. The case was thus - that non supply of goods by sellers to buyers, when the credit facility has been extended; that can not be said fraud.

[8.2] Considering the ratio laid down by the Hon'ble Apex Court, the issues framed in suit can not come in way of consideration of application under Order-VII, Rule-11, the arguments of the plaintiff-side that the present application has been filed after 10 years from the date of filing of the suit does not stand as the trial has not commenced in the present suit. Considering the facts of the citation and the facts of the application on hand and the afore noted discussions in para-[5.2] to [5.3.4], the ratio laid down by the Hon'ble Apex Court is not applicable. Hence, the citation is not helpful to the defendant No. 2.

5 I.T.C. Ltd. V/s. Debts Recovery Appellate Tribunal reported in 1997 (0) GLHEL-SC 11454

[9.1] The defendant No. 2 has averred in the application on hand and in the written arguments on page No. 2 respectively at Exh.-145 and 161 as under :

“(IV) The reference was made to Order-VII, Rule-11 to which clauses (e) and (f) have been added which enable the Court to reject the plaint where it is not filed in duplicate or where the plaintiff fails to comply with the provisions of Rule-9 or Order-VII the Supreme Court held that the said clauses being procedural, would not require the automatic rejection of the plaint at the first instance, if there is any defect has contemplated by Rule-11(e) or non-compliance as referred to in Rule-11(a), the Court should ordinarily give an opportunity for rectifying the defects and in the event of the same not being done the Court will have the liberty or the right to reject the plaint.”

[9.2] In continuation of the afore noted lines in English, in the same paragraph, further contended in Gujarati that as such, as above, when the litigation is beyond the Act and the consent agreement executed is void ab-initio; that the same is not agreement to sell; that no consideration has been paid and merely the agreement between parties had been executed.

[9.3] As far as afore noted para-[9.2] is concerned, the suit has been filed on 02/01/2008 and the amendment of Order-VII, Rule-11(e) and 11(f) has been inserted and substituted in the year 1999 and 2002 respectively. And appearance of the defendants establishes the compliance of Rule-9 of Order-VII of the CPC on record. Secondly, lately amended provisions has no prospective effect. Therefore,

the arguments of the defendant No. 2 does not stand.

[9.4] In light of the provisions of Sec.-2(h), 2(i) and 10 of the Indian Contract Act, 1872, the consent agreement at Mark-3/6 is a contract. Considering sub-paragraph-(4) on page No. 2 of the consent agreement at Mark-3/6, read as under :

"That the sale deed of the plots for this land would be made after completing all the above formalities and plotting would be done phase wise and sale deed would be between party of 1st part and respective buyers as per the ground plan of the land."

As above, the parties agreed that the first party of the agreement, i.e. Indumatiben Girjashankar Oza would execute the final sale deed in favour of the plot purchaser and the second party, i.e. the plaintiff is the developer. Therefore, non payment of consideration does not affect / touch the cause of action of the present suit. Therefore, the relevant arguments of the defendant No. 2 does not stand at all.

[10] Considering the averments made in the plaint of the suit on hand and even accepting all the averments made in the plaint as they are, the present suit is neither expressly nor impliedly covered under the provisions of Order-VII, Rule-11(a) of the CPC. Therefore, the present application deserves to be rejected. Hence, the following final order is passed in the interest of justice.

-:: ORDER ::-

- (a)** The application at Exh.-145 filed by the defendant under Order-VII, Rule-11 of CPC is hereby rejected.
- (b)** The cost shall follow the final disposal of the present suit.

Pronounced in the open Court today, on this 11th day of March, 2024.

Halvad.

Date : 11/03/2024.

(Anil Nanalal Gajjar)

Principal Senior Civil Judge,
Halvad, Dist. Morbi. (GJ-01166)