

MHRG040007102012



ORDER BELOW EXH.49 IN Spl.C.S. NO. 497/2012

1. This application is filed by defendant no.1 to 4 for rejection of plaint under **Order 7 Rule 11 read with section 151 of the Code of Civil Procedure.**
2. These defendants have contended that plaintiff has filed this suit for specific performance of Agreement executed between the plaintiff and defendant no.6 on 06-06-2007. These defendants are not concerned with the said Agreement executed between the plaintiff and defendant no.6. There is no cause of action for filing this suit against these defendants. Moreover, plaintiff has not properly valued the suit. Hence, prayed that suit is bad for no cause action and valuation.
3. Plaintiff has resisted this application and filed his reply at **Exh.53**. He contended that, present suit is posted for cross-examination of plaintiff and at this belated stage these defendants have filed said application with a sole intention to prolong the matter. He contended that, grounds raised by defendant no.1 to 4 cannot be considered under Order 7 Rule 11 of the Code of Civil Procedure, but the evidence has to be led and it is to be decided on merits. Defendant no.1 to 4 have executed Agreement in favour of defendant no.6 and defendant no.6 has executed Agreement in favour of plaintiff for Rs.88,00,000/-. Plaintiff has paid amount to defendant no.6 towards consideration of said plot. The suit is within limitation. He has properly valued the suit. He prayed that the application be rejected.

4. Considering rival contentions of both the parties following points arise for my determination and I record my findings thereon for the reasons mentioned below.

No.	POINTS	FINDINGS
1	Whether plaint is liable to be rejected under Order 7 Rule 11(d) of the Code of Civil Procedure ?	... No.
2	What Order ?	... Application is rejected.

:: REASONS ::

POINT NO.1. :-

5. Heard both the learned Advocates. Perused the record.

6. Learned Advocate for defendant no.1 to 4 vehemently argued before the Court that, suit is bared by limitation as the Agreement was executed on 21-06-2010 and this suit is filed in the year 2017. Moreover, there is no cause of action. There is no privity of contract between the plaintiff and defendant no.1 to 4. Hence, suit is liable to be rejected.

7. In support of his contention he has relied upon the following two citations. :-

1	<i>Raghwendra Sharan Singh Vs. Ram Prasanna Singh (Dead) by LRs, Hon'ble Supreme Court of India Civil Appeal No. 2960 of 2019 (Arising out of SLP (C) No.20068 of 2013), Judgment dated 13-03-2019.</i>
2	<i>The Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman Vs. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee, reported in 2012 DGLS (SC) 310 (SUPREME COURT).</i>

8. Learned Advocate for plaintiff argued that, present suit is filed for specific performance of Agreement of the property which was originally owned by defendant no.1 to 4. Defendant no.1 to 4 sold said property to defendant no.6 who in turn sold said property to the plaintiff. Suit property is a plot which is to be allotted by the CIDCO under 12.5% scheme. Hence, prayed that suit is maintainable. Moreover suit is filed within limitation. In support of his contentions he has relied upon the following citation. :-

1	<i>Gaddipati Divija & Anr. Vs. Pathuri Samrajyam & Ors. Hon'ble Supreme Court of India Civil Appeal No. 4206-4207 OF 201 (Arising out of Special Leave Petition (C) No.3229-3230 OF 2011), Judgment dated 18-04-2023.</i>
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9. Heard both the learned Advocates and perused the citations. This is suit for specific performance of Agreement executed between plaintiff and defendant no.6 on 21-06-2010. It is the case of plaintiff that suit property originally owned by defendant no.1 to 4, who sold said property to plaintiff vide Memorandum-of-Understanding dated 06-06-2007 for Rs.32,00,000/-. Defendant no.1 to 4 have filed this application on the grounds of limitation, no cause of action and valuation.

10. With regard to ground of limitation, it is settled law that issue of limitation is mixed question of law and facts, which can be decided after considering evidence of both the parties. Moreover, the Hon'ble Apex Court in the case of "**Gaddipati Divija & Anr (supra)**" has observed that, "*when specific performance of contract has not been done, then question of time being an essence of contract does not arise*". Said Agreement between plaintiff and defendant no.6 was executed in the year 2010. Till date both the parties have not performed their part of contract

and in view of this citation time is not essence of contract. Therefore, Whether suit is within limitation or not will be decided after considering evidence of both the parties.

11. With regard to cause of action, it is pertinent to note that plaintiff in his plaint has specifically mentioned cause of action in para 10, 11, 12 of the plaint. It is settled law that for considering application under Order 7 Rule 11 of the Code of Civil Procedure only the averments in the plaint has to be considered. I have perused the plaint. In the plaint from para 9 onwards, plaintiffs have explained the cause of action. Therefore, I conclude that, plaintiff has succeeded to prove that there is cause of action.

12. With regard to third ground of valuation, it is pertinent to note that suit property is Plot which is received by defendant no.1 to 4 under the 12.5% scheme of CIDCO. Award was passed in favour of defendant no.1 to 4. Accordingly, plaintiff has properly valued the suit for Rs.88,00,000/-. Hence, I find no merits in the said ground.

13. Today Advocate for defendant no.1 to 4 has filed citation of “The Church of Christ Charitable Trust & Educational Charitable Society (Supra)” and submitted that, suit is liable to be dismissed against defendant no.1 to 4 if there is no privity of contract.

14. From the record, prima facie it is clear that defendant no.1 to 4 have executed Agreement in favour of defendant no.6 and later on defendant no.6 has executed Agreement in favour of plaintiff. Whether there is privity of contract between plaintiff and defendant no.1 to 4 and whether suit is barred by limitation will be decided on merits. Burden is on the plaintiff to prove that suit is maintainable against defendant no.1 to 4.

15. Here, I would like to refer myself with the citation of the Hon'ble Apex Court in the case of "Madhav Prasad Aggarwal & ors Vs. Axis Bank Ltd. & ors. (2019) 7 SCC 158" wherein the Hon'ble Apex Court has observed that, "*rejection of plaint in exercise of powers under Order 7 Rule 11 of the Code of Civil Procedure cannot be pursued only in respect of one of the defendant i.e. plaint has to be rejected as a whole or not at all, in exercise of such powers. If the plaint survives against certain defendants and/or properties, Order 7 Rule 11 of the Code of Civil Procedure will have no application at all and suit as a whole must be proceed to trial*".

16. Hence, in view of the observation of Hon'ble Apex Court in "Madhav Prasad Aggarwal & ors (supra)" suit cannot be disposed off partly. In view of my above discussion, I have already concluded that plaintiff has succeeded to make out cause of action. Therefore, plaint cannot be rejected under Order 7 Rule 11 of the Code of Civil Procedure. Thus, I answer Point no.1 in the negative, and in answer to point no.2, I pass the following order.

:: ORDER ::

Application is rejected.

Panvel,
Date : 21-08-2023.

(Nayomi P. Pawar)
Civil Judge, Senior Division Panvel.