

ORDER BELOW EXHIBIT 31 IN REGULAR CIVIL SUIT NO.258/2012
(CNR No.:-MHRG14-000554-2012)

Ramesh Pilani V/s. Janardan Mhatre & Ors.

1. This application is filed by defendant Nos. 6 to 9 for rejection of the plaint on the ground that suit is barred by Law of Limitation .

2. It is contended by defendant Nos. 6 to 9 that, plaintiff has filed the suit against defendants for specific performance, possession and injunction. In the suit plaintiff has contended that agreement to sell of suit property is executed between father of defendant Nos. 1 to 5 and plaintiff on 04.09.1996. After this, plaintiff through his advocate sent notice dated 11.06.2012 to defendant Nos. 1 to 5 for specific performance of agreement. But father of defendant Nos. 1 to 5 was died on 23.12.2001 and names of defendant Nos. 1 to 5 were entered by Mutation Entry No.6042, dated 30.11.2002. Then, defendant Nos. 1 to 5 have executed registered sale deed in favour of defendant Nos. 6 to 9 on 12.08.2004. Names of defendant Nos. 6 to 9 were entered on 7/12 extract of suit property vide mutation entry No. 6092, dated 14.02.2005. As per Article 54 of the Limitation Act, plaintiff has to file suit for specific performance of agreement within 3 years from the date when the plaintiff has notice that performance is refused. But, plaintiff has filed this suit after 3 years from date of agreement. Thus, this suit is barred by limitation. Hence, defendant Nos. 6 to 9 prayed for rejection of the plaint under Order 7 Rule 11(d) of Code of Civil Procedure.

3. Plaintiff has filed his say at Exh. 40 and contended that the application is false, frivolous and misleading. He denied all contents of the application. He further contended that the agreement to sell is executed on 04.09.1996. He further contended that as per agreement father of defendant Nos. 1 to 5 have to obtain necessary permissions from concern

authorities to execute sale deed. But he has not obtained any permission necessary for executing sale deed. Then, father of defendant Nos. 1 to 5 died and defendant Nos. 1 to 5 have not obtained necessary permissions. Plaintiff has come to know about illegal transfer of suit property from defendant Nos. 1 to 5 in favour of defendant Nos. 6 to 9, in May 2012. Plaintiff was and is ready to execute sale deed, thus, he has sent notice on 11.06.2012 to defendants. But, defendant Nos. 1 to 5 denied to execute sale deed. Thus, cause of action arose on that day. Thus, suit is within limitation and application is liable to be rejected. Hence, he prayed to reject the application.

4. Perused application, say and record of the suit. Heard both sides.

5. Plaintiff has filed agreement to sell in dispute at Exh.4/2, notice sent to defendants at Exh.4/6 and other relevant documents along with Exh. 4.

6. From the rival pleadings of the parties, following points are raised for my consideration. I have mentioned the same along with findings and reasons thereof as under :

Sr.No.	Points	Findings
1.	Whether the defendant Nos. 6 to 9 proves that suit is barred by limitation ?	In the negative.
2.	What order ?	Application is rejected.

REASONS

AS TO POINT NOS.1 AND 2:-

7. This application is filed by defendant Nos. 6 to 9 under Order 7 Rule 11 of Code of Civil Procedure. It is the objection of the defendant Nos. 6 to 9 that suit is barred by law. For this purpose advocate for defendant argued that as per Article 54 of the Limitation Act for suit of specific performance of a contract, the period of limitation begins to run from the date fixed for the performance or if no such a date is fixed, when the plaintiff has notice that performance is refused. The agreement to sell is dated 04.09.1996 and suit is filed on 17.09.2012. Thus, plaintiff has to file suit for specific performance within three years from 04.09.1996. But plaintiff has filed this suit on 17.09.2012. Thus, the suit is barred by limitation.

8. Advocate for plaintiff argued that this is suit for specific performance of agreement dated 04.09.1996. As per Limitation Act Article 54 of the Limitation Act, suit for specific performance has to be filed within 3 years from the date of refusal. For deciding application for rejection of plaint, court has to peruse only plaint and documents filed along with it. Plaintiff has filed agreement dated 04.09.1996 at Exh.4/2. As per terms of agreement father of defendant Nos. 1 to 5 have to obtain certain permissions from authorities for execution of sale deed. As per agreement the terms of agreement are also binding on heirs, successors, etc. of parties to the agreement. Thus, the terms of taking permissions is also binding on defendant Nos. 1 to 5 as legal heirs of their father. In May-2012 when plaintiff obtained 7/12 extract of suit property he came to know that defendant Nos. 1 to 5 have illegally without permission of plaintiff executed sale deed in favour of defendant Nos. 6 to 9. Then, plaintiff has sent notice to defendants on 11.06.2006 calling them to

cancel sale deed executed by defendant Nos. 1 to 5 in favour of defendant Nos. 6 to 9 and for execution of sale deed of suit property in favour of plaintiff by obtaining necessary permissions. But defendants have not obtained such permissions. Thus, till permissions are taken by defendants he cannot ask for performance of agreement. Thus, his suit is well within limitation. Plaintiff has also filed his written argument at Exh.46.

9. It seems from the record that plaintiff has filed this suit for specific performance and injunction and for declaration that sale deed between defendant Nos. 1 to 5 and defendant Nos. 6 to 9 is not binding on him and defendant Nos. 1 to 5 be directed to execute sale deed of suit property by taking necessary permissions. It is contention of plaintiff that for execution of sale deed permission from Collector is necessary. Defendants have not obtained this permission. Thus, sale deed could not be executed. It seems from perusal of agreement at Exh.4/2, that there are contents about obtaining permissions from authorities for execution of sale deed. It is also mentioned that these permissions have to be obtained by father of defendant Nos. 1 to 5. It prima-facie reflects that as per deed, the terms of agreement also binding on defendant Nos. 1 to 5 as legal heirs of their father.

10. It prima-facie reflects that plaintiff has specifically mentioned that he came to know about transfer of suit property in May-2012. It also prima-facie reflects in agreement that there is condition of obtaining permission. Thus, there is question of fact that whether these conditions are required to be fulfilled for execution of sale deed. The date of cause of action as stated by plaintiff cannot be disproved at this stage in application for rejection of plaint. Evidence in this case is not yet recorded. It is also mixed question of fact that whether permissions are necessary for execution of sale deed, whether these conditions required to be fulfilled by

defendants, when plaintiff came to know about refusal of execution of sale deed and when plaintiff got cause of action for suit. These all facts can only be cleared after full fledged hearing and evidence. It is also to be proved by evidence which is the date of refusal of performance. As per Article 54 of the Limitation Act, for this suit, no specific date is fixed for performance, thus, second condition has to be proved by defendants that plaintiff has notice that performance has been refused. Thus, until evidence came on record, it cannot be proved whether suit is within limitation or not. When there is issue of limitation and which is mixed question of law and facts, plaint cannot be rejected under Order 7 Rule 11(d) of Code of Civil Procedure. Thus, prima-facie suit appears to be within limitation. After recording evidence of both parties, issue of limitation can be decided. Thus, the application of defendant Nos. 6 to 9 is liable to be rejected.

11. Plaintiff has relied upon ratio laid down in following citations :-

1) *Merit Magnum Constructions Vs. Nand Kumar Anant Vaity & Ors. 2014(7) All M.R. 252*, wherein it is held by Hon'ble Bombay High Court that, part of plaint cannot be rejected. Issue of limitation is mixed question of law and facts necessitating evidence for effective adjudication. This ratio is aptly applicable to the case in hand because defendants have objected the suit on ground of limitation which is mixed question of law and facts.

2) *M/s. Candolim Developers Pvt.Ltd.& Anr. Vs. Pravin Grover & Ors. 2017(2) All M.R. 117*, wherein it is held by Hon'ble Bombay High Court that, at the time of deciding application for rejection of plaint defence of defendants in written statement cannot be looked into. Only averments in plaint should be considered. This ratio is aptly applicable to the case in hand because plaintiff has stated cause of action from which limitation period started to which defendants have objected on ground of limitation which is mixed question of law and facts.

3) *Gunwantbhai Mulchand Shah & Ors. Vs. Anton Elis Farel and Ors., AIR 2006 Supreme Court, 1556*, wherein it is held by Hon'ble

Supreme Court and in *Kisanlal Bhagwandas Kalda & Anr. Vs. Harischandra Bhimaji Santre & Anr. 2015(3) All M.R. 711*, wherein it is held by Hon'ble Bombay High Court that, dismissal of suit as barred by limitation by deciding issue of limitation as preliminary issue not proper. This ratio is aptly applicable to the case in hand because this application is filed under Order 7 Rule 11 of C.P.C. and issue of limitation cannot be decided without evidence.

4) *Agya Rani Dua Vs. Vidyagauri, 2007(3) Mh.L.J.*, wherein it is held by Hon'ble Bombay High Court that, in suit for specific performance of agreement limitation of three years will not attract when agreement is subsisting and not terminated. This ratio is aptly applicable to the case in hand because agreement in present case is not terminated by decree of court and suit is also filed for relief of other declarations.

5) *Ahmmadsahab Abdul Mulla Vs. Bibijan & Ors. AIR 2009 Supreme Court, 2193*, wherein it is held by Hon'ble Supreme Court that, when date is fixed for performance means that there is definite date fixed for doing particular act. This ratio is aptly applicable to the case in hand because in agreement there is no particular date mentioned for performance.

6) *Madina Begum & Anr. Vs. Shiv Murti Prasad Pandey & Ors. 2016 All SCR 1684*, wherein it is held by Hon'ble Bombay High Court that in suit for specific performance of agreement where agreement did not specify a calendar date as the date fixed for its performance, limitation of three years would begin when plaintiff has notice that defendant has refused the performance of agreement. This ratio is aptly applicable to the case in hand because the date of refusal is disputed in this case on which evidence is not given by both parties. Thus, at this stage plaint cannot be rejected.

7) *Dipali Himmat Meherwal & Anr. Vs. Shaikh Nazir Mohammad Nasir & Ors. 2018(2) All M.R. 1*, wherein it is held by Hon'ble Bombay High Court that, where suit does not appear to be barred by law after considering statements in plaint issue of limitation which is mixed question of law and facts could not be considered at the stage of application under O. 7 R. 11 of C.P.C. This ratio is aptly applicable to the case in hand because defendants have objected the suit on ground of limitation which is mixed question of law and facts.

8) *Ganesh Keshav Patole Vs. Sheetal Sikandar Darne & Anr. 2018(6) All M.R. 660*, wherein it is held by Hon'ble Bombay High Court that, where suit does not appear to be barred by law after considering statements in plaint issue of limitation which is mixed question of law and facts could not be considered at the stage of application under O. 7 R. 11 of C.P.C. Issue of limitation have to be decided on basis of evidence laid by parties after framing of issue as to limitation. This ratio is aptly applicable to the case in hand because defendants have objected the suit on ground of limitation which is mixed question of law and facts. Evidence in this case is not yet recorded.

9) *Dattatreya Bhaskar Joshi & Ors. Vs. Sanjay Banurao Chaudhary, Writ Petition No.15482/2019, decided on 22.01.2020*, wherein it is held by Hon'ble Bombay High Court that, issue of limitation is mixed question of law and facts cannot be determined on basis of application under O.7 R. 11 of C.P.C. This ratio is aptly applicable to the case in hand because defendants have raised issue of limitation as ground for this application, which cannot be decided without evidence.

10) *Chhotanben & Anr. Vs. Kiritbhai Jalkrushnabhai Thakkar & Ors., 2018(5) All M.R. 946 (S.C.)*, wherein it is held by Hon'ble Supreme Court that, suit filed immediately after getting knowledge about fraudulent sale deed executed by defendants by keeping plaintiffs in dark, thus, issue of limitation is triable issue, plaint cannot be rejected at threshold. This ratio is aptly applicable to the case in hand because plaintiff has stated cause of action as his knowledge obtained in May 2012 about execution of sale deed by defendant Nos. 1 to 5 with defendant Nos. 6 to 9. Thus, the knowledge of plaintiff and cause of action are triable issues for deciding plaint.

11) *Salim D. Agboatwala & Ors. Vs. Shamalji Oddhavji Thakkar & Ors., Civil Appeal No.5641/2021, decided on 17.09.2021*, wherein it is held by Hon'ble Supreme Court that, issue of limitation is mixed question of law and facts cannot be determined without evidence in application under O.7 R. 11 of C.P.C. This ratio is aptly applicable to the case in hand because defendants have raised issue of limitation as ground for this application, which cannot be decided without evidence.

12) *Gopal Johari Vs. Anup Diwan, 2013(3) ICC 402*, wherein it is held by Hon'ble Delhi High Court that in suit for specific performance of agreement to sale objection of limitation being mixed question of law and

facts necessarily requires adjudication at the trial and plaint cannot be rejected threshold. This ratio is aptly applicable to the case in hand because defendants have raised issue of limitation as ground for this application, which cannot be decided without evidence of parties.

12. Defendant Nos.6 to 9 have relied upon ratio laid down in following citation :-

Subhas Chander Kathuria Vs. Umed Singh & Anr., 2006(3) Bombay C.J. 313, wherein it is held by Hon'ble Delhi High Court that, in suit for specific performance of contract where clause in agreement stipulates three months period for executing sale deed which requires prior permission from authority and where no steps were taken for obtaining permission within three months, limitation period would start running after expiry of three months from date of agreement. With due respect to the ratio laid down above I am of the opinion that ratio is not applicable to the case in hand because in present case evidence is not yet recorded and in case cited supra issue of limitation is decided after evidence of both parties. Thus, as situation and stage in both cases being different ratio is not helpful to defendants. It is also considered that after this ratio Hon'ble Apex Court in above referred cases has decided that issue of limitation is mixed question of law and facts, thus, this issue of limitation cannot be decided at this stage when evidence is not laid by both parties.

13. On perusal of the plaint and record suit does not reflect to be barred by law. The defence of limitation as raised by defendant is mixed question of law and facts. Thus, it needs to be decided only after receiving evidence of both parties. Thus, the defence raised by defendant is not acceptable at this stage.

14. From perusal of the above reasoning I did not find it fit to allow the application. Thus, I proceed to pass following order :

ORDER

Application is rejected.

Place: Uran.
Date: 18/05/2022.

(Nilesh M. Wali)
Civil Judge Jr.Divn., Uran.