

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

Civil Revision No.191/2014

Himmatlal and others

Vs.

M/s Rajratan Concept and others

&

Civil Revision No.192/2014

Himmatlal and others

Vs.

M/s Rajratan Concept and others

Shri A.K.Sethi, Senior Advocate assisted by Shri Nitin Phadke,
Advocate for the petitioners.

Shri Amit Dube, Advocate for the respondent No.1.

Shri D.C.Patel, Advocate for the respondent No.3.

Whether approved for reporting: Yes/No.

Reserved on: 27/06/2018

ORDER
(03/07/2018)

Rohit Arya, J.,

This order shall govern disposal of Civil Revision No.191/2014 and Civil Revision No.192/2014 by the defendants No.2, 3 and 5 / petitioners preferred under section 115 CPC as the parties are same, facts are identical and question involved is similar in nature, hence decided by this common order.

Civil Revision No.191/2014 is directed against the order dated 01/09/2014 passed in civil suit No.1-A/2013. The trial Court has rejected the application filed by the petitioners under Order 7 rule 11(d) CPC.

Civil Revision No.192/2014 is directed against the order dated 01/09/2014 passed in civil suit No.1-A/2014. The trial Court has rejected the application filed by the petitioners under Order 7 rule 11(d) CPC.

For the sake of convenience, facts in Civil Revision No.192/2014 have been dealt with.

2. Facts relevant and necessary for disposal of this revision petition are in narrow compass: A suit for specific performance of

an agreement to sell, declaration, permanent injunction and delivery of possession of the suit land is pending consideration since the year 2014 vide civil suit No.1-A/2014 in the Court of Additional District Judge, Sardarpur, District Dhar. The plaintiff *inter alia* contended that the agreement to sell of the suit land; agricultural land described in paragraph 3 of the plaint was entered between the plaintiff and the defendant No.1 on 27/06/2002 for a consideration of Rs.70.00 lakhs.

3. The defendant No.1 Smt. Chandarbai w/o late Champalal Jain succeeded the suit property by virtue of written 'Will' dated 20/01/2000 notarized vide No.218/2000, a testamentary succession to the exclusion of the defendants No.2 to 9 (i.e., sons and daughters) of the deceased and the same is duly mutated in her name in the revenue record.

4. It is further pleaded that an advance of Rs.1,00,000/- was paid at the time of execution of the agreement (paragraph 9 of the plaint). Further, in paragraph 10, it is pleaded that defendants No.4 to 9 had also received Rs.1,00,000/- each and also acknowledged the same by affixing signatures and thumb impressions on the reverse side of the agreement to sell.

5. In paragraph 14, it has been further pleaded that while the plaintiff called upon the defendant No.1 for registration of the sale deed, the defendant No.1 had apprised that the objection raised by the defendant No.3 was resolved by entering into a compromise vide order dated 23/12/2003 passed by the Civil Judge, Class-I. However, Rs.3,00,000/- was demanded by the defendant No.1 to meet the expenses incurred by her for various religious activities undertaken in the memory of her late husband with promise to handover the possession of the suit land with *kabja* receipt and for obtaining necessary permission from the office of the Collector, District Dhar under section 165(6A) of the Madhya Pradesh Land Revenue Code, 1959.

6. The defendant No.1 had received Rs.3,00,000/- in cash on 18/08/2004 and also acknowledged the same in writing in the second copy of the agreement to sell (remained with her) in the presence of her son, defendant No.4. Thereafter, the *kabja* receipt was handed over to the plaintiff. For ready reference paragraph 14 of the plaint is quoted below:

“14. यह कि वादीगण द्वारा प्रतिवादी क्रमांक 1 से वादोक्त भूमि के पंजीयन हेतु जानकारी चाही गई तब प्रतिवादी क्रमांक 1 द्वारा यह जानकारी दी गई की पुत्र प्रतिवादी क्रमांक 3 की हक संबंधी आपत्ति का निराकरण व्यवहार न्यायालय वर्ग 1 के पारित आदेश दिनांक 23.12.2003 को आपसी राजीनामों के द्वारा हो गया है एवं मेरे स्वर्गीय पति की याद में किए गए धार्मिक कार्य के खर्च के लिए अनुबंध पेटे 3 लाख धनराशि की विक्रय अनुबंध पेटे और मांग की गई तथा धनराशि प्राप्ति के साथ कब्जा रसीद देने की भी बात कही तत्पश्चात अनुबंध पत्र पंजीयन कराने हेतु कलेक्टर महोदय धार से 165(6क) की अनुमति का आवेदन देने का भी आश्वासन दिया। वादीगण द्वारा धनराशि देने बाबत कोरा आश्वासन ही नहीं दिया वरन उपके द्वारा प्रतिवादी क्रमांक 1 द्वारा चाही गई राशि दिनांक 18.08.2004 को 3,00,000/- रुपये प्रतिवादी क्र. 1 को नगद प्रदान किए गए जिसकी लिखित स्वीकृति प्रतिवादी क्र. 1 ने वादी क्र. 2 को अनुबंध पत्र की द्वितीय प्रति जो प्रतिवादी क्र. 1 के पास रही थी पर ही इन्द्राज कर धनराशि उनके गवाह पुत्र प्रतिवादी क्रमांक 4 के समक्ष अदा कर कब्जा रसीद की प्रति प्राप्त की।

7. It is further pleaded in paragraph 20 that again a sum of Rs.3,00,000/- was paid to the defendant No.1 on 06/12/2010 in the Court of Tahsildar, Sardarpur in the presence of defendants No.2 to 5 duly acknowledged by the defendant No.1 on the overleaf part of the agreement to sell by affixing her thumb impression and signature and also bearing signature of Tehsildar. For ready reference paragraph 20 of the plaint is quoted below:

“20. यह कि, वादीगण द्वारा वादोक्त भूमि के संबंध में प्रतिवादी क्रमांक 1 लगायत 5 के हक संबंधी विवाद के संबंध में व्यक्तिगत संपर्क किया गया तब प्रतिवादी क्रमांक 1 ने बताया की अनुबंध राशि के हक संबंधी पारिवारिक विवाद न्यायालय तहसीलदार इन्दौर में लंबित प्रकरण क्रमांक 23/अ27/09 10 अब निपटारे की कगार पर है सिर्फ प्रतिवादी क्रमांक 4 जो अनुबंध पत्र में गवाह एवं कब्जा रसीद का साक्षी है की सहमति बाकी है एवं पारिवारिक विवाद निपटाने के लिए कुछ धनराशि की और मांग की गई वादीगण द्वारा धनराशि देने बाबत कोरा आश्वासन ही नहीं दिया वरन उनके द्वारा प्रतिवादी क्रमांक 1 द्वारा चाही गई राशि वादीगण द्वारा दिनांक 06.12.2010 को प्रतिवादी क्रमांक 1 द्वारा पारिवारिक विवाद वादोक्त भूमि के अनुबंध की राशि के हक संबंधी विवाद का पारिवारिक संपत्ति के आपसी बंटवारे का मेमोरेण्डम नं. 240805 वारिसगण की हस्ताक्षर सहित सहमति दिखाने पर वादी क्रमांक 1 के द्वारा पुनः प्रतिवादी क्रमांक 1 को न्यायालय तहसीलदार सरदारपुर के समक्ष रु. 3,00,000/- नगद राशि प्रदान की गई जिसकी स्वीकृति प्रतिवादी क्रमांक 1 ने पुत्र प्रतिवादी क्रमांक 2 से 5 एवं तहसील न्यायालय में तहसीलदार साहब के समक्ष राशि रु. 3,00,000/- जिसकी प्राप्ति अनुबंध लेख के पृष्ठ भाग पर हस्ताक्षर एवं अंगुठे का निशान लगाकर प्रतिवादी क्रमांक 1 द्वारा दी गई। वास्तव में प्रतिवादी क्रमांक 1 लगायत 5 द्वारा बनाया गया पारिवारिक संपत्ति के आपसी बंटवारा लेख विधि के प्रावधानों के विपरित बनाया गया है जिसके द्वारा प्रतिवादी क्रमांक 1 लगायत 9 द्वारा प्रतिवादी क्रमांक 1 एवं वादीगण के मध्य अनुबंध के पालन में पंजीकृत विक्रय निष्पादित करने में व्यवधान ला रहे है तथा वादीगण के पक्ष में वादोक्त भूमि का पंजीकृत विक्रय पत्र के निष्पादन को रोक रहे है। “

8. Plaintiff has also pleaded other relevant facts with reference to and in the context of the agreement to sell in different paragraphs of the plaint narrating the sequence of events related to avoidance and obstructions to execution of the sale deed by the defendant No.1 in favour of plaintiff with one or the other pretext.

9. In paragraph 30, it has been further pleaded that due to continuous avoidance and delaying execution of the sale deed and the information received on 29/11/2013 that the defendants No.1 to 9 intended to dispose of the suit land to some one else has given rise to the 'cause of action' for filing the instant suit seeking specific performance of the agreement to sell, as prayed in paragraph 3 of the plaint.

10. Defendants No.2, 3 and 5 (for short, 'the applicants') have filed an application under Order 7 rule 11(d) read with section 151 CPC *inter alia* contending that the suit is not filed immediately after 09 months as agreed to under the agreement to sell and even after 18/08/2004 when alleged further advance payment was made. Hence, the suit was not filed within the limitation prescribed under Article 54 of the Limitation Act, 1963 (for short, 'the Act'). Agreement to sell is said to be dated 27/06/2002 whereas the suit was filed on 04/12/2013. Therefore, the suit is barred by time. Further, applicant also disputed the advance payment made by the plaintiff to the defendant No.1 as pleaded in paragraphs 14 and 20 of the plaint.

11. The application was replied denying the allegations made thereunder with the contention that advance payments have been made to the defendant No.1 by the plaintiff on 27/06/2002 (Rs.1,00,000/-) and on 18/08/2004 (Rs.3,00,000/-). Further, an amount of Rs.3,00,000/- in cash was paid to the defendant No.1 on 06/12/2010 in the Court of Tahsildar, Sardarpur and the same was duly acknowledged by the defendant No.1 by affixing her signature and thumb impression on the overleaf of the agreement to sell as well as the the defendants No.2 to 5. Under the circumstances, the limitation period shall be reckoned after the said date, i.e., 06/12/2010. The suit filed on 04/12/2013 is, therefore, well within the period of limitation.

12. The trial Court upon due consideration of the rival

contentions has observed that there is a contest between the parties as regards advance payments made to the defendant No.1 pursuant to the agreement to sell on the aforesaid dates; the signatures and thumb impressions on the overleaf portion of the agreement to sell are also disputed. Agreement to sell is also denied. Under such circumstances, aforesaid factual matrix since have bearing on the question of limitation requires factual adjudication being mixed question of law and fact cannot be addressed on an application filed under Order 7 rule 11(d) CPC.

13. Shri A.K.Sethi, learned senior counsel for the defendants No.2, 3 and 5/petitioners contends that admittedly the agreement to sell was allegedly executed on 27/06/2002. Avoidance of execution of the sale deed and the purported knowledge of alienation of the suit land by the defendants No.1 to 9 to a third person on 29/11/2013 pleaded to give rise to the 'cause of action' for filing the suit in paragraph 30 of the plaint cannot be construed as such to bring the suit on 04/12/2013 in view of clause (ii) of the agreement to sell; as failure of execution of the sale deed within nine months from the date of entering into agreement to sell; the cause of action had arisen, but suit was not filed, hence the suit is clearly hit by Article 54 of the Act, as according to him, time is the essence of the contract in the instant case. Hence, the order impugned is palpably erroneous and, therefore, the suit deserves to be dismissed.

14. *Per contra*, Shri Amit Dube, learned counsel for the plaintiff/respondent No.1 *inter alia* contended that; (i) at the outset, the applicants have not come to the Court with clean hands and also attempted to mislead the Court by suppression of facts as the complete copy of the agreement to sell has not been filed with the petition. The relevant part, i.e., overleaf portion of the agreement to sell bearing the acknowledgment of receipt of Rs.3,00,000/- by the defendant No.1 with due endorsement by the Tahsildar, Sardarpur, District Dhar in the presence of the defendants No.2 to 5 on 6.12.2010 has been consciously removed from copy of the agreement attached with the petition. The same has been filed alongwith the reply as Annexure R/1. Accordingly, the applicants/petitioners are not entitled to invoke the revisional jurisdiction of this Court under section 115 CPC; (ii)

the time was never the essence of the agreement to sell as no fixed date was mentioned in the agreement, the applicants have neither refused execution of the sale deed nor cancelled the agreement. With reference to Article 54 of the Act, learned counsel submits that for want of any specific date fixed for execution of the registered sale deed in the agreement to sell, the time was not essence of the contract and in the absence of refusal or cancellation of the agreement, the period of limitation shall reckon from date of payment of part of the consideration, lastly; received by the defendant No.1 on 06/12/2010. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of **Ahmmadsahab Abdul Mulla (deceased by L.Rs.) Vs. Bibijan and others, AIR 2009 SC 2193** to bolster his submission.

15. In the alternate, it is submitted that even otherwise the question of limitation in the context of Article 54 of the Limitation Act is a mixed question of fact and law to be addressed by the Court below based on pleadings, documents on record and the evidence to be adduced by the parties to the suit. Therefore, rightly the same has not been addressed on the application filed under Order 7 rule 11(d) CPC.

16. It is further contended that the fact of succession to defendant No.1 to the suit property by virtue of "written will" dated 20.1.2000 witnessed by defendant No.2 have been admitted by applicants in the proceedings before the Tehsildar, Sardarpur as evident from the order sheet dated 30.3.2002.

17. Further, to avoid and obstruct execution of the sale pursuant to the agreement to sell, collusive suits and parallel revenue proceedings were initiated by the defendants, viz., civil suit filed by defendant No.2 for declaration, injunction and partition against the defendant No.1 before the Civil Judge, Class-I, Sardarpur vide civil suit No.50A/2002 which stands disposed of in terms of the compromise entered between the parties on 23/12/2003 and the other defendants have instituted the revenue proceedings against the defendant No.1, details whereof are already pleaded in the plaint (paragraph 13 of the plaint).

18. Heard.

19. It is settled law that while addressing on an application

under Order 7 Rule 11(d) CPC the trial Judge is generally required to see only the plaint averments or integral part thereof filed with the plaint or placed on record.

20. It is also settled principle of law; whether time is essence of the contract to sell is a question of fact and the real test is the intention of the parties. It depends upon facts and circumstances of each case. The intention can be ascertained from

- (i) the express words used in the contract;
- (ii) the nature of the property which forms the subject-matter of the contract;
- (iii) the nature of the contract itself; and
- (iv) the surrounding circumstances.

The onus to plead and prove that time was of the essence of the contract is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of the essence. When the plaintiff pleads that time was not of the essence and the defendant does not deny it by evidence, the Court is bound to accept the plea of the plaintiff.

(Swarnam Ramchandran (Smt.) & Anr. Vs. Aravacode Chakungal Jayapalan, (2004) 8 SCC 689 referred to)

21. As a matter of fact time is presumed not to be essence of the contract relating to the immoveable property (AIR 1967 SC 868) unless contrary intention is well explicit on the touch stone of aforementioned relevant considerations.

22. The Hon'ble Supreme Court in the case of **Govind Prasad Chaturvedi Vs. Hari Dutt Shastri, (1977) 2 SCC 539**, has held as under :-

“5. It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract.”

23. For ready reference Article 54 under the Limitation Act is quoted below :-

54	For specific performance of a contract.	Three years	The <u>date fixed</u> for the performance, or, if no such date is fixed, when the plaintiff has notice that <u>performance is refused</u> .
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(Emphasis supplied)

24. In terms of the aforesaid Article suit for specific performance of a contract is required to be filed within three years from the date fixed for the performance. However, in the event no specific date for the performance, within a period of three years from the date when the plaintiff notices the refusal. The Honble Supreme Court in the case of ***Ahmmadsahab Abdul Mulla (deceased by L.Rs.) v. Bibijan & Ors., AIR 2009 SC 2193***, while interpreting the expression “date” under Article 54 has held that the expression “date fixed for the performance is a crystallized notion and suggestive of the specified date in the calendar. Para 7 thereof is quoted below :-

“The inevitable conclusion is that the expression “date fixed for the performance is a crystallized notion. This is clear from the fact that the second part “time from which period begins to run” refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on “when the plaintiff has notice that performance is refused”. Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances. Whether the date was fixed or not the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression “date” used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the calendar. We answer the reference accordingly. The matter shall now be placed before the Division Bench for deciding the issue on merits.”

25. This Court refrains from commenting upon the dispute raised by petitioners/defendants No.2, 3 and 5 on facts pleaded in the plaint particularly in the context of existence of agreement and acceptance of advance payments on 27.6.2002, 18.8.2004 and 6.12.2010.

26. Aforesaid facts have relevance and direct bearing on the question of limitation giving rise to mixed question of law and facts and can be addressed by trial Court after parties lead evidence.

27. It is pertinent to mention that the agreement in question dated 27.6.2002 has never been cancelled and there is no refusal to execute the sale deed. As such there is no notice to the plaintiff for performance of contract as contended by learned counsel for the respondent No.1/plaintiff in its reply before this Court and not controverted by petitioners/defendants No.2, 3 and 5.

28. This Court reiterates the law that question – Whether time is essence of the contract of sale ? is question of fact and can be addressed by the trial Court after parties lead evidence. Such question cannot be dealt with on an application under Order 7 Rule 11(d) CPC

29. As a result this Court is of the view that the trial Court did not commit any error of law and fact or jurisdictional error while rejecting the application under Order 7 Rule 11(d) CPC. Consequently, both civil revisions sans merit, hereby dismissed.

(Rohit Arya)
Judge
03/07/2018

b/- Patil