

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE ANIL VERMA

ON THE 24th OF APRIL, 2024

CIVIL REVISION No. 84 of 2021

BETWEEN:-

KISHORE PRAJAPATI S/O KEWALRAMJI PRAJAPATI,
AGED ABOUT 63 YEARS, OCCUPATION: BUSINESS R/O
24, NEELGANGA CHAURAHA PRAJAPATI COLONY
UJJAIN (MADHYA PRADESH)

.....PETITIONER

(BY SHRI MURTAZA BOHRA ADVOCATE)

AND

1. GIRISH PATHAK S/O KHUSHILALJI PATHAK,
AGED ABOUT 62 YEARS, OCCUPATION: BUSINESS
R/O A-2/10 L.I.G. RISHINAGAR UJJAIN (MADHYA
PRADESH)
2. MIRSHRILAL PRAJAPATI S/O KEWALRAMJI
PRAJAPATI, AGED ABOUT 53 YEARS
3. SUSHILA WD/O LATE BADRILAL PRAJAPATI,
AGED ABOUT 60 YEARS
4. GOPAL@MAHENDRA S/O LATE BADRILAL
PRAJAPATI, AGED ABOUT 39 YEARS
5. RAVINDRA S/O LATE BADERILAL PRAJAPATI,
AGED ABOUT 36 YEARS
RESPONDENTS NO. 2 TO 5 R/O 24, NEELGANGA
CHOURAHA PRAJAPATI COLONY, UJJAIN
(MADHYA PRADESH)
6. LAXMINARYAN @ CHOTELAL S/O LATE
KEWALRAMJI PRAJAPATI, AGED ABOUT 72
YEARS, D-407, VIVEKANANDA COLONY UJJAIN
(MADHYA PRADESH)
7. GIRDHARILAL S/O HIRALALJI PRAJAPATI, AGED
ABOUT 61 YEARS

8. MAHESH S/O HIRAJALJI PRAJAPATI, AGED ABOUT 57 YEARS
RESPONDENTS NO. 7 & 8 R/O 21, NEELGANGA COLONY PRAJAPATI COLONY. UJJAIN (MADHYA PRADESH)
9. KALABAI WD/O LATE CHOHALAL PRAJAPATI, AGED ABOUT 63 YEARS,
10. AJAY PRAJAPATI S/O LATE CHOHALAL PRAJAPATI, AGED ABOUT 43 YEARS,
11. VIJAY PRAJAPATI S/O LATE CHOHALAL PRAJAPATI, AGED ABOUT 41 YEARS
12. SANJAY PRAJAPATI S/O LATE CHOHALAL PRAJAPATI, AGED ABOUT 39 YEARS
RESPONDENTS NO. 9 TO 12 R/O 1/24, NEW PRAJAPATI COLONNEELGANGA CHOURAHA UJJAIN (MADHYA PRADESH)
13. SARITA PRAJAPATI W/O SUNIL PRAJAPATI D/O LATE CHOHALAL PRAJAPATI AGED ADULT R/O GHODA NAKKAS GALI NO. 9 KUMHAR MOHALLA JUMMERATI BHOPAL (MADHYA PRADESH)
14. STATE OF M.P. THR. COLLECTOR DISTRICT UJJAIN OFFICE KOTHI PALACE UJJAIN (MADHYA PRADESH)

.....RESPONDENTS

(SHRI MURARI LAL PATHAK ADVOCATE FOR RESPONDENT NO.1)

(SHRI SHALABH SHARMA GOVERNMENT ADVOCATE)

.....
This revision coming on for admission this day, the court passed the following:

ORDER

Counsel for petitioner submits that he does not want to press IA No. 2236/2022.

2 Prayer is allowed and IA No. 2236/2022 is dismissed as not pressed.

3 IA No. 983/2024 has already been decided on 7.2.2024.

4 Counsel for respondent no.1 submits that respondent no. 2 Mishrilal

Prajapati has been died, but service upon the respondent no. 2 has been dispensed with vide order dated 7.2.2024 and he was not the contesting party before the trial court. Therefore, the matter could be heard finally without any further proceedings regarding respondent no.2.

5 With consent of learned counsel for both the parties heard finally.

6 The petitioner has preferred this civil revision under section 115 of Code of Civil Procedure (in short CPC) being aggrieved by the impugned order dated 2.2.2021 passed by Sixth Civil Judge Class II Ujjain in civil suit No. 243/2020 whereby an application under Order 7 Rule 11 CPC filed by petitioner-defendant no.1 has been dismissed.

7 Brief facts of the case are that respondent no.1/plaintiff Girish Pathak has filed a civil suit for specific performance of agreement and permanent injunction before the trial court on 20.8.2020 by stating that an agreement to sale dated 5.10.2005 was executed in respect of land bearing survey No. 51/8, admeasuring 0.031 hectare situated at village Nanakheda Tehsil and District Ujjain by the petitioner and other respondents in favour of respondent no.1/plaintiff. The said agreement was renewed on 16.12.2005, and thereafter on 1.11.2016 and 10.5.2009. A legal notice dated 25.7.2020 was sent to the petitioner and other respondents for specific performance of contract but since no response was received by plaintiff, therefore, a suit has been filed against petitioner and other respondents.

8 During pendency of the said suit, petitioner/defendant no. 1 filed an application under Order 7 Rule 11 CPC by stating that earlier suit of plaintiff for permanent injunction has been dismissed by the trial court, therefore, present suit is barred by principle of res judicata. The earlier suit was filed for permanent injunction and no relief of specific performance of contract was

sought therefore, present suit is not maintainable as per provisions of Order 2 Rule 2 of CPC. Apart from the above, time is essence of the agreement and suit was not filed within time, therefore, as per Article 54 of Limitation Act suit is barred by time. Hence present suit deserves to be dismissed as not maintainable.

9 Respondent no.1/plaintiff has opposed the application by stating that compliance of agreement has been done at the earlier stage, the cause of action of earlier suit and present suit is different, the reason for rejection of suit was not explained by the defendant No. 1. The defendant no. 1 has relied upon certain documents but in all the case, cause of action, subject matter and relief is different, therefore, the application deserves to be dismissed.

10 The trial court after hearing both the parties dismissed the application under Order 7 Rule 11 CPC filed by petitioner vide order dated 2.2.2022 by holding that the question of limitation is a mixed question of law and fact and it can only be adjudicated after recording evidence, hence the suit cannot be rejected at this stage. Being aggrieved by the aforesaid order, the petitioner/defendant no.1 has preferred this civil revision.

11 Learned counsel for petitioner No.1/defendant submits that the order passed by the trial court is against the law and fact. The trial court has failed to consider the provisions of Order 2 Rule 2 CPC. The trial court also failed to consider that no cause of action has arisen. The plaintiff relinquished his part of the claim in the previous instituted suit and therefore, the present suit on the same subject matter is barred under Order 2 Rule 2 CPC. In support of his submission, he has placed reliance upon following judgments:

(i) Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd. reported in 2013(1) SCC 625;

(ii) Gajanan R. Salvi Vs. Satish Shankar Gupte reported in AIR 2004 Bom 455;

(iii) Satish Bahadur Vs. Hans Raj and other AIR 1980 PB 351;

(iv) Order dated 25.1.2024 in CR No. 381/2022Smt. Pushpa Patel Vs. Smt. Neelima Tiwari ;

(v) Vipin Kumar Vs. Smt. Asha Lata Ahuja (2009) 3 CivCC 737.

Hence he prays that impugned order be set aside and civil suit filed by respondent no.1/plaintiff be dismissed with cost.

12 Per contra counsel for respondent no.1/plaintiff opposes the prayer by submitting that as per agreement to sale dated 5.10.2005 it was agreed that after completion of mutation proceeding, name of respondent no.1 be mutated and at the earlier stage mutation proceedings were pending therefore, no question for execution of sale deed arises. Limitation is a mixed question of law and fact therefore, it cannot be decided without leading evidence and no interference in the impugned order is required. He placed reliance upon following judgments:

(i) Eldeco Housing and Industries Ltd. Vs. Ashok Vidyarthi reported in 2024 SAR Online (SC) 1348;

(ii) Soumitra Kumar Sen Vs. Shyamlal Kumar Sen, AIR Online 2018 SC 822;

(iii) Shakti Bhog Food Industries Ltd. Vs. Central Bank of India 2024(4) MPLJ 49;

(iv) Shubhalaya Villa and others Vs. Vishandas Parwani 2020(3) MPLJ 597.

Hence prayed that this revision deserves to be dismissed.

13 Heard learned counsel for the parties and perused the entire record.

14 The trial court has dismissed the application filed by petitioner under

Order 7 Rule 11 CPC on two grounds, firstly that the matter is to be adjudicated on the basis of pleadings of the parties and that the question of limitation is a mixed question of law and fact and it can only be adjudicated after recording evidence. In the instant case the moot question arises for consideration whether an application under Order 7 Rule 11 CPC ought to be decided on the allegations in the plaint and filing of written statement and evidence is irrelevant and unnecessary.

15 In such circumstances, Order VII Rule 11 C.P.C. reads as under:

“11. Rejection of plaint.-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 by the plaintiff 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, failed 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 reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause great injustice to the plaintiff.”

16 In the case of **Sapan Sukhdeo Sable and others Vs. Assistant**

Charity Commissioner and others reported in (2004) 3 SCC 137, Hon'ble Apex Court has observed as under:

“Rule 11 of Order VII lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word 'shall' is used clearly implying thereby that it casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13.”

17 In similar situation, Hon'ble Supreme Court in the case of **Om Agrawal Vs. Haryana Financial Corporation and others reported in 2015(4) MPLJ 495** has observed as under :

“22. An application for rejection of the plaint can be filed, if the allegations made in the plaint taken to be correct as a whole on its face value show the suit to be barred by any law. The question as to whether a suit is barred by any law or not would always depend upon the facts and circumstances of each case. However, for deciding this question, only the averments made in the plaint are relevant.”

18 In exercise of powers under this provision, the Court would determine if the assertions made in the plaint are contrary to statutory law, or judicial dicta, for deciding whether a case for rejecting the plaint at the threshold is made out. The test for exercising the power under Order VII Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed.

19 This Court in para 8 and 10 of the judgment in the case of **Neelam Kumar Bachani and Anr. Vs. Bhishamlal reported in 2013(4) MPLJ 117**, has held as under:-

“In such a situation again the suit was filed beyond the limitation and this aspect is not disputed by the non-applicant even before this Court while making his submission. This being so, for proving such facts which were specifically stated in the plaint no evidence was required. It was to be seen by the Court below that the suit filed by the non-applicant would be barred by limitation and since there is no provision to enlarge limitation for filing of such suit and no such power is vested in the Court, the suit of the non-applicant was liable to be dismissed under the provisions of Order 7, Rule 11 of Civil Procedure Code. Having failed to appreciate such legal position, the Court below erred in exercising the jurisdiction vested in it in appropriate manner and in rejecting the application of the applicants under Order 7, Rule 11 of Civil Procedure Code.”

20 In the case of **Hardesh Ores Pvt. Ltd vs M/S. Hede And Company reported in 2007 (5) SCC 614**, Hon'ble the Apex Court held that it not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be constructed as it stands without addition or subtraction of words. If the allegations in the plaint prima facie show a cause of action, the Court cannot embark upon an enquiry whether the allegations are true in fact. Therefore, it is crystal clear that if from a meaningful reading of the plaint, it is found that the suit is manifestly vexatious and without any merit, and does not disclose a right to sue, the Court would be justified in exercising the power under Order VII Rule 11 of CPC.

21 Hon'ble the apex Court in the case of **Dahiben Vs. Arvindbhai**

Kalyanji Bhanusali (Gajra) Dead through Legal Representatives and Others reported in (2020) 7 SCC 366, has held that powers under Order VII Rule 11 of CPC must be exercised by the Court at any stage of the suit either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial.

22 In the instant case, the main plea of petitioner/defendant no.1 is that at earlier stage respondent no.1/plaintiff has filed two civil suits. Firstly filed civil suit against defendant no.1 Kishore Prajapati and other defendants for declaration of title and permanent injunction of same property on the same cause of action. Vide order dated 24.9.2012 District Judge Ujjain has given opportunity to the plaintiff Girish Pathak that if he wants he may amend his suit for specific performance of contract otherwise he may choose that he will continue the suit only for relief of permanent injunction and thereafter vide order dated 4.10.2012 the court has dismissed the earlier suit on the basis that the suit is not maintainable. The plaintiff/respondent no.1 has challenged the same before this court and vide order dated 9.10.2013 passed in FA No. 822/2012 the Division Bench of this Court had dismissed the first appeal by upholding the order of District Judge Ujjain. Apart from the above, plaintiff Girish Pathak has filed another civil suit No. 26A/2017 against the petitioner/defendant no.1 Kishore Prajapati and others for declaration and permanent injunction in respect of same suit land on the same cause of action and vide judgment dated 14.12.2017 the civil suit has been dismissed. Thereafter the plaintiff /respondent no.1 Girish Pathak has filed this third civil suit on the same cause of action and on same subject matter of same property.

23 Learned counsel for petitioner vehemently urged that present suit of plaintiff is to claim specific performance of contract but the earlier suit was

injunction simpliciter. In this way it was sought to be urged that the plaintiff be prevented by the bar of Order 2 Rule 2 which provision is aimed for avoiding multiplicity of the suit. The Bombay High court in case of **Gajanan R. Salvi Vs. Satish Shankar Gupte reported in AIR 2004 Bom 455** in para 6 has held as under:-

"6 On the other hand, in substance, what is to be seen is, whether the foundation in the previous suit as well as present suit is one and the same and further what type of rulings would have been there available for seeking relief in this previous suit that was prayed."

24 Therefore, applying the same test in the light of the material pleadings of foundation on record in this proceedings, it clearly appears that the foundation is same and the evidence that would be required is also the same. Therefore, it appears that at the time of filing of earlier suit it was within the knowledge of plaintiff and he could have for seeking the relief of specific performance of contract because all the allegation made in the earlier suit was themselves enough to ask for relief. Instead of asking all these reliefs and taking the risk of only asking the relief of injunction and subsequently getting the relief, suit was dismissed on 4.12.2012 and **14.12.2017**.

25 Consequently, the plaintiff has no case under Order 2 Rule 2 which is very much there and which is standing in his way to prosecute the present suit.

26 The Single Bench of this Court in case of **Smt. Pushpa Patel Vs. Smt. Neelima Tiwari** vide order dated 25.1.2024 passed in CR No. 381/2022 has held as under:-

"Section 34 of the Specific Relief Act prohibits a suit for mere declaration without consequential relief. Section 53-A of the Act of 1882 is ordinarily to be used as a defence and not as a weapon of attack. The Privy Council, in the case of Proboadh Kumar Das (supra), has held that the right conferred by Section 53-A of the

Act of 1882 is a right available only to the defendant to protect his possession."

27 The Punjab and Haryana High court in case of **Vipan Kumar Vs. Smt. Asha Lata Ahuja reported in (2009) 3 Civ.CC 737** has held as under:-

"26. In all these authorities, the law laid down is, that if on the date of filing suit for injunction, the relief of specific performance was available, then the vendee is not entitled to file a suit for specific performance of agreement, as it would be barred under Order 2 Rule 2 of the Code of Civil Procedure."

28 A Single Judge of Punjab and Haryana High Court in the case of **Jasmer Singh and others Vs. Kanwaljit Singh reported in AIR 1991 Punjab & Haryana 194**, has held the suit for permanent injunction filed by the vendee-plaintiff as not maintainable, in view of availability of equally efficacious relief by way of suit for specific performance.

29 Although learned counsel for respondent no.1 contended that as per agreement to sale the mutation proceeding is required if the mutation proceeding was required why did respondent no. 1/plaintiff file earlier two civil suits against the petitioner as regard the same subject matter. It is also contended by respondent no.1 that possession of the suit property has been delivered to him by possession receipt on 10.5.2009 but the said receipt is related with the different land and not related with the subject matter of the suit property, therefore, the contention made by respondent is not acceptable.

30 A bare perusal of the plaint averment and pleading and judgment of the earlier litigation, relief claimed at the earlier stage, plaintiff/respondent no. 1 did not sought any relief for specific performance of contract and earlier suit was injunction simpliciter. Therefore, this third suit is not maintainable.

31 So far as the ground regarding limitation is concerned, in the

agreement to sale which was initially executed between both the parties on 5.10.2015, the time is essence and in para 1 it has been specifically mentioned that within the time rest of the amount will be paid and registered sale deed will be executed.

32 The Apex Court in the case of **Janardhanam Prasad versus Ramdas reported in (2007) 15 SCC 174** has held that Court, in applying the period of limitation would first inquire as to whether any time was fixed for performance of agreement of sale. If it is so fixed, the suit must be filed within the period of three years, failing which the same would be barred by limitation.

33 In the present case, the agreement prescribes the period for performance of the contract by the plaintiff, hence, suit ought to have been filed within three years. The defendant was required to execute the sale deed on payment of the balance amount by the plaintiff on or before 4.10.2006. Since the defendant has not paid the balance amount before that date and after that the agreement was renewed by further three times and last agreement between both the parties was executed on 10.5.2009 and no consideration amount was paid therefore, there was violation on the part of defendant in the performance of the agreement. This suit has been filed before the trial court on 20.8.2020 and after 11 years of entering into the agreement to sale therefore, as per Article 54 of Limitation Act suit is also barred by time.

34 In view of the aforesaid, this court finds that present suit filed by respondent no.1/plaintiff is clearly barred by time because the earlier suit filed by plaintiff was merely seeking relief of injunction simplicitor without claiming relief of specific performance of contract. Therefore, the present suit is not maintainable on the same cause of action. The trial court has not considered all

these aspects of the matter and ignored the mandatory provisions of law.

35 Resultantly, the present civil revision is allowed and the impugned order dated 2.2.2021 is hereby set aside. The application preferred by petitioner/defendant under Order 7 Rule 11 CPC stands allowed and plaint filed by respondent no.1/plaintiff before the trial court is hereby rejected as not maintainable.

**(ANIL VERMA)
JUDGE**

BDJ

