

Chandra Basu Vs. Sanjukta Mukherjee

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Court : Kolkata

Decided On : Apr-22-2004

Reported in : 2004(3)CHN491

Judge : Jyotirmay Bhattacharya, J.

Acts : [Limitation Act, 1963](#) - Section 54; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 7, Rule 11; ;[Constitution of India](#) - Article 227

Appeal No. : C.O. No. 1992 of 2002

Appellant : Chandra Basu

Respondent : Sanjukta Mukherjee

Advocate for Def. : S. Dasgupta, ;Tapan Mukherjee and ;Aniruddha Chatterjee, Advs.

Advocate for Pet/Ap. : S.P. Roychowdhury, ;Rupen Mitra and ;Aniket Mitra, Advs.

Judgement :

Jyotirmay Bhattacharya, J.

1. This application under Article 227 of the [Constitution of India](#) is directed against an order dated 31st May, 2002 passed by the learned 2nd Additional District Judge at Alipore in C. R. No. 427 of 2001 affirming the order being No. 13, dated

15th May, 2001 passed by the learned Civil Judge, Senior Division, 6th Court at Alipore in Title Suit No. 138 of 2000.

2. The defendant is the petitioner before this Court in this application under Article 227 of the [Constitution of India](#).

3. The facts leading to the filing of this revisional application is set out hereunder :

(a) The opposite parties herein as plaintiffs filed a suit for specific performance of contract against the defendant petitioner herein. The said suit which was filed in the Court of the learned Civil Judge, Senior Division, 6th Court at Alipore was registered as Title Suit No. 138 of 2000.

(b) In the said suit the plaintiffs opposite parties were seeking to enforce the contract, for assignment of the unexpired period of leasehold interest of the defendant in the Government land, by way of specific performance of contract. The said agreement was executed between the parties on 27th June, 1991.

(c) The plaintiffs opposite parties claimed that though the agreement provides for completion of the said transaction within 31st December, 1991 but the defendant petitioner could not perform her obligation under the said agreement by obtaining necessary permission from the Government for transferring her leasehold interest in the said property in favour of the plaintiffs opposite parties within the said stipulated date.

(d) Since the suit property is the Government land, there was restriction in transferring such land by the defendant, without obtaining permission from the Government. Accordingly, the defendant agreed to transfer her leasehold interest in the said land in favour of the plaintiffs after obtaining necessary permission from the Government.

(e) The plaintiffs opposite parties repeatedly requested the defendant petitioner to complete the said transaction but the defendant petitioner deferred the said transaction from time to time on the ground of delay in the process of grant of permission by the authority concerned. It was also represented by the defendant petitioner to the plaintiffs opposite parties that delay is being caused due to

delayed movement of the files in the Government departments. The defendant petitioner also requested the plaintiffs opposite parties to move slowly as there was delay in granting such permission by the Government.

(f) The plaintiffs opposite parties sincerely relied upon such representation of the defendant petitioner but ultimately when the defendant petitioner cancelled the said agreement by Advocate's notice dated 5th September, 1997, the instant suit was filed on 4th July, 2000 on the basis of the cause of action which arose on 27th June, 1991, 5th September, 1997 and also on various other dates.

(g) In such a suit the defendant petitioner filed an application under Order 7 Rule 11(d) of the Code of Civil Procedure, inter alia, praying for rejection of the said plaint on the ground that the suit is barred by limitation. In the said application the defendant petitioner claimed that since a particular date was fixed in the contract itself for performance of the contract, the suit for specific performance of contract should have been filed within 3 years from the date so fixed performance of such contract. The defendant petitioner claimed that 31st December, 1991 was the date fixed for performance of the said contract, and thus the suit which was filed on 4th July, 2000, is barred by the laws of limitation. Accordingly, the defendant prayed for rejection of the said plaint under Order 7 Rule 11(d) of the Code of Civil Procedure.

(h) The plaintiffs opposite parties contested the said application for rejection of plaint by filing objection denying the allegations of the defendant petitioner. In the said objection it was claimed that since the suit was filed within 3 years from the date of refusal of the execution and registration of the deed of assignment by the defendant petitioner, the suit is not barred by limitation. The plaintiffs opposite parties claimed that the period of limitation should be counted from the date of notice of cancellation of the agreement issued by the learned Advocate of the defendant petitioner, on 5th September, 1997.

(i) Thus, in substance the plaintiffs opposite parties claimed that the period of limitation should be counted from the date when performance of the agreement was refused for the first time by the defendant and not from the date which was fixed in the agreement itself for performance thereof. The plaintiffs opposite parties

prayed for dismissal of the said application on the aforesaid grounds.

(j) The learned Trial Judge by his order being No. 13 dated 15th May, 2001 was pleased to reject the petitioner's application under Order 7 Rule 11(d) of the Civil Procedure Code on the ground that the suit is not barred by limitation as the cause of action of the suit arose on 5th July, 1997 as also on other dates.

(k) According to the learned Trial Judge the defendant petitioner cannot take the plea of limitation as the defendant petitioner herself defaulted in obtaining permission from the Government as well as from the income-tax authorities for executing the deed of assignment within the stipulated period.

(l) Being aggrieved by the said decision of the learned Trial Judge, the defendant petitioner herein preferred an application under Section 115(A) of the Code of Civil Procedure before the learned 2nd Additional District Judge at Alipore. The said revisional application which was registered as C. R. No. 427 of 2001 was dismissed by the learned 2nd Additional District Judge at Alipore on 31st May, 2002 by holding inter alia, that the learned Trial Judge did not commit any jurisdictional error in rejecting the said application warranting interference under Section 115(A) of the Code of Civil Procedure.

(m) The learned 2nd Additional District Judge, at Alipore concurrently found that since the defendant petitioner could not fulfil her obligation under the contract within the stipulated period, the cause of action of the suit cannot arise on the expiry of the last date for performance of the contract, i.e., 31st December, 1991. According to the learned Court below, the cause of action of the suit actually arose on the date when the defendant petitioner failed to perform her part of the contract and not from the date fixed in the contract itself.

(n) Challenging the said decision of the learned 2nd Additional District Judge at Alipore the defendant petitioner preferred the instant application under Article 227 of the [Constitution of India](#).

4. Mr. S.P. Roychowdhury, learned Senior Advocate, appearing on behalf of the petitioner seriously contends that since the date for performance of the contract is

fixed in the agreement itself, the suit for specific performance of the contract should be filed within 3 years from such date. According to Mr. Roychowdhury in a case where the date is fixed for performance in the agreement itself, the first part of Article 54 of the Limitation Act will apply. Mr. Roychowdhury further submits that the second part of Article 54 of the Limitation Act will apply only in a case where no date is fixed for performance of the contract.

5. Mr. Roychowdhury by referring to various paragraphs of the plaint submits that the plaintiffs opposite parties agreed to complete the said transaction within 31st December, 1991. As such the suit which was filed on 4th July, 2000 is apparently barred by the laws of limitation. Mr. Roychowdhury further submits that subsequent cancellation of the agreement by the Advocate's letter dated 5th September, 1997 cannot be the starting point of limitation in filing the said suit for specific performance of contract in view of the provision of Article 54 of the Limitation Act.

6. Mr. Roychowdhury further contends that in the instant case there is no pleading of acknowledgement of liability in writing within the period of the limitation by the defendant petitioner and as such the benefit of Section 18 of the Limitation Act cannot be extended to the plaintiffs opposite parties.

7. To strengthen the aforesaid submissions, Mr. Roychowdhury referred to the decision of the Hon'ble Supreme Court, viz., T.L. Muddukrishana and Anr. v. Lalitha Ramchandra Rao, reported in : [1997]1SCR11 and contends that Article 54 of the Schedule to the Limitation Act postulates that for specific performance of a contract the period of limitation is 3 years from the date fixed for performance or, if no such date is fixed, from the date when the plaintiff noticed that performance was refused. Referring to paragraph 8 of the said decision, Mr. Roychowdhury submits that under the first part of Article 54, once the date for performance of the contract has been fixed by the parties, the limitation begins to run from that date and the specific performance of contract can be filed within 3 years from the date.

8. Mr. Roychowdhury, by further referring to another Single Bench decision of this Hon'ble Court viz., Ganapati Apartments Pvt. Ltd. v. Favourite Small Investment Ltd., reported in 2002(2) CLJ 173, submits that the notice of cancellation of the

agreement cannot be the starting point of limitation as the date for performance of the contract was specifically mentioned in the agreement itself.

9. Mr. Roychowdhury further submits that in a case where the time is fixed for performance of the contract, limitation begins to run from the time fixed for its performance notwithstanding the fact that time was made the essence of the contract or not and to support his said contention, Mr. Roychowdhury also relied upon a decision viz., *Sumerchand Hukumchand and Anr. v. Hukumchand Mathurdas and Ors.*, reported in : AIR 1965 MP177 .

10. Mr. Roychowdhury also relied upon another decision of the Hon'ble Supreme Court, viz., *Thakamma Mathew v. M. Azamathulla Khan*, reported in : AIR 1993 SC1120 and submitted that the Court cannot override the statutory limitations contained in Article 54 of the Limitation Act and as such when it is found from the pleading itself that the time for performance of the contract was fixed in the agreement itself, the Court has no other alternative but to reject the plaint under Order 7 Rule 11 of the Civil Procedure Code as admittedly the suit was filed beyond 3 years from the date so fixed for performance of the contract in the agreement itself.

11. Thus, in effect Mr. Roychowdhury submits that both the Courts below acted illegally by rejecting the petitioner's application under Order 7 Rule 11 of the Code of Civil Procedure without advertng to the true interpretation of Article 54 of the Limitation Act.

12. Mr. Sudhis Dasgupta, learned Senior Advocate, appearing on behalf of the plaintiffs opposite parties submits that while deciding an application under Order 7 Rule 11 of the Code of Civil Procedure the Court cannot look into any other document excepting the plaint. As such the Court has to decide as to whether the suit is barred by the laws of limitation or not by bare reading of the plaint itself.

13. Mr. Dasgupta further submits that in a case where pleadings are as such where further investigation is necessary for ascertaining the bar of limitation, the Court should not reject the plaint under Order 7 Rule 11 of the Code of Civil Procedure. Mr. Dasgupta further submits that even in a case where the pleadings

are vague, still then the Court cannot reject the plaint under Order 7 Rule 11 of the Code of Civil Procedure straightaway without giving an opportunity to the plaintiff to amend his pleadings in the plaint.

14. To support the aforesaid contentions, Mr. Dasgupta relied upon the decisions, viz., *Sreedam v. Tencori*, reported in : AIR1953 Cal222 , *British Airways v. Art Works Export Ltd.*, reported in : AIR1986 Cal120 and *Secretary of State for India in Council v. Golabari Paliram*, reported in 35 CWN 930.

15. Mr. Dasgupta by referring to the pleadings in the plaint as well as the various terms of the agreement contends that here is a case where limitation will not begin from the date fixed for performance of the contract as the defendant petitioner has not performed her part of the contract within the time so fixed in the agreement. Mr. Dasgupta submits that the defendant is a lessee of a Government land and the said lease was taken by the defendant from the Government with the condition that the said land cannot be transferred and/or assigned without obtaining permission from the State.

16. Mr. Dasgupta by referring to Section 52 of the Indian Contract Act contends that in a case of contract consisting of reciprocal promises, the vendee cannot perform his part of the contract until and unless the vendor fulfils the obligation on his part under the contract. Thus, according to Mr. Dasgupta limitation will begin only when the defendant petitioner obtains permission from the State for transferring the suit property in favour of the plaintiffs opposite parties. Mr. Dasgupta further submits that the pleadings in the plaint will show that the plaintiffs opposite parties never exercised their option to avoid the contract due to failure to perform the terms of the contract by the defendant petitioner. According to Mr. Dasgupta, in view of Section 55 of the Indian Contract Act, the agreement survived till the time of its determination by notice. Thus, Mr. Dasgupta submits that since the suit was filed within 3 years from the date of termination of the agreement, the suit is not barred by the laws of limitation. According to Mr. Dasgupta in the instant case the second part of Article 54 of the Limitation Act will apply.

17. Mr. Dasgupta by referring to the provision of Section 63 of the Indian Contract Act also submits that time for performance of the contract can be extended by the

parties. Mr. Dasgupta by referring to the pleadings in the plaint submits that here in the instant case the defendant petitioner herself, in spite of repeated requests made by the plaintiffs opposite parties could not execute the deed of assignment in favour of the plaintiffs opposite parties on the ground that her application for permission for transfer was still in process in the concerned Government department and due to delayed movement of files in the Government department, the opposite parties were requested to go slow. Thus, when on such plea the execution was deferred by the defendant, the time for performance of the contract should be deemed to have been extended by the parties and the parties in fact by such conduct never intended to complete the said transaction within the time fixed in the contract. According to Mr. Dasgupta in such a situation the first part of Article 54 of Limitation Act will not apply; rather the last part of Article 54 will apply in the instant case.

18. To support the aforesaid contentions, Mr. Dasgupta relied upon several decisions of the Supreme Court, viz., *Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas*, reported in 1986(3) SCC 300, *Chand Rani v. Kamal Rani*, reported in : AIR 1993 SC1742 , *D.S. Thimmappa v. Siddarmakka*, reported in : [1996]3SCR1045 and *Arosan Enterprises Ltd. v. Union of India*, reported in : AIR 1999 SC3804 and contends that the nature of the contract in the instant case suggests that time was never the essence of the contract and as such the suit which was filed within 3 years from the date of cancellation of the contract is well within the period of limitation.

19. Lastly, Mr. Dasgupta submits that limitation is always a mixed question of law and fact and such a question can only be determined by trial on evidence. Thus, according to Mr. Dasgupta for ascertaining the bar of limitation, the Court will have to consider as to (i) whether the time is the essence of the contract or not; (ii) whether the time for performance of the contract as fixed in the agreement was extended by the parties or not; (iii) whether time has at all begun to run due to non-fulfilment of the reciprocal promise by the defendant petitioner or not and such consideration, according to Mr. Dasgupta, cannot be done without taking evidence in the suit.

20. Thus, on the basis of the aforesaid submission Mr. Dasgupta supported the conclusion arrived at by both the Courts below while rejecting the defendant's application under Order 7 Rule 11 of the Code of Civil Procedure.

21. After considering the pleadings in the plaint I find that in the agreement itself the parties agreed to complete the said transaction within 31st December, 1991. Thus, when the parties agreed to complete the transaction within a particular date the first part of Article 54 of the Limitation Act will apply. But here in the instant case I find from the pleading of the plaint that there are some vague indications to the effect that the time fixed in the contract was extended by the defendant petitioner as it is the defendant herself who requested the plaintiffs opposite parties to wait for some time and to proceed slowly on the ground that because of the slow movement of the file in the Government department, permission could not be obtained. Furthermore, the termination of the contract by letter after lapse of about six years from the ultimate date for performance of the contract and holding the earnest money by the defendant petitioner for such a long time, create some confusion in the mind of the Court as to whether the time for performance of the contract was extended by the parties or not. The letter of termination of the contract may also throw some light in this regard but since the said letter has not yet admitted into evidence the Court cannot assess the text of the said letter at this juncture. That apart, when in the plaint itself it was stated that the cause of action for the suit arose on 5th September, 1997 and the suit was filed on 4th July, 2000, it cannot be held on plain reading of the plaint that the suit is barred by the laws of limitation.

22. Thus, though I find substance in the argument of Mr. Roychowdhury that in a case where the date for performance of the contract is fixed in the agreement itself, the first part of Article 54 of the Limitation Act will apply but still then in a case like this where the pleadings in the instant case are such where further investigation is necessary for ascertaining as to whether the said fixed date was extended or not, the plaint cannot be rejected straightaway on an application under Order 7 Rule 11 of the Code of Civil of Civil Procedure. The decision which was cited by Mr. Roychowdhury viz., T.L. Muddukrishana and Anr. v. Lalitha Ramchandra Rao, reported in : [1997]1SCR11 , will show that in a case where a

date is fixed for performance of the contract, 3 years will be counted from the date fixed for such performance unless the time is extended. Thus, whether time was extended or not, can only be ascertained after evidence is taken in the suit, Section 63 of the Contract Act does not speak for such extension by writing before the expiry of the date fixed for such performance. In any event I find from the pleadings of the plaint that there are at least some vague indications for extension of the period of performance.

23. The other decision which was cited by Mr. Roychowdhury viz., Ganapati Apartments Pvt. Ltd, v. Favourite Small Investment Ltd., reported in 2002(2) CLJ 173, cannot fit in the facts of the instant case as it appears from the facts recorded in the said decision that amendment for converting the suit for injunction into a suit for specific performance of contract was refused on the ground that subsequent modification of the original agreement was disbelieved by this Court. Since the modification was disbelieved, limitation intervened and as a result of which amendment could not be allowed.

24. I, however, agree with the submission of Mr. Roychowdhury that limitation will run from the time fixed in the agreement notwithstanding the fact that the time is the essence of the contract or not as has been held in the decision Sumerchand Hukumchand and Anr. (supra). But my such agreement cannot resolve the dispute in the instant case as in the instant case the basic question is whether the time so fixed for performance of the contract was extended by the parties or not and thus if ultimately it is found that it was not extended then certainly the time will run from the date so fixed in the agreement itself; similarly, if it is found that the time for performance so fixed was extended by the parties then the limitation will run from the expiry of the extended period and if no fixed date can be ascertained after such extension then from the date when execution was first refused.

25. Now let me consider the submissions advanced by Mr. Dasgupta. I have carefully considered the decisions cited by Mr. Dasgupta, viz., Rojasara Ramjibhai Dahyabhai (supra), Chand Rani (supra), D.S. Thirnmappa (supra) and Arosan Enterprises Ltd. (supra) but I find that those are not the authorities on the point of limitation. However, by referring to those decisions, Mr. Dasgupta tried to impress

upon me that since performance of the contract within the date fixed is impossible here as the defendant petitioner failed to procure the permission for transfer from the Government, limitation cannot begin to run from the date so fixed. Mr. Dasgupta by referring to the provisions of Section 52 and Section 55 of the Contract Act, submits that since the contract consists of reciprocal promises, the plaintiffs' obligation to perform his part of the contract will arise only when the performance of the part of the contract by the defendant petitioner is complete as the order of performance was fixed in the contract itself in such manner. The said submission though apparently has some substance, but in view of the decision of the Hon'ble Supreme Court viz., K. Raheja Constructions Ltd. and Anr. v. Alliance Ministries and Ors., reported in 1995 Supp. (3) SCC page 17, the said submission loses its importance. In the said decision, the Hon'ble Supreme Court has decided that the permission for alienation is not a condition precedent to file the suit for specific performance of contract as the decree for specific performance is always subject to the condition to the grant of the permission by the competent authority. Holding as such, the claim for specific performance which was sought to be raised after seven years, was held by the Hon'ble Supreme Court, as barred by the laws of limitation. Paragraph 4 of the said decision is set out hereunder for proper appraisal of the legal position in this regard :

'4. It is seen that the permission for alienation is not a condition precedent to file the suit for specific performance. The decree of specific performance will always be subject to the condition to the grant of the permission by the competent authority. The petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief for specific performance in the original suit itself. Having allowed the period of seven years to elapse from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the [Limitation Act, 1963](#), any amendment on the grounds set out, would defeat the valuable right of limitation accruing to the respondent'.

26. In such view of the matter I cannot accept the aforesaid submission of Mr. Dasgupta,

27. Let me now consider the other part of the submission of Mr. Dasgupta, whereby Mr. Dasgupta, by referring to the provision of Section 63 of the Contract Act, submits that the time for performance of the contract has been extended by the parties in this case as the defendant petitioner herself requested the opposite parties to go slow as the permission for transfer could not be obtained by the defendant petitioner on the ground that files move very slowly in the Government department. That apart, cancellation of the agreement by notice after the lapse of about six years from the date fixed for performance of the contract and the holding of the earnest money by the defendant petitioner for such a long time and expression of her desire even to refund the said money after such a long time, creates some confusion in the mind of this Court as to whether the time for performance of the contract was extended or not. The notice of cancellation may throw some light in this regard. However, this aspect cannot be considered without evidence of the parties. Since some sort of pleadings are there, though those are very vague, but still then it cannot be conclusively held at this stage that the suit is barred by limitation. Since limitation is a mixed question of law and fact, which requires to be decided on evidence, the plaint cannot be rejected at this stage under Order 7 Rule 11(d) of the Civil Procedure Code.

28. Thus, I find substance in the aforesaid submission of Mr. Dasgupta and by following the decisions, viz., *Sreedam v. Tencori* (supra), *British Airways v. Art Works Export Ltd.* (supra), and *Secretary of State for India in Council* (supra), I find no justification in interfering with the order impugned particularly sitting in the jurisdiction under Article 227 of the [Constitution of India](#) where there is limited scope for interference even with an erroneous order as this Court under Article 227 of the [Constitution of India](#) cannot correct even any error of law in the order impugned.

29. Revisional application, thus, fails. However, I make it clear that if such a question is raised at the time of trial of the suit, the learned Trial Judge will decide the said issue after taking evidence of the parties without being influenced by any of the observations made by this Court while disposing of the instant application under Article 227 of the [Constitution of India](#).

30. Urgent xerox certified copy, if applied for, be supplied to the parties, upon compliance with the requisite formalities.

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