

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 615 OF 2014
WITH
CIVIL APPLICATION NO.10160 OF 2014**

Saherao s/o Shankarrao Khapke,
Age: 66 years, Occ: Agri.,
R/o. Bherdapur, Tq. Shrirampur,
Dist. Ahmednagar.

...Appellant

versus

1. Madanrao s/o Arujun Bhingare,
Age: 51 years, Occ: Agri.,
R/o. Bherdapur, Tq. Shrirampur,
Dist. Ahmednagar.
2. Ashok s/o Arujun Bhingare,
Age: 43 years, Occ: Agri.,
R/o. Bherdapur, Tq. Shrirampur,
Dist. Ahmednagar.
3. Gitaram s/o Arujun Bhingare,
Age: 60 years, Occ: Agri.,
R/o. Bherdapur, Tq. Shrirampur,
Dist. Ahmednagar.
4. Prayaga s/o Arujun Bhingare,
Age: 81 years, Occ: Agri.,
R/o. Bherdapur, Tq. Shrirampur,
Dist. Ahmednagar.
5. Rekha Ganpat Gayake,
Age: 36 years, Occ: Household.,
R/o. Matapur, Tq. Shrirampur,
Dist. Ahmednagar.
6. Shila Hanuman Gayake,
Age: 37 years, Occ: Household,
R/o. Matapur, Tq. Shrirampur,
Dist. Ahmednagar.

...Respondents

.....
Mr. Vikram R. Dhorde, Advocate for appellant.
Mr. K. S. Bhore, Advocate for respondents.
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CORAM : N.W. SAMBRE, J.

DATE : 11TH JUNE, 2015

ORAL ORDER :

This second appeal is by original plaintiff seeking specific performance based on the agreement of sale dated 13/05/1991.

2. The litigation has somewhat chequered history. There were two mortgage deeds executed on 09/01/1979 and another on 26/10/1979 in relation to which, the suits for redemption being Regular Civil Suit Nos. 160 of 1984 and 163 of 2008 are already decreed. It is claim of the present appellant that original land owner through his sons during his life time executed agreement of sale on 13/05/1991 after adjusting the amount of loan under the mortgage. Based on the same, according to him, he has filed suit for specific performance some time in 2009 as according to him, cause of action for filing of the said suit arose after present respondents-defendants refused to honour the terms of agreement. The suit for specific performance preferred by present appellant suffered dismissal by the judgment and order dated 19/12/2012 passed by the Joint Civil Judge, Junior Division, Shrirampur, which was further upheld in Regular Civil Appeal No. 6 of 2013 by the District Judge-1, Shrirampur on 13/08/2014. As such, present second appeal.

3. Mr. Dhorde, learned Counsel for the appellant, while taking me through the observations made by both the Courts below, would urge that, the moment agreement of 13/05/1991 was executed, there was sufficient compliance of Section 10 of the Indian Contract Act. According to him, as contract in question was valid contract, specific performance thereto ought to have been granted. In support of his contention, he has invited my attention to the admission given by the defendant-land owner about receipt of consideration of Rs. 50,000/- against the agreement of 1991. According to him, both the Courts below have held against him while refusing grant of specific performance, the Courts below committed an error of law on the face of record. He would further urge that, the aspect of possession of the present appellant on the suit property since 1979, the limitation particularly having regard to the language of agreement that time is not essence of contract, is ignored by the Courts below. He would further urge that, the cause which has prompted to file suit very much brings cause within limitation in the light of language of agreement of sale of 1991 in view of Article 54 of the Limitation Act. As such, he submits that, the appeal contains substantial question of law and it needs consideration.

4. Mr. Bhore, learned Counsel for the respondent-defendants would urge that, even though mortgage deeds of 1979

are to be accepted, the fact remains that, it is an admitted position on record that, both the mortgage deeds can not be subject matter of the suit and were decreed in favour of present respondents-defendants. In addition to above, he would urge that, the Courts below having concurrently held in his favour on the aspect of limitation and the very conduct of present appellant of filing of suit for specific performance in 2009 does not call for any interference. According to him, in second appellate jurisdiction, it is not open for this Court to re-appreciate the entire set of circumstances so as to reach separate conclusion unless the perversity is reached at large so as to cause substantial injustice to the appellant.

5. Having considered the rival contentions of the parties and having gone through the observations made by learned trial Court and lower appellate Court, with the assistance of learned Counsel for the parties, it is noticed that, in support of the contention of present appellant, the appellant has examined himself at Exhibit 22 and one Machhindra Unde at Exhibit 34 as P.W.2. The documentary evidence such as 7/12 extract of the suit property below Exhibit 33, Exhibit 25-notice sent to the defendants in 2008, deed of mortgage by conditional sale dated 09/01/1979 and 26/10/1979 at Exhibit 26 and 27 were filed on record.

6. The defendants, particularly defendant No. 3 Gitaram Bhingare in support of defence has examined himself at Exhibit 38 and defendant No. 2 Ashok Bhingare is examined at Exhibit 40.

7. Having regard to the rival claims, learned trial Court framed following issues at Exhibit 12 and answered the same accordingly.

1)	Does the plaintiff prove that late Arjun Honaji Bhingare and present defendant no. 1 and 2 agreed to sale suit field described in plaint para no. 1, which was already in possession of him vide mortgage deed of year 1979, for valuable consideration of Rs. 50,000/- and accordingly executed agreement to sale on 13.05.1991?	In the negative.
2)	Does the plaintiff prove that he was and is ready and willing to perform part of his duty as contemplated in sec 16(c) of Specific Relief Act?	In the negative.
3)	Does the plaintiff prove that the defendants have committed breach of contract?	Do not survive.
4)	Is the suit is in limitation?	In the negative.
5)	Does the plaintiff's suit is maintainable in present form?	redundant.
6)	Does the plaintiff is entitle for specific performance of contract?	In the negative.
7)	What order and decree?	As per final order.

8. In my opinion, the foremost question that is required to be answered while dealing with the claim of the present appellant is; whether the claim of the appellant is within limitation? If we peruse

the contents of Article 54 of Limitation Act, which contemplates limitations of three years for bringing into action the suit for specific performance. Such cause, which prompts the party to bring action the suit for specific performance is required to be calculated from either the date fixed for performance or if no such date is fixed then the date of the notice sent by the plaintiff when performance was refused.

9. The language employed in Article 54 of the Limitation Act reads thus :

SL. NO.	DESCRIPTION OF SUIT	PERIOD OF LIMITATION	TIME FROM WHICH PERIOD BEGINS TO RUN
54.	For specific performance of a contract.	Three years	The date fixed for the performance, or, if no such date is fixed when the plaintiff has notice that performance is refused.

10. Perusal of the said Article reflects that, the party, who sought specific performance must bring into action such suit within period of three years from the date of such action, as is fixed in the agreement or if no such date is fixed, within three years from the date of refusal of performance.

11. In the present case, respondent No. 1 though has come out with the case that, in 2008 there was refusal for performance particularly in the background of receipt of consideration and relationship of the parties, in my opinion, still action has to be brought before the Court for grant of specific performance was beyond limitation. Both the Courts below while considering said aspect of the matter, have dwelt upon controversy and have reached to the conclusion that, the claim of the appellant was time barred. With the assistance of the learned Counsel for the parties, I have also perused agreement dated 13/05/1991 which provides specific stipulation about execution of sale deed within period of one month from the date of said agreement. As such, in my opinion, no material illegality could be noticed while dealing with the said aspect of the matter.

12. Once the issue of limitation is answered against the present appellant, in my opinion, rest of the issues will be of hardly any importance.

13. Be that as it may, both the Courts below have already appreciated the evidence and have concurrently held that the appellant herein is not entitled for specific performance as is claimed. While giving such findings, learned Courts below have taken into

account the very object of Section 10 of the Indian Contract Act and evidence that was brought on record. Learned Courts below have also taken into account fact about decreeing the suit of redemption i.e. R.C.S. Nos. 160/1984 and 163/2008.

14. In view of above, in my opinion, no interference is made out. The appeal is devoid of substantial question of law and as such fails, stands dismissed.

15. In view of dismissal of appeal, civil application does not survive, same stands disposed of.

[N.W. SAMBRE, J.]