

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.342 OF 2014
WITH
CIVIL APPLICATION NO.811 OF 2014

Venubai Mahadu Gabhale and others ... Appellants
Vs.
Genu Deoram Bendkule ... Respondent

Mr. Sanjiv A. Sawant for Appellants.
Mr. Sanjay P. Shinde for Respondent.

CORAM : R. G. KETKAR, J.
Reserved on : **APRIL 16, 2015**
Pronounced on: **APRIL 21, 2015**

ORDER :

Heard Mr. Sawant, learned Counsel for appellants and Mr. Shinde, learned Counsel for respondent at length.

2. By this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), original defendants have challenged the judgment and decree dated 30.08.2011 passed by the learned 7th Joint Civil Judge, Junior Division, Nashik in Regular Civil Suit No.510 of 2008 as also the judgment and decree dated 21.12.2013 passed by the learned District Judge-5, Nashik in Civil Appeal No.220 of 2011. By these orders, the Courts below decreed the Suit instituted by the respondent, hereinafter referred to as the plaintiff, for specific performance of contract by directing the plaintiff to deposit remaining consideration amount of Rs.5,000/- in the trial Court within 1 month from its order. On payment of Rs.5,000/- in the Court by the plaintiff, the appellants, hereinafter be referred to as the defendants, were directed

to execute the sale deed in favour of the plaintiff in respect of the land admeasuring 2 Hectares 41 Ares from the eastern side of the land bearing Gat No.39 situate at Village Sadgaon, Taluka and District Nashik (for short 'suit land') after permission from the Divisional Commissioner, failing which the plaintiff will be entitled to get the sale deed executed through the Court. The plaintiff was to bear the expenses of execution of the sale deed.

3. In support of this Appeal, Mr. Sawant submitted that the plaintiff alleged that the defendants executed a registered agreement of sale in his favour on 08.05.1998. The total consideration of Rs.93,000/- was fixed. Out of that, till 08.05.1998, plaintiff had paid Rs.88,000/- to the defendants and the balance consideration of Rs.5,000/- was to be paid at the time of execution of the sale deed. As the suit land was a new tenure land, parties agreed for making application to the Collector, Nashik and the Divisional Commissioner, Nashik for obtaining the permission for sale of the suit land. It was further agreed between the parties that after getting such permission and paying the amount of Nazrana, the sale deed was to be executed within 6 months. If defendants failed to execute the sale deed, the plaintiff would be entitled to get it executed through the Court. On 24.09.1998, defendant No.1 made application to the Divisional Commissioner, Nashik for granting permission to sell the suit land and enquiry is still pending.

4. Mr. Sawant submitted that the Courts below committed serious error in decreeing the Suit as the plaintiff had instituted the Suit on 10.11.2008 for specific performance of agreement of sale dated 15.05.1998. The said Suit was clearly barred by law of limitation. He further submitted that the learned District Judge committed serious error in holding that time was not essence of contract. The findings recorded

by the learned District Judge are not in consonance with the agreement as also the material on record.

5. Mr. Sawant further submitted that the plaintiff in terms admitted during cross-examination that the defendant No.1 had made statements before the Revenue Officer in the year 2001 to the effect that she had borrowed money from the plaintiff and that she does not intend to sell the suit land. Plaintiff admitted that defendant No.1 denied execution of agreement of sale in the year 2001. Plaintiff further admitted that defendant No.1 in her statement before the Tahsildar and Collector stated that she does not want to sell the suit land to the plaintiff. In short, he submitted that in the year 2001 itself, plaintiff had notice that defendant No.1 had refused performance. However, the Suit is instituted in the year 2008, that is to say, beyond the period of 3 years as prescribed in Article 54 of the Indian Limitation Act, 1963 (for short 'Act'). In support of his submissions, he relied upon the decision of the Apex Court in the case of *Rathnavathi and another Vs. Kavita Ganashamdas*, **2014 (12) SCALE 386** to contend that period of limitation would start from the date when the plaintiff had noticed that defendant No.1 had refused performance. As defendant No.1 had refused performance in the year 2001, the Suit is clearly barred by law of limitation.

6. On the other hand, Mr. Shinde supported the impugned orders. He submitted that the question of limitation is a mixed question of law and fact. In the written statement, nowhere defendants pleaded that the plaintiff had notice of refusal of performance in the year 2001. In fact, on 24.09.1998, defendant No.1 had made application to the Collector for permission to sell the suit land. Tahsildar, Nashik had conducted enquiry and submitted report on 17.08.2000. Collector, Nashik granted

permission for sale on 11.04.2001 under Section 36(2) of the Maharashtra Land Revenue Code, 1966 subject to conditions. One of the conditions was that since the suit land is of new tenure, without prior permission of Divisional Commissioner, sale deed should not be executed. It has come on record that on 24.09.1998, defendant No.1 had made application to the Divisional Commissioner, Nashik and the said enquiry is still pending. The Suit, therefore, cannot be said to be barred by limitation.

7. Mr. Shinde further submitted that even during the course of evidence, defendant No.1 did not bring on record the alleged statements made before revenue officers showing her unwillingness to sell the suit land. She also did not challenge the order of Collector, Nashik dated 11.04.2001 granting permission to sell the suit land on the ground that it was contrary to the statements made by her. He submitted that the Courts below have decreed the Suit, and therefore, no case is made out for invocation of powers under Section 100 C.P.C.

8. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that defendant No.1, a tribal had executed registered agreement of sale in favour of the plaintiff, a tribal on 08.05.1998. The total consideration of Rs.93,000/- was fixed. The Courts below, after appreciating the evidence on record, have concurrently held that the plaintiff had paid Rs.88,000/- to the defendants. The balance consideration of Rs.5,000/- was to be paid at the time of execution of the sale deed. As the suit land was a new tenure land, the parties agreed for making application to the Collector, Nashik and Divisional Commissioner, Nashik for obtaining permission to sell the suit land. It was further agreed between the parties that after getting

such permission and paying the amount of Nazrana, sale deed was to be executed within 6 months. It has come on record that on 24.09.1998, defendant No.1 had made application to the Divisional Commissioner, Nashik for granting permission to sell the suit land and the enquiry is still pending.

9. Mr. Sawant submitted that in the cross-examination, plaintiff admitted that defendant No.1 had made statements before the Revenue Officer in the year 2001 to the effect that she had borrowed money from the plaintiff and that she does not intend to sell the suit land. Plaintiff admitted that the defendant No.1 had denied execution of agreement of sale in the year 2001. Plaintiff further admitted that defendant No.1 in her statement before Tahsildar and Collector stated that she does not wish to sell the suit land to the plaintiff. In other words, he submitted that in the year 2001 itself, plaintiff had notice that defendant No.1 had refused performance. The Suit instituted in the year 2008 is, therefore, clearly barred by limitation. I do not find any merit in this submission for more than one reason. Firstly, perusal of the written statement filed by the defendants does not indicate that defendants have specifically pleaded the said fact. Defendants also did not come up with the case that in the presence of plaintiff, her statement was recorded before the revenue officer in the year 2001 and, therefore, plaintiff had notice of refusal of performance by her. Secondly, defendants did not bring on record the alleged statements made by defendant No.1 showing her unwillingness to sell the suit land. Thirdly, assuming that defendant No.1 had expressed her unwillingness to sell the suit land, defendants would have definitely challenged the order dated 11.04.2001 passed by the Collector, Nashik on the ground that it was contrary to her statement. No such material is produced on record by the defendants. Fourthly, in cross-examination of plaintiff, he deposed that the statements made

before Tahsidar and Collector were given to him in the year 2008. It, therefore, cannot be said that in the year 2001, plaintiff had notice of refusal of performance by defendant No.1.

10. Perusal of the agreement of sale shows that the sale deed was to be executed after obtaining permission of the Divisional Commissioner, Nashik. As noted earlier, though defendant No.1 had made application on 24.09.1998, material on record indicates that the enquiry is still pending. For all these reasons, it cannot be said that the Suit is barred by limitation. In view thereof, reliance placed by Mr. Sawant on the decision of the Apex Court in the case of **Rathnavathi** (*supra*) does not advance the case of the defendants.

11. Mr. Sawant further submitted that time was essence of contract. The findings recorded by the learned District Judge are not in consonance with the agreement of sale as also material on record. For the reasons already indicated, it cannot be said that time was essence of contract. The Courts below after appreciating the evidence on record have concurrently held that out of total consideration of Rs.93,000/-, plaintiff had paid Rs.88,000/- and that plaintiff was and is all along ready and willing to perform his part of contract. The Courts below held that the plaintiff proved that defendants agreed to sell the suit land. Defendants also failed to prove that the agreement of sale is illegal. The Courts below also held that the transaction between the parties was not a money lending transaction. The findings recorded by the Courts below are based upon evidence on record. It cannot be said that the findings are perverse being based upon no evidence or that they are contrary to evidence on record. In view thereof, no question of law much less any substantial question of law arises in this Appeal. Hence, the Second Appeal fails and the same is dismissed.

12. In view of the dismissal of the Second Appeal, nothing survives in Civil Application No.811 of 2014 and the same is disposed of as such.

13. At this stage, Mr. Sawant orally applies for continuation of the ad-interim order granted in terms of prayer clause (a) of Civil Application No. 811 of 2014 on 04.07.2014 for a period of 12 weeks from today. None appears for the respondent.

14. Having regard to the fact that the ad-interim order is operating since 04.07.2014 and that appellants desire to challenge this order before the higher Court, I find that the request made by Mr. Sawant is reasonable. Hence, notwithstanding dismissal of the Second Appeal, ad-interim order dated 04.07.2014 shall remain in force for a period of 12 weeks from today. Order accordingly.

(R. G. KETKAR, J.)

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