

JPP

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

SECOND APPEAL NO. 45 OF 2011

Shri Prakash Dinkarrao Nalawade since
deceased through his heirs and L.Rs.

(A) Smt. Chayadevi Prakash Nalawade and Ors. ... Appellants.

V/s.

Dhairyashil Shivajirao Bhosale and Ors. ... Respondents.

Mr. V.S. Gokhale for the Appellants.

Mr. D.V. Sutar for the Respondents.

CORAM : N.M. Jamdar, J.

13 June, 2016.

Oral Order :-

Heard the learned Counsel for the parties. Admit on the
following questions of law :-

- (1) Whether both the Courts were right in denying the relief to the Appellants on the ground that the relief was time barred ?
- (2) Whether the Appellate Court was right in setting aside a decree of the Trial Court directing refund of the earnest amount with interest at the rate of 6% per annum ?

2. By consent of parties, the Appeal is taken up for final disposal forthwith. Paper-book dispensed with.

3. The Appellant No.1 is the Plaintiff in Regular Civil Suit No. 40 of 2001. The agreement for sale was entered into between the Appellant and the father of the Respondent in respect of Gat No. 733 area , 4 H and 71 R for Rs. 35,500/- on 10 September 1973. An amount of Rs.27,500/- was paid to the father of the Respondent. On 13 March 1997 father of the Respondent Shivajirao expired. A suit was filed by the Respondent bearing RCS No. 38 of 1999 for injunction against the Appellant. Thereafter, the Appellant filed the present suit in the Court of Civil Judge, Junior Division Gargoti seeking specific performance of the agreement of 10 September 1973.

4. In the plaint it was the case of the Appellant that the agreement was to be executed within six months after the permission for sale was obtained. In view of the cordial relation between the Appellants and the Respondent's father, the Appellants believed the word of Respondent's father that they will execute the sale deed, and waited. After the death of the Respondent's father, the Respondents filed a suit for injunction and thereafter the present Suit was filed. The Respondents filed written statement and contested the claim and contended that the suit was filed after 28 years of executing the agreement. The learned Civil Judge dismissed the Suit on the ground that the relief sought for was hopelessly time barred and the Appellant did not take any steps to get the

agreement executed for a long period of time which showed that they were not ready and willing. While dismissing the Suit, the learned Civil Judge directed the Respondents to pay the amount of Rs.27,500/- with interest at the rate of 6% per annum from the date of the Suit. The Appellants filed a Regular Civil Appeal No. 231 of 2006 in the District Court, Kolhapur. The Respondents filed cross objections as against the order directing refund of consideration. The learned District Judge came to the conclusion that the Suit was time barred in view of the limitation provided under Article 54 of the Limitation Act and the Appellants were not ready and willing to perform their part of the contract. The learned District Judge held that since the suit was not maintainable, there was no question of direction of refund of amount. Accordingly, by a judgment and order dated 20 November 2010 the Appeal filed by the Appellants was dismissed and cross objections filed by the Respondents were allowed. Thereafter, the present Second Appeal is filed.

5. In respect of the first question that is framed, the learned Counsel for the Appellants submitted that the cause of action arose in the year 1999 when the Respondents filed a Suit for injunction. He submitted that before filing of the Suit, the Appellants believed the word of the Respondent's father and did not file a Suit earlier. The Suit was to be filed within six months of taking the permission. This submission cannot be accepted.

6. The learned Civil Judge considered the time gap between the agreement and institution of the Suit which is 28 years. The learned Civil

Judge considered the conduct of the Appellants during this period and found that it was not believable that the Appellants would wait for such a long period for execution of the agreement when the property is substantial. The Court also found that what was the condition for the permission to be obtained was not specifically pleaded. The learned Trial Judge while dismissing the Suit relied upon the decisions of the Apex Court in the case of *Veeravee Anmal V/s. Seeni Ammal reported in (2002) 1 All MR. 264 (S.C.)* and *K.S. Vidyadnam V/s. Vairavan (1997) 3 SCC (1)*. The learned Civil Judge concluded that even though time was not essence of contract, the Appellants did not approach the Court within reasonable period and was not entitled to any equitable relief. The learned District Judge however, non-suited the Appellants that the Suit was itself was time barred. The learned Counsel for the Appellants may be justified in contending that for the purpose of Article 54 the institution of the Suit by the Respondents in the year 1999 be taken as a starting period. However, it will not take the case of the Appellants any further as the relief sought for is equitable relief. Merely because Suit for specific performance is maintainable it need not be decreed. The reason given by the Appellants for not taking any steps for 28 years, cannot be disbelieved. There is absolutely no cogent evidence forthcoming as to how the Appellants believed the word of Respondent's father and did not seek for specific performance. The agreement is of the year 1976 and the Appellants took absolutely no steps to even issue notice to the Respondent's father calling upon him to execute the agreement. The rise in prices of property over 28 years cannot be lost sight of. In the case of *Veeravee Anmal V/s. Seeni Ammal reported in (2002) 1 All MR. 264*

(S.C.), the Apex Court has stressed that even though time is not essence of the contract, it must be performed within reasonable period. The Trial Court was therefore right in concluding that the complete inaction on the part of the Appellants for almost three decades indicated that they were not ready and willing to perform their part of the contract and no discretionary relief could be granted to the Appellants. Therefore, even assuming the Suit filed by the Appellants is not barred by limitation, on the ground of reasonableness, the discretion used by both the Courts in not granting the specific performance of the agreement of 1976, cannot be faulted with.

7. As regard the refund of earnest amount is concerned, the learned District Judge has solely based its conclusion on a finding that the Suit was barred by limitation. It is on the ground of reasonableness that the Appellants are not entitled to any relief. Hence on an equitable ground, that when the relief of specific performance is refused, the Appellant was entitled to refund. The equities were rightly balanced by the learned Civil Judge by directing refund of the amount deposited at the rate of 6% per annum. In the circumstances, the directions of the learned Civil Judge to refund the amount of Rs.27,500/- to the Appellants with interest will have to be restored.

8. Accordingly, the Appeal is disposed of as under :-

(a) The conclusion of both the Courts, dismissing the Suit for specific performance filed by the Appellants is confirmed.

(b) The part of the order passed by the learned District Judge setting aside the decree passed by the learned Civil Judge in respect of payment of Rs.27,500/- with interest at the rate of 6% per annum from the date of the Suit, is quashed and set aside and the order passed by the Civil Judge in this regard stands restored.

9. The Appeal is disposed of as above. No costs.

(N.M. Jamdar, J.)