

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 381 OF 1993**

Sadashiv Ramchandra Arve)
 age about 26, resident of)
 Borgaon, Taluka : Tasgaon,)
 District : Sangli) **..... Appellant**
(Original Defendant No.3)

VERSUS

1. Kashinath Virupax Hingmire)
 since deceased by his legal heirs and)
 representatives)

1(a) Rukmini Kashinath Hingmire,)
 age adult, residing at)
 At & Post Rajapur, Taluka Tasgaon,))
 Dist. Sangli)

1(b) Ashok Kashinath Hingmire,)
 age adult, residing at)
 At & Post Rajapur, Taluka Tasgaon,))
 District Sangli)

1(c) Chhabutai Bhupal Kore,)
 age adult, residing at Vakhor Bhag,)
 Vetar Nagar, Taluka Miraj,)
 Dist. Sangli)

1(d) Shobhatai Sunil Sagar,)
 age adult, residing at A/9/502,)
 Shiv-Sagar City, Phase 1,)
 Anand Nagar, Wadgaon Budruk, Pune)

2. Baburao Gangadhar Hingmire,)
 since deceased by his heirs & legal)
 representatives)

2(1) Smt.Sushila Baburao Hingmire	)	
2(2) Siddeshwar Baburao Hingmire	)	
2(3) Rameshwar Baburao Hingmire	)	
2(4) Arun Baburao Hingmire	)	
2(5) Bharat Baburao Hingmire	)	
2(6) Sou. Mangal Navale	)	
Nos.(1) to (6) residing at Bhaji Market)		
Pandharpur, Dist. Solapur	)	 Respondents (Original Plaintiffs)

Mr.V.S.Gokhale for the Appellant.

Mr.Ashok Misal for the Respondent nos. 1A to 1D.

CORAM : R.D. DHANUKA, J.

DATED : 29th JANUARY, 2016

JUDGMENT

By this second appeal filed under section 100 of the Code of Civil Procedure, 1908 the appellant has impugned the order and judgment dated 2nd December, 1992 passed by the Additional District Judge, Sangli dismissing the appeal filed by the appellant (original defendant no.3). In the Regular Civil Appeal No.27 of 1986, the appellant had impugned the decree for specific performance passed by the learned Joint Civil Judge, Senior Division, Sangli on 31st October, 1985 in Special Civil Suit No.26 of 1983 which was filed by the respondent no.1 (original plaintiff) inter alia praying for specific performance of an agreement dated 1st October, 1974.

2. The suit properties are Gat Nos. 817, 820 and 828 situated within the limits of Village Boragaon, Taluka Tasgaon, District Sangli. There is no dispute that the suit properties belonged to Mr.Ramchandra Hari Arve. The said Mr.Ramchandra Hari Arve had no issue out of the wedlock with defendant no.2. It was the case of

the plaintiff that on or about 1st October, 1974 the said Mr.Ramchandra Hari Arve had agreed to sale the suit properties to the plaintiff for a consideration of Rs.35,000/- and had executed a registered agreement of sale. The plaintiff had made payment of earnest amount of Rs.10,000/- to the said Mr.Ramchandra Hari Arve. Under the said agreement, it was agreed that the sale deed was to be executed within one month after receiving permission by Mr.Ramchandra Hari Arve within one month after Mr.Ramchandra Hari Arve after obtaining permission of the concerned authority for sale of the said property.

3. Pursuant to the said agreement for sale, the said Mr.Ramchandra Hari Arve applied for appropriate permission to the authority. The notice was issued by the concerned authority pursuant to the said application. Before any permission could be granted for sale in favour of the said Mr.Ramchandra Hari Arve, Mr.Ramchandra Hari Arve expired on 11th October, 1976.

4. It was the case of the plaintiff that after demise of the said Mr.Ramchandra Hari Arve, there was dispute about the heir-ship of the said Mr.Ramchandra Hari Arve by and between the defendants. It was the case of the plaintiff that when the plaintiff approached the defendants for obtaining permission of the authority by them, the plaintiff was informed that the dispute of heir-ship between the defendants inter se was pending. The plaintiff accordingly issued a notice on 30th September, 1982 through his advocate inter alia asking for compliance of their obligation from all the defendants. Defendant no.1 replied that he would execute the sale deed after decision of the suit. Defendant no.2 informed the plaintiff that he can file a suit. Defendant nos. 3 and 4 alleged that there was a transaction of mortgage between the plaintiff and the said Mr.Ramchandra Hari Arve and disputed the transaction. The plaintiff accordingly filed a civil suit (Special Civil

Suit No.26 of 1983) before the Joint Civil Judge, Senior Division, Sangli inter alia praying for specific performance.

5. During the pendency of the suit, the defendant no.2 who was widow of the said Mr.Ramchandra Hari Arve and defendant no.4 Mr.Bajrang Ganpat Arve was deleted from the cause title of the suit. The suit was therefore resisted by the original defendant no.1 and defendant no.3 who both claimed to be the legal heirs and representatives of the said Mr.Ramchandra Hari Arve by propounding two separate Wills. Defendant no.3 claimed to be adopted son of the said Mr.Ramchandra Hari Arve. The defendants also raised issue of limitation in the written statement filed before the learned trial judge.

6. The learned trial judge framed 12 issues. In view of the rival submissions made by the defendant nos.1 and 3 about their legal heir-ship and ownership in respect of the suit property, the learned trial judge also framed issues in that regard in the said suit. The issues framed by the learned trial judge along with the conclusion thereon are extracted as under :-

Sr.No	Issues	Findings
1	Does plaintiff proves that on 1.10.1974 deceased Ramchandra Arve has executed an agreement of sale in respect of the suit properties for a consideration of Rs.35,000/- by receiving Rs.10000/- as earnest money ?	Yes
2	Does plaintiff prove that possession was delivered on that day only towards the part performance of agreement ?	No

3	Does plaintiff prove that he is ready and willing to perform his part of the contract ?	Yes
4	Does he prove that the defendants are legally liable to perform the remaining part of the contract which had remained completed by the deceased Ramchandra ?	Yes, Deft. no.1 is liable to perform the remaining part of the contract as a representative of deceased Ramchandra
5	Does he prove that in spite of the repeated request and the demand notice dated 30.9.1982 the defendants have failed to perform the remaining part of the contract ?	Yes, Deft no.1 failed to perform the remaining part of the contract.
6	Does the deft no.1 prove that excepting himself none of the defendants have any concern over the suit properties ?	Yes
7	Does defendant no.1 prove that the suit agreement is hallow one and not to be acted upon ?	No
8	Is the suit barred by limitation ?	No
9	Is the plaintiff entitled to specific performance of the suit agreement from the defendants ?	Yes, only from deft no.1
10	Is he in the alternative entitled to refund of earnest money and damages ?	Does not survive
11	What order and decree ?	As per final order

12	Does deft no.3 prove that the he is exclusive owner of the suit lands as adopted son of deceased Ramchandra and also under the will of deceased Ramchandra dated 16.7.1976 ?	No.
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7. The learned trial judge after considering the oral and documentary evidence led by both the parties, decreed the said suit only against defendant no.1 and directed him to execute the sale deed in favour of the plaintiff in respect of the suit property by accepting balance consideration of Rs.25,000/- from the plaintiff within three months from the date of the said order. The defendant no.1 was also directed to deliver the possession of the suit property to the plaintiff within one month, failing which the plaintiff was allowed to recover possession from the court. It was also made clear that if the defendant no.1 failed to execute the sale deed as directed within three months from the date of the said order, the plaintiff was allowed to get the sale deed executed through court.

8. Defendant no.1 did not challenge the said order and judgment dated 31st October, 1985. The judgment was challenged only by defendant no.3 by filing an appeal (Regular Civil Appeal No.27 of 1986) before the Additional District Judge, Sangli. The lower appellate court formulated 12 points for determination and upheld the order and judgment delivered by the learned trial judge. The lower appellate court also referred to the documentary as well as oral evidence and has confirmed the order passed by the learned trial judge and has upheld the findings rendered by the learned trial judge in toto. Being aggrieved by the said order and judgment delivered by the lower appellate court, the appellant has filed the present second appeal under section 100 of the Code of Civil Procedure, 1908.

9. The substantial questions formulated by this court on 9th August, 1993 are as under :-

(1) Whether the lower Courts were right in holding that appellant-defendant No.3 was not legally adopted son of the deceased Ramchandra ?

(2) Whether the will executed by Ramchandra had the effect of revocation of will executed in favour of defendant No.1?

The additional substantial question of law framed is as under :-

Whether the suit filed by the plaintiff for specific performance was barred by law of limitation ?

10. Mr.Gokhale, learned counsel for the appellant invited my attention to the findings rendered by the learned trial judge as well as by the appellate court. It is submitted that the suit filed by the plaintiff was ex-facie barred by law of limitation. In support of this submission, learned counsel invited my attention to the issues framed by the learned trial judge as well as by the appellate court and would submit that admittedly the agreement was entered into on 1st October, 1974. Mr.Ramchandra Hari Arve had expired on 11th October, 1976. The suit was admittedly filed on 15th March, 1983. He submits that in any event the plaintiff ought to have filed a suit within three years from the date of expiry of Mr.Ramchandra Hari Arve. He submits that the notice for seeking performance of the agreement was issued by the plaintiff on 30th September, 1982. He submits that the said notice itself was issued after almost six years after demise of Mr.Ramchandra Hari Arve. He submits that the learned trial judge as well as the

lower appellate court have completely overlooked this crucial facts and had allowed the time barred claim filed by the plaintiff.

11. It is submitted by the learned counsel for the appellant that even on the issue as to whether defendant no.1 was the legal representative of the said Mr.Ramchandra Hari Arve or whether defendant no.3 was the legal heir and representative of the said Mr.Ramchandra Hari Arve, the learned trial judge has totally overlooked the evidence led by his client.

12. It is submitted that the suit filed by the plaintiff was collusive action between the plaintiff and the defendant no.1 and thus defendant no.1 did not file any appeal against the impugned order and judgment. He submits that the findings rendered by the learned trial judge as well as by the lower appellate court are totally perverse.

13. Learned counsel appearing for the respondent no.1 on the other hand invited my attention to various findings of fact rendered by both the courts below and submit that the said finding recorded by the courts below are concurrent findings and are not perverse and thus no interference with such findings is permissible under section 100 of the Code of Civil Procedure.

14. Insofar as issue of limitation is concerned, it is submitted by the learned counsel for the respondent no.1 that admittedly it was obligation on the part of said Mr.Ramchandra Hari Arve to obtain permission from the competent authority before executing a sale deed in favour of the plaintiff and only after obtaining such permission, the sale deed was to be executed within one month. He submits that till the date of his death, the said Mr.Ramchandra Hari Arve admittedly could not

obtain any such permission from the competent authority. He submits that the plaintiff had led evidence also on the issue of limitation and had proved before the learned trial judge that upon the plaintiff contacting the defendants he was informed that there was dispute about the heir-ship of the said Mr.Ramchandra Hari Arve by and between the defendants and till such issue was resolved, the defendants were not be able to execute any sale deed in favour of the plaintiff.

15. My attention is invited to the findings recorded by the learned trial judge on the issue of limitation and would submit that after considering the oral evidence, the learned trial judge has accepted the explanation of the plaintiff as to why the suit was not barred by law of limitation in view of the pendency of the heir-ship dispute between the defendants. He submits that the limitation was a mixed question of fact and law and the plaintiff had proved beyond a reasonable doubt that the suit was not barred by law of limitation.

16. Insofar as other two issues raised by Mr.Gokhale learned counsel for the appellant on the issue of adoption and on the execution of the Will is concerned, he submits that the plaintiff as well as the defendant no.3 had led oral evidence on both these issues. The defendant no.3 could not prove that he was given in adoption to Mr.Ramchandra Hari Arve. The defendant no.3 himself did not enter into witness box to prove the adoption. He submits that defendant no.3 had also filed an application for probate. During the pendency of the suit filed by the plaintiff, defendant no.3 could not produce any decree of the trial court granting probate in favour of the defendant no.3. As against that the appellant had proved beyond reasonable doubt the Will was executed by Mr.Ramchandra Hari Arve bequeathing the suit property in favour of the plaintiff.

17. It is submitted that the learned trial judge has considered all this evidence at great length in the impugned order and has rightly rendered finding in favour of the defendant no.1 that he was the legal heir of the said Mr.Ramchandra Hari Arve and rightly passed a decree of specific performance against him. It is submitted that the plaintiff had also proved the execution of the agreement for sale and also payment of earnest money of Rs.10,000/- and about his readiness and willingness to perform his part of the obligation. The learned trial judge has accordingly rightly passed an order and decree of specific performance in favour of the plaintiff and against the defendant no.1. He submits that defendant no.1 has admittedly not challenged the said decree. The said decree for specific performance thus could not be challenged by the defendant no.3.

18. A perusal of the record indicates that the learned trial judge has recorded the findings of fact that the said Mr.Ramchandra Hari Arve had executed the agreement of sale in favour of the plaintiff. The plaintiff had also paid earnest money amount of Rs.10,000/- to the said Mr.Ramchandra Hari Arve. The said Mr.Ramchandra Hari Arve had also applied for permission of the authority for executing the sale deed in favour of the plaintiff. During his lifetime he could not obtain any permission. The defendant claimed to be the legal heirs of the said Mr.Ramchandra Hari Arve also did not apply for any permission.

19. Insofar as issue of limitation raised by the defendant no.3 is concerned, there is no dispute that the agreement was executed on 1st October, 1974. The said Mr.Ramchandra Hari Arve expired on 11th October, 1976. The suit was filed on 15th March, 1983. The plaintiff had proved before the learned trial judge about the execution of the agreement for sale between the plaintiff and the said Mr.Ramchandra Hari Arve. It was one of the condition in the said agreement that

the sale deed would be executed within one month from the date of Mr.Ramchandra Hari Arve obtaining permission from the competent authority. Since Mr.Ramchandra Hari Arve could not obtain any permission from the competent authority, in my view the limitation did not commence for filing the suit for specific performance.

20. There was admittedly a dispute of heir-ship between the defendants inter se who were all claiming to be the legal heirs of Mr.Ramchandra Hari Arve. The said dispute was going on for quiet sometime. The said dispute continued even during the pendency of the suit. In view of these facts in my view, the learned trial judge was right in holding that the suit filed by the plaintiff was not barred by law of limitation. The appeal court has rightly confirmed the said finding of limitation rendered by the learned trial judge. In my view there is no merit in the submission of the learned counsel for the appellant (original defendant no.3) that the suit was barred by law of limitation.

21. Insofar as other two issues framed by the learned trial judge as to whether the defendant no.3 was adopted son of the said Mr.Ramchandra Hari Arve or not or whether any Will was executed by the said Mr.Ramchandra Hari Arve in favour of the defendant no.3 or not is concerned, both the courts below have considered the documentary as well as oral evidence led by both the parties. The application filed by defendant no.3 for probate was not decided during the pendency of the suit and even on the date of passing the order by the learned trial judge. The learned trial judge accordingly considered the evidence led by both the parties and has rendered a finding that the defendant no.3 had neither proved the adoption nor proved the execution of the said Will in his favour by the said Mr.Ramchandra Hari Arve.

22. On the other hand, the plaintiff had also led oral evidence in support of his plea that he was the legal representative of the said Mr.Ramchandra Hari Arve and was bequeathed the suit property by the said Mr.Ramchandra Hari Arve in his favour. The learned trial judge has rightly rendered a finding of fact in favour of the plaintiff on that issue also.

23. A perusal of the order passed by the lower appellate court clearly indicates that the lower appellate court has also independently considered the documentary as well as oral evidence led by both the parties and have confirmed the findings rendered by the learned trial judge.

24. In my view the findings rendered by both the courts below are concurrent findings and are not perverse and thus cannot be interfered with by this court under section 100 of the Code of Civil Procedure, 1908.

25. This court while admitting this second appeal on 9th August, 1993 had formulated the substantial question of law as recorded in the grounds 2 and 3. During the course of the argument, Mr.Gokhale, learned counsel for the appellant prayed for framing of additional substantial question of law on the issue of limitation. Learned counsel for the respondents fairly conceded that issue of limitation can be considered by this court.

26. Insofar as substantial question no.1 is concerned, in my view the lower court was right in holding that the defendant no.3 was not legally adopted son of the deceased Mr.Ramchandra Hari Arve and the said question is accordingly answered in affirmative.

27. Insofar as substantial question no.2 is concerned, since the defendant no.3 has failed to prove the execution of the Will alleged to have been executed by Mr.Ramchandra Hari Arve in favour of the defendant no.3, this issue does not survive and is accordingly answered.

28. Insofar as additional substantial question of law on the issue of limitation is concerned, in my view the suit filed by the plaintiff was not barred by law of limitation and the said issue is accordingly answered in negative.

29. The appeal is devoid of merits and is accordingly dismissed. No order as to costs.

[R.D. DHANUKA, J.]