

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 229 OF 2010

Ramesh Bhagwandas Nagdeo ...Appellant

Versus

Shri Shashikant Laxman Rajendra ...Respondent

WITH

SECOND APPEAL NO. 532 OF 2011

Nirmala Ramesh Nagdeo ...Appellant

Versus

Shri Shashikant Laxman Rajendra ...Respondent

WITH

SECOND APPEAL NO. 734 OF 2011

Shri Shashikant Laxman Rajendra ...Appellant

Versus

Ramesh Bhagwandas Nagdeo ...Respondent

WITH

SECOND APPEAL NO. 735 OF 2011

Shri Shashikant Laxma Rajendra ...Appellant

Versus

Sau. Nirmala Ramesh Nagdeo ...Respondent

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Mr. Sachin Gite for the Appellant in SA No. 229 of 2010 and SA No. 532 of 2011 and the Respondent in SA No. 734 of 2011 and SA No. 735 of 2011.

Mr. Tushar Sonawane for the Respondent in SA No. 229 of 2010 and SA No. 532 of 2011 and the Appellant in SA No. 734 of 2011 and SA No. 735 of 2011.

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CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE : **APRIL 03, 2018**

P.C.:

1. These four Second Appeals are taken together, as they are filed by the original plaintiff and the original defendant against each other.

2. The original plaintiff has filed two Special Civil Suits against the original defendants, who are the husband and wife. They are the owners of two different shops i.e., Shop Nos. 7 and 8. Hence, the parties are addressed by their original status to avoid confusion.

3. The original plaintiff, who is a landlord/ builder, has entered into registered Agreement of Sale dated 7th March, 1981 in

respect of Shop No. 7 admeasuring 264 sq.ft. with one Ramesh Nagdeo i.e., defendant in Special Civil Suit No. 13 of 2001. The original plaintiff has also entered into registered Agreement of Sale in respect of Shop No. 8 admeasuring 169.50 sq.ft with Nirmala Ramesh Nagdeo. Shop No. 7 was agreed to sell for Rs.39600/- and consideration for Shop No. 8 was fixed at Rs. 22,575/-. There is no dispute in respect of the payment of consideration of both the shops. The original defendants have paid all money. In the year 1981, the possession of both the suit premises i.e., Shop Nos. 7 and 8 was handed over to the original defendants. It is the case of the original plaintiff that after taking possession of the suit shops, the original defendants have carried out unauthorized construction on the adjacent land, which was open space and was not a part of the Agreements of Sale. The original defendants have illegally constructed mezzanine floor in the suit shops and hence, they have violated not only the terms of the respective contracts but also breached the Municipal Rules. Hence, the original plaintiff approached and lodged a complaint with the Municipal Corporation, Nashik. It is the case of the plaintiff that because of unauthorized construction, which was carried out by the original defendants, ingress and egress of the

plaintiff and other shopkeepers was demolished by the Municipal Corporation. However, it was reconstructed by the original defendants. Hence, the original plaintiff had filed two Special Civil Suits in the Court of the learned Joint Civil Judge, Senior Division, Nashik. Suit No. 13 of 2001 was filed for cancellation of Agreement of Sale dated 7th March, 1981 in respect of Shop No.7 . Another Special Civil Suit No. 14 of 2000 was filed for cancellation of Agreement of Sale dated 3rd October, 1981 in respect of Shop No. 8. The plaintiff has also sought declaration, possession and recovery of the maintenance charges of both the suit shops from the defendants. The original defendants appeared in the respective suits. They had filed counter claims for specific performance of the respective Agreements. Parties have tendered the oral as well as documentary evidence. On 30th June 2004, the learned Jt. Civil Judge, Senior Division, Nashik, after considering the oral and documentary evidence, dismissed both the suits filed by the original plaintiff and also dismissed the counter claims filed by the original defendants. Being aggrieved by the said order, both the parties have filed First Appeals in the District Court, Nashik. Against the judgment and order passed in Special Civil Suit No. 13 of 2001 in respect of Shop No. 7, the

original plaintiff had filed Civil Appeal No. 277 of 2004 and the original defendant had filed Civil Appeal No. 274 of 2004. Against the judgment and order passed in Special Civil Suit No. 14 of 2001 in respect of Shop No.8, the original plaintiff had filed Civil Appeal No. 278 of 2004 and the original defendant had filed Civil Appeal No. 273 of 2004. The learned District Judge-1, Nashik by orders dated 28th January, 2009 dismissed all the Appeals and confirmed the orders of dismissal of the suits and the counter claims filed by the plaintiff and the original defendants respectively. Being aggrieved by the said judgments and orders of the First Appellate Court, both the parties have filed these Second Appeals.

4. Heard submissions. Perused the judgments and orders passed by the Trial Court and the First Appellate Court. Perused the record and proceedings. The original defendants i.e., shopkeepers have paid the entire amount of consideration. They are in possession of the suit shops since 1981. This fact is not disputed either by the plaintiff or the defendants. The Trial Court and the First Appellate Court have considered the oral as well as documentary evidence tendered by both the parties and held that

the suits filed for cancellation of two Agreements of Sale dated 7th March, 1981 and 03rd October, 1981 are beyond limitation. The plaintiff could not prove his claim for cancellation of Agreements of Sale and no case is made out by the plaintiff to recover the possession of the suit shops against the respective defendants. Both the Courts have rightly appreciated the evidence and have given detailed reasoning on the issues of limitation and cancellation, which is sound and legal. No substantial question of law can be formulated in the case of the plaintiff and hence, those Appeals are failed.

5. The defendants have filed counter claims for specific performance on the basis of two registered Agreements. The Trial Court has framed separate issue on the point of proof of counter claims and whether the defendants are entitled to get relief of specific performance. The Trial Court refused the relief of specific performance. The Trial Court has considered that the date of the contract was 7th March, 1981 and 3rd October, 1981 and, therefore, the defendants ought to have filed suit or asked for specific performance of the contract from the date of the registered Agreements of Sale. It is also held that the defendants

have never asked for execution of the Sale Deed and, therefore, it is held that the defendants are not entitled for specific performance. The First Appellate Court has adopted the same view and confirmed the orders of dismissal of the counter claims.

6. The learned Counsel for the appellants/ defendants has raised substantial question of law as follows:

Whether the refusal of specific performance is legal or not when the condition in the Agreements of Sale i.e., formation of the society by the landlord/builder is not fulfilled.

7. After going through the terms of the contract, it is found that the parties have agreed that the Sale Deed will be executed and registered only after formation of the society by the builder.

8. In this case, the plaintiff himself is a landlord and builder. Hence, it is his legal obligation to form a co-operative society within time. However, he did not discharge his legal obligation for many years. In the year 2000, the plaintiff gave notices for

cancellation of the respective Agreements of Sale and possession and recovery of the suit shops. Thus, as the defendants received the notices wherein the plaintiff communicated his refusal to perform his part of contract, limitation starts running from that date. The Trial Court and the First Appellate Court have committed error in computing the limitation. Though for filing the suit for specific performance, the time starts from the date of the agreement, however, it would be extended time to time when the contract is contingent, depending on a particular compliance of fulfillment of a condition. It is specifically mentioned in the Agreements that the Sale Deed will be executed only after formation of the society and till today, it was not formed. However, the limitation will start when there is a specific denial of the execution of the contract by either of the parties. It is to be noted that the payment of consideration of both the suit shops is not denied. The defendants have paid the entire amount of consideration and possession of the suit shops is also with them. Hence, readiness and willingness of the defendants, which is requirement of the suits for specific performance, cannot be questioned as it is manifested by the conduct of the defendants.

9. Under such circumstances, the view taken by both the Courts in respect of refusing the claim for specific performance of the contract is erroneous and the judgments and orders passed by both the Courts in respect of dismissal of counter claims are hereby set aside. The substantial question of law is to be answered in affirmative. Both the Courts have committed error in computing the limitation and dismissed the counter claims.

10. The plaintiff, who is landlord/ builder, has not formed the society. Hence, it is necessary to pass the specific orders in respect of execution of registered Sale Deed irrespective of non-formation of the society. The plaintiff has made claim for recovery of maintenance, which also cannot be denied, as the defendants have been using the water and electricity and they have been in use and occupation of the suit shops.

11. I am informed by the learned Counsel for the defendants that the defendants have been paid water and electricity charges to the Municipal Corporation directly, as separate electricity meters and water line are taken by them.

12. Under such circumstances, I pass the following order :

ORDER

(1) The judgment and order dated 30th June, 2004 passed by the learned Jt. Civil Judge, Senior Division, Nashik in dismissing Special Civil Suit No. 13 of 2001 is hereby confirmed. However, the order of dismissal of the counter claim of the defendant is hereby set aside.

(2) The plaintiff in Suit No. 13 of 2001 is hereby directed to execute the registered Sale Deed in favour of the defendant or purchaser of Shop No. 7 on or before 31st May, 2018.

(3) The defendant in Suit No. 13 of 2001 is directed to pay arrears of maintenance charges i.e. Rs. 250/- p.m. from the decision of the suit i.e., 30th June, 2004 and continue to pay hereafter.

(4) Accordingly, the judgment and order dated 28th January, 2009 passed by the learned District Judge-1, Nashik in Civil Appeal No. 274 of 2004 is hereby set aside. However,

the judgment and order dated 28th January, 2009 passed by the learned District Judge -1 Nashik in Civil Appeal No. 277 of 2004 is hereby confirmed.

(5) The judgment and order dated 30th June, 2004 passed by the learned Jt. Civil Judge, Senior Division, Nashik in dismissing Special Civil Suit No. 14 of 2001 is hereby confirmed. However, the order of dismissal of the counter claim of the defendant is hereby set aside.

(6) The plaintiff in Suit No. 14 of 2001 is hereby directed to execute the registered Sale Deed in favour of the defendant or purchaser of Shop No. 8 on or before 31st May, 2018.

(7) The defendant in Suit No. 14 of 2001 is directed to pay arrears of maintenance charges i.e. Rs. 250/- p.m. from the decision of the suit i.e., 30th June, 2004 and continue to pay hereafter.

(8) Accordingly, the judgment and order dated 28th January,

2009 passed by the learned District Judge-1, Nashik in Civil Appeal No. 273 of 2004 is hereby set aside. However, the judgment and order dated 28th January, 2009 passed by the learned District Judge -1 Nashik in Civil Appeal No. 278 of 2004 is hereby confirmed.

(9) Parties to bear their own expenses.

13. Second Appeal Nos. 229 of 2010 and 532 of 2011 are allowed.

14. Second Appeal Nos. 734 of 2011 and 735 of 2011 are disposed of.

(MRIDULA BHATKAR, J.)