

Sarnobat

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

**SECOND APPEAL NO. 165 OF 2016
ALONGWITH
SECOND APPEAL NO. 152 OF 2016
ALONGWITH
CIVIL APPLICATION NO. 276 OF 2016
ALONGWITH
CIVIL APPLICATION NO. 361 OF 2016**

Sabaji Dhavji Dhore
Shankar Sabaji Dhore.

... Appellant.

Vs.

Baburao Raghuji Kare
Since deceased through Legal heirs.

... Respondents.

Mr. Dushyant S. Pagare, for the Appellant in SA 165/16.

Mr. Rajesh S. Datar, for the Appellant in SA 152/16.

Mr. Uday B. Nighot, for Respondent Nos. 1/1 to 1/10 & 2 in both SA.

Mr. Mr. V. M. Thorat I/by Mr. M. V. Thorat, for the Respondent Nos. 3 to 5 in SA 165/16 & Respondent Nos. 5 to 8 in SA 152/16.

CORAM : A. M. DHAVAL, J.

DATE : 24th AUGUST, 2018.

ORAL JUDGMENT :

1. Heard learned advocate Mr. Datar for the appellant in SA No.152/2016 and Mr. Pagare for the appellant in SA No. 165/2016.

They have proposed following substantial questions of law :

- (i) The findings of learned Trial Court and Appellate Court on the readiness and willingness is based on no evidence.

(ii) Both the Courts failed to consider that the plaintiff had failed to comply the terms of agreement of re-conveyance within time fixed under the agreement.

(iii) Some LR's of Dhavji were minor and no guardian ad-litem were appointed for them and the matter proceeded against them without compliance of Order 32 of CPC.

2. The facts relevant for appreciating the arguments may be stated as follows :

On 24th June, 1968 Babu Kale a common ancestor of the respondent herein executed Sale Deed in favour of Dhavji whereby he sold his land of 10 Acres and 9 Gunthas for consideration of Rs.1,000/-. Along with said Sale Deed simultaneously there was agreement of re-conveyance by Dhavji executed. It is the case of original plaintiff (the respondent herein) that Dhavji had issued notice just before completion of period of five years. Babu Kale had issued notice to Dhavji on 19th June, 1973 informing him that it was a loan transaction, the land was worth Rs.15,000/- and he had returned Rs.1,000/- as agreed in June, 1973. Since no receipt was issued, he was ready to make fresh payment of Rs.1,000/- before completion of five years on 24th July, 1973. This notice was sent by RPAD which was returned unserved and one copy was sent by UCP. Since there was no response, Babu Kale filed RCS No. 74/1974 on 31st October, 1974

against Dhavji. During the pendency, both Babu Kale and Dhavji died and their LR's brought on record. The defendants raised several issues. After recording evidence, the learned Civil Judge held that the agreement to re-convey on payment of Rs.1,000/- was made. The time was not essence of contract and suit was not barred by limitation. He also held that the readiness and willingness to perform his part of a contract was proved by the plaintiff. Hence, the suit was decreed with a direction to deposit Rs.1,000/- a decree for specific performance was granted.

3. It may be stated that when Dhavji died his heirs were brought on record out of which defendant No. 8-Ram Baban Dhore and defendant No. 9-Shankar Saba Dhore were minor and they were shown to be represented by their natural guardian father defendant 2 and 3. The decree of the Trial Court was challenged in Civil Appeal No. 519/2013. After hearing the learned advocates, the first Appellate Court confirmed the findings of learned Trial Court regarding the existence of agreement of re-conveyance, non-payment of Rs.1,000/- and that time was not essence of contract and the plaintiff was ready and willing to perform their contract. Hence, the appeal came to be dismissed. Hence, this appeal.

4. As far as the necessity of appointing the guardian ad litem

for minor defendants is concerned, as held in **Ram Chandra Vs. Man Singh**¹, decree passed against a minor without appointment of guardian is nullity and void. But in the present case it is found that the minor heirs were not at all legal heirs of deceased Dhavji. The Sale Deed and agreement to sell were executed by Dhavji. On his death his class-I heirs would be legal heirs. He was survived by two sons Baban and Sabaji and one daughter Muktabai defendant Nos. 1 to 3. They are the respondents. Defendants 4,5,6,7,8 and 9 are grand sons of Dhavji and sons of either defendant No. 2-Baban Dhavji or defendant No. 3-Sabaji Dhavji. It cannot be disputed that when the sons are alive the grand sons cannot be the class one legal heirs of the deceased. It was a mistake to include defendant Nos. 4 to 9 in the suit and their presence was not at all essential and therefore, it is not relevant whether guardian ad-litem was appointed or not for defendant Nos. 8 and 9 who were minor. Hence, non appointment of guardian ad-litem will not affect the judgment and decree passed by first Appellate Court. Substantial question of law can not be framed on this point.

5. The evidence on record shows that amount of Rs.1,000/- was to be refunded within five years and thereafter, re-conveyance was to be executed. When Dhavji declined to receive Rs.1,000/- and execute re-conveyance then only the cause of action would arise. The

1 AIR 1968 SC 954

Sale Deed was of 24th July, 1968. Just before the completion of period of five years, notice was sent by RPAD and under certificate of posting. There is deemed refusal by Dhavji when he failed to respond to the notice. The cause of action arise in July 1973 and the suit is filed in October, 1974. There is no issue of limitation involved in the matter.

6. Learned advocate Mr. Datar strongly argued that there was no evidence to show readiness and willingness to perform the contract. The issue of readiness and willingness is a question of fact. Both the Courts have discussed in detail the issuance of notice by the plaintiff on 19th July, 1973 sent by RPAD and under certificate of posting. Both of them came to the conclusion that the plaintiff was ready and willing to perform his part of contract. When there are concurrent findings of fact and when there is no material to show that any vital evidence had been ignored or that any inadmissible evidence has been considered, there is no scope for interference in such findings in the second appeal. I find no substance in both appeals.

7. Hence, both the appeals are accordingly dismissed with costs. Civil Application Nos. 276 of 2016 and 361 of 2016 filed in the appeal, do not survive and are accordingly disposed of.

Sd/-
[A. M. DHAVAL, J.]