IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.52 OF 1986

Maruti Kondiba Gorad
(Deceased) through his LRS
(A) Dhula Maruti Gorad & Ors. …Appellants
vs.
Shri Namdev Shambhu Patil
(Deceased) through his LRS
(1A) Shriram Namdev Patil
(Deceased) through his LRS
(1A-a) Chandrabhaga S. Patil & Ors. …Respondents

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Mr. Pradip R. Kadam, for the Appellant.

Mr. Yatin Malvankar, for the Respondents.

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CORAM : S.C. GUPTE, J.

DATE: 13 NOVEMBER 2019

ORAL JUDGMENT:

. This second appeal, filed by the original plaintiff, challenges a decree of dismissal passed by the first appellate court, namely, the District Court at Solapur. The plaintiff's suit was for specific performance of an agreement for sale of immovable property. The second appeal was admitted on a substantial question of law, namely, whether time was of essence in relation to the suit immovable property under the contract in dispute. As per the arguments advanced by the parties at the hearing of the appeal, the question is altered to read as follows:

> "Whether the lower appellate court was right in law in dismissing the suit for specific performance on the ground of the bar of limitation?"

2. The suit property consists of one-half share of defendant no.1 in the suit land. It was submitted by the plaintiff that, on or about 10 October 1971, defendant no.1 agreed to sell this one-half share to the plaintiff (since deceased and now represented by the Appellants herein) for a sum of Rs.5,500/-. It was submitted that on the date of this agreement, the plaintiff paid a sum of Rs.1,500/- out of the total consideration to defendant no.1 as earnest money. It was submitted that the sale deed was to be executed on or before 31 March 1972 against payment of balance consideration. It was submitted that the date, when the sale deed was to be executed, namely, 31 March 1972, being a holiday, defendant no.1 had agreed to come to Sangola for execution of the sale deed on 30 March 1972. It was submitted that, accordingly, the plaintiff went to Sangola along with the balance consideration for execution of the sale deed, but defendant no.1 did not turn up and, thereafter, refused to perform the suit agreement for sale. The trial court decreed the suit and directed defendant no.1 to execute a sale deed of one-half share of the suit land in favour of the plaintiff against payment of Rs.4,000/-, which amount had already been deposited by the plaintiff in court. The learned District Judge, in an appeal from that order (Civil Appeal No.386 of 1982), set aside the judgment and decree passed by the trial court. Whilst the learned District Judge dismissed the plaintiff's claim for specific performance of the agreement for sale dated 11 October 1971 and possession of the suit land, he decreed the

plaintiff's claim for refund of earnest money. This order has been challenged in the second appeal herein by the legal heirs of the deceased plaintiff.

3. The record of the case bears out that in the suit, as originally filed by the plaintiff on 13 August 1973, the plaintiff had prayed only for refund of earnest money. The plaintiff later on filed an application (Exhibit-19) for amending his plaint so as to include the relief of specific performance. That application was allowed on 10 December 1980. The plaint, thereupon, came to be amended. Originally, the plaintiff had only claimed the relief of refund of earnest money on the basis that in accordance with the provisions of Section 31 of Bombay Prevention of Fragmentation And Consolidation of Holdings Act, 1947 ("Fragmentation Act"), the plaintiff could not have claimed specific performance, since such performance would have entailed fragmentation of the suit land in breach of the provisions of that Act. It appears that the Fragmentation Act was amended, whilst the suit was pending before the trial court, *inter alia* by amending Section 31 and introducing Section 31AB in the Act. The amendment was by Maharashtra Act No.XLII of 1977. By this amendment, no transfer or sub-division of any land in contravention of Section 31, as it stood immediately before the commencement of the amending Act, made on or after 15th day of November 1965 and before the date of such commencement, was to be deemed to be void or ever to have become void merely on the ground that such transfer or sub-division, as the case may be, was effected in contravention of the provisions of that section as it stood before such commencement; it was deemed to be valid if

such transfer or sub-division was in accordance with the provisions of Section 31 as substituted by the amending Act. The substituted Section 31 excepted certain lands from the purview of the restriction on fragmentation contained in sub-section (1) of Section 31. It was the case of the plaintiff that the suit land fell within these lands and thus, the prohibition against transfer or sub-division of land, without the previous sanction of the Collector, contained in sub-section (1), did not apply to the suit land with effect from 29 August 1977, and accordingly, the plaintiff was now entitled to seek specific performance of the suit contract for sale of property. The amended suit was resisted by the defendants *inter alia* on the ground of limitation so far as the relief of specific performance was concerned.

4. The trial court, whilst decreeing the suit, did not even frame any issue of limitation. It appears to have completely ignored the aspect of limitation and decreed the suit granting specific performance. The appeal court, however, duly considered the defendants' case of bar of limitation for claiming specific performance. The appeal court came to a conclusion that having regard to the provisions of Section 3 of the Limitation Act, which were mandatory in nature, every suit instituted after the prescribed limitation period was liable to be dismissed, although limitation had not been set up as a defence. The court held that though the original period of limitation for filing of a specific performance suit could be said to have commenced on 31 March 1972, even if one were to take into account the plaintiff's knowledge of refusal of performance by the defendants and, accordingly, make an appropriate allowance of time in favour of the plaintiff, it was clear

that, at any rate, on the date of the suit, i.e. 13 August 1973, the plaintiff was aware of such refusal and even if one were to compute the period of limitation from that date, the limitation would have expired on 13 August 1976. The claim of specific performance made on 10 December 1980, i.e. after more than four years of expiry of the limitation period, was clearly out of time and was liable to be dismissed.

5. There is absolutely nothing in law to fault the conclusion of the appeal court. As held by the Supreme Court in **Kamlesh Babu vs. Lajpat Rai Sharma**[1], it is well settled that Section 3(1) of the Limitation Act casts a duty upon the court to dismiss a suit or an appeal or an application, if made after the prescribed limitation period, although limitation is not set up as a defence. Further, as noted by the Supreme Court in that very case, referring to the case of **Lachhmi Sewak Sahu vs. Ram Rup Sahu**[2] decided as far back as in 1943, a point of limitation is *prima facie* admissible even in the court of last resort, although it had not been taken in the lower courts. There is no infirmity, in the premises, in the lower appellate court considering the issue; it was after all considered on admitted facts and did not call for evidence.

6. It is, however, submitted by learned Counsel for the Appellants that the issue of limitation was not actually argued before the appeal court and that the plaintiff was taken by surprise, when he noticed that the appeal court had rejected his claim for specific performance on the ground of limitation. I am afraid no such argument can be countenanced in a second appeal. The impugned order indicates

1 (2008) 12 S.C.C. 577
2 AIR 1944 PC 24

that both parties, namely, the plaintiff as well as defendant no.1, had appeared before the court and the defendant's contention that the plaintiff's case for specific performance was barred by time was deliberated upon. It is impermissible to go behind the order of the court in a second appeal and hold that the issue was not debated before the court despite its being reflected in the order as something, which was actually debated before the court. Be that as it may, even the appeal memo of the Appellants in the present second appeal is silent about any such grievance; there is no ground in the memo to indicate that the issue of limitation was not brought to the notice of the plaintiff in the course of the second appeal or was not debated before the Court. Besides, as pointed out below, there is nothing to show how the suit for specific performance could anyway be saved from the bar of limitation, even if the Appellants were allowed to debate the issue in the present appeal.

7. On merits, learned Counsel for the Appellants submits that the amendment of the suit so as to include the relief of specific performance in the prayers, upon its being allowed, must relate back to the date of the suit. There is clearly no substance in the argument. The suit, as originally framed, only contained a prayer for refund of earnest money. It was specifically averred by the plaintiff that not being a co-owner of the suit property, or an agriculturist holding an immediately adjacent land, it was impossible for him to seek execution of a sale deed in his favour in respect of the suit property, since it would have been in violation of the Fragmentation Act and that, in the premises, the plaintiff was restricting his prayer to refund of earnest money. If this suit were to be amended at a later date, may be as a result of change of

law permitting the new subject, such amendment, as and when allowed, would certainly relate back but it would not relate back to the date of the suit; it would relate back to the date of the application for amendment. The amendment clearly introduces an altogether new relief, which, at the time of filing of the suit, was termed as impossible by the plaintiff himself. The appeal was, accordingly, correctly allowed partly by the lower appellate court.

8. The judgments of **Pirgonda Hongonda Patil vs. Kalgonda Shidgonda Patil**[3] and **Sampath Kumar vs. Ayyakannu**[4], relied upon by learned Counsel for the Appellants, do not support his case. In **Pirgonda Hongonda Patil**, the Supreme Court allowed an amendment beyond the period of limitation on the ground that it did not really introduce a new case; the opponent did not have to meet a new claim set up for the first time after expiry of the period of limitation. In our case, as noted above, the amendment indeed introduced a new case. Even in **Sampath Kumar**'s case, the Supreme Court was of the view that the basic structure of the suit was not altered by the proposed amendment. The Court observed that the courts had refused the plaintiff's prayer for amendment on the ground that it was open to him to file a fresh suit for the relief sought; and if that was so, the court saw no reason why such relief could not be incorporated in the existing suit. This judgment does not say that in every case amendment relates back to the date of the suit. In fact, it acknowledges that there is no such universal rule; and in appropriate cases, the court is competent to direct otherwise. The point to be noted is that even a fresh suit was not barred in that case as of the

3 AIR 1957 SCC 363
4 (2002) 7 SCC 559

date of the amendment application.

9. It is alternatively submitted by learned Counsel for the plaintiff that the cause of action of the plaintiff for seeking specific performance arose on the date the Fragmentation Act was amended and execution of a sale deed in respect of the suit land was thereby made permissible. The date of commencement of the Amending Act, Maharashtra Act No.XLI of 1977, was 29 August 1977. Even if one were to consider that date as the date of accrual of the cause of action for seeking specific performance, the plaintiff's application for amendment made on 10 December 1980 was clearly barred, being beyond three years of such commencement. That is, however, in any case, neither here nor there. So far as the plaintiff's case on limitation is concerned, as the appeal court has noted in its order, the original plaint having been filed on 13 August 1973, the plaintiff could be said to have terminated the suit agreement as of that date, or, at any rate, treated the same as having come to an end on that day, for it is only on that basis that he could have claimed refund of earnest money. (Any prayer for specific performance would have entailed a legal requirement to plead a valid, subsisting and binding agreement coupled with readiness and willingness to perform the same.) If that be the case, a subsequent amendment to Fragmentation Act, which, it is said, has allowed the plaintiff to seek specific performance, cannot be said to have given any new cause of action to the plaintiff for filing of a suit for specific performance. The cause of action accrued, at any rate, on 13 August 1973, when the plaintiff accepted the defendants' breach of the suit agreement for sale and treated the agreement as having come to an end

and applied for refund of earnest money paid on the agreement.

10. The case of **Dwijendra Narain Roy vs. Joges Chandra De**[5] of Calcutta High Court, relief upon by learned Counsel for the Appellants, does not support their case. The Calcutta High Court, in that case, has considered the true test to determine the starting point of limitation in the following words:

> "The true test to determine when a cause of action has accrued to ascertain the time when plaintiff could first have maintained his action to a successful result."

This was in the context of an incomplete cause of action. The court observed that the statute (of limitation) does not attach to a claim for which there is as yet no right of action and does not run against a right, for which there is no corresponding remedy or, for which, judgment cannot be obtained. In the present case, the original suit was filed on the basis that the cause of action for claiming refund of earnest money by treating the agreement as having come to an end had accrued. Once such remedy is invoked, a fresh cause of action cannot be said to have accrued in favour of the plaintiff after it became permissible to obtain a sale deed instead of mere refund of earnest money.

11. There is, accordingly, no merit in the challenge to the impugned order passed by the lower appellate court. The substantial question of law framed by this Court whilst admitting the appeal, which has been altered as above, in the light of what was debated before this

5 AIR 1924 Calcutta 600

Court, is answered in the affirmative, that is to say, in favour of the Respondents. The second appeal is, accordingly, dismissed.

12. The decree of the appeal court for refund of earnest money, along with interest at the rate of 6% per annum from the date of the first appellate order, i.e. 12 October 1984, till payment or realisation, is affirmed. Since the Appellant/plaintiff has deposited the balance amount of consideration reserved under the suit agreement for sale in the trial court, that amount must be refunded to the Appellants with accrued interest, if any. It is ordered accordingly.

(S.C.GUPTE, J.)

Smita Gonsalves Digitally signed by Smita Gonsalves Date: 2019.12.03 11:51:45 +0530