

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

SECOND APPEAL NO.98 OF 2020

Sanjivani Kacheshwar Chine & Anr.	..Appellants
Vs.	
Bastiram Changdev Chine & Ors.	..Respondents

Mr. Nikhil M. Pujari, for the Appellants.

Mr. Kuldeep U. Nikam, for the Respondents.

CORAM : C.V. BHADANG, J.

DATE : 22nd FEBRUARY 2021

P.C.

. The challenge in this appeal is to the concurrent findings recorded by the Courts below dismissing the suit filed by the appellants for specific performance of contract of sale.

2. The brief facts necessary for the disposal of the appeal may be stated thus-

Land admeasuring 0 Hecter 59 Ares, from out of Gat No.27 of Village Pathare Khurd, Taluka Sinnar, District Nashik, happens to be the subject matter of dispute. According to the appellants (original plaintiffs), the land was owned by late Changdeo Mahadu Chine.

Changdeo had entered into an agreement to sale of the suit property with the plaintiffs in the year 1999. The agreement to sale interalia contemplated execution of the sale deed after clearance of a loan / encumbrance on the property and obtaining of the necessary permission by the vendor. According to the plaintiffs, they were all along ready and willing to perform their part of contract. However, Changdeo failed to comply with the stipulations in the agreement to sale and to execute the sale deed. Changdeo passed away on 4/2/2010 and is succeeded by the respondents (original defendants) alongwith Maruti Changdeo Chine and Sukhdeo Changdeo Chine as his legal heirs / representatives.

3. The case made out in the plaint is that the plaintiffs requested the heirs of Changdeo to execute the sale deed. However, only two of them namely Maruti and Sukhdeo agreed to execute the sale deed and accordingly a sale deed was executed in favour of the plaintiffs on 17/9/2012 after accepting Rs.1000/-. It may be mentioned that according to the plaintiffs, the suit property was agreed to be sold by Changdeo for a consideration of Rs.1,07,000/- out of which Rs.1,06,000/- was already paid to Changdeo.

4. Be that as it may, in as much as, the sale deed was executed by only two of the legal representatives, the plaintiffs again requested the defendants to execute the sale deed. However, they failed to do so. In these circumstances, the plaintiffs filed RCS No.182/2013 for specific performance of the contract of sale. It may be mentioned that according to the plaintiffs, they were already put in possession of the suit property.

5. The respondents resisted the suit interalia on the ground that the suit property was the ancestral property of Changdeo and his brother Namdev. It was contended that although the suit property was standing in the name of Changdeo in the revenue record being the elder brother, Changdeo had no exclusive right, title or interest in the suit property and therefore, the alleged agreement to sale was illegal. They also questioned the sale deed executed in favour of the plaintiffs on 17/9/2012. There were other contentions raised including non joinder of necessary party namely Namdev Mahadu Chine, brother of Changdeo Chine and the suit being barred by limitation, in as much as, the suit was filed in the year 2013 seeking specific performance of an agreement to sale of the year 1999.

6. The learned Trial Court framed as many as eleven issues.

7. The plaintiff No.1 examined himself as P.W.1 alongwith Kacheshwar Waman Chine as P.W.2. The plaintiffs also produced documentary evidence including 7/12 extract, mutation entries, copy of the notice and acknowledgment and the agreement to sale at Exh.20. The defendant No.1 examined himself as D.W.1.

8. The learned Trial Court answered issue Nos.1 to 3, 5, 6, 8 and 10 in the negative and issue Nos.4, 7 and 9 in the affirmative. In the face of the findings as above, the learned Trial Court by the judgment and decree dated 13/11/2015 dismissed the suit. The appellants challenged the same before the learned District Judge at Nashik in RCA No.415/2015. The learned District Judge by the impugned judgment and decree dated 5/4/2018 has dismissed the same. Hence, this appeal.

9. I have heard the learned counsel for the appellants and the learned counsel for the respondents. With the assistance of the learned counsel for the parties, I have gone through the record.

10. It is submitted by the learned counsel for the appellants that the Courts below were not justified in holding that the plaintiffs were not ready and willing to perform their part of the contract when admittedly substantial part of consideration was paid excepting Rs.1,000/-. It is submitted that the Courts below erred in holding that the plaintiffs had failed to prove that there was an agreement to sale executed by the father of the defendants in the wake of a clear admission by the Defendant Bastiram Chine in his cross examination that his father Changdeo had executed the agreement to sale. It is submitted that the vendor Changdeo was under an obligation to clear the encumbrance and to obtain the necessary permission which he failed to do and therefore in the absence of any duty being cast on the plaintiffs in the agreement to sale, it cannot be accepted that the plaintiffs were not ready and willing to perform their part of contract. It is submitted that the subsequent execution of the sale deed on 17/9/2012 by two of the legal representatives of Changdeo would also indicate that indeed there was an agreement to sale and substantial part of the consideration was already paid in as much as the sale deed of the year 2012 was executed by accepting Rs.1,000/- i.e. remaining consideration. He therefore submitted that findings of fact recorded

are perverse which according to the learned counsel is a substantial question of law in the appeal.

11. The learned counsel for the respondents has supported the impugned judgment. It is submitted that there is a substantial delay in filing the suit in the year 2013 seeking specific performance of the agreement of sale of the year 1999. It is submitted that the plaintiffs waited even after the death of Changdeo on 4/2/2010 for which there is no explanation forthcoming. It is submitted that the plaintiffs cannot indefinitely wait even assuming that there is any failure on the part of Changdeo to comply with his obligation under the agreement of sale. It is submitted that the suit property is ancestral property of Changdeo and his brother Namdev and the suit was bad for non joinder of necessary party namely Namdev Chine. It is submitted that in any event, the execution of the sale deed of the year 2012 by only some of the legal representatives is illegal and cannot enure to the benefit of the appellants. It was also denied that the possession was ever handed over to the plaintiffs. It is submitted that both the Courts below after appreciation of the oral and documentary evidence on record have rightly refused to grant specific performance. It is submitted that in the absence of said

finding of fact being shown to be perverse, the appeal does not raise any substantial question of law.

12. I have carefully considered the rival circumstances and the submissions made. The agreement to sale (Exh.20) is a registered document shown to be executed in favour of the appellants. At the relevant time, the appellant No.2 who is son of the appellant No.1 being 10 years of age, was a minor. The appellant No.1 examined herself. The Appellate Court on the basis of cross examination of P.W.1 has come to the conclusion that there is a doubt about valid execution and registration of agreement Exh.20. P.W.1 claimed that the possession was delivered at the time of execution of the agreement Exh.20. However, the agreement itself recites that it is without possession. The First Appellate Court has noted the recitals in the agreement that it is without parting of possession. The P.W.1 also feigned ignorance whether the suit property was a joint family property of Changdeo Chine and Namdev Chine which is also found to be contrary to the contents of the agreement Exh.20. In fact, P.W.1 stated that she was unaware about the transaction till it was executed. She claimed that the earnest amount was not paid in the presence of the Sub-Registrar. She was also unaware of the attesting witnesses.

13. In so far as readiness and willingness is concerned, the First Appellate Court has noted the admission by P.W.1 that she does not have any documentary evidence to show that since the year 1999 she ever demanded execution of the sale deed. It is true that the sale deed was to be executed after clearance of the loan / encumbrances and after obtaining necessary permission. However, that does not mean that the plaintiffs can wait indefinitely. In the present case, it is significant to note that Changdeo died in the year 2010 and even thereafter there was no demand for execution of the sale deed. The Appellate Court has found that P.W.1 was unable to specify the date when any such demand for execution of the sale deed was made. The First Appellate Court has also found that none of the attesting witnesses to the agreement were examined. P.W.1 claimed that the transaction was within the personal knowledge of her husband Kacheshwar Chine. The First Appellate Court has also found that the suit was not filed within three years as prescribed by Article 54 of the Limitation Act. It is necessary to note that Article 54 has two parts, in so far as the starting point of the limitation is concerned. The first part pertains to a case where there is a specific date fixed for performance. The second part pertains to a case where no such date is fixed in which case the suit is to be filed within three years, when the plaintiffs have notice that the

performance is refused. In the present case, it has come on record that since the year 1999 there is no evidence of any demand made to deceased Changdeo. At least on the death of Changdeo on 4/2/2010, the plaintiffs ought to have been put to notice about the refusal. Even thereafter, the suit is not filed within three years. The suit appears to have been filed only on 19/6/2013. Thus looked from any angle, no exception can be taken to the concurrent findings recorded by the Courts below refusing to grant specific performance. The appeal is without any merit and is accordingly dismissed, with no order as to costs. A decree be drawn accordingly.

C.V. BHADANG, J.