

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO. 442 OF 2018

APPELLANT : Devendra Krishnarao Raut,
(Ori. Plaintiff) Aged 58 years, Occ: Retired,
R/o E-52, Mehar Prabha, Ambazari
Hill Top, Nagpur.

..V E R S U S..

RESPONDENT : Ku. Jyoti Govind Thatte
(Ori. Defendant) Aged 41 years, Occ: Household,
R/o 19, State Bank Colony, Near Police
Line Takli, Nagpur.

Shri V.B. Bhise, counsel with Shri J.Y. Ghurde, counsel for the
Appellant.

Shri Rahul L. Rathod, counsel for the Respondent.

CORAM : ANIL S. KILOR, J.

DATE : 17th DECEMBER, 2021

ORAL JUDGMENT :

1. The present appeal is arising out of the judgment and decree dated 26.03.2018, passed in Regular Civil Suit No. 294/2015 by the District Judge-14, Nagpur, dismissing the Regular Civil Suit No. 2720/2012 filed by the appellant

for specific performance of contract.

2. Brief facts of the present case are as follows: (The parties are referred to as per their status before the trial Court)

3. The Plaintiff/Appellant filed a suit for specific performance claiming that the defendant is the owner and possessor of Plot No. 2 admeasuring 137.959 sq. mtr situated at Kh. No. 34/3, Ph. No. 8-A, Mouza Gorewada, situated in the layout of Manohar Co-operative Housing Society Ltd., Nagpur, which is the suit property.

4. It is further case of the plaintiff that the defendant agreed to sell the said suit land to the plaintiff for consideration of Rs. 2,22,750/- (Rs. Two Lack Twenty Two Thousand Seven Hundred and Fifty only) and accordingly agreement of sale was executed on 17/10/2006 and, the plaintiff paid total amount of Rs.2,00,000/- (Rs. Two Lack only) to the defendant out of the agreed total consideration and the balance consideration of Rs. 22,750/- (Rs. Twenty Two Thousand Seven Hundred and Fifty only) was agreed to

be paid at the time of registration of sale-deed.

5. The plaintiff, on finding that, the defendant is avoiding execution of sale-deed, he filed a suit praying for specific performance of contract.

6. The defendant appeared and filed her written statement, denying the case of the plaintiff.

7. The learned trial Court, after considering the oral as well as documentary evidence held that, the plaintiff was ready and willing to perform his part of contract. The learned trial Court further held that, the suit was filed beyond limitation. However, while partly allowing the suit, denied the prayer of specific performance and directed the defendant to return back the earnest amount of Rs. 2,00,000/- (Rs. Two Lack only) at the rate of interest 14% per annum from the date of agreement i.e. 17/10/2006 till its realization, vide judgment and decree dated 02/05/2015.

8. The plaintiff, feeling aggrieved by the said judgment and decree preferred an appeal namely Regular Civil Appeal No. 294/2015, which came to be dismissed vide judgment and decree dated 26/03/2018, the same is under challenge in this appeal.

9. This Court while issuing notice on 24/08/2018, has framed following substantial questions of law :-

“(1) In the absence of any appeal/cross-objection being preferred by the defendant against the decree for refund of earnest amount as passed by the trial Court, whether the appellate Court was legally justified in dismissing the entire suit ?

(2) Whether the findings recorded that the suit was barred by limitation is in accordance with law?”

10. I have heard the learned counsel for the respective parties.

11. Learned counsel for the appellant submits that, the learned First Appellate Court has misinterpreted the clauses mentioned in the agreement for sale and thereby arrived at an erroneous conclusion that the suit was barred by limitation.

12. It is submitted that, once the trial Court has held that the suit was well within limitation and in absence of any challenge raised to the said finding by way of cross-objection, by the plaintiff, the learned First Appellate Court ought not to have gone into that issue.

13. *Per contra*, the learned counsel for the respondent supports the impugned judgment and decree and submits that, the learned First Appellate Court has rightly held that the suit was barred by limitation.

14. To consider the rival contentions I have perused the record and gone through the judgments and decree of both the Courts below.

15. The whole controversy revolves around the clause mentioned in the agreement to sell about the date of execution of sale-deed. Thus, it would be appropriate to refer to the relevant clause in the agreement at Exhibit No.31, which reads thus :-

“5. That, the sale deed of the above said plot/property shall be executed and registered within one month from the date of obtaining the necessary ‘No Objection Certificate’ from Nagpur Improvement Trust, Nagpur and concerning Co-operative Housing Society and any other necessary permissions from the concerning competent authorities. The Vendor/Party No.1 hereby specifically agreed that she shall bring all the above said permissions with her own expenses prior to execution and registration of sale deed”.

16. From the above referred clause, it is clear that time

was not the essence of the contract and it was agreed between the parties that, the sale-deed of the suit property shall be executed and registered within one month from the date of obtaining necessary 'No Objection Certificates' from Nagpur Improvement Trust and concerned Cooperative Housing Society.

17. Nothing has been brought on record by the defendant, to show that such 'No Objection Certificate' was obtained by the defendant from Nagpur Improvement Trust or from the concerned Cooperative Housing Society. Even the defendant did not enter into the witness box to prove her case.

18. In absence of any evidence, it is apparent that the learned First Appellate Court has wrongly held that the suit was barred by limitation. In this matter, the time period of one month for the execution of sale-deed would start to run from the date of obtaining necessary permissions and no objections from the concerned authorities.

19. Admittedly, the defendant never informed the plaintiff that she had obtained necessary permissions or 'No Objection Certificate'. No correspondence was made in this regard by the defendant at any time.

20. In that view of the matter, the findings recorded by the learned First Appellate Court that for four years, the plaintiff remained silent and did not take steps and as such, the suit was barred by limitation, is without evidence and hence, the said finding is perverse. Moreover, the findings recorded by the learned first appellate court relating to limitation, for the reasons recorded above are not in accordance with law.

21. In that view of the matter, I am of the considered view that the learned Lower Appellate Court ought not to have gone into the issue of limitation in absence of any cross-objection filed by the defendant challenging the finding recorded by the learned Trial Court that the suit was filed

within limitation. I have answered both the substantial questions of law in above terms.

22. Accordingly, I pass the following order :-

ORDER

- a] The appeal is partly allowed.
- b] The impugned judgment and decree dated 26/03/2018 passed in Regular Civil Appeal No. 294/2015 is hereby quashed and set aside and thereby the judgment and decree dated 02/05/2015 passed in Regular Civil Suit No. 2720/2015 is hereby confirmed.
- c] Pending application (s), if any, stand(s) disposed of. No order as to costs.

[ANIL S. KILOR, J.]

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Signed By: RAJESH K
NANDURKAR

Signing Date: 14.01.2022 17:20