

SGA

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 166 OF 2021
AND
SECOND APPEAL NO. 167 OF 2021

Madhav Mariba Jadhav
and others.
Versus

... Appellants

Bhimrao Mohanrao Kadam
(Died) Through L.Rs.
1-A) Sulochana Bhimrao Kadam
and others.

... Respondents

...

Mr. Shailesh P. Brahme i/b Mr. G.R. Syed- Advocate for appellants.
Mr. P.R. Katneshwarkar – Advocate for respondent nos. 2 to 4.

....
CORAM : GAURI GODSE, J.
DATE : 30th January, 2023

PER COURT :

1. Second Appeal No. 166 of 2021 is filed by original defendants for challenging the judgment and decree dated 30th November, 2018 for possession in Regular Civil Suit No. 10 of 2010 passed by the learned Civil Judge, Senior Division, Biloli and confirmed by learned District Judge-1, Biloli by judgment and decree dated 10th March, 2021 in Regular Civil Appeal No. 2 of 2019.
2. Second Appeal No. 167 of 2021 is filed for challenging the judgment and decree dated 29th November, 2018 passed by the

learned Civil Judge, Senior Division, Biloli thereby dismissing Special Civil Suit No.9 of 2011 filed by appellants for specific performance as well as judgment and decree dated 10th March, 2021 passed by the learned District Judge-1, Biloli, thereby dismissing Regular Civil Appeal No. 1 of 2019 preferred by the appellants.

3. The respondents/original plaintiffs are owners of the suit land. The respondents had executed an agreement for sale on 16th February, 2003 in favour of the appellants for sale of the suit land by accepting part consideration. Pursuant to the agreement for sale, the appellants were put in possession of the suit land. There was a specific clause in the agreement for sale that the balance consideration amount was to be paid by the day of Gudi Padwa of the year 2004 and sale deed was to be executed on that day. As per the agreement, the appellants were permitted to cultivate the suit land and for that purpose, they were put in possession pursuant to the agreement for sale.
4. It is the case of the respondents that on Gudi Padwa of the year 2004, there was a meeting held and it was decided to cancel the agreement for sale. It was further decided that instead of refunding the amount of part consideration accepted by the

respondents, the appellants would be allowed to cultivate the suit land for a period of three years. After expiry of the period of three years, the respondents filed Regular Civil Suit No.10 of 2010 on the ground that the agreement for sale stood cancelled and hence prayed for possession of the suit land.

5. Thereafter, the appellants filed Regular Civil Suit No.9 of 2019 for specific performance of agreement for sale. The appellants had denied that on the day of Gudi Padwa of the year 2004, there was any meeting held with respect to cancellation of agreement for sale.
6. Both the suits were tried separately and the trial Court decreed the suit filed by the respondents and directed the appellants to hand over the possession of the suit land to the respondents. The suit filed by appellants for specific performance was dismissed. Appellants filed two separate Civil Appeals in the District Court for challenging the decree passed in the suit for specific performance as well as for challenging the decree for possession passed in favour of the respondents. First Appellate Court decided both appeals by common judgment. First Appellate Court confirmed the findings of the Trial Court with respect to the claim of the appellants regarding specific performance and

the appellants were held not entitled for specific performance on the ground that the suit was barred by law of limitation as well as that the appellants failed to perform their part of contract as per the agreement dated 16th February, 2003. Thus, the First Appellate Court confirmed both the decrees passed by the Trial Court.

7. Learned counsel appearing for the appellants submitted that so far as agreement for sale is concerned, it was a combined agreement by which there was also a lease executed with respect to the agricultural land in favour of the present appellants and hence, the Civil Court had no jurisdiction to decide the suit.
8. With reference to the said submissions, learned counsel for the respondents pointed out that there was an application made for recasting the issues for framing issue of tenancy, however, the application was rejected and said rejection was challenged in this Court by way of Writ Petition No. 9522 of 2017. The said writ petition was dismissed and hence now it is not open for the appellants to raise any objection of jurisdiction on the ground of tenancy. The copy of the order dated 4th July, 2018 passed in Writ Petition No.9522 of 2017 is produced on record. Perusal of the same shows that there is a specific finding recorded by this

Court while rejecting the writ petition, thereby observing that the appellants who had denied the existence of any lease, can only be said to have shrewdly taken up a stand of tenancy so as to delay the proceedings before the trial Court. It was held that seeking to frame the issue with respect to tenancy was only for the purpose of attempting to invoke section 99A of the Tenancy Act, so as to have the matter referred to a tenancy court. Thus, by these observations, the rejection of the application for recasting of the issues was confirmed by this Court. Hence, in my view, the said point of jurisdiction cannot be reopened at this stage.

9. It is further submitted on behalf of the appellants that the suit for specific performance could not have been dismissed on the ground that time is essence of contract. It was also submitted that suit could not have been dismissed on the ground that same was barred by law of limitation. Learned counsel for the appellants submitted that so far as point of limitation is concerned, period of limitation would come into play, when there was refusal on the part of the defendants to perform the part of contract. Thus, he submitted that when the respondents had filed suit for possession on the ground that agreement was

cancelled, period of limitation would start, as that was the time of refusal to perform the contract, hence, the suit could not have been dismissed on the point of limitation. It is further contention on behalf of the appellants that time was not essence of contract, hence, the suit could not have been dismissed on the said ground. It was further contended that even if there was stipulation provided in the agreement for the purpose of performing the part of contract, the clause in the agreement for sale, stated that the balance consideration amount was to be paid by the day of Gudi Padwa of the year 2004 and that the sale deed was to be executed on that date. Hence, it was necessary to produce on record overwhelming evidence to show that the time was essence of the contract and hence only on the basis of the clause in the agreement, the suit could not have been dismissed by recording the finding that time was essence of the contract.

10. I have perused the terms of the agreement dated 16th February, 2003, which is produced on record. There is a specific clause in the agreement, which says that the time for making payment of balance consideration was from the date of the agreement till Gudi Padwa of the year 2004 and that the agreement was to be executed on the day of Gudi Padwa of the year 2004. The

agreement further states that in the meantime, the appellants were put in possession for the purpose of cultivation of the suit land. Thus, plain reading of the agreement itself shows that in fact, time was an essence of the contract. Hence, there was a clear stipulation in the agreement, thereby fixing the date for paying the balance consideration amount and thus there was no requirement on the part of the respondents to produce on record any further evidence to prove that time was essence of the contract. Hence in my view, the issue framed and decided by the Trial Court as well as First Appellate Court that time is essence of contract is well within the terms and conditions of the contract itself.

11. Both the courts on appreciation of evidence have recorded a finding of fact that the agreement for sale stood cancelled and cancellation is proved by the respondents by producing the documentary as well as oral evidence on record. Hence, the said finding of fact cannot be now reappreciated in Second Appeal. Both the courts have recorded findings of facts with respect to (i) handing over the possession of the suit land for specific purpose to the appellants, pursuant to the agreement for sale and (ii) cancellation of the agreement as per the meeting which was

held on the day of Gudi Padwa of the year 2004. I do not find any perversity and/or illegality in the reasons recorded by both the courts. Hence, the findings of facts recorded by both the courts cannot be interfered in the second appeal. Once, it is held that the agreement for sale stood cancelled, there is no right in favour of the appellants to retain the possession of the suit land.

12. The suit for specific performance filed by the appellants is dismissed on the ground that the same is barred by limitation and that, the appellants failed to prove that they were ready and willing to perform their part of contract as per the agreement. There is a clear finding recorded by both the Courts that suit for specific performance ought to have been filed within three years from the expiry of the time fixed for execution of sale deed i.e. three years from day of Gudi Padwa of the year 2004. However, the suit was filed on 5th March, 2011, after the respondents filed the suit for possession. Thus, the suit for specific performance was rightly held to be barred by law of limitation. Both the Courts on appreciation of the evidence, have recorded finding of fact that the appellants failed to prove that they were ready and willing to perform their part of contract.
13. Learned counsel for the appellants has relied upon the decision

of the Hon'ble Supreme Court in the case of *Smt. Chand Rani (dead) by LRs. Vs. Kamal Rani (dead) by LRs.*¹. Learned counsel relied upon the said decision in support of his submissions that the issue as to time was essence of contract being a question of law, needs to be decided in the Second Appeal. The Hon'ble Supreme Court in the decision of *Chand Rani* held that an intention to make time an essence of the contract must be expressed in unequivocal language. So far as the present case is concerned, plain reading of the agreement itself shows that time was essence of the contract, hence the said decision relied upon by learned counsel for the appellants is of no assistance to the facts of present case.

14. In the second appeal arising out of the suit for specific performance of contract is concerned, points that were argued are purely based on the facts. I do not find any perversity and/or illegality in the reasons recorded by both the Courts. There is no substantial question of law involved in both the Second Appeals. Hence, both the Second Appeals are dismissed.
15. In view of the dismissal of the Second Appeals, Civil Applications in both the Second Appeals are dismissed.
16. At this stage, learned counsel for the appellants seek stay to the

¹ (1993) 1 SCC 519

execution of the decree for possession for a period of four weeks. The decree for possession is of the year 2018. Second Appeals are pending since the year 2021. There was no stay granted during the pendency of the Second Appeals, hence I do not find any reason to stay the decree for possession at this stage.

[GAURI GODSE, J.]