

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 246 OF 2022
WITH
CIVIL APPLICATION NO. 5940 OF 2020**

Shivaji Dagadu MisalAppellant

Versus

1. Sopan Pandurang Katore
2. Mahesh Madhukar Kulkarni
3. Santosh Dagdu Misal
4. Somnath Dagdu Misal
5. Kamalbai W/o. Dagdu MisalRespondents

**WITH
SECOND APPEAL NO. 694 OF 2019
WITH
CIVIL APPLICATION NO. 10337 OF 2019**

1. Sopan Pandurang Katore
2. Mahesh Madhukar KulkarniAppellant

Versus

1. Shivaji Dagadu Misal
2. Santosh Dagdu Misal
3. Somnath Dagdu Misal
4. Kamalbai W/o. Dagdu MisalRespondents

Advocate for Appellant : Mr. R.R. Karpe
Advocate for Respondent Nos. 1 & 2 : Mr. M.A. Kulkarni
Advocate for Respondent Nos. 3 to 5 : Mr. S.S. Gangakhedkar

CORAM : R.M. JOSHI, J.
DATE : 12th April, 2023

PER COURT :

1. Heard counsel for both sides.
2. Plaintiff and defendants have filed these Second Appeals to challenge the judgment and decree passed by first appellate Court in RCA No. 117 of 2014, whereby, judgment of the Trial Court in Special Civil Suit No. 215 of 2011, is reversed. Parties are referred to by their nomenclature in suit.
3. Plaintiffs have filed the suit for specific performance with averments that the defendants are the owners of suit property being 40 R land out of survey no. 379/1d/2. It is stated that the defendants agreed to sale the suit propriety for consideration of Rs. 8 Lakhs and accordingly agreement to sale was executed on 22.11.2002 by accepting earnest money of Rs. 25,000/-. It is further averred that since the defendants were in need of the money from time to time plaintiff's have paid a sum of Rs. 2,96,400/- thus in all amount of Rs. 3,21,400/- was paid by plaintiff to the defendants. It is averred that as

per the agreement between the parties, the defendants were to carry out measurement of the suit property through government surveyor and after completion of the measurement within six months the sale deed was to be executed. It is further averred by the plaintiff that after the execution of the sale deed a suit came to be filed *interse* between the defendants being RCS No. 243/2003 for partition and possession. Another suit was filed by adjoining owner of the property being RCS No. 165 of 2003 alleging encroachment against defendants. Since defendants avoided to execute sale deed in spite of assurances, plaintiff finally issued notice in the year 2010. The said notice was replied by defendants on 19th March, 2010, refusing to execute sale deed, hence suit came to be filed.

4. Defendants appeared before the trial Court and opposed the suit by contending that no agreement to sale was executed by them. It is the claim of these defendants that they are owners of the suit property. According to these defendants, plaintiffs are money lenders and defendants have obtained monetary assistance from time to time from them. In the written statement in paragraph nos. 10 and 11, specific averments are taken by the defendants showing the amount received. It is the case of the defendants that the execution of the

agreement to sale was never intended for sale of the suit property because it was security towards the transaction of loan.

5. With these averments, both sides led evidence before the Trial Court. It has come on record from the cross-examination of the plaintiff that plaintiff was aware about the measurements being carried out through government surveyor in respect of the suit property in the year 2003. Relying upon the said admission, it is argued on behalf of the defendants that once the plaintiff admits the measurements being done of the suit property and Rs. 10,000/- was paid for that purpose, it was incumbent on the part of the defendants to obtain the sale deed within six months, thereof. Since the suit has not been filed within six months, it is said to be barred by limitation. The said submission countered by learned counsel for plaintiffs stating that the said measurement was not as contemplated by agreement and whatever measurements carried out in the proceedings, wherein, the plaintiffs were not party, cannot be binding on them. Thus according to her, the measurement in suit between third parties, could not have provided cause of action to file suit. It is further argued that the time can never be essence of contract in case of sale of the immovable property. According to her, on issuance of notice in the year 2010 when the

same was replied denying execution of the sale deed, the cause of action arose for the plaintiff to file suit.

6. Perusal of the judgment of the learned first appellate Court shows that the issue of limitation has been decided in favour of plaintiff, which is sought to be challenged by defendants. The question arises as to whether the said finding is perverse and contrary to the evidence on record. Pertinently, the terms of the agreement exh. 55 indicate that the sale deed was to be executed within six months of the government measurement of the land. The measurement carried out in suit, wherein, the plaintiffs were not party, can not be attributed to their knowledge. Even, if it is accepted that the plaintiffs knew that in such proceeding the measurement of the property was done, the same cannot be said to be available to plaintiffs herein for consideration or raising objection, if any. Needless to say that intention of parties to the agreement to carry out measurement would be aimed at that no any dispute occurs between them in respect of land subjected to sale. In this context if the said evidence on record is considered, there is no room for doubt that the measurement even if it was carried in the suit between third parties for the plaintiffs. It is held that the said measurement was done at expense of plaintiffs who paid Rs. 10,000/-.

There is no direct evidence to prove this fact. Only because around that time Rs. 10,000/- was paid to defendants it cannot be inferred or presumed that said measurement carried was as per terms of agreement. In considered view of this Court, the findings recorded by the Appellate Court with regard to the suit being within limitation is in consonance with the evidence on record.

7. The first appellate Court has held that the plaintiffs have failed to prove readiness and willingness to perform their part of contract more particularly from 31st May, 2003, till filing of the suit in the year 2011. The said findings cannot be faulted with in view of the fact that neither in the plaint nor in the evidence plaintiffs state as to the steps taken by them to obtain specific performance of the contract from defendants. In fact, there is reason to believe that since the suits were filed *interse* between defendants as well as by adjoining owner, plaintiffs preferred to keep quite by not taking any further steps. The submissions made by the counsel for the plaintiff that the readiness and willingness will have to be established only after the refusal of the defendants to execute sale deed deserves to be rejected in view of settled law that readiness and willingness has to be pleaded and proved through out entire period till culmination of the proceedings. In this

case, even accepting that time was not essence of contract, the plaintiffs have not shown as to what prevented them from filing suit for specific performance within the period of reasonable time. Though, technically even suit is held to be within limitation, considering the time lapsed in between which is not attributable to defendants, discretion for grant of specific performance the contract cannot be exercised. First appellate Court has considered the entire facts on record and rightly refused the specific performance.

8. Learned counsel for the defendants raised objection to the judgment of the first appellate Court for refund of the earnest money on the ground that there is admission of the plaintiff about he having not obtained receipts towards payment made to the defendants. It is further argued that plaintiff in original plaint has not claimed for refund of earnest money and the amendment carried out is beyond limitation and hence, prayer for refund thereof, cannot be granted. As far as payments made by plaintiff to defendant, is concerned, statement of the defendants is more than sufficient to show that the amount sought to be refunded was in fact paid. As far as claim of defendants that the amount is towards loan transaction and plaintiffs being money lenders, there is absolutely no evidence on record to hold so. Further,

there is no dispute of the fact that pursuant to order of the Court, plaint is amended and ordinarily unless otherwise directed amendment relates back to date of suit. Moreover, proviso to sub Section 2 of Section 22 of Specific Relief Act, provides that, where plaintiff has not claimed relief of refund, the Court shall at any stage of proceeding, allow him to amend the plaint for including such relief. In view of this proviso there is no substance in the arguments advanced on behalf of defendants about claim of refund being time barred.

9. Upshot of above discussion shows that both plaintiffs as well as defendants have failed to make out any substantive question of law in these appeals. Consequently, no case is made out for causing interference in the impugned judgment.

10. Resultantly, both appeals stand dismissed. No order as to costs.

[R.M. JOSHI, J.]