

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 390 OF 2022
WITH
INTERIM APPLICATION NO.2869 OF 2022**

Deepa Chandrashekhar Shetty & Anr. .. Appellants
(Orig. Resp.1 & 2)
Versus

Milind Jaykumar Kole .. Respondent
(Orig. Appellant)

Mr. Prasad L. Gajbhiye, Advocates for the Appellants.

Mr. Prashant P. Kulkarni, Advocates for Respondent.

CORAM : VINAY JOSHI, J.

DATE : 20 SEPTEMBER 2023

P. C.

1. This is defendant's Second Appeal raising a challenge to the Judgment and Decree passed in First Appeal RCA no. 52/2016 dated 31st January 2020. Initially, Respondent Mr. Kole has filed a suit for specific performance of contract (Special Civil Suit no. 251/2005) seeking performance of an agreement to sale dated 18/09/1996. Appellant's predecessor Guruprasad (Defendant) though served with suit notice

remained absent and allowed to proceed ex-parte. In the result, the suit claim remained uncountested. However, the Trial Court has dismissed the suit only on the ground that the suit was barred by law of limitation. Being aggrieved original plaintiff Mr. Kole has filed first appeal in which the First Appellate Court has reversed the judgment of Trial Court. The First Appellate Court held that the suit was within limitation and thus passed a decree of specific performance.

2. Defendant's legal heirs have come up in second appeal whereby the legality and correctness of the order of First Appellate Court is challenged. It is argued that the suit was purely barred by limitation. However, the First Appellate Court failed in appreciating the said aspect. It is argued that agreement to sale was dated 18/09/1996, suit notice was issued on 02/09/1999, whilst the suit was filed on 16/06/2003 i.e. after three years from the notice. It is argued that though there is a reference of second notice, it was not produced till the First Appellate Court. It is argued that the First Appellate Court erred in holding that the Defendant has not performed his obligation and thus the suit was within limitation.

3. The learned counsel for original plaintiff would submit

that the Appellate Court has correctly used its discretion in granting the relief of specific performance. The entire pleadings have gone unresisted as well as the appeal was also uncontested. It is argued that the agreement itself cast obligation on the Defendant to measure the land, procure revenue extract and obtain the consent of other heirs which the Defendants did not. Therefore, according to plaintiff as the Defendant has not performed his obligation, the period of limitation does not start. It is submitted that as per agreement, the period of 11 months would start only after, Defendant completing his obligation.

4. True the Defendant has not appeared in Trial Court nor contested the suit on merits. However, Section 3 of the Limitation Act casts an obligation on the Court to see that every suit and appeal shall be filed within limitation though the limitation has been taken as defence or not. Therefore, though there is no resistance, the point of limitation has to be ascertained. As regards to the other aspects are concerned, since there was no resistance the plaintiff's averments shall be taken to be accepted.

5. The copy of agreement states that the land is to be

measured and the consent of other heirs was to be obtained. As a matter of fact, the legal notice dated 2nd September 1999 discloses that there was one prior notice also and as the performance was refused, the notice. A matter for consideration is whether despite issuance of notice in the year 1999 can it be held that still the Defendant has not performed his obligation and thus period of limitation would not commence. There is no dispute that so called second notice of the year 2003 is not produced nor the pleadings bear averments of issuance of second notice. In the circumstances, the following question of law would arise.

- i) *Whether the First Appellate Court was justified in holding that period of limitation did not commenced despite issuance of legal notice dated 2nd September 1999?*
- ii) *Whether a specific performance of entire land shall be enforced against legal heirs of the original defendant?*

6. Admit. Issue notice after admission. Mr. Prasad P. Kulkarni waives the notice.

7. Interim relief to continue till the disposal of the appeal.

8. The amount deposited by original plaintiff in the first Appellate Court shall be invested by the concerned Court from time to time.

[VINAY JOSHI, J.]