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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO. 269 OF 2020
WITH
CIVIL APPLICATION NO. 260 OF 2020
IN
SECOND APPEAL NO. 269 OF 2020**

Badshah Mulla (Deceased
Represented by Following Lrs)
Shri. Iqbal Badshah Mulla and Ors

.....Appellants

Vs.

Shri. Baburao Bala Jadhav
(Deceased) Shri. S. B. Jadhav
(Deceased Thr. Lrs) Smt. Sakhubai
S. Jadhav and ors

.....Respondents

Adv. Mr. Umesh R. Mankapure a/w Adv. Ms. Stefy J. Dias for the
appellants
Adv. Mr. D. D. Rananaware for the respondents

CORAM : GAURI GODSE, J.

DATE : 2nd SEPTEMBER 2024

ORDER:

1. Heard learned counsel for the parties. This second appeal is preferred by the original plaintiff to challenge the concurrent Judgments and Decrees dismissing the suit for specific performance.

2. Learned counsel for the appellants submitted that execution of the suit agreement is accepted by both the Courts. However, the prayer for specific performance is erroneously refused on the point of limitation and readiness and willingness answered in the negative against the plaintiff. He submits that there was a mortgage document executed by Bhagubai i.e. one of the original owner who had executed the suit agreement. Hence, until and unless the owners had redeemed the property and removed the encumbrances, there was no question of executing the sale deed. He thus submits that the suit could not have been dismissed on the ground that the plaintiff was not ready and willing to execute the sale deed. He submits that admittedly the amount of ₹500 was paid towards earnest amount. Hence, the obligation on the part of the plaintiff to pay the balance consideration amount would have arisen only at the time of execution of the sale deed, once the encumbrances was removed by Bhagubai. He submits that the suit agreement was signed by Bhagubai, predecessor of defendant nos. 1 to 5 and defendant no. 6. He thus submits that said defendants were under obligation to remove the encumbrances by the execution of the deed of redemption of the mortgage.

3. Learned counsel for the appellants submits that the suit is

erroneously dismissed by holding that it was barred by limitation. He submits that though time was essence of the contract, same could not have been held against the plaintiff for calculating the period of limitation. To support his submissions, he relied upon the Judgment in the case of **Balasaheb Dayandeo Naik (Dead) through Lrs and others Vs. Appasaheb Dattatraya Pawar¹**. Learned counsel for the appellants therefore submits that the second appeal would require consideration on the point of the suit being dismissed as barred by limitation and the point of readiness and willingness answered against the plaintiff.

4. Learned counsel for the respondents supports the impugned Judgment and Decree. He submits that both the Courts have concurrently held that time was the essence of the contract between the parties. He submits that no steps were taken by the plaintiff for getting the sale deed executed within the time stipulated in the said agreement. He thus submits that both the courts have rightly dismissed the suit as barred by limitation. He submits that the issue regarding readiness and willingness is also concurrently held against the plaintiff. He thus submits that in view of the concurrent findings of fact recorded by both the Courts, the grounds raised on behalf of the

¹ (2008) 4 Supreme Court Cases 464

appellants would not require any consideration by this court.

5. For examining the rival contentions raised on behalf of the parties, I have perused both the impugned Judgments as well as plaint. Both the courts have concurrently held that the sale deed was to be executed after payment of the balance consideration amount within 11 months of the execution of the agreement. The claim of the plaintiff to be in possession pursuant to the agreement is concurrently not accepted by both the Courts. In view of the terms and conditions of the agreement, both the Courts held that the earnest amount was agreed to be forfeited after the period of 11 months. The reasons recorded by both the Courts indicate that the plaintiff failed to prove his readiness and willingness regarding payment of balance consideration for the purpose of executing the sale deed. Hence, the suit filed on 29th April 1989 for specific performance of the agreement dated 29th January 1971 is held to be barred by limitation.

6. The point regarding removal of encumbrances with regard to execution of the mortgage document in favour of defendant no. 7 is concerned, admittedly there was no term in the contract regarding removal of any encumbrances. Even if there was a mortgage executed

and the obligation was accepted as that of the owners, the redemption and removal of encumbrances cannot be accepted as a ground available to the plaintiff for filing the suit at a belated stage. Once, it is accepted that time was essence of the contract, it was for the plaintiff to prove by pleadings and cogent evidence that there were any contrary terms agreed between the parties for extension of time provided in the terms of the contract.

7. The Hon'ble Apex Court in the case of **Balasaheb Naik** held that when time was essence of the contract, the general presumption in view of the Constitution Bench decision in the case of **Chand Rani (Dead) by LRs Vs. Kamal Rani (Dead) by LRs**² that time cannot be termed as essence, unless contrary intention is expressed in unequivocal terms.

8. In the present case, both the Courts have concurrently held that the plaintiff has failed to prove his readiness and willingness to perform his part of contract within the time provided in the suit agreement. The obligation for removal of encumbrances in view of the mortgage document is not pleaded in the terms and conditions of the contract for execution of the sale deed. The first Appellate Court while dealing with

² (1993) 1 SCC 519

the issue of limitation has also referred to the plaintiff's admission that Bhagubai had refused to execute the sale deed in the year 1984. The plaintiff's admission is referred to by the first Appellate Court for holding that the suit would otherwise also not be within the period of limitation, as it was not filed within three years of the refusal on the part of Bhagubai to perform her part of contract. The first Appellate Court has therefore referred to Article 54 of the Limitation Act to hold that the suit was barred by law of limitation.

9. Once it is admitted that the term of 11 months was provided in the agreement for payment of balance consideration and execution of the sale deed, it was for the plaintiff to plead and prove with cogent evidence regarding extension of the period provided for execution of the sale deed or to prove any contrary intention expressed by the parties for extension of time as agreed in the terms of the contract. Thus, in view of the concurrent findings of facts recorded with regard to the cause of action and the terms of the contract, the ground regarding the suit being within limitation would not require any consideration by this court.

10. The ground raised with regard to readiness and willingness is

also concurrently held against the plaintiff by both the Courts. Hence, the said ground would amount to reappreciation of facts and evidence on record which is not permissible under section 100 of the Code of Civil Procedure, 1908.

11. The second appeal does not raise any other substantial question of law. The second appeal is dismissed.

12. In view of dismissal of the second appeal, pending Civil Application No. 260 of 2020 is dismissed as infructuous

[GAURI GODSE, J.]