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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 439 OF 2021
WITH
INTERIM APPLICATION NO. 3875 OF 2021
IN
SECOND APPEAL NO. 439 OF 2021**

Prasad s/o. Sahebrao Chavan and Anr ... Appellants/Applicants
vs.

Bhimrao s/o. Ningappa Gaikwad and ... Respondents
Anr

Mr. Atul Damle, Senior Advocate a/w. Ms. Payal Vardhan i/b. Mr. Rahul Khot for Appellants/Applicants.

Ms. Pratibha D. Shelake, Ms. Reshma Mahadik a/w. Ms. Kalpana Kanhere for Respondents.

CORAM : GAURI GODSE, J.

DATED : 17th DECEMBER 2024

ORDER:

1. Heard learned counsel for the parties. The second appeal is preferred by the original plaintiffs challenging the judgment and decree passed by the first appellate court dismissing the plaintiffs' suit for specific performance and allowing the counter claim directing the plaintiffs to hand over possession of the suit property.

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2. Learned senior counsel for the appellants submits that the first appellate court for the first time recorded findings on the suit being barred by limitation. He submits that the issue of limitation being a mixed question of law and fact, the first appellate court could not have recorded the findings on the issue of limitation. He submits that the first appellate court ought to have either remanded the matter back to the trial court for recording findings on the issue of limitation or called for the findings on the point of limitation.

3. Learned senior counsel for the appellants further submits that the execution of the agreement is not in dispute. He, submits that the agreement records payment of earnest amount of Rs. 5,25,000/-. He further submits that the only performance on the part of the plaintiffs was the payment of balance consideration at the time of execution of the sale deed. He submits that the plaintiffs were always ready and willing to perform their part of contract. Hence, the findings recorded by the first appellate court on readiness and willingness on the part of the plaintiffs would amount to incorrect appreciation of the evidence on record. He submits that the first appellate court has disbelieved the plaintiffs' contentions by erroneously holding that the source of payment of the earnest amount was not proved by the plaintiffs. He therefore submits that the second appeal would require consideration on the point of the

suit being dismissed for the first time by the first appellate court on the point of limitation and incorrect appreciation of evidence on record for recording findings on readiness and willingness of the parties.

4. With regard to the decree passed in the counter claim filed by the respondents, learned counsel for the appellants submits that the defendants failed to plead and prove any date of the defendants' dispossession and the plaintiffs taking forcible possession as alleged by the defendants. He submits that there was no complaint filed on behalf of the defendants making allegations regarding taking forcible possession. He therefore submits that the counter claim could not have been decreed without recording specific findings on the defendants' forcible dispossession. He submits that in the absence of any evidence to show forcible dispossession, the plaintiffs' evidence in support of their contention that they were put in possession on the date of agreement ought to have been accepted.

5. Learned senior counsel for the appellants thus, submits that in the absence of any findings recorded on the plaintiffs taking forcible possession, the plaintiffs possession cannot be held to be unlawful. He thus, submits that the findings recorded by the first appellate court in granting decree of possession by allowing counter

claim would not be sustainable. He therefore submits that even the challenge to the decree passed in the counter claim would require consideration by this court on the ground that the decree for possession could not have been granted without recording the findings that the plaintiffs were in unlawful possession of the suit property.

6. Learned counsel for the respondents supports the impugned decree. She submits that the cause of action pleaded by the plaintiffs is based on the notice dated 19th January 2010, stating that the defendants were called upon to execute the registered sale deed on 2nd February 2010. She submits that the cause of action further states that the defendants failed to remain present for execution of the sale deed which would amount to refusal on the part of the defendants to perform their part of contract. She thus, submits that even if the cause of action as pleaded by the plaintiffs is considered, the suit not filed within three years from 2nd February 2010, would be barred by limitation. She further submits that as per the terms and conditions of the contract four months time was provided for payment of balance consideration amount and execution of the sale deed. She thus, submits that in view of Article 54 of the Limitation Act, the period of limitation would begin on expiry of period of four months from the date of agreement.

7. In view of these admitted facts, the learned counsel for the respondents submits that the findings recorded by the first appellate court on the point of limitation cannot be faulted. She submits that no further evidence was necessary for deciding the point of limitation. She thus, submits that the issue of limitation being a question of law, is rightly decided by the first appellate court. She, thus, submits that the issue of limitation would not require any consideration by this court.

8. With reference to the second ground on incorrect appreciation of evidence on the point of readiness and willingness of the plaintiffs, she submits that even if the payment of earnest amount is accepted, nothing is produced on record to indicate the readiness and willingness of the plaintiffs to make payment of the balance consideration amount within four months as agreed in the contract. She therefore submits that even the second ground would not require any consideration by this court.

9. With reference to the decree passed in the counter claim, the learned counsel for the respondents submits that the plaintiffs claimed to be in possession based on the suit agreement. However, admittedly, the suit agreement does not record handing over possession. She submits that the counter claim was filed with

specific pleadings supported by the oral evidence that the plaintiffs took forcible possession sometime in the month of April 2010. She submits that the first appellate court has examined the oral evidence and recorded the findings of facts disbelieving the plaintiffs' contentions that they were put in possession based on the suit agreement. She submits that the pleadings and the oral evidence indicates different dates claimed by the plaintiffs to be in possession. She therefore submits that the findings recorded by the first appellate court on the point of plaintiffs being in unlawful possession would not require any consideration of this court as the said ground would amount to appreciation of the pleadings and evidence on record. She thus, submits that the second appeal does not raise any substantial question of law.

10. To examine the rival submissions made by both the parties, I have gone through the papers of the second appeal, pleadings and evidence which are placed on record. There is no dispute that time was the essence of the contract between the parties. The suit agreement dated 10th August 2009, provided for four months time for payment of balance consideration amount and execution of the sale deed. The first appellate court has accepted the defendants' contentions that by notice dated 21st August 2013, the plaintiffs were called upon to hand over possession of the suit property. The first

appellate court recorded that the notice issued by defendants indicates that the suit agreement was in the form of the security for the hand loan and the demand was made for possession.

11. The suit is filed after the defendants issued notice on 21st August 2013. The first appellate court considered the terms and conditions of the agreement and held that the time period for filing the suit would be three years from the date of expiry of four months as per the agreement, as the time was the essence of the contract. Hence, the first appellate court considered the admitted facts and held that in view of Article 54 of the Limitation Act, the three years period is required to be computed from the expiry of period of four months. The first appellate court referred to the plaintiffs' contentions regarding refusal of performance on the part of the defendants in response to the notice dated 19th January 2010. Thus, the first appellate court held that even if the plaintiffs contentions regarding the refusal on the part of the defendants on 7th February 2010 was accepted, the suit for specific performance filed on 25th November 2013 was barred by limitation.

12. In view of the aforesaid admitted facts regarding the time being essence of the contract, the period of limitation would begin from expiry of four months from the date of agreement, in view of

Article 54 of the Limitation Act. Even if the plaintiffs' contentions regarding refusal by the defendants to perform their part of contract in response to plaintiffs' notice dated 19th January 2010 is considered, the suit is not filed within three years of refusal. Thus, both the contingencies provided under Article 54 are not satisfied. Hence, no fault can be found in the findings recorded by the first appellate court holding that the suit for specific performance was barred by limitation. The findings on the point of limitation are recorded by the first appellate court, based on the admitted facts; hence, there was no necessity to call for any further findings from the trial court by leading any fresh evidence, or remand the matter to trial court.

13. The findings recorded by the first appellate court on readiness and willingness also cannot be faulted in view of the admitted terms of the contract which provides four months time for payment of balance consideration amount. Nothing is produced on record by the plaintiffs to indicate readiness and willingness to perform their part of contract within the time agreed between the parties. Thus, even the point of readiness and willingness does not raise any substantial question of law. The findings recorded by the first appellate court are based on the admitted facts and the evidence produced on record. I find no illegality or perversity in the findings

recorded by the first appellate court, disbelieving the plaintiffs contentions that they were ready and willing to perform their part of contract.

14. With reference to the points argued on the decree for possession passed in counter claim in favour of the defendants, the first appellate court has referred to the plaintiffs' pleadings that they are in possession from the date of agreement and the oral evidence indicating that they claimed to be in possession from 2nd February 2010. The pleadings in the written statement to the counter claim refers to the plaintiffs being in possession on the date of the agreement. It is further pleaded that the defendants were called upon to execute the sale deed on 2nd February 2010, hence, the plaintiffs' possession is to be accepted from 2nd February 2010. Thus, the pleadings and supporting evidence of the plaintiffs indicate that except for the suit agreement there is no supporting evidence produced on record indicating that the plaintiffs were put in possession by the defendants. The agreement also does not record handing over of possession. Thus, in the absence of any supporting evidence to indicate that the plaintiffs were put in possession either on the date of the agreement or otherwise, the plaintiffs cannot be held to be in lawful possession of the suit property.

15. The defendants' title is not in dispute. The plaintiffs prayer for specific performance is dismissed by the first appellate court on the ground of limitation and the plaintiffs failing to prove their readiness and willingness to perform their part of the contract. Hence, in the absence of any evidence that the plaintiffs were lawfully put in possession, pursuant to the agreement and that they acted in furtherance of the contract to fulfill their part of the contract, the plaintiffs would not be entitled to retain possession of the suit property. Therefore, considering the aforesaid facts recorded by the first appellate court after examining the pleadings and evidence on record, there is no substance in the grounds raised on behalf of the plaintiffs that the defendants failed to prove their dispossession. The findings recorded by the first appellate court is based on the correct appreciation of pleadings and evidence on record. There is no illegality or perversity in the reasons recorded by the first appellate court.

16. The second appeal does not raise any substantial question of law. Hence, the second appeal is dismissed.

17. In view of dismissal of the second appeal, pending applications are disposed of as infructuous.

18. Learned counsel for the appellants seeks extension of ad-

interim relief granted by this court on 8th December 2021. Ad-interim relief granted by this court on 8th December 2021, shall continue for a period of eight weeks from the date of uploading this order, subject to the appellants not creating any third party rights or parting with of the suit property.

(GAURI GODSE, J.)