

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.763 OF 2015
WITH
CIVIL APPLICATION NO.1640 OF 2015

Bhavadu Lotan Pawar

(Deceased through Legal Heirs)

...Appellant/Applicant

Versus

Ganpat Pundu Khaire (Decd. Thr.
Legal Heirs)

...Respondents

Mr. Pradeep J. Thorat i/b Mr. Tushar N. Sonawane for the
Appellant.

Mr. Rohan Mirpury a/w. Mr. Harshvardhan Borse, Mr. Yashwant
Dhanegave i/b Mr. G. Mogre for the Respondents.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 5th MARCH, 2024

P. C. :

1. Being dissatisfied by the judgment dated 4th April 2015 passed by the Appellate Court in Regular Civil Appeal No.263/2009 dismissing the appeal confirming the judgment and decree passed by the Trial Court in Regular Civil Suit No.32/2003 on 7th November 2009, the original plaintiff is before this Court.

2. Regular Civil Suit No.32/2003 was filed by the plaintiff seeking specific performance of agreement of sale dated 26th March 1972

executed in favour of the plaintiff by the Defendant. It was pleaded that possession of the suit property was handed over to the plaintiff. The consideration amount was fixed at Rs.6,500/- out of which a sum of Rs.5,500/- was paid and the balance Rs.1,000/- remained to be paid. It was contended by the plaintiff that he is always ready and willing to perform his part of the contract. It was further pleaded that since 1973 the suit property was in the possession of the plaintiff. It was pleaded that in the interregnum there were revenue proceedings which were initiated as no permission was sought from the Collector for the sale transaction and in the year 1982 it was held that the transaction could be regularized. It was contended that in and around 2001 the defendant obstructed the possession of the plaintiff and on 27th January 2003 the plaintiff issued a notice to the defendant calling upon the defendant to execute the agreement of sale to which there was no response by the defendant. It was contended that as per the agreement for sale the obligation was upon the defendant to obtain the permission and that in spite of repeated demands the defendant did not obtain the permission and as such agreement of sale could not be executed.

3. The suit came to be resisted by the defendant. It was contended that the suit property was Inam Land of Class 6B which was re-

granted to the defendant by mutation entry No.123. It was contended that under Section 59 of the Maharashtra Land Revenue Code on 2nd December 1977 the possession of the suit property was taken from the plaintiff and given to the defendant and as such he is in possession of the property.

4. The defendant filed counter claim seeking an order of injunction restraining the plaintiff from obstructing the possession of the defendant over the suit property and in the alternative if the possession is held to be with the plaintiff for relief of recovery of possession. The Trial Court by the judgment dated 7th November 2009 dismissed the suit as well as the counter claim. The Trial Court accepted the execution of the agreement of sale however negated the issue as regards the readiness and willingness as also the issue of limitation. The Issue as regards the possession of the defendant as well as the obstruction at the hands of the plaintiff came to be negated.

5. As against the dismissal by the Trial Court, Civil Appeal No.263/2009 was filed by the plaintiff. There was no cross appeal/cross objections filed by the defendant. The Appellate Court framed the following points for determination:

Sr. No.	POINTS	FINDINGS
1.	Whether the defendant has executed agreement to sale in favour of plaintiff on 26/3/1972 and defendant had received Rs.5,500/- towards consideration amount out of total Rs.6,500/- ?	...Yes
2.	Whether suit is bad for non joinder of necessary parties ?	...No
3.	Whether the suit is within limitation ?	...No
4.	Whether plaintiff proves that he was ready and willing to perform his part of contract and entitled for specific performance ?	...No
5.	Whether plaintiff proves that his peaceful possession was obstructed by the defendant and therefore he is entitled for relief of perpetual injunction ?	...No
6.	Whether the judgment and decree passed by the learned trial Court calls for any interference ?	...No
7.	What order ?	...As per final order

6. The Appellate Court held that the Suit was barred by limitation and that the plaintiff was not ready and willing to perform his part of the contract and thus was not entitled for specific relief.

7. Heard Mr. Pradeep J. Thorat for the appellant and Mr. Rohan Mirpury for the respondents.

8. Mr. Thorat, learned counsel for the appellant would submit that the suit was filed after the notice of refusal of performance by the defendant which was in the year 2003. According to him as there was no date fixed for the performance of contract and upon the notice of refusal of performance by the defendant the suit came to be filed. He submits that the Trial Court has held that the notice is produced on record and was not proved and the Appellate Court has held that neither notice was produced nor it was proved. Pointing out to the pleadings in the written statement, he would submit that there is no denial as far as receipt of notice is concerned and as such the notice dated 27th January 2003 was proved. He submits that the plaintiff was ready and willing to perform his part of the contract the obligation was upon the defendant to obtain necessary permission from the Collector. He submits that as the plaintiff was in possession of the property since 1972 there was no occasion for the plaintiff to seek specific performance of the contract in the absence of the permission being obtained by the defendant. He submits that the Appellate Court had erred in coming to a finding as regards the payment for the regularization of the transaction which obligation was not upon the plaintiff as per the terms of the contract. He would further submit that there were three witnesses who were examined by the plaintiff and the issuance of notice dated 27th January 2003 was proved. He submits that

despite cross examination there was no suggestion given as regard non receipt of the notice. He further submits that there was no cross appeal filed by the defendant challenging the dismissal of the counter claim and before the Trial Court the plaintiff was held to be in possession. Pointing out to the findings of the Appellate Court he would submit that the Appellate Court has observed that the plaintiff is not in possession of the plaintiff property and no such point for determination of the plaintiff's possession was framed. He submits that substantial question of law which arises is the conclusion on the issue of limitation as well as the findings of readiness and willingness which suffers from perversity.

9. *Per contra*, Mr. Mirpurj learned counsel for the respondent would point out that the plaintiff had filed his affidavit of evidence, however he remained absent for the cross examination and thereafter his Power of Attorney entered into the witness box and has deposed about the transaction. He submits that as no evidence was led by the plaintiff the notice of 27th January 2003 was not proved. He would further submit that for a period from 1983-2003 there was no action on the part of the plaintiff and no notice was even issued to the defendant calling upon him to obtain the permission and complete the obligation to execute agreement of sale. He submits that in view thereof Courts have rightly

answered the issue of readiness and willingness against the plaintiff.

10. Considered the submissions and perused the record.

11. The issue as regards limitation as well as readiness and willingness has been answered against the plaintiff. The cause of action according to the plaint arose upon the non response to the notice dated 27th January 2003 issued by the plaintiff seeking execution of the agreement of sale. As per Article 54 of the Limitation Act the period of limitation commences if date is fixed for performance from that date and in event no date is fixed from the date when the plaintiff has notice of refusal of performance. In the present case, admittedly no date has been fixed for performance and as such limitation would commence from the date when the plaintiff has noticed refusal of performance and said notice of refusal has to be established by placing necessary material on record and by leading evidence. In the present case, the plaintiff after filing his affidavit of evidence has not stepped into the witness box and thereafter evidence has been led by the power of attorney holder. It is well settled that the power of attorney cannot depose in respect of the facts which are personal to the knowledge of the principal and can depose only in respect of the facts about which he has personal knowledge or which have been

performed by him as the constituted attorney. In the present case notice of 27th January 2003 was issued by the plaintiff and not by the power of attorney holder. As the plaintiff choose not to make himself available for cross examination, his evidence was discarded. Even if notice has been produced the same was not admitted in evidence and as such the Trial Court as well as the Appellate Court has rightly held that notice has not been proved. From the judgment of the Trial Court and the Appellate Court it does not appear that any arguments were advanced as regards admissibility of the notice and rightly so as plaintiff had not made himself available for cross examination and therefore his evidence could not have been considered. That being so, the suit was rightly held to be barred by limitation in absence of any material produced on record to show the date of notice of refusal of performance when the agreement of sale has been executed in the year 1972.

12. Now coming to the issue of readiness and willingness, the agreement for sale was executed in the year 1972 and the plaintiff was put in possession of the property in the year 1983. Thereafter there was certain revenue proceedings as regards the possession of the defendant and it appears that the transaction was permitted to be regularized. From the year 1983 till the filing of the Suit in the year 2003 there are

absolutely no steps taken by the plaintiff to get the agreement of sale executed. For the purpose of seeking specific performance the continuous readiness and willingness has to be demonstrated. In the present case from the year 1983 till the year 2003 not even a notice was issued to the defendant calling upon him to obtain permission from the Collector and to execute the agreement of sale. By reason of complete silence from the period 1983 till 2003, it cannot be said that there was continuous readiness and willingness on the part of the plaintiff. It is settled that the readiness and willingness has to be inferred from material produced on record to demonstrate that the plaintiff stands by the contract and for the said purpose all attendant factors are to be taken into consideration. The transaction was regularized in the year 1983 and although the obligation was upon the defendant to obtain the permission, there is not even a single communication addressed by the plaintiff to the defendant indicating his willingness to complete the transaction and offer to pay balance money or calling upon him to obtain the permission and comply with his obligation. As such, the Trial Court and the Appellate Court has rightly answered the issue of readiness and willingness as against the plaintiff.

13. The Trial Court has dismissed the counter claim of the

defendant and had held that plaintiff was in possession of the suit property. There was no cross appeal which was filed by the defendant as against dismissal of the counter claim in spite thereof the Appellate Court while answering the issue as regards obstruction by the defendant over the plaintiffs possession has observed that merely on the basis of the name of the plaintiff being mutated in the 7/12 extract, he cannot be presumed to be in possession of the suit property. The said observations is clearly unsustainable and observation to that extent is set aside.

14. Having regards to the discussion above on the basis of the evidence which has come on record the Trial Court and the Appellate Court have rightly appreciated the evidence. As such no substantial question of law arises.

15. Second Appeal stands dismissed. Civil Application does not survive and is accordingly disposed of.

(SHARMILA U. DESHMUKH, J.)