IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.717 OF 2016
WITH
CIVIL APPLICATION NO.1018 OF 2016

Najir Farid Shaikh ... Appellant.
Versus
Ramchandra Sadashiv Sankpal and Anr. ... Respondents.

Mr. Surel S. Shah i/by Mr.Pramod G. Kathane a/w. Mr. Manoj Sawardekar, for Appellant No.2.
Mr. W.M. Samlewale, for Respondent No.1.
Mr. Prashant P. Jadhav, for Respondent No.2.

CORAM : SHARMILA U. DESHMUKH, J.
DATE : FEBRUARY 28, 2024

P. C.:

1. Being dissatisfied by the judgment dated 3rd February, 2016 passed by the Appellate Court in Regular Civil Appeal No.80 of 2014, dismissing the Appeal thereby upholding the judgment and decree of the trial Court dated 18th January, 2014 passed in Regular Civil Suit No.129 of 2012, the original-Defendant No.1 is before this Court.

2. Vide Judgment dated 18th January, 2014, the Trial Court had partly decreed the suit rejecting the claim for specific performance of the agreement and directed the present Appellant to refund the amount received under the agreement for sale along with interest @ 18%.p.a. For sake of convenience the parties are referred to by their status before the Trial Court.

3. The facts of the case are that Regular Civil Suit No.129 of 2012 was filed by the plaintiff seeking specific performance of agreement for sale dated 8th February, 1994 executed by the Defendant No.1 in favour of the Plaintiff. The case of the Plaintiff was that in lieu of demolition of the shop owned by Defendant No.1 during road widening, the Defendant No.2-Sangli Nagar Parishad had assured allotment of Shop No.8A admeasuring 232 square feet. That RCS No.508 of 1991 was filed against the Defendant No.2 by the shop owners which included the Defendant No.1 which delayed the handing over of possession of the shop. Vide Agreement for Sale dated 8th February, 1994, the defendant No.1 agreed to transfer the suit shop being Shop No.8A to the plaintiff for total consideration of Rs.3,75,000/-, out of which sum of Rs.1,00,000/- was paid as earnest money on 8th February 1994, further sum of Rs.1,00,000/- on 14th February, 1994 and the balance Rs.1,50,000/- was to be given at the time of handing over the possession and sum of Rs.25,000/- to be paid after the shop is transferred in the name of the plaintiff. A supplementary deed dated 14th February, 1994 was executed by the Defendant No.1 agreeing that in event of Defendant No.1 being unable to hand over possession of the suit shop due to any legal or technical reason, the Defendant No.1 would return the amount received under the Agreement for Sale dated 8th February, 1994 alongwith interest @18% p.a.

4. It was pleaded that the Defendant No.1 claimed to be unable to accept the balance consideration and transfer the suit shop as he had not received possession of the suit shop from Defendant No.2. It was further pleaded that on 12th December, 2004 from a newspaper report the plaintiff became aware that the suit filed by the defendant No.1 and the other shop-owners was to be compromised and the Defendant No.2 had shown readiness and willingness to handover possession of the shops. It was pleaded that the Plaintiff approached the defendant No.1 and requested him to give possession of the suit shop as per the agreement, however, the defendant No.1 refused the same.

5. The suit came to be resisted by the defendant No.1. It was contended that the Plaintiff had fabricated the document by forging the signature of the Defendant No.1 about which the Defendant No.1 first became aware upon receipt of legal notice dated 30th March, 1998 from the Plaintiff. It was contended that by reply dated 6th April, 1998, the Defendant No.1 sought better particulars of the document which was not received till date. It was contended that in RCS No.508 of 1991, the Plaintiff sought to intervene and had contended that the Plaintiff had deposited the amount with Defendant No.2. The receipt of consideration was denied. It was contended that the possession of the shop had not yet been received by Defendant No.1.

6. The parties went to trial and the Trial Court declined the relief of specific performance holding that the agreement is not enforceable in absence of sanction of Defendant No.2 and granted alternate relief of refund of the earnest money alongwith interest @18%. p.a.

7. As against this, Regular Civil Appeal No.80 of 2014 was preferred by the defendants. The Appellate Court framed the following points for determination, which reads thus:

	" Points	*Findings*
1	*Whether the suit is within limitation ?*	*In affirmative*
2	*Does the plaintiff prove that defendant no.1 had executed an agreement dated 08/02/1994 & thereby to transfer the suit property ?*	*In affirmative*
3	*Does the plaintiff prove that on 04/03/1994, he paid Rs.1,00,000/- to defendant no.1 ?*	*In affirmative*
4	*Does the plaintiff prove that he also paid Rs.20,000/- to defendant no.1 in the inter-mediate period ?*	*In negative*
5	*Does the plaintiff prove that he was and is ready and willing to perform his part of agreement to sale dated 08/02/1994 ?*	*In negative*
6	*Is suit bad for want of statutory notice as required ?*	*In affirmative*
7	*Does the defendant no.2 prove that as it is owner of the suit shop and defendant no.1 lessee, defendant no.1 has not right to sell it to plaintiff and hence agreement dated 08/02/1994 is enforceable ?*	*In affirmative*
8	*Does the plaintiff prove that defendant no.1 had agreed to refund the earnest amount or any payment done by him with interest at the rate of 18% per annum, if defendant no.1 could not give possession of the suit as agreed and hence he is entitled for the alternative prayer of refund of earnest money ?*	*In affirmative*

9	*Whether the impugned judgment and decree dtd.08/02/1994 in RCS no.129/2012 (Spl. C.S.No.10/2005) suffers from any illegality, impropriety or irregularity and requires any interference of this Court ?*	*In negative*
10	*What order ?*	*Appeal dismissed."*

8. The Appellate Court reversed the finding of the Trial Court on readiness and willingness of the Plaintiff, however, declined to interfere with the judgment of the trial Court as regards the refund of the earnest money paid.

9. Heard Mr. Shah, learned counsel for the Appellant No.2, Mr.Samlewale, learned counsel for the Respondent No.1 and Mr.Jadhav, learned counsel for the Respondent No.2.

10. Mr. Shah, learned counsel for the Appellant would submit that the suit was barred by limitation as in 1998, the notice had been issued by the plaintiff to the defendant no.1 in response to which in April, 1998, reply was given by the defendant No.1 denying the execution of the sale-deed. He submits that as such, there was refusal of performance of the agreement for sale in the year 1998 itself and the suit filed in the year 2005 is barred by limitation. He would further submit that once the Appellate Court had reversed the findings as regards the readiness and the willingness, no relief of grant of the refund of the earnest money could have been granted by the Court. He would further submit that the plaintiff had failed to prove the execution of the agreement for sale dated 8th February, 1994 and 14th February, 1994 by examining any witness and the findings of the trial Court that the execution of the agreements as well as the signatures are not disputed by the defendant No.1 is perverse.

11. Considered the submissions and perused the records.

12. The admitted position is that the defendant No.1 had not stepped into the witness box and did not lead any evidence in support of his defence. In the written statement there has been denial to the execution of the agreements as well as to the receipt of the part consideration amount however, the plaintiff during his evidence has produced the agreement for sale dated 8th February, 1994 and 14th February, 1994, which were marked at Exhibits 56 and 57. It is not disputed that no objection to the admissibility of the documents was raised when the agreements were produced by the Plaintiff in his evidence and marked as exhibits having been duly proved. The objection as regards the admissibility of the documents is required to be taken at the first instance when the documents are tendered in evidence, so that if there is any objection to the admissibility or mode of the proof, the plaintiff would have an opportunity of examining further witness to prove the documents in accordance with the law of evidence. In the present case, in the absence of any objection by the defendant no.1, the agreements were admitted in evidence and marked as exhibits. Perusal of the judgment of the trial Court does not indicate that any objection to the inadmissibility of documents or as regards mode of proof was raised even at the time of final arguments. It is not the case of the defendant No.1 that the documents are inadmissible but the submission is that the documents were not duly proved. As such, the objection was as to mode of proof. Once the documents have been admitted in the evidence, the same has been rightly read in evidence. The finding of the Courts as regards the execution of the agreements cannot be faulted.

13. As regards the issue of limitation, the submission is that on 30th March, 1998, notice was issued by the plaintiff to which on 6th April, 1998 reply was given by the defendant No.1 denying the execution of the agreement. The limitation for filing of suit seeking specific performance is governed by Article 56 of the Limitation Act, 1963 which prescribes period of three years from the date fixed for performance and if no such date is fixed when the Plaintiff has notice that performance is refused. Before this Court, the Agreement for sale dated 8th February, 1994 and the supplementary agreement dated 14th February, 1994 were not produced on record. As such the judgment of Trial Court has been perused to ascertain the terms of the agreement. It is noted in the judgment of the Trial Court that as per the Agreement for Sale dated 8th February, 1994, the Defendant No.1 had agreed to hand over the suit shop to the Plaintiff against consideration of Rs.3,75,000/- out of which amount of Rs.1,00,000/- was paid. The agreement was further confirmed by the agreement dated 14th February, 1994, stating that the Defendant No.1 had to inform the Plaintiff on getting possession of the shop. The documents are further supported by receipt for further payment of Rs.1,00,000/-

dated 4th March, 1994.

14. Considering the recitals in the Agreements dated 8th February, 1994 and 14th February, 1994 it appears that no date was fixed for performance as the shop was not yet allotted to the Defendant No.1. The transaction is therefore governed by the second part of the Article and the period of three years will have to be reckoned from the date when the Plaintiff had notice that the performance is refused. The date of notice of refusal of performance is to be established with reference to the material and evidence brought on record. The Defendant No.1 has not stepped in the witness box. In the written statement it is pleaded that in response to the notice dated 30th March, 1998, by reply dated 6th April, 1998, better particulars were sought. From the pleading it is therefore evident that what was sought were better particulars. Learned Counsel for Defendant No.1 would point out the cross examination of the Plaintiff wherein the Plaintiff has admitted that the first notice was given by the Plaintiff in the year 1998 seeking specific performance of the agreement. He has further admitted that in the reply the Defendant No.1 had denied the transaction.

Admittedly neither the notice dated 30th March, 1998 nor the reply is produced on record. The question of limitation is a mixed question of law and fact and the date of notice of refusal of performance is question of fact which had to be proved by cogent evidence. The admission in the cross examination is not sufficient to conclusively establish the date when the Defendant No.1 had refused to perform his obligation particularly when in the cross examination of the Plaintiff, the date of the reply of Defendant No.1 is not mentioned coupled with the averment in the written statement that the Defendant No.1 had merely sought better particulars. There has to be specific denial to the performance of obligation to execute the Sale deed which would be the starting point for commencement of period of limitation. As it is sought to be contended that by reply notice dated 6th April, 1998 there was refusal of performance, the contents of the reply assumes importance and in the absence of the reply being brought on record, in my view, it cannot be conclusively established that on 6th April, 1998 the Plaintiff had notice of refusal of performance. Pertinently in the year 1998, the shop was not yet allotted to the

Defendant No.1 and as such there was no cause of action as on that date for seeking specific performance.

15. Now coming to the contention that upon the finding on the readiness and willingness being reversed by the Appellate Court, the plaintiff was not entitled to the refund of the earnest money. Upon the issue of readiness and willingness being negated, the plaintiff became dis-entitled to the specific performance of the contract. However, there are concurrent findings of proof of execution of Agreement for Sale and receipt of sum of Rs.2,00,000/- as earnest money. There is no case put forth of forfeiture of money in the contract. If the agreement for sale and payment of part purchase consideration is proved, the vendee is entitled to refund of amounts paid in event of non grant of relief of specific performance. The agreement itself provides for interest @ 18% p.a. The Courts have therefore rightly granted the alternate relief of refund of money.

16. Having regard to the discussion above, no substantial question of law arises in the present matter. Appeal stands dismissed. In view of the dismissal of the Appeal, Civil Application does not survive for consideration and same is disposed of.

17. At this stage, request is made on behalf of the Appellant to extend the ad-interim relief which has been operating in his favour since the year 2016. Learned counsel appearing for the Respondents opposes the same. However, as the interim relief has been operating since 2016, I am inclined to extend the same for further period of four weeks from the date of uploading of this order on the official website.

(Sharmila U. Deshmukh, J.)