

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.240 OF 2015
WITH
CIVIL APPLICATION NO.87 OF 2018

Malubai Marutirao Jirge

....Appellant-Applicant

Versus

Vijaylaxmi Vishwasrao Mohite (Decd. Thr.
Legal heirs)

....Respondent

Mr. G.S. Godbole, Senior Advocate a/w. Mr. V. B. Rajure for the
Appellant-Applicant.

Mr. Pralhad Paranjape a/w. Mr. Manish Kelkar for Respondent No.1.

CORAM : SHARMILA U. DESHMUKH, J.
DATED : 5th FEBRUARY, 2024.

P. C. :

1. At the outset learned Senior advocate appearing for the appellant tenders draft amendment incorporating additional substantial questions of law. Draft amendment is taken on record.

2. Being dissatisfied by the judgment of the Appellate Court dated 16th August 2014 passed in Regular Civil Appeal No.75/2011 dismissing the appeal thereby confirming the judgment and decree of the Trial Court dated 24th December 2010 passed in Regular Civil Suit No.456/2006 the original plaintiff is before this Court. For sake of convenience the parties are referred to by their status before the Trial

Court.

3. Regular Civil Suit No.456/2006 was instituted seeking specific performance of agreement of sale dated 20th March 1975. The plaintiff No.1 is the widow and plaintiff Nos.2 to 5 are the children of deceased Marutirao Jirge, who expired on 25th May 2009. Defendant Nos.1 to 7 are the legal heirs of one Vishwasrao Pandurgang Mohite. According to the plaintiffs, the suit property was owned by deceased Vishwasrao Mohite and the said deceased Vishwasrao Mohite agreed to sell the suit property to the deceased Marutirao Jirge at the rate of Rs.2/- per sq. ft. aggregating to Rs.4,800/-. That, on 20th March 1975 a sum of Rs.4,400/- was accepted as part consideration by the deceased Vishwasrao and an agreement for sale came to be executed on 20th March 1975, in the presence of two attesting witnesses. That, the possession of the deceased Marutirao Jirge over the suit plot which was prior to the execution of the agreement for sale dated 20th March, 1975 was confirmed under the said agreement. That, there was no date fixed for execution of the Sale Deed. It was pleaded that the deceased Marutirao and after his demise plaintiff No.1 called upon Vishwasrao to execute the sale deed time and again. It was pleaded that Vishwasrao assured to execute the sale deed after getting the suit property converted into non agricultural land and getting the layout of the suit plot approved from the competent authority and upon

separate property card being prepared for the same. It was pleaded that in the initial lay out 40 ft. wide colony road was shown over the suit plot and as such the sale deed could not be executed. That, with the permission of deceased Vishwasrao, the deceased Marutirao had constructed a house on the suit plot which was demolished by the Municipal Corporation on 5th December 1991 being without permission. That, the deceased Marutirao had instituted special Civil Suit No.31/1992 for injunction and compensation. The suit came to be withdrawn on written assurance given by the Municipal Corporation that no road will be constructed on the suit property and in the revised layout the suit property will be shown as an independent plot. That, a compound wall came to be constructed by the Plaintiffs on four sides of the suit property with an iron gate which was kept locked. It was pleaded that at the instance of the plaintiff, defendant No.1 submitted a proposal for revised lay out for City Survey No.462/B which was sanctioned on 31st January 2003 and as per the revised lay out a plot came to be shown instead of road and separate property card *vide* City Survey No.462/B showing plot No.8 came to be prepared. It was pleaded that despite the plaintiff offering the balance consideration of Rs.400/-to the defendant calling upon them to execute sale deed of the suit plot, the defendants avoided to perform their part of the contract. Hence notice dated 12th

April 2006 was sent to the defendant calling upon them to execute sale deed which came to be denied by defendant No.1. As such Suit for specific performance came to be filed.

4. The Suit proceeded *ex parte* as against defendant Nos. 2 and 3 and Defendant No.1 resisted the Suit by filing his written statement. It was pleaded that there was no agreement for sale which was executed. It was contended that the Suit was barred by limitation. It was further contended that neither agreement for sale was executed nor the possession was handed over to the plaintiffs. As per the defendant their predecessors in title had got a layout sanctioned on 3rd December 1974 and as per the said lay out between plot Nos.3 and 4 there was a 40 feet road which could not have been sold.

5. It was contended that the predecessor of the plaintiffs was Municipal Councillor and political leader and deceased Marutirao and deceased Vishwasrao were acquainted with each other. It was contended that deceased Vishwasrao during time of distress had taken certain amount on loan and as and by way of security had affixed signatures on certain documents which had been misused and a forged and fabricated agreement has been prepared. It was contended that after the revised lay out of 7th February 2003 the suit property has been numbered as plot No.8 and the defendants have obtained construction

permission from the Planning Authority and has started the work of construction.

6. Defendant Nos.4 and 6 have contested the Suit by filing the written statement contending that there was no agreement for sale executed with the plaintiffs and the lay out was not sanctioned on the date of the alleged agreement. It was pleaded that the property being shown as road in the initial lay out could not be sold under the provisions of the Maharashtra Municipal Corporation Act. It was contended that the plaint is silent as to the date on which deceased Marutirao had called upon the deceased Vishwasrao to execute the sale deed and as such the Suit was barred by limitation.

7. The parties went to trial. The Trial Court framed and answered the following issues as under :

<u>Sr. No.</u>	<u>ISSUES</u>	<u>FINDINGS</u>
1.	Whether the description of the suit property is mentioned in para 2 of the plaint is correct ?	Yes
2.	Whether the plaintiffs prove that, late Vishwasrao Pandurang Mohite (predecessor-in-title of the defendants had executed an agreement to sell the suit property in favour of late Marutirao Kallappa Jirage (predecessor-in-title of the plaintiffs) on 20/3/1975 ?	No.

3.	Whether the plaintiffs further prove that their predecessor-in-title was in possession of the suit property as a consequence of part performance of contract and after his death the plaintiffs are in possession of the suit property ?	No.
4.	Whether the plaintiff prove that, they are always ready and willing to perform their part of contract ?	No.
5.	Whether the suit is barred by law of limitation ?	Yes
6.	Whether the defendant No.4 to 6 prove that, the alleged agreement to sell is void ?	Yes
7.	Is plaintiff entitled to the relief of specific performance of contract or in the alternative the refund of earnest money ?	No.
8.	What order and decree ?	As per final order.

8. After considering the oral and documentary evidence on record the Trial Court dismissed the suit negating the issue as regard of the execution of agreement for sale, possession of the predecessor in title of the plaintiffs as well as issued regarding readiness and willingness on the part of the plaintiff. The Trial Court also held that the suit is barred by limitation.

9. As against this, the plaintiffs filed Regular Civil Appeal No.75/2011. The Appellate Court framed the following points for determination:

<u>Sr. No.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1.	Whether deceased Vishwasrao had agreed to sell the suit plot to deceased Marutirao by executing alleged agreement dated 20/3/1975 ?	In the affirmative.
2.	Whether the alleged agreement dated 20/3/1975 was legally enforceable ?	In the negative.
3.	Is the suit within the statutory period of limitation ?	In the negative.
4.	Whether the predecessor in title of the plaintiffs and the plaintiffs were ready and willing to perform his/their part of contract ?	In the negative.
5.	Are the plaintiffs entitled to a decree for specific performance ?	In the negative.
6.	What order ?	Appeal is dismissed.

10. The Appellate Court held that the execution of the agreement for sale dated 20th March 1975 was proved. The Appellate Court held that the said agreement was not legally enforceable, was not within the period of limitation and that there was no readiness and willingness on part of Plaintiffs to perform their part of the contract. As regards the enforceability of the agreement, the first Appellate Court noted the admission of PW-1 that the agreement in question was in respect of DP road and that after the lay out was sanctioned the road on the open plot was handed over to the Municipal Corporation. The

Appellate Court also noted that PW-1 conceded that in the year 1975 deceased Vishwasrao had no right to sell the suit property which was a road between plot Nos.3 and 4 of the sanctioned lay out. On the basis of the admitted factual scenario, the Appellate Court held that there was no plot in which Vishwasrao had saleable interest. The Appellate Court held that the road not getting vested in the Municipal Corporation *ipso facto* does not necessarily imply that it could be subject matter of transfer and as such held that the agreement was not legally enforceable. As regards the issue of limitation, the Appellate Court noted that there is evidence to indicate that in the year 1976-1977 the plaintiff's predecessor in title demanded performance of the agreement which was refused repeatedly and that in the year 1987 master plan was revised and yet till the death of deceased Vishwasrao no action was taken by the predecessor in title of the plaintiffs. The Appellate Court noted that PW-1 in his cross examination has conceded that in the year 1976-1977, the predecessor in title of the defendants was called upon to execute sale deed, yet it was not executed and that the demand was again repeated but in spite of repeated demands sale deed was not executed by the predecessor in title of the defendants. The Appellate Court in view of the admissions held that in absence of any term in the agreement that the sanction of the revised lay out was a condition precedent for the performance of the contract held that the

Suit is barred by limitation as even after notice of refusal the suit was not instituted within 3 years.

11. On the issue of readiness and willingness the Appellate Court held that till the suit notice dated 12th April 2006 came to be issued there was no written communication by the plaintiffs expressing their readiness and willingness to perform their part on the contract or calling upon the defendants to perform their part of contract. The Appellate Court considered that it is brought out in the cross examination of PW-1 that even after the road was deleted in the master plan, there was no communication by the predecessor in title of the plaintiffs to the deceased Vishwasrao calling upon him to execute sale deed. The Trial Court held that the plaintiff has not succeeded in establishing readiness and willingness in respect of an agreement which was executed prior to 30 years.

12. Heard Mr. G.S. Godbole, learned Senior Advocate appearing for the appellant and Mr. Pralhad Paranjape for Respondent No.1.

13. Mr. Godbole has taken this Court through the findings of the Trial Court and the Appellate Court. He would submit that the substantial questions of law which would arise is in respect of the

enforceability of the agreement as the statutory provisions defining private street and public street within the meaning of Section 2(50) and 2(52) of the Maharashtra Municipal Corporation Act indicates that road shown in private layout does not vest in the Municipal Corporation without any declaration and/or acquisition as per the provisions of law. He would submit that in the year 1974 the initial layout was prepared and an area 2400 sq. feet was shown as a road with a dead end. He submits that the agreement was executed on 20th March 1975 and consideration of Rs.4,400/- was paid. As regards the possession, he would contend that possession was proved from the fact that a house was constructed which came to be demolished by the Corporation as against which Special Civil Suit No.131/1992 for injunction and damages was filed against the Corporation in which according to him on 30th August 2002 a compromise was entered into and a fresh layout came to be sanctioned on 31st December 2003 resulting in road being shown as plot No.8. He submits that in the year 2004, the plaintiffs building plans were sanctioned and commencement certificate was obtained on 17th March 2004. He submits that as sale deed was not executed, notice came to be issued on 12th April 2006 and as the defendant failed to execute sale deed the Suit was filed on 29th April 2006. He would further submit that as per the provisions of Article 54 of the Limitation Act, the period of limitation

would commence from the date of notice of refusal of performance as no date was fixed for performance in the agreement. He submits that the conduct on the plaintiff would show that he was ready and willing to perform the agreement. Without prejudice to the earlier submissions, he submits that in view of the provisions of Section 43 of the Transfer of Property Act upon the interest being subsequently acquired by the defendants the specific performance of the agreement for sale deserves to be decreed. In support thereof he relies on *Tanu Ram Bora vs. Pramod Ch. Das (Dead) through legal Representatives and Ors.,(2019) 4 SCC 173*.

14. Considered the submissions and perused the record.

15. The Appellate Court has reversed the finding of the Trial Court on the issue of execution of agreement for sale dated 20th March, 1975 and as such the execution of agreement has been proved. The Appellate Court has dismissed the Appeal holding that the agreement was not legally enforceable, the suit was barred by limitation and the Plaintiffs were not ready and willing to perform their part of the agreement. The undisputed fact is that at the time of execution of the agreement for sale dated 20th March 1975, in the sanctioned layout the suit plot was shown as road. Without the layout being revised, irrespective of whether the road was private road or public street and irrespective of whether the road vests

in the municipal corporation, the plot shown as road could not have been the subject matter of transfer. The agreement for sale does not make the sale contingent upon the revised layout being sanctioned revising the suit property from road to an independent plot. The Appellate Court was therefore right in holding that the agreement for sale was not enforceable as the same was in respect of road. As regards the issue of limitation, Article 54 of the Limitation Act prescribes a limitation of 3 years for specific performance of contract which commences from the date fixed for performance and if no such date is fixed when the plaintiff has notice of refusal of performance. Admittedly in the instant case, no date is fixed for performance and the limitation would commence from the date when the Plaintiffs had notice of refusal of performance. The agreement for sale was executed on 20th March, 1975, the revised layout was sanctioned in December, 2003 and the notice seeking specific performance was issued on 12th April, 2006 to which the Defendant No 1 responded by reply dated 20th April, 2006 denying the execution of the agreement for sale dated 20th March, 1975. In the plaint, the cause of action is pleaded to have arisen when the reply dated 20th April, 2006 was sent by the Defendant No 1 denying the execution of the Agreement for Sale.

16. Admittedly from the year 1975 till the year 2006 there is no written notice sent by the Plaintiffs or their pre-decessor in title calling

upon the Defendants or their pre-decessor in title to perform their part of the contract and execute the sale deed. Mr. Godoble, learned Senior Advocate would contend that the limitation would commence from the date of reply of the Defendant No 1 i.e from 20th April, 2006 as that was the time when there was refusal of performance. In this context, the Trial Court as well as the Appellate Court has considered the vital admissions given by PW-1 in his cross examination that the agreement for sale was in respect of DP road and that the deceased Marutirao had made an inquiry that the said DP road belong to the municipal corporation. PW-1 has further admitted that demand was made for execution of the sale deed as per agreement for sale in the year 1976-1977 and as per demand the sale deed was not executed. He has further admitted that repeated demands were made for execution of the sale deed from time to time and despite repeated demands sale deed was not executed. Based on the admissions of PW-1, the Appellate Court has held that it is not the case of postponement of the execution of sale deed in view of the pending of revised layout but refusal of performance as there is no term in the agreement for sale as regards the revised layout.

17. It is well settled that under Section 100 of CPC, this Court can interfere with finding of fact where there is perversity in appreciating the evidence on record. In the present case, the Trial Court as well as the

Appellate Court has rightly appreciated the evidence of PW-1 that there was refusal to perform the agreement when in the year 1976-1977 and thereafter repeated demands for execution of the sale deed was not complied with. It is also not disputed that structure was constructed by the deceased Marutirao on the said plot despite the same being shown as road and as such the contention that performance was deferred to the sanctioning of the revised layout cannot be countenanced. The Appellate Court has rightly held that if the sale deed was to be executed after the revised layout was sanctioned, there was no question of demand of performance. The admission of PW-1 is clear and explicit that in spite of repeated demands the sale deed was not executed. Once there is an admission on record that there was demand for execution of the sale deed which demand was not complied with by the defendant the same would constitute refusal of performance of the agreement and as such the period of limitation would commence from that date. The despatch of legal notice in the year 2006 will not enure to the benefit of the plaintiffs in view of the admissions of PW-1 as the plaintiffs had notice of refusal in the year 1976-1977 itself. The suit not being instituted within a period of 3 years was clearly barred by limitation. The Appellate Court and the Trial Court on the basis of evidence which has come on record had rightly dismissed the Suit. The decision in case of *Tanu Ram Bora vs. Pramod*

Ch. Das (Dead) through legal Representatives and Ors (supra) was pressed into service as regards the alternative submission on Section 43 of Transfer of Property Act. In view of the discussion above, the question of applicability of Section 43 of Transfer of Property Act does not arise for consideration.

18. Having regard to the discussion above, no substantial question of law arises in the present case. Appeal stands dismissed. In view of dismissal of the Appeal, Civil Application does not survive and stands disposed of.

(SHARMILA U. DESHMUKH, J.)