



IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

SECOND APPEAL NO. 89 OF 2010

Dharmaraj S/o Rambhau Chikne
Age : 51 years, Occ : Agri.,
R/o Gangawadi, U/v Talwada,
Tq. Gevrai, Dist. Beed.

..APPELLANT

-VERSUS-

1. Asaram s/o Kashinath Jadhav
age : 33 years, Occ : Agril.,
R/o Gangawadi, U/v. Talwada,
Tq. Gevrai, Dist. Beed.
2. Motiram s/o Kashinath Jadhav
Age : 42 years, Occ : Agril.,
R/o Gangawadi, U/v Talwada,
Tq. Gevrai, Dist. Beed.
3. Shantabai w/o Kashinath Jadhav
Age : 52 years, Occ : Agri.,
R/o As above.
4. Savitribai w/o Baburao Kadam
Age : 43 years, Occ : Agril.,
R/o Limbgaon, Tq. & Dist. Beed.

..RESPONDENTS

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Advocate for appellant : Mr. M.M. Patil (Beedkar)
Advocate for Respondent Nos.1 to 4 : Ms.Rekha Chaudhari h/f Mr. S. S.
Chaudhari

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CORAM : ROHIT W. JOSHI, J.

RESERVED ON : 18.03.2025

PRONOUNCED ON : 25.06.2025

JUDGMENT :

1. The present second appeal arises out of a suit for specific

performance of contract filed by the present appellant in which the respondents had filed a counter claim for possession. The suit for specific performance filed by the appellant came to be dismissed and the counter claim for possession filed by the respondents came to be decreed. First Appeal preferred by the appellant, being Regular Civil Suit No.1136/1996 is also dismissed. In such circumstances, the present second appeal is filed challenging the said concurrent decrees. The appeal is admitted vide order dated 13th April, 2011 on the following substantial questions of law :-

- "i) Whether the counter claim filed by the present respondents was maintainable in view of provisions of Order 23 Rule 3-A of the Code of Civil Procedure ?
- ii) Even if the plaintiff in its written statement had not taken the plea of limitation, whether the Court should not have considered the same in view of Section 3 of the Indian Limitation Act, 1963 ?
- iii) Whether the plaintiff in the facts and circumstances of the case is entitled for the relief of specific performance ?"

2. The respondents are owners of the suit property, which is an agricultural land bearing survey no.94/A2 admeasuring 5 acres and 47 gunthas. The suit property is ancestral property of the defendants. The plaintiff claims that he had entered into an oral agreement of sale with respect to suit property with late Kashinath Jadhav, father of

defendant nos.1 and 2, husband of defendant no.3 and son of defendant no.4 for a valuable consideration of Rs.13,000/- on auspicious day of Gudi Padwa i.e. on 08.04.1978. The plaintiff claims that he had paid earnest amount of Rs.1,000/- at the time of agreement and was placed in possession of the suit property. He claims that balance amount of Rs.12,000/- which was to be paid at the time of execution and registration of sale deed was paid although the sale was not executed and registered since the vendor Kashinath was suffering from tuberculosis and was in need of money for his treatment. He claimed that Kashinath was trying to disturb his possession over the suit property, and therefore, a suit for perpetual injunction was instituted by him against Kashinath, being Regular Civil Suit No.238/1978 in which compromise decree was passed on 26.06.1978.

3. It will be pertinent to mention here that Kashinath expired on 17.11.1981. During the life time of Kashinath his sons i.e. defendant nos.1 and 2 filed a suit for partition and separate possession, being Regular Civil Suit No.865/1980. In the said suit, the present plaintiff was arrayed as defendant no.4. Apart from Kashinath, present defendant no.3 and three other purchasers of different properties were parties to the said suit for partition. The learned trial court had dismissed the suit for partition holding that all alienations including the transactions between Kashinath and present plaintiff were for legal

necessity and that the purchasers including the present plaintiffs had made payment of consideration to Kashinath. In the appeal preferred by defendant nos.1 and 2 (plaintiffs in the said suit), the decree passed by the learned trial court was reversed holding that alienations were without legal necessity and accordingly, the decree for partition and separate possession came to be passed. The present appellant and other purchasers had filed two separate second appeals before this Court, which are decided simultaneously by a separate judgment.

4. The learned trial court has disbelieved the case of the plaintiff regarding agreement *inter se* between plaintiff and deceased Kashinath, consequently the payment of earnest money and balance sale consideration is also disbelieved. As regards, compromise decree in Regular Civil Suit No.238/1978, it is held that the same is obtained by practicing fraud. The learned trial court has also recorded that the agreement was hit by provisions of the Maharashtra Resettlement of Project Displaced Persons Act, 1976. Accordingly, the suit was dismissed and counter claim for possession was decreed. Although, issue with respect to limitation is not framed, the learned trial court has discussed the aspect of limitation elaborately in paragraph 7 of the judgment. It is held that according to the plaintiff, Kashinath during his life time was threatening to dispossess plaintiff, and therefore, Regular Civil Suit No.271/1978 was required to be filed. This according to the learned

trial court indicated refusal on the part of Kashinath to execute the sale deed. The trial court has held that the limitation of three years for filing suit for specific performance of the contract commenced in the year 1978 itself. The learned trial court has further held that the suit for partition was filed by sons of Kashinath i.e. defendant nos.1 and 2 and in that suit, Kashinath had filed written statement supporting the cause in the plaint, which again clearly indicated that he was disputing the agreement, which also gives rise to cause of action.

5. As regards, the learned first appellate court, it has concurred with the findings recorded by the learned trial court and has dismissed the appeal accordingly. In such circumstances, the present second appeal came to be filed, wherein aforesaid substantial questions of law are framed.

Question No.(ii) :-

6. Section 3 of the Limitation Act, 1963 imposes an obligation on every court to dismiss a suit, which is barred by limitation, although limitation may not have been set up as a defence. The question of limitation is a mixed question of law and facts. Therefore, inquiry on facts is necessary to decide the issue of limitation. Since inquiry on facts is essential, it is necessary to have a look at the rival pleadings and

evidence led by the parties. In the present case, however, it is apparent from the plaint averments itself as also from the contentions canvassed by the plaintiff that after entering into agreement of sale on 08.04.1978, that vendor, Kashinath tried to disturb his possession, as a consequence of which, a suit being Regular Civil Suit No.238/1978 was filed by the plaintiff seeking decree for perpetual injunction against Kashinath for protection of his possession. In the said suit, a compromise decree came to be passed on 26.06.1978 i.e. on very day on which the suit was filed. Thereafter, during life time of Kashinath, suit for partition and separate possession, being Regular Civil Suit No.865/1980 was filed by defendant nos.1 and 2, who are sons of Kashinath. Kashinath and his wife were arrayed as defendant nos.1 and 2 in the said suit. The plaintiff has alleged that the suit was filed by minor sons of Kashinath in collusion with him and his wife. Kashinath had filed written statement against the plaintiff who is defendant no.4 in the said suit. Kashinath has expired on 17.11.1981. Thus, there was refusal on the part of Kashinath to honour the agreement during his lifetime i.e. prior to 17.11.1981. This refusal is the starting point of limitation. The refusal is in the year 1978 and 1980. The plaintiff, who is defendant no.4 in the suit for partition, was aware about this. The suit for specific performance is filed in the year 1987. Since the date for execution of sale deed was not fixed, the refusal to abide by the agreement will be starting point of limitation. The suit is not filed

within a period of three years from the refusal and is clearly barred by limitation. The fact that the suit is barred by limitation is apparent from plaint averments, which refer to the earlier compromise decree as well as the suit for partition and collusion between deceased Kashinath and present defendant nos.1 to 3, who are plaintiff nos.1 and 2 and defendant no.2 in the said suit. The substantial question of law is thus answered in favour of respondents and against the plaintiff.

Question No. (iii):-

7. Since question of law pertaining to limitation is answered against the appellant, substantial question of law No.(iii) will also have to be answered against him in view of the fact that the suit was barred by limitation. It will be pertinent to mention that in the earlier suit for partition and separate possession filed by defendant nos.1 and 2, the allegations with respect to fraud and non-payment of consideration are held to be not proved. However, it is not necessary to elaborate further on this aspect since the question of limitation is answered against the plaintiffs.

Question No.(i):-

8. As stated above, a compromise decree was passed in Regular Civil Suit No.238/1978, the contention of defendant nos.1 to 3 is that the said compromise decree was obtained by practicing fraud.

The learned trial court has recorded a finding on the said issue in favour of the defendants. Based on this finding, the decree for possession in respect to the suit property was passed in the counter claim filed by the defendants.

9. As regards compromise decree in Regular Civil Suit No.238/1978, it must be noted that the defendants are not parties to the said suit. The compromise decree is not for specific performance of contract and it also does not speak about the protection of possession of plaintiff under Section 53A of the Transfer of Property Act. It is a simple decree for perpetual injunction according to which Kashinath has agreed not to dispossess plaintiff without due process of law.

10. Kashinath himself could not have filed a suit claiming that compromise decree was obtained by fraud. The defendants as his legal representatives also cannot raise the said issue. However, the defendants are claiming right over the suit property in their individual capacity by stating that the suit property was an ancestral land wherein they had independent right as coparceners by birth. In view of clear stand of the defendants claiming clear right over the suit property, it was open for them to challenge the compromise decree. The bar under Order XXIII Rule 3A of Code of Civil Procedure will not be applicable having regard to the nature of property in which the defendants can

claim independent right.

11. Even if, it is assumed that defendants cannot challenge the compromise decree, still they will be entitled for decree for possession. It is undisputed that alleged agreement between plaintiff and Kashinath was an oral agreement. It is undisputed that the agreement has not culminated in the sale deed. The suit for specific performance filed by plaintiff is liable to be dismissed as time barred. Protection under Section 53A cannot be claimed by the plaintiff since the alleged agreement is not a written agreement. The ownership of defendants cannot be disputed. The plaintiff can avoid decree for possession only on succeeding in obtaining decree for specific performance of contract or by seeking shelter under Section 53A. The plaintiff is not entitled to a decree for specific performance of contract as also to seek shelter under Section 53A of the Transfer of Property Act. Compromise decree in the earlier suit will also not come to the rescue of plaintiff since it is a matter decree for specific performance not for protection of possession under Section 53A of the Transfer of Property Act. Consequently, even if the substantial question of law is answered in favour of plaintiff and compromise decree is maintained, the decree for possession which is granted in the counter claim is inevitable. It is reiterated that compromise decree is for perpetual injunction against forcible dispossession.

12. In view of the answers to the substantial questions of law given above, second appeal deserves to be dismissed and is dismissed accordingly with costs.

13. Civil Application, if any, stands disposed of.

[ROHIT W. JOSHI]
JUDGE

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