

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 824 OF 2024
WITH
INTERIM APPLICATION NO. 16029 OF 2024

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Anil Punjaji More and Ors.	...	Appellants/applicants
V/s.		
Shivaji Eknath Aher and Ors.	...	Respondents

Mr. Pramod Joshi, for the appellant in SA/824/2024 and for applicants in IA

Mr. S.G. Deshmukh i/by Shubhankar Avhad, for the respondents.

CORAM : N.J. JAMADAR, J.

DATE : 9TH JUNE 2025.

Oral Order :

1. Heard the learned counsel for the parties.
2. This Second Appeal is directed against a judgment and decree dated 29th August 2024 passed by the learned District Judge, Niphad in Regular Civil Appeal No. 102 of 2019 whereby the learned District Judge was persuaded to set aside the judgment and decree dated 19th June 2019 passed in Regular Civil Suit No. 55 of 2014, instituted by the respondent-Plaintiffs for recovery of possession of the suit property.

3. Eknath, the predecessor in title of the respondents, was the holder of the suit land. An agreement for sale of the suit land came to be executed on 19th March 1966 in favour of the predecessor in title of the appellants. Possession of the suit property was delivered under the said agreement for sale.

4. Alleging that the predecessor-in-title of the respondents committed default in the performance of the contract, the appellants instituted a suit, being Regular Civil Suit No. 29 of 1980, for specific performance of the contract contained in the agreement dated 19th March 1966. The said suit was dismissed by the trial Court by a judgment and order dated 16th October 1986. The appellant-plaintiffs therein carried the matter in appeal before the District Court in Civil Appeal No. 56 of 1987. The respondents filed a cross objection seeking possession of the suit property.

5. By a judgment and order dated 21st June 1991, the said appeal was dismissed. Cross-objection was allowed, and the appellants were directed to deliver possession of the suit property.

6. The appellants preferred Second Appeal, being Second Appeal No. 409 of 1991. By an order dated 21st April 2014, this Court was

persuaded to dismiss the appeal. The suit for specific performance of the contract instituted by the appellants stood dismissed. The cross-objection filed by the respondents was also dismissed, and, thereby the decree passed by the District Judge directing the appellant to deliver the possession of the suit property to the respondent was quashed and set aside.

7. Thereafter, on 26th May 2014, the respondent instituted the instant suit for recovery of possession of the suit property.

8. The learned Civil Judge was persuaded to dismiss the suit observing, inter alia, that the suit was barred by the law of limitation, the principle of constructive res judicata and also under the provisions of Order II Rule 2 of the Code. The learned Civil Judge was of the view that, the respondent ought to have filed counter-claim in R.C.S No. 29 of 1980, and failure to do so entailed the consequence of the remedy being barred by limitation.

9. The learned District Judge interfered with the order passed by the Trial Court holding that the Trial Court ought to have considered the bar of limitation from the perspective of the provisions contained in Article 65 of the Limitation Act. It was nowhere the case of the

appellants / defendants that the possession of the appellants/defendants had become adverse to that of the plaintiffs. Thus, the suit was not barred by limitation. Since the R.C.S No.29 of 1980 was dismissed on the ground that the plaintiffs had failed to prove readiness and willingness, the appellants were not entitled to protect possession under Section 53A of the Transfer of Property Act, 1882

10. Mr. Joshi, learned counsel for the appellants, submitted that the Appellate Court committed a manifest error in law in interfering with a well-reasoned order passed by the trial Court. Only the issue of limitation was dealt with; that too in a perfunctory manner. The aspects of bar of constructive res judicata and Order II Rule 2 of the Code were not at all considered. Since the respondents had not filed the counter-claim after the appellants instituted the suit for specific performance and the decree for possession was set aside by the Second Appellate Court, the remedy to seek possession was clearly lost. Therefore, substantial questions of law arise for determination.

11. Mr. Deshmukh, the learned counsel for the respondents, countered the submissions of behalf of the appellants. Inviting the attention of the Court to the developments in the proceedings, since

the execution of the agreement for sale in the year 1966, Mr. Deshmukh submitted that the order passed by this Court in Second Appeal No. 409 of 1991 was restricted to examining the legality of the order passed by the Appellate Court on cross-objection, especially the maintainability of the cross-objection. The said order, under no circumstances, operates as a res-judicata on the issue of recovery of possession of the suit property.

12. The First Appellate Court, in the considered view of this Court, has correctly appreciated the controversy. Once the suit for specific performance of the contract was dismissed on the ground that the plaintiff was not ready and willing to perform his part of the contract, such plaintiff is not entitled to take refuge under the doctrine of Part Performance contained in Section 53A of the Transfer of Property Act, 1882.

13. A profitable reference in this context can be made to a decision of the Supreme Court in the case of D.S.Parvathamma V/s. A. Srinivasan¹ wherein it was enunciated that if a suit for specific performance of the contract filed by the transferee has been dismissed on merits and his disentitlement to seek enforcement of the contract

¹ (2003) 4 SCC 705

has been adjudicated upon by a judicial verdict, it cannot be said that the transferee has performed or is willing to perform his part of the contract. It would be a contradiction in terms. On the suit for specific performance of contract having been dismissed, such a plea is not available to raise.

14. The thrust of the submission of Mr. Joshi was that de hors Section 53A of the Transfer of Property Act, in view of the order passed by this Court in Second Appeal No. 409 of 1991, the remedy of the respondents to seek possession was lost. I find it difficult to accede to this submission.

15. A suit for specific performance of the contract, of necessity, proceeds on the premise of absolute and unqualified admission of the title of the vendor. Learned District Judge was wholly justified in observing that, at no point of time, the appellants claimed that their possession became adverse to that of the Respondents-Plaintiffs. Nay, such ground could not have been taken by the appellants.

16. The observations of this Court in the second appeal were indeed restricted to the justifiability of filing the cross-objection, when a counterclaim was not filed by the respondents. The observations and

findings in the said order do not amount to a determination on the proprietary title of the respondents and their remedy to seek the possession of the suit property after the dismissal of the suit for specific performance of the contract. The appellants have no semblance of right to hold on to the suit property after their suit for specific performance of the contract came to be dismissed on merits. Thus, no substantial question of law arises for consideration.

17. The Second Appeal stands dismissed.

17. Interim Application No.16029 of 2024 also stands dismissed.

18. At this stage, Mr. Joshi, the learned counsel for the appellants, seeks continuation of interim order passed by the first appellate Court.

19. The interim order passed by the first Appellate Court on 29th August 2024 shall continue to operate for a period of six weeks from today.

(N.J. JAMADAR, J)