

**Narendra Vs. Tulsabai and Others**

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**SooperKanoon Citation :** [sooperkanoon.com/1185079](http://sooperkanoon.com/1185079)

**Court :** Mumbai Nagpur

**Decided On :** Feb-23-2016

**Judge :** A.B. Chaudhari

**Appeal No. :** Second Appeal No. 180 of 2014

**Appellant :** Narendra

**Respondent :** Tulsabai and Others

**Advocate for Def. :** Mr. Bhalerao

**Advocate for Pet/Ap. :** Mr. Khajanchi

**Judgement :**

1. Being aggrieved by judgment and order dated 29.01.2014 passed in Regular Civil Appeal No.54/2005, passed by District Judge-1, Pandharkawda, thereby confirming judgment and order dated 20.04.2005 in Regular Civil Suit No.140/2000, passed by Jt. Civil Judge (Junior Division), Wani by which the suit filed by the appellant-plaintiff was dismissed and the counter claim was partly decreed directing delivery of possession of the suit property to the defendants, the present appeal has been filed by the unsuccessful plaintiff.

**FACTS**

2. The plaintiff-appellant filed a suit for specific performance of contract in respect of field survey No.77/1 area 1.81 HR owned by deceased Bapurao istari Parshive, Rajeshwar and Vitthal Bapurao Parshive. The deceased Rajeshwar and Vitthal were the sons of the deceased Bapurao. According to the plaintiff, by agreement dated 14.02.1986, all the three, Bapurao, Rajeshwar and Vitthal had agreed to sell the suit land to the plaintiff for Rs.45,000/- and he had paid in all Rs.30,400/- from time to time. It was agreed that the sale deed would be completed on 30.04.1987 and that is why possession was handed over to the plaintiff. A Regular Civil Suit No.134/1986 was filed by a Cooperative Society for claiming dues from the deceased Rajeshwar and there was a prayer for injunction from selling the suit land and that Rajeshwar had given an undertaking not to alienate the suit property. According to the plaintiff, because of the pendency of the civil suit, the registered sale deed could not be executed and finally suit was dismissed on 30.04.1994. It is, thereafter by notice dated 22.04.1987, the proposed vendors were called upon to execute the sale deed. By that time, all i.e. Bapurao, Rajeshwar and Vitthal had died and the suit obviously was filed against the widow of Bapurao who also died during the pendency of the suit and the legal heirs were added as defendants. In the written statement that was filed by defendant nos. 1 to 7, it was contended that the suit property was ancestral property of the deceased and the defendants had a share in the suit property. The agreement was denied so also the receipt of money or delivery of possession. According to the defendants, the deceased Rajeshwar was a drunkard and addicted to gambling. He used to execute any document about his property. Even about house, he has executed a document with Vitthal Choure. The father Bapurao was deaf and dumb and an old aged person. There was no legal necessity to agree to sell the ancestral property. The suit was barred by limitation and the market price of the property was more than Rs.1,00,000/- per acre. The trial Judge, thereafter, framed the issues and tried the suit and dismissed it. The appellate Court held that the agreement was not entered into by Vitthal since he had never signed the document and it was Bapurao and Rameshwar who had agreed to sell. The Courts below concurrently held that the plaintiff was not ready and willing to perform his part of contract and further that the suit was not within limitation. Both the Courts concurrently found that both the defendants were entitled to a decree of possession.

## SUBMISSIONS:

3. In support of the appeal, Mr. Khajanchi, learned counsel for the appellant, submitted that by conduct of the original proposed vendors, the time was never the essence of contract and the suit property being the immovable property and the appellant-plaintiff having paid the substantive amount of Rs.30,400/-, out of Rs.45,000/-, there was no reason not to grant relief of specific performance as claimed. He then submitted that the courts below committed error in holding that there was no readiness and willingness for performing their part of contract. He, relied upon decision in the case of **Biswanath Ghosh (dead) by Lrs. And others..vs..Gobinda Ghosh Alias Gobindha Chandra Ghosh and others; 2014 (3) SCALE 630** and prayed for allowing the appeal.

4. Per contra, Mr. Bhalerao, learned counsel for the respondents-defendants, vehemently opposed the appeal and supported the impugned judgment. He submitted that there are concurrent finding of facts recorded by both the Courts below. As such the appeal deserves to be dismissed since the findings are not perverse. He then submitted that even according to the plaintiff, the agreement was of the date 14.02.1986 and admittedly it was not signed by Vitthal and at any rate, the defendants were legal heirs of the deceased Bapurao and had a share in the suit property as the property was ancestral property of Bapurao and, therefore, neither Bapurao nor Rajeshwar were competent to execute the agreement of sale without shares of the defendants being defined. The shares not being defined, there could be no question of directing specific performance of contract even in respect of the part of property. The learned counsel then contended that having taken possession, the plaintiff remained quiet for over a period of 10 years and thereafter he issued the notice for the first time claiming performance in the year 1996 and also filed the suit in the year 1996. The plaintiff did not take any action for all these 10 years for claiming specific performance of contract. For this, he relied upon decision of the Supreme Court in **Manjunath Anandappa Urf. Shivappa Hansi..vs..Tammanasa and Ors.; 2003 (3) ALL MR 303 (SC)** and in particular, paragraph 30 thereof. He then contended that even looking at the case of the plaintiff, the demands were never made for discharging loan liability of the society, which was to be cleared by up by 30.04.1987 but then as agreed in the

agreement, entire amount was not paid so that the terms of the agreement could be complied with i.e. by discharging the loan liability, if any, and then performance could have been claimed. According to him, the limitation to file specific performance of contract never stopped merely because the society had filed the suit or Rajeshwar had given an undertaking not to alienate the property and the suit was obviously barred by limitation. He relied on decision in the case of **Ahmmadsahab Abdul Milla (Dead) by LRs...vs..Bibijan and others; 2009 (3) CLJ 184.**

5. Upon hearing learned counsel for the rival parties, I frame the following substantial questions of law:

|                                                                                                                                                                                                                                                                                               |                                   |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------|
| (i) Whether the plaintiff was ready and willing to perform his part of contract and his conduct in not filing the suit for a period of 10 years having obtained possession of the suit property, disentitles him from claiming any discretionary relief for specific performance of contract? | <b>Plaintiff was not willing.</b> |
| (ii) Whether the plaintiff was guilty of breach of terms and conditions of the agreement namely; payment of entire amount of consideration to enable Rajeshwar to make payment of dues of the society?                                                                                        | <b>In the Affirmative.</b>        |

|                                                                                                                |                            |
|----------------------------------------------------------------------------------------------------------------|----------------------------|
| (iii) Whether finding recorded by the Courts below that the suit was barred by limitation is legal and proper? | <b>In the Affirmative.</b> |
| (iv) What order?                                                                                               | <b>As per final order.</b> |

6. I have perused the findings of facts recorded by the courts below. I do not find that the finding recorded by the Court below can be said to be not based on evidence and neither they are perverse insofar as the question of readiness and willingness is concerned. Admittedly, the agreement was allegedly executed on 14.02.1986 and the notice for execution was, for the first time, issued by the appellant-plaintiff in the year 1996 i.e. almost after 10 years asking them for specific performance. Admittedly, the appellant has been in possession of the suit property and did not make full payment, as stated in the agreement, on or before 30.04.1987. The fact that the suit was filed after 10 years from the date of agreement that too without making full payment as per agreement, clearly indicate that the appellant was not ready and willing to perform his part of the contract. Paragraph 30 from the decision in the case of **Manjunath** (supra), would be apt in the situation. I quote paragraph 30 as under:

30. There is another aspect of the matter which cannot be lost sight of. The plaintiff filed the suit almost after six years from the date of entering into the agreement to sell. He did not bring any material on records to show that he had ever asked defendant No. 1, the owner of the property, to execute a deed of sale. He filed a suit only after he came to know that the suit land had already been sold by her in favour of the appellant herein. Furthermore, it was obligatory on the part of the plaintiff for obtaining a discretionary relief having regard to Section 20 of the Act to approach the court within a reasonable time. Having regard to his conduct, the plaintiff was not entitled to a discretionary relief.

7. In this connection, it is also worthwhile to note that the property was ancestral property of Bapurao and the fact that the agreement was not signed by Vitthal is also undisputed. Therefore, Rajeshwar and Bapurao were not competent to execute any agreement of sale with the appellant, particularly when all the

defendants, legal heirs of Bapurao, Rajeshwar, Vitthal had a share in the suit property, which was undivided as an agreement in which all other shareholders had a share could not be enforced by a Court of law. It is clearly borne out of the record that by 30.04.1987 i.e. a period of almost one year and two months, the entire amount of consideration was required to be paid by the appellant-plaintiff.

It is an admitted position that the plaintiff did not pay entire amount as per the agreement which clearly means that the appellant was not ready and willing to perform his part of contract. I, therefore, answer question nos. 1 and 2 in the affirmative.

8. Insofar as the aspect of limitation is concerned, in this case, it is seen that the last date of performance of agreement in entirety was 30.04.1987. It is not in dispute that the appellant did not make entire payment by that date. The date having been fixed for the performance of agreement namely; 30.04.1987, the limitation started running and ended by 30.04.1990. The suit was filed in the year 1996. The explanation given by the learned counsel for the appellant that because of pendency of the Regular Civil Suit No. 28/1986 filed by the society against Rajeshwar and the undertaking given by him not to alienate the property, the limitation would stop running, is misconceived.

9. It would be apt to look into the observations of the apex Court in **Van Vibhag Karmachari Griha Nirman Sahkari Sanstha Maryadit (Registered).vs.Ramesh Chander and others; (2010) 14 SCC 596**, paragraphs 26 to 29 in particular, which read thus:

26. The appellant, on noticing the same, filed a suit on 11.2.1991 but he did not include the plea of Specific Performance. The appellant wanted to defend this action by referring to two facts

(i) there was an acquisition proceeding over the said land under the Land Acquisition Act and (ii) in view of the provisions of the Ceiling Act, the appellant could not have made the prayer for Specific Performance.

27. The aforesaid purported justification of the appellant is not tenable in law. If the alleged statutory bar referred to by the appellant stood in its way to file a suit for Specific Performance, the same would also be a bar to the suit which it had filed claiming declaration of title and injunction.

28. In fact, a suit for Specific Performance could have been easily filed subject to the provision of Section 20 of the Ceiling Act. Similar questions came up for consideration before a Full Bench of Gujarat High Court in the case of Shah Jitendra Nanlal v. Patel Lallubhai Ishverbhai [AIR 1984 Guj 145]. The Full Bench held that a suit for Specific Performance could be filed despite the provisions of the Ceiling Act. A suit for Specific Performance in respect of vacant land in excess of ceiling limit can be filed and a conditional decree can be passed for Specific Performance, subject to exemption being obtained under Section 20 of the Act. (Paras 1113).

29. We are in respectful agreement with the views of the Full Bench in the above mentioned decision and the principles decided therein are attracted here.

In the light of the above observations, it is clear that the limitation never stops and as contended by the learned counsel for the appellant-plaintiff it started running from 30.04.1987 onwards. The suit was, therefore, obviously barred by time by limitation and, therefore, question no.3 will have to be answered in affirmative.

9. In view of above, following order is passed.

## **ORDER**

Second Appeal No. 180/2014 is dismissed.

No order as to costs.

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