

CASE NO.:
Appeal (civil) 1492 of 2006

PETITIONER:
Gunwantbhai Mulchand Shah & Ors.

RESPONDENT:
Anton Elis Farel & Ors.

DATE OF JUDGMENT: 06/03/2006

BENCH:
S.B. SINHA & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T
(arising out of SPECIAL LEAVE PETITION (CIVIL) NO. 24643 OF 2004)

P.K. BALASUBRAMANYAN, J.

Leave granted.

1. This appeal is by the plaintiffs. Their predecessor-in-interest along with another entered into an agreement dated 18.12.1964 for purchase of the plaint scheduled property. The agreement was registered. The agreement was to be performed by the predecessor-in-interest of defendants 1 to 3, the other party to the agreement, within three months of the date of getting due permission for such sale, presumably from other co-owners. On 5.10.1968, a subsequent agreement was executed. It was stated that possession was transferred to the predecessor of the plaintiffs, in pursuance of the agreement for sale. An intending purchaser from the plaintiffs issued a public notice on 7.11.1993 inviting objections, if any, to the purchase to be made by him. Defendants 1 to 3 objected. In the light of this objection dated 19.11.1993, the plaintiffs filed the suit on 4.4.1994 for specific performance of the agreement dated 18.12.1964 and for a perpetual injunction restraining the defendants from interfering with their possession of the suit property. It may be noted that defendant No. 1 claims to have sold the property and the same has subsequently been purchased by defendant No. 4 from that vendee.

2. It was averred in the plaint that pursuant to the agreement for sale, the predecessor-in-interest of the plaintiffs, had paid the entire consideration in terms of the agreement and he was in possession of the property. The plaint implied that there remained nothing to be performed on the part of the plaintiffs on the terms of the agreement for sale and since on 19.11.1993, the plaintiffs came to know that the defendants were refusing to perform their part of the agreement, the suit was being filed. Defendant No. 1 resisted the suit. She did not admit the agreement. She put the plaintiffs to proof of the fact that the entire amount due as consideration and as per the agreement, has been paid towards the purchase price. She denied the averment to that effect in the plaint. She pleaded that she had transferred the title and possession to another and that other had sold the property to defendant No.4. The pecuniary jurisdiction of

the trial court was questioned. A plea was also raised that the suit was barred by limitation. Defendant No. 4, the assignee, also reiterated those contentions.

3. Two other facts to be noted are that according to the plaint, the father, predecessor of the plaintiffs, died in the year 1972 and according to defendants 1 to 3 their predecessor, the other party to the agreement, died in the year 1965.

4. The defendants sought a trial of the issue relating to jurisdiction as a preliminary issue in terms of Section 9A as introduced in Maharashtra and Order XIV Rule 2 of the Code of Civil Procedure. The trial court allowed that prayer. But before that issue was tried preliminarily, the defendants pleaded that the issue of limitation also be tried as a preliminary issue. Though the plaintiffs opposed the same submitting that evidence was needed for deciding the question of limitation, the trial court acceded to the plea of the defendants to try the issue of limitation also as a preliminary issue. It is seen that both the parties informed the trial court by filing statements in writing in that behalf, that they do not want to lead any evidence on the issues to be tried as preliminary issues. The court therefore proceeded to decide those issues on the pleadings and the documents filed.

5. The trial court held that it had jurisdiction to entertain the suit. In fact, that aspect was not projected before us and, therefore, it is not necessary to refer to that aspect any further. The trial court held that the suit for specific performance of the agreement dated 18.12.1964, filed only on 4.4.1994, more than 29 years after the agreement, was barred by limitation. It, therefore, dismissed the suit on the ground of limitation. The plaintiffs filed an appeal before the lower appellate court. That court, agreed with the trial court in its conclusion that the suit was barred by limitation. The plaintiffs filed a second appeal before the High Court of Bombay. The High Court by the impugned judgment upheld the decision of the trial court as affirmed by the first appellate court and confirmed the dismissal of the suit as barred by limitation. It is this decision of the High Court that is challenged in this appeal at the instance of the plaintiffs. For convenience, the parties are being referred to in this judgment with reference to their ranks in the trial court, namely, as the plaintiffs and the defendants.

6. Learned counsel for the plaintiffs initially argued that the question of limitation, on the facts and in the circumstances of the case, was a mixed question of fact and law and was not one of those issues which could have been tried as a preliminary issue in terms of Order XIV Rule 2 of the Code of Civil Procedure. Learned counsel further submitted that on the averments in the plaint, it could not be said that the suit was barred by limitation. Obviously, no time for performance was fixed in the agreement for sale and hence the first limb of Article 54 of the Limitation Act which was the applicatory article, had no application. It was the second limb of Article 54 of the Limitation Act that had application and the cause of action arose only when the plaintiffs had notice that performance was refused by the defendants. Learned counsel submitted that the plaintiffs had notice of

the refusal to perform only on 19.11.1993, when the defendants objected to the public notice issued by an intending purchaser from the plaintiffs and the suit having been filed within six months of the said knowledge of refusal, it could not be held to be barred by limitation. Learned counsel for the defendants, on the other hand, submitted that a reading of the plaint as a whole would clearly show that the entire consideration is claimed to have been paid by the predecessor of the plaintiffs before his death in the year 1972. According to the learned counsel, the agreement had stipulated that on the vendor getting consent for the sale, the purchase price payable under the agreement would be paid by the intending purchaser, the predecessor of the plaintiffs and on the averments in the plaint, it is clear that the amount was paid prior to 1972. He pointed out that the further stipulation in the agreement for sale was that the sale deed would be executed within three months of the paying of the purchase price in full and that occurred in the year 1972 itself. Twenty one years had expired thereafter and this is a case to which the first limb of Article 54 of the Limitation Act would have application and the plaintiffs should have sued within three years of payment of the entire consideration under the agreement to the defendants. Alternatively, learned counsel contended that when in spite of the payment of the entire consideration the defendants did not come forward to execute the sale deed in terms of the agreement for sale, the plaintiffs must be taken to have knowledge of the refusal of the defendants to perform their part of the contract and they should have filed the suit within three years of the payment of the entire consideration or in any event within three years of the death of their father. Learned counsel also submitted that in a case where no time was fixed for performance of an agreement, Section 46 of the Indian Contract Act was attracted and the contract had to be performed within a reasonable time. No doubt, the explanation to Section 46 of the Indian Contract Act showed that what is reasonable time would depend upon the facts of the case but on the facts of this case, going by the agreements and by the averments in the plaint in the light of the written statements filed, it was clear that 29 years could not be treated as reasonable time within which the obligation under the contract had to be performed by the predecessor of the defendants. Learned counsel, therefore, submitted that there was no reason to interfere with the finding that the suit was barred by limitation.

7. We may straightaway say that the manner in which the question of limitation has been dealt with by the courts below is highly unsatisfactory. It was rightly noticed that the suit was governed by Article 54 of the Limitation Act, 1963. Then, the enquiry should have been, first, whether any time was fixed for performance in the agreement for sale, and if it was so fixed, to hold that a suit filed beyond three years of the date was barred by limitation unless any case of extension was pleaded and established. But in a case where no time for performance was fixed, the court had to find the date on which the plaintiff had notice that the performance was refused and on finding that date, to see whether the suit was filed within three years thereof. We have explained the position in the recent decision in R.K. Parvatharaj Gupta Vs. K.C. Jayadeva Reddy [2006 (2) SCALE 156]. In the case on

hand, there is no dispute that no date for performance is fixed in the agreement and if so, the suit could be held to be barred by limitation only on a finding that the plaintiffs had notice that the defendants were refusing performance of the agreement. In a case of that nature normally, the question of limitation could be decided only after taking evidence and recording a finding as to the date on which the plaintiff had such notice. We are not unmindful of the fact that a statement appears to have been filed on behalf of the plaintiffs that they do not want to lead any evidence. The defendants, of course, took the stand that they also did not want to lead any evidence. As we see it, the trial court should have insisted on the parties leading evidence, on this question or the court ought to have postponed the consideration of the issue of limitation along with the other issues arising in the suit, after a trial.

8. It is seen that the suit was dismissed by the trial court on the finding that the claim for the relief of specific performance was barred by limitation. The plaint contains not only a prayer for specific performance but also a prayer for perpetual injunction restraining the defendants from interfering with the possession of the plaintiffs and from creating any documents or entering into any transaction in respect of the suit property. Of course, the latter part of that prayer is directly linked to the claim for specific performance, but the suit as regards the prayer for perpetual injunction to protect the possession of the plaintiff over the suit property on the claim that the predecessor of the plaintiffs was put in possession of the property pursuant to the agreement for sale, on a subsequent date, could not have been held to be not maintainable on any ground. Of course, the grant of the relief of injunction in a sense is discretionary and the court ultimately might or might not have granted the relief to the plaintiffs. The defendants could have also shown that the relief of injunction claimed is merely consequential to the relief of specific performance and was not an independent relief. But that is different from saying that the suit could be dismissed merely on a finding that the prayer for specific performance of the agreement was barred by limitation. In any event, therefore, the dismissal of the suit as a whole as not maintainable, could not be justified or said to be correct.

9. It is true, as contended by learned counsel for the defendants that it might be possible to infer that the entire consideration according to the plaintiff was paid prior to 1972 when their predecessor died. But on going through the agreement for sale, it is seen that there were certain obligations to be performed by the predecessor of the defendants, who allegedly entered into the agreement for sale and what was the position regarding the fulfillment of those obligations had to be considered. The subsequent agreement or receipt relied on by the plaintiffs had also to be proved since the same had been denied by the first defendant in her written statement and it had to be decided whether the possession in fact was handed over to the predecessor of the plaintiffs by the defendants on receipt of the amount referred to in the subsequent agreement or receipt dated 5.10.1960. Whether the plaintiffs by themselves could have maintained the suit for specific performance and, if so, whether they are entitled to specific performance and whether even if they are not entitled to a decree for specific performance, they are

entitled to a perpetual injunction based on their alleged possession are all matters which had to be decided before the suit could be satisfactorily disposed of. These aspects relating to the prayer for specific performance, of course, would become relevant, only if the suit for that relief is found to be in time and that question requires investigation, on the terms of the agreement in this case.

10. The reliance placed on Section 46 of the Contract Act by learned counsel for the defendants would also be an aspect that has to be considered when finally deciding whether the suit could be held to be in time and whether in a suit filed 29 years after the agreement for sale any relief could be granted to the plaintiffs. The applicability of Section 46 of the Contract Act, and if applicable, what is the reasonable time, in this case has to be determined. The aspect of delay will have relevance while considering whether the plaintiffs would be entitled to the discretionary relief of specific performance, even if they satisfy the other requirements of the Specific Relief Act. But those aspects can be decided only after taking evidence in the case and giving the plaintiffs an opportunity to show that they had always been and they are ready and willing to perform their part of the contract and to show that they had paid the entire consideration and had been put in possession of the property, and nothing further remained for them to perform and all that remained was the execution of the sale deed in their favour and their failure to sue earlier does not disentitle them to the relief of specific performance either on the ground that the suit was barred by limitation or on the ground of delay and laches on their part or on the ground that the discretion of the court in terms of Section 20 of the Specific was not liable to be exercised in their favour in the circumstances of the case. All these pleas available to the defendants cannot enable the dismissal of the suit as barred by limitation under Article 54 of the Limitation Act, as things now stand.

11. The question as to how long a plaintiff, even if he had performed the whole of his obligations under an agreement for sale, in which a time for performance is not fixed, could keep alive his right to specific performance and to come to court after 29 years seeking to enforce the agreement, may have also to be considered by the court especially in the context of the fact that the relief of specific performance is discretionary and is governed by the relevant provisions of the Specific Relief Act. But again, these questions cannot be decided as preliminary issues and they are not questions on the basis of which the suit could be dismissed as barred by limitation. The question of limitation has to be decided only on the basis of Article 54 of the Limitation Act and when the case is not covered by the first limb of that Article, normally, the question of limitation could be dealt with only after evidence is taken and not as a preliminary issue unless, of course, it is admitted in the plaint that the plaintiffs had notice that performance was refused by the defendants and it is seen that the plaintiffs approached the court beyond three years of the date of notice. Such is not the case here.

12. Section 27 of the Limitation Act provides for extinguishment of right to property only at the determination of the period limited by the Limitation Act

for instituting a suit for possession. Section 3 of the Limitation Act provides that subject to Sections 4 to 24 of the Act every suit instituted after the period prescribed therefor in the Limitation Act shall be dismissed. When the suit is for specific performance of an agreement for sale and we conduct a search in the Limitation Act in the context of Section 3 of the Act, we are obviously confronted only with Article 54 of the Schedule to the Limitation Act. We have already dealt with the scope of Article 54 and indicated that in this case it would be the second limb of the Article that would apply and consequentially the suit could not be held to be barred by limitation, having been filed three years after the agreement for sale or the date for performance fixed in the agreement for sale. We have also noticed that the plaintiffs have pleaded that they are in possession of the suit property and since it is not a suit for possession as such, the applicability of Section 27 of the Limitation Act also may not arise. It is, therefore, a case where in the context of Article 54 of the Limitation Act, the question had to be decided on the pleadings and evidence to be adduced by the parties on the aspect of the second limb of Article 54 of the Limitation Act.

13. We have already indicated that the suit insofar as it relates to the prayer for a perpetual injunction restraining the defendants from interfering with the possession of the plaintiffs cannot be held to be barred by limitation. Whether the plaintiffs are able to prove that they are in possession of the suit property as on the date of suit and establish that they are entitled to the injunction prayed for, is a different matter. There is also the question whether the relief of injunction can be treated as being only a relief consequential to the relief of specific performance and the denial of one would automatically lead to the denial of the other, or whether it is an independent relief in itself and even if the plaintiffs are not entitled to a decree for specific performance they would still be entitled to a decree for injunction, a relief the grant of which is, of course, in the discretion of the court. It may be noticed that a suit for injunction would be governed by the residuary article, Article 113 of the Limitation Act and the cause of action for the said relief arises when the right to sue accrues. That would depend upon the court deciding when the right accrued, on the pleadings and the evidence in the case. Therefore, the suit insofar as it relates to the prayer for a decree for perpetual injunction cannot be held to be barred by limitation at this preliminary stage.

14. In such a situation, especially, when the whole matter requires reconsideration, we do not think it proper to go into the various arguments urged by learned senior counsel appearing in this case. We think that all those arguments require to be kept alive for decision in the suit after a trial. Suffice it to say that we consider that the interests of justice would be subserved by setting aside the finding by the courts below that the suit is barred by limitation, even while upholding the finding that the trial court had the jurisdiction to try the suit and remand the suit to the trial court for a decision of all the issues arising therein, including the issue of limitation, in accordance with law after giving the parties an opportunity to adduce evidence in support of their respective cases.

15. In the result, this appeal is allowed, the finding that the suit is barred by limitation and the consequential dismissal of it are set aside and the suit is remanded to the trial court for a proper trial of all the issues (other than the issue of jurisdiction) arising in the case and for disposal afresh in accordance with law. The parties are directed to appear in the trial court on 17.4.2006 so as to receive further orders as to posting. However, in the circumstances, there will be no order as to costs.

JUDIS